A. VILHELM LUNDSTEDT

LEGAL THINKING REVISED

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Painting by Carl Gunne, owned by Uppsala University

V. Lundstedt

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My Views on Law

BY

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Preface

In 1947 ANDERS VILHELM LUNDSTEDT, having reached retirement age, left his chair as Professor of Civil Law at the University in Uppsala. His retirement did not, however, involve any slackening of his scientific activities. Although emeritus, he restlessly carried on research and writing. Extensive and penetrating publications in the field of the Law of Torts bear witness to his industry.

Lundstedt's works are characterized by his efforts to shape a new jurisprudence based on new methods of work and reasoning and to discard traditional concepts and theories which he branded as false and even superstitious. He published the results of his studies in numerous works, mainly of course in the Swedish language but also in English, German and French. It was his intention to conclude his life's achievement by presenting a comprehensive and integrated account of his legal thinking. He wrote himself: "Before lying down my pen for ever, I wish to present an outline of my views on fundamental questions of law and society. I hold these views of mine to be nothing short of a basic reshaping of legal thinking."

Lundstedt never failed to mention that is was AXEL HÄGERSTRÖM, once Professor of Philosophy at Uppsala, who gave him the impetus to start his crusade against the traditional jurisprudence, and Lundstedt's theory of law is, in fact, based on the philosophy of Hägerström. It came quite natural to him to dedicate to the memory of his great master the present work which Lundstedt significantly called "Legal Thinking Revised".

At the time of Lundstedt's death, the 20th of August, 1955, the first proofs of his book were ready and nearly all of them had been revised by the author himself. Table of Contents and a Bibliography were drafted, but the General Index which he seems to have been planning had not been started.

The Law Faculty of the University in Uppsala now follow the intention of ANDERS VILHELM LUNDSTEDT in publishing his last work which rightly may be called his juridical testament. The Faculty could in no better way pay homage to the memory of one of its most remarkable members.

The final scrutiny of the proofs and the editorial work have been the responsibility of Dr. Per Olof Ekelöf, Professor of Procedural Law.

Uppsala, 15th September, 1955.

For the Faculty of Law:

HALVAR G. F. SUNDBERG

/ *Sven Nyborg*

AXEL HÄGERSTRÖM

THE GREAT PHILOSOPHER OF LAW

MY UNFORGETTABLE

TEACHER

IN MEMORIAM

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Introduction

Before laying down my pen forever, I wish to present an outline of my views on fundamental questions of law and society. I hold these views of mine—as do many scholars throughout the world—to be nothing short of a basic reshaping of legal thinking. I have struggled for them in hard fights at the height of my vigor and I have tried to communicate them to others not only as a university teacher, but as an author and as a member of Sweden's legislative body, the *Riksdag*. These views are paramount to the present and future fate of mankind. And even though in the past I have sought to reach beyond the narrow confines of my native social linguistic community by publishing essential works of mine in English and German (a few writings also in French)[1] I now feel privileged and duty-bound to set down a summary of my contribution to jurisprudence for the large English-speaking audience of this world of ours.

I feel privileged because it gives me another chance to stimulate further discussions touching the vital problem of law and society. I feel duty-bound, because the respect and privileges which our society bestows upon its men of learning, must be matched by our utmost sincerity and our readiness to take the trouble to help clarify problems which, like the problems of law, have beset mankind since time immemorial. I feel that it was given to me to make some useful contribution to the enlargement of human knowledge and to the development of human thought.

I have tried, no more and no less, to help lay the basis for a *scientific* approach to matters of law, in other words, to make of jurisprudence a science.

This implies that it is my considered opinion that traditional jurisprudence, however 'radical' some of its modern representatives

[1] A list of my foreign language publications will be found in the bibliography at the end of this book.

claim or are said to be, is unworthy of being called a science. I have spent many a year to prove that the representatives of jurisprudence, up to this very day, have failed to give a true picture of legal machinery in action. In doing so, I have opposed to the prevailing, time-honored 'method of justice' my 'method of social welfare'. In place of the 'method of justice' of traditional jurisprudence which reveals itself to critical analysis as empty talk climaxed by the cardinal error of confounding cause and effects, I have proposed an approach to the 'mystery of law' based on historic facts, logical criticism of legal ideology, and psychological experience. This I consider the only approach possible to cope empirically with questions of law.

These 'revolutionary' activities of mine in the field of jurisprudence began with a peculiar personal experience thanks to which I underwent an extraordinary intellectual upheaval.

Back in 1914, when I was working as a lecturer at the Faculty of Law at the University of Lund, I had made sufficient headway in the tightly-knit fraternity of legal logomachists to be considered for and, by due authority, appointed to the chair of civil and Roman law at the Royal University of Uppsala. Here I made the acquaintance of Axel Hägerström, professor of practical philosophy (which includes the philosophy of law) and became familiar with certain ideas and writings of his. This meeting of minds induced me to reconsider the basic assumptions of jurisprudence. Up to then I had worked with current legal concepts and beliefs without too much critical questioning. Under the impact of Hägerström's writings, my views on legal matters underwent a radical change. Of fundamental importance for me, my teachings and writings since 1918 have been the following works of Hägerström's (in Swedish): *The State and the Law,* 1904; *Critical Points in the Psychology of Value,* 1910; *On the Truth of Moral Ideas,* 1911; *Is Positive Law an Expression of Will?,* 1916; *On the Question of the Notion of Law,* 1917.[2] Moreover I attended his lectures on legal philosophy for many a university term and had with him countless verbal discussions on legal matters.

Hägerström had probed into certain problems of law, after he

[2] The last two are now available in English. Cf. Hägerström, *Inquiries.*

had laid a solid foundation for his investigation by restating and, perhaps, solving the problem of knowledge, the epistemological problem. All his writings on legal philosophy are characterized by a rare power of reasoning combined with penetrating insight into the psychology of that social *animal mysticum* called man, whose life in society must be made the sole preoccupation of those concerned with questions of law.[3]

It is with joy and a strong sentiment of humility that I acknowledge my indebtedness to Axel Hägerström († 1939) and the decisive part the thoughts of this great man on matters of law played in the development of my own views on law and my concept of jurisprudence as a science. To intimate the relations between Hägerström and myself, the following may be recorded.

In 1934, I was impudently attacked in a paper by two brash youngsters, graduate students of philosophy (now both of them professors of philosophy), who reproached me, among other things, with misinterpreting Hägerström's thoughts on law. I did not feel that these two cocky boys rated an answer; but when Axel Hägerström suggested he would answer in my stead I agreed of course. He did so in an article where he proved that the criticism voiced was without foundation. He concluded by quoting Fichte's famous words: 'A stone, my friends, is a poor argument indeed!' and continued as follows:

'Furthermore it ought to be considered that the academic teacher—who now has been publicly insulted by students of the university at which he is appointed—by *his own merits* has made Swedish science greatly respected abroad. To confirm this statement I need only refer to the numerous penetrating reviews of the foreign works of Professor Lundstedt ... In this connection I feel the need for declaring publicly that even though Professor Lundstedt, prompted by a strong sense of honor, has always emphasized the point that the impulse of his theories comes from me, it would be a mistake to believe that he had not independently developed the "impulse" and further carried it out. That conception of "legal right" as a reality, because of which he has gained special acknowledgement, is *his* property, not *mine*.' (The italics are Hägerström's.)[4]

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[3] It was interesting to have seen Hägerström recently referred to as the 'Copernicus of the social sciences'. Cf. *Cornell Law Quarterly*, XXXIX p. 368.

[4] Cf. the Swedish review *Fönstret*, 1934, No. 6–7. The article appeared under the German title: *'Ein Stein, Ihr Herren, ist ein schlechtes Argument!'*

As far as I know—and the numerous discussions to which our friendship gave rise strengthen this opinion of mine—I have on the whole correctly interpreted Hägerström's views on matters of law. As concerns a very important point, however, I wish to say as follows. The social function of criminal law I have described mainly not as deterring but as engendering and directing people's moral feelings or instincts (of 'justice') against the actions made criminal.[5] From an article by Hägerström[6] I got the impression that he accepted my view. And I said so in a writing. Hägerström then *viva voce* called my attention to the fact that he had found my points of view very penetrating without desiring to accept them in express terms. However, when we later on discussed this question together I always had the impression that he approved of my view of the matter. Indeed, this has to a great extent been advanced by my discussing it with him.

Gradually it became clear to me that 'law' 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. Most prominent among these conditions are people themselves as psycho-physical beings, equipped with the faculties of reasoning and acting, as well as their emotional make-up and sensory apparatus. The group life of our species is made possible by 'law'. In point of fact 'law' is an intricate machinery which is essentially kept going not, of course, with the help of electric, mechanical or manual power, but by means of psychological impulses arising in various ways from the nature of man, his senses, his instincts, and his emotions. These psychological impulses operate as mainsprings for man's actions, and his actions in turn have a multitude of psychological as well as material consequences. All this interplay is in a peculiar way subject to control which makes it possible for man to exist in a society responding to his needs and wants, his interests and his wishes. Gradually certain social valuations cristallize and by degrees determine the accomplishment of the machinery. In general terms, the

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[5] About this later on, pp. 228–235.

[6] *Law of Nature in Criminal Law?* (Swedish).

control just mentioned consists of legislation, so-called administration of law or justice, the execution of the judgments of the courts, the application of certain other measures of coercion, and, moreover, a number of administrative acivities on the part of persons elected or appointed to fulfill certain functions in society.

To this view of 'law' as a legal machinery in action I have adhered ever since; and my main concern has been to broaden it, to enlarge it and to fill in details. It was and is diametrically opposed to the basic beliefs prevalent in current jurisprudence, that body of concepts properly called legal ideology, under whose continued domination jurisprudence has remained in a deplorable state of pre-scientific wordmongering; and mankind has remained steeped in a maze of superstitions without intelligent guidance as to whither we are travelling.

Thus concerned with the question of the very object of legal science, I proceeded to match wits with the representatives of traditional jurisprudence. Considering my background and position, this approach was quite natural, even though I now realize that the ensuing feuds with Scandinavian jurists may somewhat have impaired the readiness on the part of others to subject their basic assumptions to critical scrutiny. But knowing that one cannot build on the same site before wrecking the old structure, I still feel that the battles royal I waged over the years with the protagonists in Scandinavia of the 'method of justice' have had their useful effects. Nowadays there are surely not many jurists if even anybody in Scandinavia who would be inclined to take sides with my opponents in our sometimes quite heated arguments on various questions of law. Already shortly after the publication of my 'Answer to Professor Thyrén' (1921),[7] a well-known legal philosopher wrote that he had tried to follow our arguments closely and that he could but conclude that Thyrén had lost out on all counts as far as he could see.[8]

In spite of my main interest being that part of civil law which

[7] Thyrén died in 1933. Professor of criminal law at the University of Lund, Thyrén was known not only as the Rector of the University and as the leader of the criminal law reform in Sweden, but also by his numerous writings on matters of criminal law, published in German and, in some part, also in French.

[8] Cf. Tegen, *Den moderna straffrättens principer*, p. 476.

is known as the 'law of obligation' (incl. the 'law of torts'),[9] I have devoted considerable time and study to an analysis of traditional legal concepts in the fields of criminal and international law. This 'transgression' into other fields of jurisprudence than my 'own' was necessary as concerns criminal law. International law I have drawn into the discussion in order to show certain dangerous consequences of legal ideology to foreign politics. In the present book I am not going to dwell upon this matter. In addition to those of my writings which partly were prompted by my controversy with Dr. Thyrén (which, like most of my writings, are available only in Swedish) I expounded my views on criminal law in my *Die Unwissenschaftlichkeit der Rechtswissenschaft* (vol. II, 1936); and my views on what is called international law in English, German and French in my *Superstition or Rationality in Action for Peace?* (1925); *Das Trojanische Pferd* (1928); *Le Droit des Gens—Danger de mort pour les peuples* (1937).

Many Swedish writers on law have supported my criticism of the lines of reasoning which characterize traditional jurisprudence. One seems to have had great difficulties, however, in Sweden as well as elsewhere, to grasp the positive implications of my arguments and especially my 'method of social welfare'. As a scholar holding about the same views as mine I have considered Karl Olivecrona, professor of Law at he University of Lund since 1933. He has published a number of acute and sagacious articles and treatises based on the theories of Hägerström, and, perhaps, in some measure inspired by my lectures and writings.[1] Yet I think that today our views differ in several respects, although he may perhaps still go along with me, on the whole, in my criticism of the 'method of justice'.

My writings have been reviewed extensively in other parts of Europe and within the orbit of the British Commonwealth. I have been condemned and lauded. But only a few of those who criticized

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[9] A series of lectures of mine, entitled *On Selected parts of the Law of Obligation* and published in 8 volumes between the years 1920–1953 is so far available in Swedish only.

[1] His most important and a very important book seems to me to be his *Lagen och Staten (Law and State)* which was (in essentials) published the year before in English under the title: *Law as Fact* (1939).

my work have succeeded in coming to grips with my arguments. Where it serves to clarify my ideas or to avoid misunderstandings, I shall, in the course of my discussions, deal with some of the objections raised. There are, however, a small number of intellectuals whose responses to my theories vividly recalled to me the sensations I had experienced upon coming into contact with Axel Hägerström and his ideas. If *I* felt at that time as if something like scales fell from my eyes, a similar experience must have been made, among others, by Albert Heider, Josef Schenk, Heinz Lunau, Heinz Pfeffer and W. F. Wertheim upon reading the foreign-language works of mine. It may be of a certain interest to my new readers to know the following about the authors just mentioned.

One of the first persons outside of Sweden to acknowledge the strength of my criticism of legal ideology was the Swiss jurist Albert Heider. After my book 'Superstition or rationality?' he supported me completely when I made practical use of this criticism in order to show the dangerous character of the so-called law of nations and of the peace policy at Geneva after World War I. (See his *Die Kampagne im Sundgau 1914,* I–II.) He concluded vol. I by saying: '"Fetishism still remains the very foundation of current theories of jurisprudence", could (Austin) Chamberlain when he went to Locarno, have read in Lundstedt's Preface in which the great Scandinavian cynic Mephistopheleanly scorns and Faustianly execrates the law of and the league of nations.' In vol. II pp. 107 ff. Heider gives a short essay on my English book. Among other things, after quoting several passages from my book he continues: 'Therefore Lundstedt is one of the greatest subverters of the present age and about to be compared with an Einstein. One can be proud that he is a jurist. One can be proud that it is our era which has produced such a jurist. And the sadness ... comes from the fact that a world war was needed before such a jurist would place his powerful brain in the service of *this* real learning. — Still, "inquisitive individuals be warned" of this study ... because they will not be able to master it in an easy chair of a Pullman-car without being forced to put down the book during page after page of increasing excitement at every moment blinded by its unbearably clear brightness. They will, on the whole, not be able to read the book in an arm chair ... however much the really grand master succeeds in speaking to every one.' (Ibid. p. 119.) The enthusiastic manner in which Heider spoke for my book *Superstition or rationality in action for peace?* greatly encouraged my work. He intuitionally understood that it was really a question of a revolution within the sphere of jurisprudence. For the courage which he inspired in me to continue this work I shall always remain grateful to him. Heider was or is (for he is still alive) indeed a genius but his

interests were directed more towards literature than legal scholarship. He became a dramatist and has published many novels.

Several years afterwards vol. I of my German book *Die Unwissenschaftlichkeit der Rechtswissenschaft* was reviewed in a 60-page article by Dr. Josef Schenk in Austria. Among other things he said:

'The book is shaking the foundations, and its effects are going to correspond to its title; if understood the book will lay a foundation too ... We see a field of scattered remnants but still a field with wide views ... The knowledge of the life of law *(Rechtsleben)* within a State, that Hägerström and Lundstedt have arrived at, stands firm and places the legal machinery, thus, concrete activities and sentiments of real human beings, in the center of the view ... If the knowledge mentioned mentally illuminates the reader then entire edifices of thoughts break down as houses of cards, whole literatures become waste paper and the Aphorisma der Ebner-Eschenbach will find acceptance: "say something that is self-evident but say it for the first time and you are immortal".' (See Schenk, *Die Unwissenschaftlichkeit,* pp. 145 f., 176, 203, 206. Schenk called his review with the title of my book. At the end of World War I Schenk was appointed Minister of Justice in Austria.)

After the publication of *Unwissenschaftlichkeit* I, I acquired in Germany a young pupil who would certainly have been of great significance for the furtherance in his country of my theories and their future influence and development, if he had not been driven from Germany by Hitlerism. After several years of unhappy existence he was able to acquire citizenship in the U.S.A. His name is Heinz Henry Lunau. Nothing is more stimulating for a scholar than to be able by means of his writing to arouse such an interest in other countries that will attract students of outstanding ability. Before the oubreak of World War II, Lunau wrote some reviews of my books in German and French. (See among others *Zur Lage der Rechtswissenschaft* and *Une Nouvelle théorie du droit.*)

Lunau characterized my book *Unw.* I as 'this enormously great brain-work of which to be sure the counterpart has not hitherto often been produced in the world of legal science'. He continued: 'If one really makes clear to oneself what a great influence jurisprudence actually has on the ways of thinking among lawyers of all categories, then one will be able to understand of what enormous importance the work of Anders Vilhelm Lundstedt is to the whole of legal life.' In concluding his review Lunau calls the attention to the want of a radical change of the prevailing useless condition of judical institutions. 'Where', he says, 'this uselessness has its cause and the only thing that is to be done in order to remove the defectiveness, this is shown with great sagacity, with the most clear eye for reality and with complete argumentation in Anders Vilhelm Lundstedt's great work ... To me there is no doubt that Lundstedt's argumentations are unassailable. Only in Lundstedt's ways will it

be possible to create that national law the rise of which is the only thing that can preclude a justice-crisis.' (See Lunau, *Zur Lage,* pp. 124 ff., and cf. *Une nouvelle théorie,* pp. 3 ff.)

Another German pupil of mine was expelled and lived in Holland. Here at last he was murdered by Hitler's hangmen. His name was H. Pfeffer. He wrote in *Weekblad van het Recht,* 1934, that my book *Unw.* I more than any other writing of recent times forced the reader towards reflection and self-criticism. (After *Unw.* II was published, Pfeffer wrote in *Rechtsgeleerd Magazijn,* vol. 55 an essay of more than 50 pages on the entire work. Later on he wrote *Nieuwe Wegen in het Strafrecht* which was published in *Tijdschrift voor Strafrecht,* 1938, pp. 97—144. It is a treatise on that part of *Unw.* II which deals with criminal law.) However, of most interest may be what Pfeffer wrote immediately after my book *Unw.* II was published in *Amsterdamsch Studenten Weekblad 1936* pp. 334 f. Here Pfeffer addressed himself to the Dutch students of law, stressing the shocking effect that my work first had made on himself and pointing out the great importance of reading it carefully in order to grasp it in its entirety and understand that it made a clean sweep of all the prejudices of jurisprudence. In *Prager Juristische Zeitung,* vol. XV, No. 14 (1935) a scholar characterized *Unw.* I as a 'critically ingenious and sensational work'. 'The revolutionary work' was fervently recommended by him. Concerning the opinion of the Dutchman W. F. Wertheim see p. 129 n. 7 below, and those of the American Alb. Kocourek pp. 396 ff. below.

As I have already said, Pfeffer—this hard working, veracious man—was murdered by Hitler's hangmen. And Lunau went into exile. He had a narrow escape from the Nazis in France. With some of the most zealous adherents of mine I have, thus, had bad luck. Of course I should be able further to add a number of grateful comments about my English and German works. Yet, I refrain from it.

Indeed a much greater number of authors have opposed my writings in question. This opposition has not seldom been of a malignant and obviously untruthful character. However, I have reason to take things calmly. My opponents, at least all those whom I know of, are legal ideologists, hence representatives of that jurisprudence which I have made it my object to combat. Yet I wish to mention that now and then a certain respect for my views can be found even among my opponents.

Thus a German scholar, after treating in detail my English book, wrote among other things as follows:

'Lundstedt's criticism of that practice of the law of nations which widely dominates the international life of the states points with irrefut-

able certainty to such obvious defects that all his arguments deserve the most careful critical examination. If Lundstedt's legal-theoretical criticism proves justified, then certainly the existence of the whole of the present official law of nations would be called in question altogether. —Rarely has there been a work exposing with such skill and penetration that brutal nationalistic power policy which conceals its philosophy of power behind juristic phraseology. Lundstedt's satire on this morally camouflaged law of nations, this *vae victis,* is unfortunately only too well founded. The connections with his general criticism of legal theory are laid down so neatly that Lundstedt's criticism of the law of nations cannot be considered seriously enough. If Lundstedt's attacks direct themselves against the practice of the law of nations—not merely against certain *abuses* of it but against *the law of nations altogether*—and if they turn out to be correct, then certainly the last hour of the law of nations has arrived.' (See Walz, *Wesen des Völkerrechts,* pp. 146 f.)

Further, J. D. Sauerländer affords unrestricted approval to what he calls Lundstedt's annihilating criticism of the false legal doctrines (in his review of *Unw.* I, p. 596). — Ministerialrat Hofacker acknowledges that my criticism means 'a basic reversal of the whole world of legal thoughts'. I am said to pursue the object of paving the way towards more reasonable views on matters of law by my criticism and by my eradication of superstition in legal science. Hofacker characterizes my criticism of the doctrine of the right of property as 'particularly fruitful' and that of the conception of wrongfulness as 'extraordinarily penetrating'. 'We discover', he says, 'to our surprise that those brief sentences which Lundstedt lays before us—there are no legal rights, you confuse cause and effect, your conceptions are fancies—imply more truth than we supposed at the first glance.' (Hofacker, *Unwissenschaftlichkeit* etc., pp. 226 f., 231, 240.) — In his book, *Zukunft der Rechtswissenschaft* (1933), Dr. Wilhelm Fuchs writes:

'Legal science has surely found in A. V. Lundstedt one of its most merciless critics. Schooled in the hypercritical thinking of Hägerström, his philosophical teacher, Lundstedt, for about ten years now, has been waging what may be called a pitiless and annihilating world war against all juristic thinking up to the present time.'

I have felt it to be an unpleasant, indeed a repulsive task to cite all these more or less appreciative judgments of my English and German books. Nevertheless I have found it appropriate to mention them for the following reasons.

It seems to me significant that several persons, who at that time were unknown to me and to each other, but who were occupied in their own way with the intellectual problems of our times, should have assessed my views on law as it was done by those just

mentioned. It is inconceivable that these men should have judged my work as they did unless it contained something both *new* and *worthy of attention*. Their reaction has greatly encouraged me through the years and has led me, quite in keeping with man's experience concerning the fate of new ideas, to believe that I did not sow in vain. I readily concur with Professor Albert Kocourek of Northwestern Univerisity Law School who once suggested in a review of three of the books of one of my pupils:[2]

'As a follower of the Hägerström—Lundstedt school it is refreshing to see the unbounded acknowledgment of esteem and praise the author renders to his distinguished masters. Both Hägerström and Lundstedt may well have a feeling of pride in the enthusiasm, learning and ability of their faithful and generous pupil.'[3]

However, those books of mine which have caused the reviews just indicated are not any more available. Circumstances connected with the publication of them have been somewhat unfortunate. Of course a lot of copies of my English book have been sold. But now that a certain genuine interest in my theories has begun to develop the book is out of print. The London warehouse of the publisher (Longman) was bombed during World War II and all the remaining stock was destroyed. As for my German work, vol. I was published in 1932 and vol. II in 1936. Because of the rise of Nazism I was rather doubtful about going through with the publishing of vol. II, all the more so because the publisher was a Jew, Walter Rothschild. The ownership of the company was transferred, but according to an agreement Rothschild was to have a say in the management of the firm, so since the manuscript was ready I decided to go ahead with the publication. I hope that at least some of the larger libraries in Germany, England and America have acquired copies of this book. How many, or even if any copies have been sold, I do not know.[4]

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[2] H. Lunau: *Die Geistige Situation der Deutschen* (1937); *Karl Marx und die Wirklichkeit* (1937); *Illusions et réalités dans la politique internationale de paix* (1939). Two more recent books by the same author may also be mentioned here: *The Germans on Trial* (1948); *Revolte in USA* (1954).

[3] *Illinois Law Review*, vol. XXXIV p. 637 ff. (638).

[4] About 75 copies are here in Uppsala, held by the publishers Almqvist & Wiksell.

Because of these disappointments connected with my foreign main writings I have been especially anxious to awake as great an interest as possible for my present work. And that is the reason for having allowed myself to quote some of the favourable comments of my foreign books in question.

In the present work I move very often in the field of what in English is called law of torts. However, I seldom use that expression. Instead of it I say law of damages, therewith meaning non-contract law of damages, consequently the culpa-rule (= fault-liability) and strict liability. 'Law of torts' includes certain historical curiosities, peculiar to Anglo-Saxon law and of no interest for my exposition.[5]

In this book I am going to show that all the conceptions of legal ideology are metaphysical. Nevertheless there is no reason why some of the terms of traditional jurisprudence should not be made use of as *terms* or *labels* denoting certain realities as far as these are known and, thus, there is no need of inquiring into these realities. Using the conceptions of legal ideology, however, as starting points or presuppositions in scientific reasonings is simply impossible. As instances of the false notions in question the following may be mentioned: legal rights and duties, obligations, legal claims and demands, legal relationships *(Rechtsverhältnisse),* fault, guilt, liability, rules of law, (natural) justice etc. The expressions (natural) justice, wrong, wrongful, lawful, legal ought, fault and guilt, should be rejected according to my opinion, and not be retained even as terms for or labels of certain realities.[6] Liability, however, I find very good just as a short term or label instead of more or less tiresome periphrases. In the province of civil law I mean by it nothing but the condition of things that the defendant

[5] Of course, one sees at least in American literature the phrase 'law of damages'. This is in fact the title of McCormick's handbook on the matter. But in general I have found the term 'law of torts' used in the Anglo-Saxon literature. McCormick, however, has not limited his treatise to torts but deals, among other things, also with damages in contract cases. The phrase 'law of damages' corresponds to the usage of language in Scandinavia, Germany, Austria and Switzerland (in German: *Schadensersatzrecht*).

[6] Of course, such a phrase as e.g. 'the administration of justice' (as parallel to 'legislation') is a matter apart. However, I myself never speak of the administration of justice but of that of law.

may be adjudged to pay damages. The word 'owner' too may be used as a good term. It is then used only as a name for a person in a certain actual situation. 'Ownership' again, as this expression is commonly used, involves an entirely metaphysical idea. The expressions legal rights, duties, obligations, relationships, claims and demands, properly speaking, should not be used, not even as terms or labels. But I think it will be impossible in the common practice of law (be it outside or before the courts of law) to eradicate them. If legal writers use such a term and if they are afraid thereby to be misunderstood they may place the term in question between quotation marks. What I mean by the use of the term 'law' I have already indicated. To explain it more closely is one of the purposes of the present work. As to 'legal rules' or 'rules of law' this book will, of course, have something to say. However, I mean that it is practically expedient to use such terms. Indeed, I am myself going to use it although declarations or statements in 'law' upon closer examination cannot be characterized as any 'rules'. Now and then I have put the term in question between quotation marks, thereby reminding the reader of my opinion that there are no legal 'rules' or 'rules' of law.

Concerning terminology in conclusion I wish to call attention to the fact that such terms as damage, harm, injury, loss etc., consequently damages, compensation, indemnity (as well as crime, delict and punishment) are *sometimes* used inaccurately. In some reasonings in the province of the law of torts, the conceptions just named involve *petitiones principii*. Of course, the terms now referred to are not to be abandoned even if the corresponding conceptions in certain reasonings involve, strictly speaking, *petitiones principii*. Indeed, it is so that society itself presupposes the maintaining of what we call law or laws. Nevertheless we can and must, of course, in an investigation into law speak of society as existing. Only we must not forget that in certain reasonings it is of importance to consider that, without e.g. what we call criminal law, the law of contract and the law of torts, that which we now mean by society could not possibly exist.

I have often been playing with the thought of expressing my view of the legal machinery in an image that could not be misunderstood by readers: but this desire has, so far, been in vain.

The aggregate of complicated machinery represented e.g. by a battleship or an ocean liner in dry dock without doubt lies there as a useful object for an expert investigation and detailed description, as does a locomotive over the repair pit in the roundhouse, or the automobile raised on a grease rack in a service station. All such machinery, however, can only to a certain extent do as an image or a picture for contributing to elucidate the legal machinery. The expert on this must try to lift, as it were, the legal machinery over his head and hold it there, to his mind's eye, during certain basic investigations. For the essence of legal machinery itself consists of live factors, the human beings, who through their modes of conduct and mental faculties constitute the power works, drive wheels, cogs and other gears of the machinery. On the whole the legal machinery consists of those actions which mutually influence and are influenced by each other in accordance with the psychic and physical nature of man. The various equipments first hinted at are in themselves *dead* machineries. It is this difference which causes the difficulty of illustrating the legal machinery in analogous images. Dead machineries *can* (and must) be examined and described from a position quite *detached from,* i.e. completely *outside of,* the machinery as such. Opposed to this is the person, in his capacity as an authority on legal machinery, who shall contribute to the investigation and description of the same, living himself in the very middle of it and constituting some kind of a more or less insignificant incentive or perhaps being only a little cog in the machinery. It is of importance to such an expert, as far as it is possible for him to do so, to imagine himself detached from the legal machinery, from society during certain investigations, and to assume the role of an outside observer. To the extent that he does not succeed in doing this he risks losing sight of certain *conditions* for his own life and that of other human beings as members of society. This I have often described thus: when conceiving their view of law, legal scientists usually lose the awareness of their own conditions or presuppositions as civilized human beings. It is this oversight which I consider to be the most important contributory factor to the mistakes even of the most up-to-date legal writers. A paragraph saying this concluded the Preface

of my most recent work published in Sweden. What I am going to develop in the present work may confirm these words.

The significance of this predicament will become particularly clear further on, in the discussion of certain American authors, who seem to believe that their theories are free from legal ideology and based on sociological facts. It can be demonstrated, I think, that the oversight just mentioned from the side of these authors is due to a very shallow repudiation of legal ideology and the method of justice.[7]

Returning to my terminology, this will of course be more clearly understood later on during the exposition of my view of legal matters. Perhaps I ought to point out that, of course, it has nothing to do with semantics, properly so called, nor with so-called logistics (founded by Russell and Whitehead). Persons who believe in helping *jurisprudence* with such methods have no idea of that intricate machinery which we call the law.

Although I shall later revert to it with due emphasis, I may point out already here that in using the term 'legal activities' I have in mind legislation and the administration of law, *not* jurisprudence (legal science). As legal activities I classify also the execution of judgments and certain other administrative activities. However, they are of no relevance to my present work.

When speaking, for instance, of preventing or non-preventing liability, I have in view the preventing *law* of liability or, to be more correct, the *maintenance* of the (preventing) law of liability. Generally, I am anxious to discuss the importance to society, not of law (or legal rule), but of the *maintenance* of law. Cf. p. 40 below. Occasionally I have only used the expression 'law' instead of 'maintenance of law'. This has often been done by sheer inadvertence.

With the utmost generality I must touch upon certain superficial differences in legal doctrines during the last century or perhaps a little longer back in time. Indeed it is on my part a question only of touching upon these differences in their most general outlines, not at all of developing any points of view of the history of legal doctrine. These have no importance for the

[7] Cf. pp. 370 ff. below.

present work. For its purpose the generalization which I shall make will do.

The remarks made below, pp. 204 ff., on valuing activities within various sciences outside jurisprudence are, of course, not founded on any especial investigations. They only concern actual conditions obvious to everyone who reflects thereupon. For my purpose there was no need to enter into any more deep-reaching questions. Among sciences not mentioned in that connection there is history. This science I have excluded not because I am convinced that it is quite free from evaluations even today, but because a presentation of the matter, even with the limitations following from my purpose, would of necessity have been rather detailed.

I have discussed a few Scandinavian objections against my method of social welfare, in spite of the fact that the authors in question have written in a language probably not understood by my readers in general. However, this discussion has taken place mostly for pedagogical reasons. When at times I have referred to my writings in Swedish, this is because readers understanding Swedish might be interested in studying these publications.

In some of the questions dealt with in this book I have stated my opinion in English several times before. In order to facilitate the expression of my thoughts in the English language, in the following I am going to utilize literally many of my previous statements without thereby citing the writings in English from which they are taken. — Finally I have to remind the readers that when speeking of America or American literature I have always only U.S.A. in view.

Of course, I am keenly aware of the fact that my following attempt to summarize my views on law and jurisprudence will expose the reader to certain difficulties. Those who strive for precision in expressing their thoughts are by nature less concerned with ease of style and the comfort of the reader. In the matter before us particular troubles occur. For it is a question of unravelling a tangle of prejudices and realities mixed together and in different ways woven into each other since hundreds or thousands of years. Extricating the truth from such a confusion at times pre-

supposes a language very circumstantial and wearisome. In order to make things clear repetitions have been made, not seldom intentionally. And since the work has largely been composed on the basis of extracts from my different writings, quite a number of uninentional repetitions could not be avoided. To this must be added that English is for me a foreign language, and my American assistant in the translation may have felt hamstrung more than once by my insistence on greater precision. The biggest difficulty, however, will be that my prospective readers will be forced, at every turn, to disengage themselves from the legal ideology which is the very substance of their specialty, their professional equipment, which they have learned in law school and which they continue to take for granted while going about their professional endeavors. Here I can only appeal to the good will, the fairness and the patience of my readers and earnestly suggest that they follow my arguments to the very end. For one who has tried to examine scientifically the facts of law and to break the trail for a jurisprudence based on facts instead of fancy, on how things are in law and not how they ought to be, this does not seem to be an undue request.

At last I am solicitous to communicate the following observation. The center of gravity, if I may say so, of this book lies in what I have tried to produce of my total view of law as a kind of legal or social machinery in the sense stated above, pp. 8 f. My arguments for certain legal maxims of liability—in this work for the most part merely hinted at (cf. p. 267 below)—are of a rather subordinate kind in comparison with the lines of thought that I have developed to show my method of social welfare as necessarily appearing from my criticism of legal ideology. The arguments for those legal maxims form no more than *attempts at applying my method.* My own conviction of the tenability of my general view of legal matters and of the fitness of my method is, of course, quite differently and more deeply founded than my opinion that exactly those results in divers questions which I for my part have arrived at when using the method, are the best or the most beneficial to society. *One* man *alone* cannot, with the help of his studies and investigations and his experience otherwise obtained, acquire such a comprehensive survey of the host of

factors and elements which must be taken into consideration, that he will be capable of advancing acceptable maxims of liability in those extensive fields of the law of damages of which it is here the question.

It must also be borne in mind that a scholar's capacity of forming an opinion cannot be homogeneous in all the different questions. This capacity varies according as it concerns this or that more or less limited department within the vast subject-matter. What may be generally required for procuring the best possible legal maxims according to my method—if and so far as this is going to be recognized—is a co-operation between men of legal science and those of legal practice, as well as, of course, a co-operation between people *within* these categories. Moreover, in case of need expert advice—already accessible or provided for the purpose—outside of the circles of jurists and lawyers must be resorted to.

To be sure, I have done my best and I mean what I have said —in this work and elsewhere—also concerning those legal maxims of liability which I have proposed. Even so, I have at times felt very uncertain owing to my insufficient ability of mastering the multitude of relevant social realities. After what I have just said this should hardly be surprising.

And now, to the summary of my views on law and jurisprudence.

I

GENERAL CRITICISM OF PREVAILING JURISPRUDENCE

Law as a body of rules, norms, etc.

One can use the words as one will and thus decide accordingly that 'law' is to have this or that connotation. See, for example, the article by Bingham.[1] I shall now discuss law as an 'objective' or 'material law', i.e. considered as a body of rules, maxims, principles, norms, precepts, prescriptions, commands etc. Properly speaking I think only of those countries that have evolved the so-called code laws. But the conclusion I come to—that there is no such law as a body of rules etc.—applies of course not only to those countries with code laws but also to those whose legal systems, as in England and America, are distinguished through the so-called case law, as 'common law' in the Anglo-American sense. However, I consider now Scandinavia and the continent of Europe. Here there has frequently been spoken of objective and material law as contrasted not only with adjective, i.e. formal or remedial law, but even with written and customary law which is held to be an *expression* of material (or objective) law. Material law is in turn considered to be based on natural justice and, therefore, to form the distal background for law. 'Material law' is not nowadays such a usual concept. This may have depended on the great part that has been played by the historical *positivism* of law, often called by its opponents in the free judge movement the 'notion-building' or 'conceptual' jurisprudence. The adherents of this positivism believed in having found a solid basis for law and in having clearly dissociated themselves from the law of nature.[2] And since a mate-

[1] Bingham, *Credo*, pp. 5–25.

[2] See *Unw.* I, pp. 158–170, 189 f., 196, 201–210. Concerning legal positivism see my entire criticism ibid. pp. 158–275. As to the positivistic doctrines 'socially founded' with Duguit and Ritchie, see ibid. pp. 276–316.

rial law must be especially significative for natural law, within legal positivism (at least at times) it seems to have been of importance to avoid the term although it is used now and then. In English and American legal literature I have not been able to find the expression 'material law' although it appears characteristic as contrasting with formal law. However this contrast does appear in the English 'substantive law'. Indeed, *literally* substantive law could be the same as material law. Yet it should be noted that 'substantive' law seems to be used simply as contrasted to 'adjective' law. Conformable to the idea itself no difference may be made between material and objective law. Consequently these two terms in the discussion can be used as synonyms. The idea of a 'positive' law is common in America as well as in Europe. In general I shall not use this expression. It is rather confusing because of that juristic movement which is called (historical) legal positivism, among other things.

Concerning objective or material law, what is meant thereby is a body of legal maxims, on the Continent and in Scandinavia often called legal 'norms' or 'imperatives' (in England, after Austin, legal 'commands'). The conception of objective or material law falls to pieces already because the subject which necessarily would stand behind these rules or commands cannot be discovered in whatever way one constructs, and because logic must be violated to imagine that the judgment were an expression of some kind of superindividual will or that in any event the judge in passing his judgment would be determined by such a will.[3]

Most legal scholars who have not thorougly studied the history of legal doctrines seem to have a more or less strongly pronounced legal positivistic way of thinking. But let us for example consider the school (or schools) of free research.[4] Also those who associate themselves with the free judge movement must, of course, imagine that in addition to the judge-made law for a present case there is

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[3] See Hägerström, *Inquiries,* pp. 17–56; see also ibid. pp. 58 ff., 74–84, 92–104. See also certain of the following sections in the same work.

[4] To the free judge movement or the school of free law or free research I classify Ehrlich and others, even after the characterization of their doctrines as belonging to a sociological school of law; also among this group I place the so-called jurisprudence of interests. See pp. 274 f. below.

also a body of rules or norms available to the judge. These rules must either have already been expressed in codes, statutes or customary law or have not as yet even found expression in customary law.[5] Indeed the rules or norms in question appear to be necessary,

[5] Cf. ZGB Art. 1. Concerning legal positivism it appears to me that its followers in spite of all their talk of positivism cannot consistently regard the established law itself (in codes and statutes) and the customary law as coincident with objective or material law. For this appears actually even according to legal positivism—and of course according to both the historical school and the natural law previous to this and also according to the free judge movement—if one attempts to be logical, to consist of *underlying* norms or commands for which the so-called positive law (codes, statutes and 'unwritten' law) would be only incomplete expressions. How this is brought about is not made entirely clear by the relevant authors. Certain statements of Bierling, for example, indicate that this is the idea, while other statements of his, on the other hand, do not (see Bierling I, §§ 3–7; IV, pp. 342 ff.; pp. 431 ff.). However, there is no doubt that the former alternative accords with his common view of law. The same applies to the doctrine of Thon who states: *das gesammte Recht einer Gemeinschaft ist nichts als ein Complex von Imperativen.* See Thon, *Rechtsnorm,* p. 8. Cf. ibid. pp. 9 n. 26, 19 ff., 40 ff., 69 f. I cannot however remember having seen in Thon the phrase *materielles Recht.* As a matter of fact, according to legal positivism the gaps in written and customary law are to be filled by the judge by virtue of *law.* (See, eg. Bergbohm pp. 372–392.) What may this mean but an underlying hidden material law? With material law in this meaning, the more undisguised natural law and its successor the historical school have evidently reckoned as well as also the different streams within the free judge movement. Beyond the judge-made law for a certain case, according to this movement, the law should be expressed not only in the sections of the codes or statutes but also in unwritten law, in general the so-called customary law *(Gewohnheitsrecht).* This 'unwritten law' must have had some origin. To find this origin immediately in natural justice would be formally too dim. Particularly when one knows that the authors belonging to this group believe in and depend upon 'rules of law', 'legal norms', 'legal commands', 'positive norms', etc. (see Ehrlich, p. 31 ff.; p. 295 ff.; Jung, *Subjectives,* p. 36 f.; p. 109; p. 128 etc.; Heck, *Rechtsordnung,* p. 9 f.; cf. Frank, *Law and the Modern Mind,* p. 282) there is no reason to believe anything other than that the authors belonging to the free judge movement all depend upon an objective or material law as underlying codes, statutes and unwritten law; and indeed why not the judge-made law too? In this connection one should note particularly that the objective of the jurisprudence of interests is to establish legal norms. See Heck, *Begriffsbildung,* pp. 129 ff. On p. 104 n. 1 ibid. Heck agrees with Ehrlich (representative of the 'free law' school) with regard to the use of the concepts of interests and of the basic idea that every legal norm is to be led back to a *balancing* of conflicting interests. Cf. Isay, *Die Methode der Interessenjurisprudenz,* pp. 35 ff.

among other things, as the basis for the existence of legal rights and duties. According to the doctrines in question such rights and duties cannot base their common existence on that law which the judge has 'created' concerning the particular case, for this judge-made law *presupposes* legal rights and duties.[6] Against the conception of a general law (not to be confused with common law in the Anglo-American sense) now touched upon, the same objection as against the law according to legal positivism can be made, namely, that the assumption of a source for such a law must depend upon constructions out of contact with reality.

Also if one is not always anxious to attempt in one way or another to describe more closely the subject for legal norms or commands, yet, it is evident that these are considered to emanate from something which stands over the individuals and thereby becomes the authority for them in order that they have to obey the norms or act according to the rules. Not only legal positivism but also the so-called free judge movement will be criticized in the discussion under the next section.

Concerning the judge-made law according to the free judge

See *Jurisprudence of Interests,* pp. 194 ff., p. 177 n. 1, and p. 315. Cf. pp. 272 ff. below.

Whether I have struck the right mean in every respect in this note seems, however, to be fairly indifferent. I will only add that to Wieacker, who appears to have legal ideology during the later centuries at the tips of his fingers, it appears that all the legal ideologies now touched upon—with the exception of what he calls *Gesetzespositivismus* (completely formed, apparently he meant, first with the domination of BGB—are based on *ein übergesetzliches Recht,* or *übergesetzliche Gerechtigkeit,* i.e. what I have called material law as underlying the actually valid law having this underlying law its basis in natural justice. What I called underlying norms or law is thus called *übergesetzliches Recht* by Wieacker. See Wieacker, pp. 327, 348, 350.

[6] The so-called code law or statute law is not either supposed to be a basis for these legal rights and duties. In Anglo-Saxon law, indeed, there are conceptions of 'common law' and 'equity law' too. And on the continent of Europe as well as in Scandinavia, the idea of a customary law plays a great part. The thought 'scientifically' worked out in general is that in the background lies an unwritten objective or material law which has its more or less uncomplete expression in written and customary law (including common law). Cf. the preceding footnote. Naturally one can assert that one does not look upon the matter in such a way. Nevertheless this remains, however, an assertion which is not compatible with the constructions of legal ideology in general.

movement one is, of course, in general quite clear that the creative function of the judge in his 'research' for the rule applicable must have certain limitations. I do not need to discuss here the factors which from a reasonable point of view should be decisive for the judge, but only state that what one *believes* ultimately to be decisive for him is nothing other than his understanding of natural justice, usually coincident with the general idea thereof, the so-called common judicial conscience or common sense of justice.[7] Now if the 'law' of the judge in the concrete case shall have its basis in the common sense of justice, it would be unthinkable that civil law, on the whole, written as well as unwritten law, according to the free judge movement did not also have this basis. It is also a generally known condition that the school of free research—whether it has satisfied itself with this name, or it emphasizes particularly its method as sociological, or it suggests its type through calling itself the jurisprudence of 'interests' and thereby allows *expressis verbis* that its method is the weighing of interests —considers natural justice as the basis for all real law. As a matter of fact, in the free judge movement one is quite clear that the law exists for the administration of justice in the case at hand. This is believed to be brought about by weighing the reasons which support the interest of each of the parties, the interest of one being to win the judgment to his claim, the interest of the other to be freed from it.

Indeed it is obvious that even law in the legal positivistic meaning must be considered ultimately to be based on natural justice, however anxious one may be to speak as silently as possible of it. This appears already from the fact that, as pointed out above, in reality nothing other than in word, never in fact, has the positivism succeeded in dissociating from natural law. In addition the following should be observed. Germany has in this question as in so many others in the field of legal scholarship been the foremost land. Here legal positivism appeared first in treatises on the Pandects. It is significant that within the Pandects Ulpian's thought

[7] This is apparent moreover from Art. 4 of ZGB which states that the magistrate has to judge *nach Recht und Billigkeit, selon les règles du droit et de l'équité* (according to law and equity, i.e. natural justice). As to the feelings of justice see pp. 159—170 below.

of *iustitia* as constituting the basis for *ius*[8] simply was considered as an axiom. Afterwards when the legal positivistic way of thinking was expressed as *Gesetzespositivismus* or something similar, nothing occurred to do away with the Ulpianian idea of justice as the basis for material or objective law.[9] Natural justice expresses itself primarily in that the one individual shall have a right against another and for that reason he should be able to make a certain ideal claim on the other individual. The claim for justice on the side of the owner is what Ulpian calls a right of the owner of having distributed to him that which is his (viz. property).[1] And *ius* itself (in this connection = the objective or material law) is considered, as has just been shown, to depend upon iustitia, and is said to contain among other *praecepta* the following: to everybody shall be distributed what is his.[2] These conceptions of justice

[8] *Ius* has received its name from *iustitia* says Ulpian, See D.1.1.1. pr.

[9] When I discuss legal positivism I consider what I usually call the *historical* positivism whose foremost, but of course not first representative, because of his thoroughness, was Bergbohm. As the originator of *sociological* legal positivism it is customary to name Comte. One of its foremost representatives is Duguit. In *Unw.* I, pp. 276–314, I have shown the untenability of Duguit's way of thinking. According to my expounding of his doctrine I have been able to characterize it as a *socially* founded law of nature in contrast to prevalent jurisprudence which in spite of different mutual tendencies as to its foundation, is in that way determined by natural law that regard for the claim of the *individual* for justice is dominating. — The historical positivism nowadays is frequently called *Begriffsjurisprudenz* and the like by its critics. It began, perhaps, with Puchta (some time before the middle of the 19th century) and prevailed by degrees on the Continent and in Scandinavia until 1920 or 1930 or thereabouts. Its reasonings still affect legal thinking. Now I should say that probably the free judge movement in all of its various graduations has a very great influence on European jurisprudence. — Heck, a representative of the jurisprudence of interests, said in 1929 that the *Begriffsjurisprudenz* (historical legal positivism) up to now prevailing had 'in point of principle' been overcome. Its after-effects, however, were still operating. See Heck, *Grundriss* I, p. V. In his preface to *Grundriss* II (1930) he says that the method of the *Begriffsjurisprudenz* has 'in general' been given up, although the after-effects are still to be felt everywhere.

[1] *Iustitia = voluntas ius suum cuique tribuendi.* D.1.1.10. pr.

[2] The conceptions of justice were probably not to be found in Roman law proper before Ulpian (d. A.D. 228). They belong to the natural law formed within the Greek philosophy, particularly stoicism. Cf. Hägerström, *Obligationsbegriff,* p. 290 f. In regard to the notion of justice in particular, Aristotle can

dominate to this very day the mind of Western civilization. The 'common judicial conscience' or 'common sense of justice' is composed of them. And there we have the distal 'basis' for legal ideology, a 'basis' that always turns up if one really scrutinizes the matter.[3] Speaking of a super-individual will or subject in the back of the rules of law can never be reasonable even if the idea in itself of an objective law were not a fancy. Indeed, this will or subject must have some motive for its attitude. Being within the entire nature of legal ideology not to be guided clearly, openly and most af all directly, by considerations of social welfare, nothing else can be found out as the said motive than natural justice. But with the belief in natural justice underlying the entire body of the rules of law, the talk of a super-individual will or the like becomes nothing but a formal insertion without any importance even according to the very reasonings of the legal writers in question.

No matter how much legal positivism opposed the historical school with the latter's belief in law as founded on the common consciousness of the people, legal positivism in reality has never

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probably be said to have established it in the meaning in which it has been used in Roman law and afterwards in the jurisprudence of Western Europe. This meaning is: alloting according to merit or balancing between interested parties so that *equilibrium* ensues. Cf. Del Vecchio, *Gerechtigkeit,* pp. 28—44. In both cases it is a question of the attainment of *aequitas.* It seems to be this —that *aequitas* was already a notion of Roman law—which caused Ulpian to venture to proclaim *iustitia* as the basis for law. (Ps.-Cicero, *Rhet. ad Herennium,* Liber III 2, 3: *Iustitia est aequitas, ius unicuique rei* [one MS has re] *tribuens pro dignitate cuiusque.*) Perhaps Ulpian then overlooked that *aequitas* of Roman law arose as a practical means of escape out of those consequences, injurious to the economy of the community, of *ius strictum.* As a matter of fact, in Roman law properly speaking, *aequitas* was contrasted to *ius* and was not considered from an ethical point of view. The latter however was the case with the notion of justice in the Stoic philosophy (to which Aristotle, of course, did not belong). Cf. Hägerström, *Obligationsbegriff,* p. 290. — For the sake of completeness it should be added here that before the influence from Greek philosophy, *ius* in Roman law could not be considered to contain any *praecepta* but was a mystic power swayed by various types of magic. See ibid. pp. 555 ff.

[3] This 'natural justice', 'common judicial or legal conscience', 'common sense of justice' and the like is nothing but an ideological construction on the so-called feelings of justice in man. (About this construction se my remark in p. 170.)

been able to free itself from the belief in question, i.e. the idea that law is founded on the common sense of justice. What other than 'natural justice' could the judge have as a guide according to legal positivism when he should apply a law 'quite without gaps' and he was not able to find either any paragraph in a code or statute or any precedent, or any legal analogy.[4] As a matter of fact a German author says legal positivism *(die Begriffsjurisprudenz)* fills in the actual gaps in law by means of an instinct which is called *Gerechtigkeitsgefühl oder Rechtsgefühl.*[5]

Occasionally one hears that the legal order itself[5a] should include the super-individual will and the background situation for the legal norms, imperatives, commands or however the various rules of law are named. This is of course and will always remain only a manner of speaking. Take for instance the question of the legal significance of a promise, i.e. its so-called validity according to the theory of reliance (as contrasted to the theory of will)[6] and see how this argument has been discussed within the legal positivism of Scandinavia. Indeed, as said above one inserts, so to speak, 'the legal order' in the meaning of material law as the basis for the theory in question as well as for other legal maxims. But at the same time one finds it necessary to say that in the background for the maxim of the validity of the promise is a principle that agreements and promises *ought* to be kept *(pacta sunt servanda).* With this is meant, *either* that this principle *is* that very rule of law which includes the validity of the promise and therewith that of the agreement, *or* that the legal rule of the validity of a promise (or an agreement) is based on the principle that 'promises ought to be kept'. The latter alternative lacks all basis in legal positivism. The basis is reduced to a demand of the legal conscience (i.e. the common sense of justice) analogous to the old principle of *natural*

[4] Cf. Bergbohm, p. 383 and the note on p. 385. See also *Unw.* I, pp. 158 ff. Cf. p. 25 n. 5 above.

[5] Fuchs, *Kulturkampf,* pp. 35 ff. Concerning the positivisticly emphasized legal theories Gény says that for his part he can find only *un excès de reaction, un peu aveugle* against the doctrines of the law of nature such as they appeared in the 18th century. Cf. Gény, *Méthode II,* p. 97 f.

[5a] 'Legal order' can mean nothing but the whole of so-called rules of law or, better, of legal machinery.

[6] About the theory in question see pp. 241 ff. below.

law: *pacta sunt servanda.* But may matters logically speaking stand otherwise in the former alternative? Certainly not. Indeed the principle that the promise must be kept shall now enter the 'legal order'. But this cannot depend upon a mere chance, there must be a reason. The only conceivable possibility of inserting the principle in question into 'the legal order'—other than to take refuge in natural justice—would be that one could say that it acquired the character of law on the basis of social welfare, the interests of *society.* But now the entire discussion of the significance of the principle as legal support for the theory of reliance shows that it shall be the claim of the *individual* for the protection of his well motivated reliance on the promise which justified the incorporation of the principle with law. Accordingly this incorporation would depend upon the person's demand for *the realization of natural justice.* In other words the principle, as I have already indicated, should appear from the balancing against each other of the interests of the parties supported on certain reasons. This is the exact opposite of the thought that the points of view of social welfare have determined the matter.[7] When a contemporary author describes legal positivism as a system which should make possible 'rightly' to decide all imaginable cases, with 'rightly' he means explicitly the same as justly. In other words it is considered as somewhat obvious that natural justice constitutes the basis for law according to legal positivism.[8]

With what has now been said I have only desired to point out the idea that the thought of law in the meaning of a system or a body of rules lacks any real basis. Further on I shall in another connection show the lack of contact with reality when thinking that the judge in his decisions applies one or another rule of law either written or unwritten. However what I am now going to say (about the concept of wrongfulness etc.) will once more show the absurdity in the idea of law as a body of rules which must, of course, be considered as authoritative norms or precepts, i.e. legal imperative (forbidding or enjoining commands).

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[7] Cf. pp. 53 ff., pp. 281 ff. below for further discussion of this point. For a reasonable basis for the legal validity of an agreement see pp. 241 ff. below.

[8] See Wieacker, p. 254.

The notions of wrong and wrongfulness

The belief in an objective or material law just touched upon naturally stands behind several metaphysical, thus, superstitious conceptions within legal ideology. Of course I cannot take up all types of different nuances in the idea of an objective law, but will confine myself to the view which appears because of the lack of a thorough enough investigation to be quite natural, namely, to the view of law as emanating from a will of the community (society) or the State which thus would be subject for a body of legal rules or norms, often called imperatives or commands, forbidding individuals to do certain acts and enjoining them to do others.[9] If a person acts according to such a command, he acts according to law (hence the conception of lawfulness); if he acts in contravention of it, he acts contrary to law, unlawfully or wrongfully, he does a wrong. The wrongfulness has in legal ideology its greatest significance in criminal law and the law of torts. It shall, namely, constitute a necessary condition of punishment or damages (in the latter case—at least in general in Scandinavia and on the Continent—only if the defendant has rendered himself liable to guilt [fault-liability]). However, such legal reactions as punishment and damages are on principle not considered allowed to take place against the defendant if they are not *just*. With the exception of so-called strict liability, the natural justice of a legal reaction now mentioned must appear from the fact that the defendant has deserved it through a conduct which incurred guilt or blame to him. However there is a tenet on which there is general agreement:

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[9] To avoid being misunderstood attention should be given to what I pointed out in the note on p. 25 f., namely, that it is of course not only legal positivism and its predecessors which characterize the law as a system of norms directed to the judge and private persons. This also applies e.g. to the school of free research and the jurisprudence of interests. These groups also believe in the normative character of the law although they perceive that the law is not free from gaps and therefore describe the functions of the judge in some other way than legal positivism does. But there is a certain difference between these descriptions according to whether the (original) school of free research or the jurisprudence of interests is concerned. However these differences are not important in this connection. See, however, pp. 272 ff. below.

without wrongfulness there can be no guilt. Thus wrongfulness has to form a sort of bridge for the guilt. This takes place (to summarize the argument) so that wrongfulness not only constitutes an action against a legal command, but that such a command has a special power which brings forth a legal duty for people to act according to it. Accordingly, wrongfulness shall involve not only that the conduct is in contravention of a legal command, but also that at the same time the defendant has acted contrary to a legal duty, thus, violated such a duty. It is this violation of a legal duty which shall be a necessary condition for a person having drawn guilt upon himself.

Of course the notion of wrongfulness falls to pieces already because of the fact that there is no will of the state or society[1] and accordingly there are no legal commands and the like. But it is important here to call further attention to the illogicalness of the concept wrongfulness and the absurdity of the belief in these legal norms. For the sake of brevity I now confine myself to criminal law and the law of fault liability (the so-called culpa-rule).

First of all I must object to the contrast made between the society or community on the one side and the individual on the other. As a matter of fact this contrast is consistently followed in systems of jurisprudence. Furthermore, just as one speaks of the society's rights in relation to the individual, so one also speaks of the rights of the individual in relation to the society. It would appear as if the society is a domain by itself with its own limited sphere of rights, and as if the individual in his turn has his own limited sphere of rights in relation to the society. But let us scrutinize the matter a little more closely. The society is, after all, only an aggregation of individuals, i.e. made up of the individuals. Thus, if the individuals disappear, the society disappears too. It is just as impossible, except in an imagination entirely divorced from reality, to take the whole and set it up in contrast to its parts, as to set up the society in contrast to the individuals. Such a thing is simply a logical impossibility. To be sure, from considerations of convenience and in everyday parlance one can use such phrases as the right of the State against an individual and vice versa. But

[1] See reference to Hägerström, *Inquiries,* on p. 24 n. 3 above.

then one should remember that the notion of 'right' is nothing to base a scientific investigation upon.[2]

However, let us assume that what has just been said could be disproved. It must nevertheless be obvious that the legal command cannot apply to anyone else but to the person who has received and understood the command. Consequently, the idea that a legal command has given rise to a duty for all persons to act in a certain way is excluded already on this account. Take this example from daily life. A child has been commanded to act in a certain manner, but has not been able to understand the command correctly. No one in his senses could possibly argue that the child ought to be punished on account of its disobedience to the command. In order to anticipate all objections it may be mentioned that not infrequently special legal knowledge is required to understand the meaning of a supposed command not to commit a crime. Thus this condition is comparable to the preceding instance of the child. If then the talk of disobedience to a legal command as the basis of punishment or damages is not to be looked upon as a sort of magic formula, which for certain mysterious reasons it is dangerous to touch upon, such talk must presuppose that the command has been understood by the person upon whom it has been laid. Now, however, it is commonly acknowledged that a person—apart from special cases—is punished or adjudged to pay damages entirely irrespective of whether he has known the meaning of the command or not. Therefore it follows inevitably that there must be some other basis for the legal reactions in question than the fact that the command has been disobeyed.

But even if a person has disobeyed the command in question, and has fully understood it, the legal reaction cannot, on that account, be motivated as a *just* retribution for the guilt involved. For guilt must of course presuppose an action in opposition to one's duty. To disobey a legal command is, however, one thing and to act contrary to one's duty is another. Whoever disapproves of a legal command certainly need not feel it his duty to obey it. Nevertheless it is beyond all doubt that an accused person cannot escape a legal reaction by showing that he disapproves of the legal

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[2] About this see pp. 78–118 below.

command which he has disobeyed and that his feeling of duty has presented no obstacle to his action. Consequently it must also be understood that the opposition of the action to the command cannot reasonably justify the legal reaction. No 'blame' need be attached to the criminal or the injurer in spite of his even conscious conduct in contravention of a legal command.

The objections now made have not, of course, escaped writers on jurisprudence, though they believe themselves able to explain them away. One introduces the idea of *legal* duty and says that this is not only subjective but also *objective*. In the cases just hinted at, it is said that the defendant has violated an objective, a legal duty. Such talk however is mere empty words. That which has misled writers on jurisprudence into the error of basing legal reactions on the foundation of wrongfulness is the idea that a legal command gives rise to a duty to obey the command, and that wrongfulness (unlawfulness) thus involves the violation of a duty, on which violation must follow the reaction of punishment. At a superficial glance this reasoning sounds, it is true, plausible, provided that the doer knew and understood the command, and in a moral sense approved of it, or at least, was conscious, by virtue of the existence of the command, of a duty to perform the acts prescribed by it. However to speak of the *objective* existence of a duty presupposes the belief that a violation of the duty may occur *without* an act having been performed against a sense of duty. In that case the seemingly rational underlying conception is simply suspended in mid-air. One should, however, notice in particular the striking contradiction in the argument. That something is objective means that it can be established by means of arguments based on reason, without regard to feelings or emotions. But the determination of a duty, as well as all other valuations, *cannot* be grounded on any arguments based on reason, but is dependent upon individual feelings, and is thus in its very *nature* the opposite of objective, namely, subjective.[3] Therefore all this talk about *objective duty* is simply an absurd combination of two words just as void of meaning as 'dry water' (of course not to be confused with expressions such as 'dry' sherry or champagne). Duty,

[3] Concerning this see pp. 43 ff. below.

then, is a *feeling* which drives us to do or not to do a certain act. It is quite true that with this feeling is associated the conception that the action corresponding to the duty is objectively right, and that consequently all people must feel this action to be their duty. But this is quite another thing from saying that *all* people *actually* have this feeling of duty.

There is nowadays no philosopher who denies that duty is anything but the feeling to be driven to undertake an action or to neglect it. It would be pure magic if the legal commands should at all times be considered able to bring about this feeling in individuals. Indeed, it must be regarded as arbitrariness that these 'commands' in themselves should be able to imply anything at all *over and above their own existence.* If jurisprudence does mean something with a legal duty—and it, of course, does—then it is completely impossible that this 'something' could be brought about only through legal 'commands'. Such would be opposing the so-called law of causation. That writers on jurisprudence have been able nevertheless to make this strange assumption concerning the existence of a legal duty for the individual in and with the legal command, depends upon a series of intricate psychological conditions which led them to false reasonings. These can perhaps be best summarized as follows.

The sentiment of duty is often and can always to the duty-feeling person be perceived or apprehended as a command to himself, a so-called self-command. He says to himself: thou shalt act so! thou shalt not act so! It is easy to understand that the state of consciousness, which thus exists in a duty-feeling person, even if he had not received any command from another, shows a great resemblance to the state of consciousness which exists in a person who has received a command from another, supposing that the command in question has made a real and strong enough impression on the recipient of the command. Such a recipient feels very often a duty to act according to the command. Consider now that one cannot imagine a more authoritative will behind a command than the so-called will of the State or that of the society or community, or the 'will of law', or whatever commanding will of this kind as may be fancied! It may be the said resemblance or kinship now mentioned between the two states of consciousness—that in

the duty-feeling person with his 'self-command', on the one side, and that in the recipient of a legal command, on the other—which has led writers on jurisprudence to the extra superstitious idea that the legal command *in addition to* its own falsely believed actuality *caused* a legal duty in the commanded person to act according to the command. An especial pecularity in the construction which alone discloses its character as opposed to reality is, as we have already seen, that the duty in question shall also appear to those who feel themselves unaffected by the command, even to those who are unaware that it exists. With respect to this particular difficulty, the construction has been applied so that the legal command would at the same time be considered as an authoritative declaration, that the action commanded absolutely *ought* to be undertaken. It is in this way that the *legal* duty is considered to come into existence, a duty in the objective meaning based on an *objectively valid ought* and consequently independent of any subjective attitude in the defendant.[4]

Furthermore the following should be noted. The wrongfulness of an act must of course imply that the law—i.e. the 'will' of the State, society or, as sometimes expressed, the legal order itself etc. —prescribes that the act must not occur. It is clear, however, that to the extent the law actually prescribes something, it must also appear as a power. Yet it cannot appear as such without making its prescriptions effective by some legal reaction directed against the doer because of his disobedience. How could we, on the whole, know that the law prescribes obedience, if no legal reaction were attached to its violation? If one casts aside all mystical conceptions and seeks the origin of the law, not in a supernatural force but as existing in the world of man, one understands that to speak of the *prescription of the law* is to use an empty phrase, so long as it is supposed to be based on the *mere formulation* of the law, irrespective of whether the violation carries with it any legal reaction. Without superstitious ideas the *mere words* in a law can no more assume the character of a prescription in the common sense of the word than can any private statement in the imperative mood.

[4] One of Hägerström's greatest accomplishments was probably his unraveling of the confusion of ideas relevant to this matter. See Hägerström, *Inquiries*, §§ 4–7 (pp. 116 ff.).

Hence, the decision reached as to whether or not an act is wrongful is in itself absolutely unimportant when we have to distinguish, e.g. between a punishable and a non-punishable act. In order to decide whether an act is wrongful, one must *know beforehand* whether it is punishable. One cannot decide the punishableness of an act in a given case by proving that the act is wrongful as regards other provinces of law. Because an act is visited by one kind of a reaction, it surely need not be followed by another. But to what other province of law could one turn? As far as I can see, almost exclusively to the law of damages (fault-liability). In other words, by setting up the idea of wrongfulness (unlawfulness) one would merely succeed in setting up as the criterion the fact that liability to punishment presupposed that the act carried with it liability for damage. Here, however, many objections arise but for lack of space I am forced to limit myself to the following two points. If the damage—as must be the case here—is the consequence of a 'blameable' act, writers on jurisprudence base the very liability to pay damages on the wrongfulness of the act! Furthermore in the case of numerous crimes it is impossible to speak of either liability to pay damages, or on the whole, of any other legal reaction than punishment. It appears from the foregoing that the wrongfulness of an act as determining its liability to punishment cannot imply anything else but the absolutely meaningless idea that the act is wrongful *if* it is punishable. Thus the theories of jurisprudence move here in the following circle: Punishment presupposes wrongfulness, but wrongfulness signifies nothing but liability to punishment.

What now has been said as to criminal law has correspondence in the province of the culpa-rule, i.e. the law of fault-liability. Here too legal writers move in an eternal circle: the coercion to pay damages presupposes the wrongfulness of the conduct; this wrongfulness, however, cannot be anything but the circumlocution of the state of things that the defendant may be adjudged to pay damages.

Finally it should perhaps be observed that it makes no difference whether these commands, which are assumed to be conditions for punishing persons (or adjudging them to pay damages), are considered to be of a legal nature or merely moral as is sometimes

maintained. Even so, the above mentioned contrast between the community and the individual must of course be false. Naturally the mystical moral lawgiver could not be located here either. Even an assumption that punishment was motivated as a retribution for the violation of merely moral commands must logically result in the acquittal of the defendant, as a consequence of the substantiation of his ignorance of the command, or its inability to produce in him a moral aversion to the crime. It is true that the vicious circle just criticized would not arise. For the characteristic difference between moral and legal rules is supposed to lie in the fact that the latter are enforced by an external agency, whereas the former are not. On that account, however, the assumption just mentioned falls to the ground. As a matter of fact, the acceptance of moral commands would imply a frank admission that the command was nothing but empty words, of the same significance as any other imperative statement. It is just in order to prevent such commands from becoming 'bloodless' that it has been sought to represent them as 'legal'.

For the sake of completeness it might also be mentioned that one cannot extricate oneself from all these absurdities by pointing directly to criminal codes or statutes. Any attempt of that kind would merely be to beg the question in its entirety. Certainly this striking error is frequently made in criminal law—i.e. criminal law is distinguished from punishment, as if the former were the basis or the cause of the latter. The law of crime is however not conceivable apart from punishment. The conception of punishment is simply included in our conception of criminal law as valid, as in force. The absurdity of distinguishing between criminal law and punishment becomes particularly evident in the treatment of the question under discussion. One seeks to explain the fact that the community may inflict suffering upon the individual by means of punishment. Such an explanation must obviously be identical with that which motivates the maintenance of a criminal law in the community.[5]

In an analogous way it is with the law of damages and all law which in this treatise may be of interest to us. This is the reason

[5] Concerning this matter see pp. 219 ff. below.

for my speaking throughout of the significance to society, *not* of *law* but of the *maintenance* of law (or rules of law). As a matter of fact, in the legal ideological manner of reasoning one not seldom seems to forget this self-evident condition of affairs. However the observation made has its greatest importance in the province of criminal law.

The vicious circle pointed out above has of course been noted by legal writers without my help.[6] For instance Dohna in his time spoke of this *geradezu beängstigenden Zirkel.*[7] But neither Dohna nor anybody else has been able to grasp the *real importance* of knowing that this argument was a vicious circle. In spite of this knowledge they have not understood that the notion in question is absolutely nothing at all, but have instead continued to regard the wrongfulness of a conduct as a real and necessary condition for its being actionable! They have, however, never been able to state the import of the notions: wrong, wrongful and wrongfulness. Yet, there is nothing astonishing in that, since the notions in question are words completely void of meaning.

This irrational attitude depends essentially on two reasons. Firstly: One has not conceived that a command in itself can be nothing but certain words in an imperative mood and that the crucial importance of a so-called legal imperative lies precisely in the conduct—contrary to the 'enjoined' one or according with the 'forbidden' one—being actionable, i.e. being followed by a legal reaction in the form of punishment or coercion to pay damages (and expenses of the suit too). Secondly: This want of understanding—accounted for by the catastrophic effect to the whole of legal ideology of insight into the matter—has in turn prohibited a genuine effort of trying to find the realities which here, as it seems to me, press forward with elementary power. With the utmost brevity, the realities in question are that the so-called wrongful conduct is that which according to the leading valuations in the community or society it is desirable to work against, to prevent, and that therefore such conduct is counteracted by means of legal

[6] I mean the circle established thereby that wrongfulness is nothing but a periphrasis of the fact that the defendant's conduct falls under criminal law or culpa-rule, as the case may be.

[7] Dohna, *Die Rechtswidrigkeit,* p. 28.

reactions, above all, punishment and coercion to pay damages. The executioner, the distrainor, the bailiff, the policeman, the surgeon, the flogging father, mother or teacher—all of them are not punished or coerced to pay damages owing to murder, assault and battery or injury to another's property.[8] For their actions according to the valuations just mentioned have not been undesirable from the point of view of social welfare. By inserting the superstitious notion of wrongfulness we cannot get any help whatsoever. This will become fully clear through the presentation of my method of social welfare, replacing that method of justice distorting the realities of which are the question.

However, in the foregoing we have seen that this notion of wrongfulness as contradictory to lawfulness, which up to now has been so important to Scandinavian and Continental jurisprudence, was indeed created through belief in legal rules, norms, commands etc. *(iuris praecepta),* and that the notion received its particular character in that it includes the violation of legal duty, also created by means of the norms. This duty for a person to act in a certain way usually serves for the benefit of another individual. This benefit thus is considered to be a legal right. Consequently a legal right had arisen *indirectly* via a legal duty which in its turn came into existence because of a legal command. However there are also authors who allow the legal maxims to be sometimes imperatives, thus constituting directly legal duties, indirectly legal rights, and sometimes, as it were, *directly* entitling, i.e. directly bring about legal rights. This was perhaps more usual during the 19th century before the theories of Thon, Bierling and others.

Professor Sjögren, my predecessor in the chair of civil law here at Uppsala, asserted that legal norms could only be commands in criminal law and thus obligating, but that in private law they were entitling.[9] Another prominent legal positivist maintained indeed that legal norms could never be imperatives but only judgments. But these legal judgments were of such a peculiar type that what was pronounced in them became true in and with the pronounce-

[8] Assumed, of course, that no exaggeration has occurred in the discharge of the functions in question. But even then the act cannot be actionable because of its wrongfulness. This 'notion' is and remains only a word void of sense.

[9] Sjögren, *Formen des Unrechts,* pp. 357 ff., particularly pp. 366 ff.

ment. In this way, both legal rights and legal duties could because of legal norms come directly into existence.[1] That contrasting opinions of such a kind form a dispute over trifles is something we shall presently be certain of.

In the previous pages under this heading I indicated that such legal reactions as punishment or coercion to pay damages in conformity to prevailing doctrines are considered to be just, i.e. based on natural justice, or as expressed frequently, correspond to equity and justice or to law and equity. Punishment and damages are considered just because of the defendant's guilt or blame; damages in this case arise only if the culpa-rule (so-called fault-liability) is applicable. How is it then in a case of so-called strict liability? Even then damages are held to be based on justice, this being a result of weighing against each other, on the one hand, the reasons which support the interest of the defendant to be free from the coercion to pay damages, and on the other hand, the reasons which support the plaintiff's interest to get compensation for the damage.[2]

We have now found a great many 'fundamental' concepts in the predominant jurisprudence: rules of law (commonly supposed to be imperative-attributive); wrongfulness; an objective ought; accordingly, objective (legal) duties and objective guilt; further, legal rights; and natural justice, also the last conception obviously in an objective meaning. That all of these concepts are not true to reality should already be clear. However concerning rules of law, it has only been shown that no system or body of rules of law can exist. As indicated above, I shall later on in a particular connection show that it also depends upon superficial thinking when the judge is considered in the special case to 'apply' rules of law. I shall now immediately show in more detail the falsity in talking of 'ought', 'duties', 'guilt' and 'justice' in an objective meaning. From what I am going to show it must be clear that the concept legal right is also irrational. Nevertheless I shall under-

[1] Zitelmann, *Irrtum*, p. 222 f., and *Gewohnheitsrecht*, p. 449.

[2] The fact that balancing of (the reasons for) the interests of the parties and the justice thereby achieved gives rise to the defendant's liability is, in cases of liability for dangerous activity, by Scandinavian courts often expressed in this way: the circumstances in the case make the defendant 'closer' to bear the hazard than the plaintiff.

take a particular analysis of the concept legal right, considering above all else ownership or the right of property.

Fundamental notions in the sphere of jurisprudence depend upon value judgments, hence are entirely unscientific

The lack of scientific character in the basic notions of jurisprudence should by now be clear from what I have already shown concerning the non-existence of legal norms and concerning the constructions of them as implying an 'ought' and therewith constituting the basis for legal duties and rights. I shall now show that the notions in question—however the bases for them are established—are unscientific. This is closely allied with the fact that the entire foundation—i.e. for legal rights and duties, and for the realizing of these, and accordingly for the coercive means as bringing pressure to bear for such realizing—is considered to be natural justice. This is again inseparably bound up with the idea that this or that *ought* to exist or take place. This in its turn gives direct origin to duties and indirectly to rights even though, as we have seen, rights are also considered able to arise directly, i.e. without the intercession of duties. The latter, indeed, depends upon the belief in material or objective law as having the power to allow certain facts to lead, in the name of justice, to the existence of rights for a person. But returning to the question of the legal 'ought', one can, of course, consider the argument that what ought to be or to be done is just and that justice consequently rests on the ought and not, on the contrary, the ought on justice. But considered historically the situation is such that within the science of jurisprudence justice is considered to be fundamental; as we have seen, Ulpian allowed the concept *ius* to receive the name of *iustitia*.[3] There is however no reason to imagine any consistent way of thinking down through the ages. It is obvious that quite often that which ought to take place or to be done has been the primary factor which has occasioned the attribute justice, as also that at times a type of reci-

[3] Radbruch says: The idea of law can be nothing but justice, quoting in this connection the gloss to D.1.1.1. pr.: *Est autem ius a iustitia, sicut a matre, ergo prius fuit iustitia quam ius.* See Radbruch, *Rechtsphilosophie,* p. 124.

procity may have taken place, so that it is difficult to determine what is first, the 'justice' or the 'ought'. However, as this is a legal and not a philosophical work, discussion of such questions as these can be left open. And so to proceed.

Legal writers use this category of notions in their 'judgments' 'assertions', 'assumptions', etc., altogether as if it were a question of judgments (assertions assumptions etc.) regarding true facts, real states of things. These 'judgments' etc. are used as to judicial and other judgments, further as to the actions of persons, often also concerning the question of the existence of legal rights and duties, 'claims' and things like that. In respect to the linguistic form of the sentences in question, one can easily classify them as judgments. But in consideration of that which I am about to show, it is suitable to reserve scientifically this terminology for true or proper, i.e. theoretical judgments and regard these in question only as formal or nominal judgments, assertions, assumptions etc. Actually they are very often called by the same term which I use: judgments of *value* or *(e)valuations*. As the most important examples I shall give the three following sentences: 'This action is of a quality that it *ought* to be done'; 'Through this action he has brought *guilt* upon himself'; 'It is *just,* that A obtains a claim for damages against B'. Actually all the judgments of value, which come within jurisprudence, can be regarded as characterized by these three: ought-judgment, guilt- (or blame-) judgment and justice-judgment.

Certainly many other judgments of value are to be found within jurisprudence, e.g. the characterization of an action as dutiful, undutiful, wrongful (unlawful), or lawful. A *dutiful* action, however, is equal to the ought-conduct; an *undutiful* action is equal to the action which is contrary to the ought-action, and besides is a condition of the guilt-judgment. On the other hand regarding *unlawful* or *wrongful,* these words signify, it is true, immediately that the action 'is in opposition' to a legal command, but as the legally commanded action at the same time always shall be an ought-action, the unlawful or wrongful action becomes equal to the omission to do the ought-action; thus the characterization of the action as unlawful or wrongful comes under the judgments of value. Perhaps it should be added here that when a right is

considered to be based on an entitling legal maxim, the situation is believed to be such that the circumstances made a right arise in the name of justice. From what has been said it is clear that a legal right—whether it is said to have arisen indirectly via a legal duty or directly on the basis of an entitling legal maxim—is always something which one believes *ought* to be realized. Further it should perhaps be mentioned already here that when a legal reaction is adjudged on the basis of a person's guilt (implying a conduct contrary to his duty) this is considered to agree with the demand of natural justice for retribution.

It is a fact that in its reasoning jurisprudence is founded on all these judgments of value. But naturally the condition for using them scientifically should be that they are true statements of reality. But this cannot be the case, as they state nothing whatsoever about reality. The natural consequence is that they cannot either be false. Therefore they are *neither true nor false.*

Judgments of value differ from proper judgments, because they are dependent on the *feeling,* in a positive or a negative direction, in the person who makes the judgment. A purely theoretical examination, which—completely freed from all emotional influences—only established facts, could never lead to: that something ought to be done, that someone has brought guilt (or blame) upon himself, or that something was just. The conceptions 'ought', 'guilt', and 'justice' should in other words be completely incomprehensible to a person devoid of feelings—if such a being, a pure thinking-machine, were to exist. This is inherent in the nature of the formulation that ought-, guilt- and justice-judgments are subjective and therefore cannot be objective, i.e. cannot have any theoretical meaning, consequently can neither be true nor false. This question, when more closely examined, will be seen in the following way.

From the above point of view, these judgments belong to the same category as judgments, for instance, that a thing is beautiful or ugly, that a person or his actions are good or bad. It is self-evident that such judgments would be completely ridiculous if the person did not *feel* that the object was beautiful or ugly etc. However, the feeling of the value is not *directly* dependent on the actual object—the person or action which one believes oneself

to be judging—but on the *conception* or the *consciousness*[4] of it. It thus follows that that view is illogical according to which the judgment of value referred to a quality in the thing itself, the person or the action. It simply is impossible to pass a judgment of value *directly* on the thing (person or action), i.e. independently of the conception of it. How could one, for instance, regard a certain building as beautiful or ugly, a certain person as pleasant or unpleasant, a certain action as correct or blameworthy, if one had not observed them or at least formed a conception about them? But, it is a fact, the objection may be made, that we apply our judgments of value *directly* to the thing, the person, or the action, and that, at least often, we also *imagine* that we make a direct evaluation of them. Nevertheless we are unable to make this evaluation, for it is logically impossible. In everyday life we are mistaken regarding that which really happens, and in our feelings of value we confuse the *conception* with the *object* of the conception. Therefore the judgment of value—the expression of the *emotion* caused by the *conception* of the thing (person or action)—appears to us as referring to the thing itself, etc. and not only to the emotion evoked from the conception of it.

In order to avoid misunderstandings which have arisen in connection with a similar presentation in a German work of mine, it should perhaps be pointed out that all analogizing of the judgment of value with, for instance, the expression for our perception of colors, is out of the question, because in the latter case there is psychologically *nothing but the conception of the thing* as having this or that quality. In the former case, for instance, when I say that the thing is beautiful, there is psychologically not only the conception of the thing, but *also,* connected with it, a *feeling* of value dependent on the conception, and of this feeling the sentence 'the thing is beautiful' is an expression. But the sentence 'the thing is red' expresses *no feeling whatsoever,* but only the conception of the thing as being red. Consequently it is a judgment about reality and thus must be either true or false. Since in this case there is nothing else in the mind than the conception of the thing as having these or those qualifications or, more correctly, determina-

[4] In what follows I shall only use the word 'conception', which also includes consciousness dependent on direct observation.

tions, the question is in this connection quite indifferent whether the determinations which the person adds to the thing depend upon the thing itself or upon the conception of it.

Quite something else is the fact that man in his conception of the thing is influenced by physic and physiologic conditions which may make his conception untrue. But the color-blind person's judgment that the thing is green may be perfectly true, although a formulation has been given which is misleading for a person who is not color-blind. His judgment may be true, for it expresses a conception, that the thing has a color-quality which makes an impression of green on his eye. And this conception of the color of the thing can agree with reality. For the color-blind person, just as for the normal person, it is *only* a question of a conception and, of course, a conception *about the thing itself.* But in the case of a judgment of value, *something new* enters, namely, *emotion.* And the feeling which thus functions has been directly brought to life not by the *thing* but by the person's *conception* of the thing.

The opinion that there should be *objective* values—e.g. that a certain action 'really' is good or evil, or that one has brought guilt upon oneself, or that a conduct falls under an 'objectively valid' ought, or that something 'actually' is just—has thus only been able to arise because one has not understood the process when making judgments of value. In short, however, the case is as follows: The conception about an action or some other reality gives rise to certain feelings in us. A judgment of value is our expression for these feelings, but the feelings in question are not in themselves *observations,* as little as other feelings are observations; they *do not* in themselves contain any *conception* (or any consciousness) about reality. Therefore they can be neither true nor false, a characterization which logically must be reserved for such judgments (judgments in the proper sense of the word), which express directly the conception about reality.

The exclusion of allowing value judgments to enter into scientific reasonings as premises or arguments is obvious—if one has decided that science (disregarding abstract mathematics and pure logic) must be empirical, i.e. based solely on empirical knowledge. Evaluations have nothing to do with such knowledge, as they cannot be any statements of reality, of true facts. Nothing is

changed in this respect by the fact that a value judgment in jurisprudence can often be shared by the majority in the community and is sometimes even almost unanimous. It is apparently another matter that the *evaluations themselves are true facts,* and as such objects of one's observation, and consequently of empirical knowledge. This is of course very important and must always be observed in legal science.

It is hardly necessary to add anything further. That this—that an action *ought* to be performed or abstained from, which implies that the action or the abstinence from it is my *duty*—is a judgment of value and thus an expression for a feeling can hardly be contested within philosophy nowadays. But it is certainly not necessary to be philosophically trained in order to reach this conclusion. If the judgment that a certain action ought to be performed were a true judgment, then one would be able to state, i.e. epistemologically establish, either that it is true or that it is false. But such a statement is logically impossible. Let us assume that the action intended by the ought-judgment consists in the payment by A of a certain sum to B. What is it that can be established here? Only that certain conditions of this or that quality are present, i.e. that an agreement has been made between A and B as well as several details connected herewith, or that certain other facts of one description or another are present, such as that B is A's friend in need, that he has turned to the former, who is a wealthy man etc. Further, it may be stated, whether the situation is such that A—if he does not pay—may be adjudged as liable to pay according to law, or what the situation is in respect to the occurrence of other consequences caused by his failure to pay the sum, such as reduced respect socially, some form of reprisals from B's side, the enmity or disapprobation of other people, A's own guilty conscience, and so on. After establishing any of these conditions, the conclusion may perhaps be reached that A ought to pay, or that he ought not to pay, or that his paying is of no consequence from an ought point of view. But the truth or falseness of that 'judgment' from an ought point of view, to which one has thus come, can never be established, because the conclusion of which the judgment is a result is not a *logical conclusion,* but has been determined by the *subjective attitude* of the person who judges, i.e. by his *evalu-*

ation of the disadvantages of the consequences referred to above, in comparison to the advantages of a postponement of, or complete avoidance of payment, or of the satisfaction of asserting his independence and disregarding the judgments of others, etc.

All the foregoing has been said in order to indicate that—even if the ought judgment can *appear* to be a logical conclusion from a judgment in a proper sense—it however can never be so, as the 'conclusion' also has been conditioned by the feeling of value, called forth by the conception of certain facts. Just as little as other feelings does this feeling contain any (observation of, or) conception about reality. Thus not only a conception but also a feeling has been decisive for the 'conclusion' about reality. Consequently the 'conclusion' itself cannot lead to any conception about reality and thus not to any proper judgment about it. Concerning the ought-judgment regarding such things as punishable actions, breaches of contract, and negligent and damaging conduct, the judgment—generally quite unthinkingly—is made that such actions ought not to occur, without establishing anything except that the action is punishable or, in any case, actionable. The tendency to schematize and toward uniformity, which thus exists here[5] in regard to the ought-judgment in such cases, has contributed to a confusion of ideas, in consequence of which it has been believed to be possible to set up a specific *legal* ought, which, distinct from the purely moral ought, should have an objective quality. This 'objectively valid' ought-judgment is only a meaningless combination of words. As the ought-judgment is an expression of *feeling* of an ought, it cannot be objective. For only that is objective which can be determined independently of our feelings. The *legal ought-judgment*—this violent, not to say monstrous construction, containing in two words the most radical contradiction —forms the kernel of the conception of natural justice as well as of the judgment that a state of things or an act or an omission is, or is not, just. Accordingly the contradiction now mentioned constitutes the quintescence of the whole of legal ideology, i.e. the prevailing jurisprudence.

[5] What this actually depends upon cannot be entered into now. See however below pp. 164 ff. of the feelings of justice being taken into the service of legal machinery.

However one approaches the problem, one must try to understand that the ought-judgment is not conceivable, except if it is supported by a moral or some other feeling of value. For the action must always have a definite purpose in respect to which it is found that it ought or ought not to happen. It is not possible to determine this purpose objectively. The opposite would imply a belief in objective (i.e. absolute) values. As I have shown, such a belief is logically impossible. Consequently it is a belief in something metaphysical, something which cannot be set into the world of reality. The purpose of an action which determines the ought-judgment *must* consequently be decided by the subjective attitude of the person forming the judgment, by his own evaluation. Without his feelings of value behind the ought-judgment, this would be an empty phrase without any meaning. But the epistemological investigation purely and simply states facts. This means that it functions completely independently of all feelings. In such an investigation one can never state that something *ought* to be or *ought* to occur, only that something *is* or *has occurred.*

However, I shall now briefly touch upon the judgments of guilt (or blame) and justice. The guilt-judgment no more than the ought-judgment implies any conception about reality, for it is an expression of the *feeling* that something *ought* to have occurred which has not occurred, and consequently also the expression of a feeling of disapproval, i.e. an evaluation in a negative direction of the action which has occurred instead of the ought-action. In brief, the guilt-judgment is an expression for a feeling of value of an action as undutiful. This feeling is obviously only, so to speak, another side of the feeling for the opposite, i.e. the omitted line of conduct, as *dutiful.* Whether such an evaluation actually is made—by the person who acts or by someone else—i.e. whether the *feeling* of the negative value of the action, which is expressed in the statement that the action was undutiful and consequently brough guilt upon the person, really arises *must,* according to the above, with logical necessity depend on everyone's own feelings, thus on entirely *individual* circumstances. However honest these feelings may be, the judgment which they cause—that guilt is present, or is not present—can still *never* be true (and neither false), because this judgment never states anything regarding real-

ity. Of course no alteration of this can be made on the grounds that the judgment, as far as one knows, was perhaps shared by all those initiated in the case, and to that extent was unanimous. The guilt is and remains subjective. It can never be objective, for we never can be sensible of it except through our feelings.

Regarding the justice-judgment, the matter is somewhat complicated by the fact that very often a *claim* is said to be just. This contains a tautology, in so far as the claim—quite naturally used by jurisprudence as a legal ideological factor—is considered to be based on (material) law and everything based on that must obviously be just. But not seldom jurisprudence finds itself in such a position that it is forced to decide whether a certain claim is to be regarded as present, i.e. really to be a claim and consequently based on (material) law, or not. This question is answered in the positive if it can be proved that it is *just* that a claim of the type in question arises. Consequently natural justice is considered *partly* to form the basis for the whole system or body of rules of law already known, *partly* in a certain case at hand to make the basis for the rule of law not yet clearly known which is to be applied in a case of the kind under consideration. Here appears the *true external, so to speak, character of justice: to be the result of a balancing against each other of the interests of the parties,* that of the defendant to be free from punishment or any other legal reaction, and that of the plaintiff of sentencing or adjudging the defendant to this or that legal reaction. This weighing of interests —or more properly, this balancing against each other of the reasons for the interests of each of the parties—is characteristic for all shades of jurisprudence and not only for the jurisprudence of interests. This balancing is only a consequence of the belief in natural justice as the ultimate substratum for law. The 'weighing' or 'balancing' against each other of the reasons for the interests of the parties illustrates better than anything else that we have in front of us nothing but a question of *evaluation.* The conditions of things is indeed less clearly marked in criminal law than in the law of torts because the position of the parties in the former case is rather different. Here the person prosecuted does not stand as a party against another individual; the prosecutor does not represent his own interests but those of the public. However, the judge at

least appears to allow himself to be guided by the points of view of justice: the scale-pan is weighed or lightened as to the accused, according as the circumstances in the case indicate his guilt or not.

Indeed, the matter is more clearly illustrated in regard to the law of damages, as the situation here, judged in a general way, is that two parties stand as individuals and before the court as equal to each other. Paying no regard to divers interesting curiosities of the English law of torts, I consider only fault-liability, and strict liability, as they are met with in Scandinavia and on the continent of Europe. In both cases it is of course impossible to achieve the would-be justice except by weighing against each other, on the one hand, the reasons which support the interests of the defendant to be free from the coercion to pay damages, and on the other hand, the reasons which support the plaintiff's interest to get compensation for the damage. As a matter of fact the method is easier to report in the case of 'fault-liability' than in that of so-called strict liability. In the former case one needs only to examine if the circumstances connected with the line of conduct of the defendant amount to his 'guilt' or not. If he is found guilty and the plaintiff himself was not liable of any guilt, then the defendant is adjudged to pay damages.

As just observed, it is mainly in the sphere of the law of strict liability that the justice-judgment is in practice, in express terms, made use of by jurisprudence. The interest of the person who has suffered the damage to get compensation is weighed on the one hand against the interest of the defendant to be released from the coercion to pay damages on the other. On both sides of the scales are placed certain circumstances, according to whether they are regarded as advantageous to the interests of one or the other of the parties. That the justice-judgment has the character of a judgment of value is thus apparent. As a matter of fact, this judgment implies that the one part has (or has not) a *right,* i.e. an interest qualified by the 'ought' to be realized, in the first place, through a conduct of the other party. Of this justice-judgment, as of all judgments of value, it is of course true that it is and remains an expression for the *feeling of* a value and is consequently determined by the judging person's emotional attitude, i.e. subjective. It specifies nothing about reality, and can thus never be true, never

objective, as that which is true and objective has the very characteristic of only being determinable independently of every emotional attitude.

However, in order to avoid a misunderstanding, it is important to point out that the entire chimera of justice falls to the ground irrespective of the realization of the lack of contact with reality in making value judgments. This can be understood if one acquaints oneself with my criticism of the notions of wrongfulness and lawfulness, and—partly in connection therewith—of the ideas of legal rights, duties, obligation and guilt, or in brief, my entire criticism of legal ideology, and perhaps my illustration of the functioning within the legal machinery of the so-called common sense of justice, as well. Indeed in my criticism, e.g. as to Jhering's concept of legal right and the concept of legal duty, I have sometimes called attention to the false belief in objective values. But this observation has then not been a main point. The principal argument in *my* criticism of legal ideology—this argument being completely sufficient in itself—is *that* the entire substratum for legal ideology, the so-called material law and its basis natural justice, lacks the character of reality; *that,* accordingly, even legal rights, legal obligations, legal relationships and the like lack such a character; *that* the common sense of justice (the feelings or sentiments of justice) far from being able to support the 'material law' on the contrary, receives its entire bearing through the maintenance of law, i.e. legal machinery, which takes the common sense of justice (= the feelings of justice) into its service and directs it in grooves and furrows advantageous to the society and its economy, and *that* consequently legal ideology does not perceive and *cannot* perceive those realities appertaining to the legal machinery such as they are, but places them right on their head.[6]

The absurdity of the method of justice

In all situations now referred to—of criminal law, of fault-liability and strict liability—we find that this method, of allowing one-

[6] Concerning this see pp. 26–43 above and pp. 78–122 below. Of fundamental importance to my statement about the value-judgments in jurisprudence has been Hägerström, *Kritiska punkter,* pp. 17 ff. See also Hägerström, *Om moraliska föreställningars sanning,* pp. 45–59.

self to be guided by one's belief in natural justice, is contrary to the idea of law as something regular. As a matter of fact, writers on jurisprudence very often try to find a 'rule' applicable to the special case at hand. As this procedure, through the development of the so-called school of free research, and not the least of its offspring 'the jurisprudence of interests', appears rather to be encouraged than opposed, it seems to me important to point out in more detail its lack of scientificness, if not to say its absurdity.

Let us first go to the province of criminal law, although now indeed the school of free research is quite naturally not occupied with criminal law, which indeed is considered in general to be more or less dominated by the maxim *nulla poena sine lege*. As I find it especially instructive, I shall repeat the example of the theft or larceny which I have made use of several times previously. If, regarding the question of the thief's punishment, one really followed the guilt-justice line, then the punishment for larceny would have to be completely discarded, at least to the extent that the judging person had a so-called deterministic attitude. For is it not indisputable that as a rule it is the poor and not the rich who steal? Is it not also apparent *why* it is generally the poor and the rich who steal? Can a psychically sound individual feel it just that a poor person must suffer for an action which he would not have done if he had not been poor? To this one might object that not all poor people steal. This is true. But what separates the various categories within the poor group, and forces some to crime, are circumstances which a person in no way can master: environment, upbringing, and education, intellectual ability to judge the social character of an action and survey its consequences, as well as moral strength to resist the temptation, thus partly external circumstances which have been *forced* on him, and partly an *inherited* disposition in intellectual and emotional spheres. Surely one must understand that there is something absurd about a *justice* which demands that one is to be punished for an action which perhaps depends on nothing except that one has had such or such parents, perhaps on nothing except that one was born and grew up in the poorest districts of a great city, perhaps on nothing except that from childhood one was sent out by parents or other people in whose care one was to hunt up anything edible in order

to still one's hunger, even in an emergency to go so far as searching and taking from other person's pockets and storeplaces; for an action which perhaps depends on nothing except that one was exclusively brought up by, and together with, criminals and other scum. What has been said about larceny has its counterpart in the question of all crimes. But even if what I have pointed out is disregarded, it is surely undeniable that all legal reprisals in criminal cases, including the procedure of placing the delinquent at the bar, have essentially *different* tormenting or demoralizing effects on *different* individuals, depending on their physical and psychical resistance, and also on their social and economic condition. Even from this point of view the punishment must appear to thinking people with sound feelings as a suffering which is forced upon the defendant without it being possible to regard it as a result of *aequitas,* i.e. an *equitable* and *therefore just* treatment.

In addition to this it may very well happen that the culprit felt forced by *duty* to commit the crime: to steal in order to help a person in distress, to murder in order to liberate his country from a criminal or his fellowmen from an evil miser, etc.—not to mention the real political murders, whether the perpetrator of them was a fanatic, or in any case was inspired by the duty to fulfill a mission. In such cases, how could the punishment be motivated as *just* on account of guilt brought about by breach of duty? Far from violating the commandment of duty, the culprit has on the contrary been affected by it to do his deed!

It stands to reason that this question—whether the accused had *justly merited* the punishment or not—must, according to the circumstances in the case, be answered sometimes in one way and sometimes in another (and, as mentioned above, from a deterministic standpoint always be answered in the negative). A paragraph in the criminal law could only be applied, if the circumstances did show that the punishment of the person persecuted agreed with the feelings of natural justice. Consequently it would be out of the question that criminal *law* could be maintained; all the more as the feelings of justice, of course, are not unanimous neither among judges nor among other people. But it is obviously a *law,* i.e. a *regular order,* which is actually sought for by those who watch over the interests of society in checking the criminality.

Even if, as we shall see shortly, writers on jurisprudence, from their points of departure illogically enough, plead for a regular order in criminal law, the points of view of justice now indicated have had and still have a fatal effect on criminology as a science. This important topic will be dealt with later on (pp. 217 ff.).

Here, I think, is the place to insert a remark on indeterminism and determinism. One has maintained that the old controversy about the freedom of the will does not concern the concept of guilt in criminal law.[6a] This concept, indeed, has no reference to reality[6b]—whatever the state of the case may be with regard to the various doctrines of free will. Yet, it is obvious that the belief in the guilt of the doer as a condition for his criminal responsibility is only compatible with the view of his will as a *free* cause of his decision to commit the deed.

The doctrines of free will presuppose that the will is the producing cause of the decision of the action in question. However, being the cause of something means only that this something of necessity succeeds to the former. Of this one does not seem to have a clear grasp. One interprets the consequence as something that the *cause produces out of itself*. Such a line of thought is logically impossible.[6c] It would mean that the consequence were contained in the cause. But the consequence is according to its own concept something *other* than the cause, something *beyond* the cause. Thus, the consequence must be separated from the cause. Thereby nothing remains as characteristic to the causal connection—as distinguished from the bare chronological order —but the fact that the one (the consequence) *necessarily* succeeds to the other (the cause).

The talk of the freedom of the will, however, implies that the will is claimed to be the *free* cause of the decision, i.e. that the decision would *not necessarily* succeed to the will (that is as much as to say the *nature* of the will in connection with the state of *motives*). Accordingly, with the assumption of the freedom of the will one *denies the causal connection* between the will and the

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[6a] See, e.g., Mezger, *Lehrbuch,* p. 251, and cf. *Unw.* II, pp. 37 ff.

[6b] See above pp. 44–51.

[6c] Cf. Hägerström, *Botanisten och filosofen,* pp. 24–26.

decision, i.e. one *denies one's own point of departure.* If the postulate of the freedom of the will is not acknowledged, then the idea of the will being the cause of the decision must be abandoned. By that in turn it is impossible to find in the freedom of the will any support of the idea of guilt as a reason founded on justice for punishing the perpetrator.

No matter how it is turned and twisted, it is logically impossible to adhere to the concept of guilt. First: certainly, by a deterministic view the will may be the cause of the decision. According to this view, however, the will of the perpetrator is nothing but a plaything of outside circumstances. Consequently it is void of sense to allow his will to motivate the reproach of guilt against him. Second: with an indeterministic view such a reproach is seemingly compatible—but only as long as one fails to understand that, according to this view, the will of the doer cannot even be the cause of the decision. For, in conformity with the prevailing doctrine, such a causal connection is requisite for the deed being punishable.

From this it is seen that the doctrine of guilt (*mens rea*) in criminal law is equally untenable either one proceeds from indeterminism or determinism. And if one cannot speak of the criminal's guilt one cannot either reasonably speak of the punishment as based on justice. Moreover we know from the foregoing (pp. 43 ff.) that the assumption of guilt as well as that of justice depends upon evaluations.

After this brief digression on the question of the freedom of the will I am going to point out the untenableness in general of the procedure of justice as to the 'law of damages' (fault-liability and strict liability). It is self-evident that by means of such a procedure—by restricting one's observation to the individual case instead of surveying the entire field in which this case is only an unimportant little episode—one so to speak cuts off the entire horizon from one's view. One is simply deprived of the logical possibility of taking into consideration the *social* interests, for society is really something quite different from the two parties. Surely it is unimportant from the standpoint of society whether in the special case a person who has suffered an injury gets compensation or not. In the first place in order to confine this discus-

sion principally to fault-liability—what is the importance of this, from the point of view of society, in comparison with the innumerable number of injuries which *might* have occurred but which *have not* occurred thanks to the maintenance of the law of torts, above all the culpa-rule, or in Anglo-American law the so-called fault-liability rule (coupled with some paragraphs of criminal law)? Of what value is it from the point of view of society that in a certain case the injury is, so to speak, economically transferred from the plaintiff to the person who caused it; of what value is this to society in comparison with the importance of the fact that it takes place in *all* cases, i.e. that the *public* can look ahead and feel security in regard to injuries? This common feeling of security is brought about *partly* through the fact that the injuries, instead of florishing in society are actually reduced, relatively speaking, to a rarity, and *partly* by the fact that the public knows in advance that compensation can be legally demanded when in these rare cases an injury has occurred.

This general feeling of security is *not* obtained by compensation in the special case, but it is obtained by the maintenance of the *law* of fault-liability and, to a certain extent, the *law* of strict liability too, and by the consciousness of the public regarding the law in question as actually valid. As far as one uses the method of justice, it is logically impossible to pay attention to what now has been said, although *that* must be regarded as the most important of all points of view. If one really carried the balancing of the interests of the parties and the justice thereby achieved into effect, no *law* of liability, regarded as a regularly obtaining order, could be brought about. The passing of judgments to pay damages would only be sporadic. This would lead to general chaos in this sphere. In brief the case is as follows—and I still confine myself mainly to fault-liability as an illustration.

It is in the nature of the thing that *if* justice is to be decisive then it really *should* be. For those who are to exercise it, justice cannot be, at least not consciously, divisible. The circumstances influencing the justice-judgment—according to what is said above, the feeling of justice—must, as far as they are known, be entirely and completely taken into consideration. Justice swings over to its opposite, injustice, if one only takes into consideration *some*

of all the known circumstances which have the significance of influencing the estimation by people of to what extent a person has made himself 'justly merited' of paying damages. Therefore, if, on account of the circumstances of the case, the burden of the damages were disproportionately heavier for the defendant than the burden of the uncompensated damage were for the plaintiff, then surely a person with sound feelings could not regard it as *just* to let the former pay damages. We could for instance, in order to give a good illustration, assume that the defendant is a poor breadwinner with many children and a wife who is ill, while the plaintiff is a wealthy bachelor; the damages, the loss of let us say, a few thousand crowns would hardly be noticed in the budget of the rich bachelor, whereas the execution of the damages would be catastrophic for the poor breadwinner. Under such circumstances, how could the claim for damages be regarded as based on justice? Between this case and the completely opposite—the excessively rich defendant and the destitute plaintiff—there are obviously all gradations, which must, for a sensitive conscience which does not allow itself to be led and ordered, but which reacts in accordance with its own nature, make the constraint to pay damages sometimes more or less unjust and sometimes more or less just.

Further, it must be taken into consideration that the carelessness or negligence which the blame in this case shall involve can depend on hereditary clumsiness or on a hereditary highly strung and nervous disposition, which the person, as popular speech puts it, cannot help. Even if the recklessness was found to be gross, it is often conceivable to excuse it by considering that the person was born of such and such parents, was brought up or otherwise forced to live in such or such surroundings, etc. If these and all similar circumstances, as far as they are known, were taken into consideration, the consequence would be the annulment of the *law* in the matter, i.e. *law* in the meaning of a *regular order.*

Of course, what has just been said corresponds to what I mentioned previously concerning criminal law. However, what I have just said remains true in regard to strict liability too; i.e. the reasoning in this field is analogous to what I have now set forth, although, naturally, in the case of strict liability the guilt or blame

is eliminated.[7] On this account legal writers seem sometimes to distinguish between retributive and distributive justice. Strict liability then depends upon distributive justice[8] only. It seems to be a modern tendency also in the field of fault-liability to let distributive justice push retributive justice into the background. Therewith no scientific progress can be made.

It is apparent from all that has been said now and in the foregoing that the method of justice cannot be in accordance with real life. But, as we have seen, it is precisely the method of justice with which jurisprudence deals in these provinces, and one is tempted to ask how it is possible to continue to work according to a method to such great an extent lacking in realism. The falseness of the method must certainly reveal itself when applied, and make it appear useless for those who practice it. Surely no scientist, or anyone else either, can continue to work according to a method which has shown itself to be useless? I now come to something, the emphasizing of which I dare aver to be of great importance, because it should be calculated to preclude every intellectual possibility of maintaining the method while referring to 'practical viewpoints', based on the 'satisfactory results', which in spite of everything have proved to be obtainable. *For these results depend upon the fact that one has actually to a great extent abandoned the method and thus has acted inconsistently, even* if one has been led by a certain practical purpose and thus has come to observe a certain method in the inconsistencies. This is the answer to the question of how to explain that, on the one hand, the method of justice is respected and that, on the other, in spite of this, criminal *law* and a *law* of civil liability, i.e. so-called legal *rules*, actually can be maintained. In more detail the state of the case is as follows.

The pressure of community life on jurisprudence itself as well

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[7] I shall devote a few pages (below pp. 64 ff.) to strict liability directly.

[8] Cf. Esser, *Grundfragen*, p. 140 f. Coing, *Grundzüge*, pp. 180 ff., 187 f., distinguishes, according to Aristotle, between *justitia commutativa* and *distributiva*. Cf. Radbruch, pp. 125 ff. Coing speaks also of social justice and protective justice, ibid. pp. 180, 184 f., 188. I have not been able to find any meaning, even from the point of view of legal ideology, with all of these distinctions. On Coing see further pp. 291 f. below.

as on the administration of law is so strong that, although one does not seem to notice it, and in any case does not admit it, one fails to draw the full consequences of one's point of departure founded on the idea of justice. This is really not so remarkable as it may seem, as the drawing out of the consequences would actually lead, as has already been stated, to the annulment of the law in the meaning of a regular order. As a matter of fact, writers on jurisprudence are forced to distort their own method in such a way that it is almost abandoned. They are forced to do this by the method's obvious uselessness for the needs of the society's organization. What would be the good of, at the best, a criminal 'law' or a 'law' of civil liability according to which the *same* course of conduct brings in one case a reprisal, and in another none, according to which one judges sometimes in one way and sometimes in another? What importance could such 'laws' have as guiding maxims for the conduct of man? A legal science which resulted in such absurdities must of course go under. Now one actually proceeds thus: when weighing the interests of the parties, one disregards everything which could possibly influence man's estimation of just and unjust, except a *certain something* which has been laid down *once and for all.*

I now again limit myself to the culpa-rule or fault-liability. That 'something' which in this field one retains and attaches the whole importance to is guilt or blame, determined as breach of a *legal,* hence an objective duty. But one goes still further on the way of abstracting. Properly speaking, the blame of the defendant should presuppose either that he has perceived or that, only through his negligence, he has failed to perceive the 'wrongfulness' of the conduct, i.e. the dangerous character of it. As a matter of fact, however, judges as well as legal writers do not ask if the *defendant* really is in this way to blame or not, but if he has observed such a caution as a *reasonable man, a man of ordinary prudence,* would observe. Indeed, they leave the personal equation or idiosyncrasies of the defendant out of account! Already by this 'objectivating' of the blame the demand for jutice is noticeably 'diluted'.

That which, in respect to man's conception of damages as a just or unjust reaction, gives the blame its basic character is the

violation of *duty*. But the violation of *legal* duty is only an ideological construction which is applied completely independently of the fact whether either the doer himself or other persons who judge his action really interpret the neglected mode of action as a duty. The duty *is* only a person's *feeling* or *sentiment* that he *ought* to conduct himself in a certain manner, consequently, something quite *subjective*. This subjective element legal writers have been forced to turn into the exact opposite, into the monstrous contradiction: an *objective duty!* Thus the result has been achieved that, in reality, the blame itself is given up as a necessary supposition for the just and equitable character of the legal reaction in question. The idea of justice is then further reduced, as has been stated, by means of permitting the blame—in reality thus released from the idea of justice—to dominate *alone* with regard to the question of justness or unjustness of the legal reaction, and that in such a manner that this is only regarded as just, if the constructed blame mentioned is present.

Except for what I have said of the 'objectivating' of the blame every word now expressed is applicable to penal law too. Indeed, in this province one should pay particular attention to the fact that—besides the question whether the person persecuted really followed or did not follow the commandment of duty, the voice of conscience—as pointed out above, one has also left out of consideration, among other things, the fluctuations (which vary with different individuals) in psychical, physical, or economic resistance to the legal reprisals, variations resulting in one person being hit considerably harder than the other, consequently in a way which must be characterized as the opposite of that conceived in the words equitable and just.

Without abstractions as well as constructions now hinted at—which actually make the justice-judgment purely and simply a label stuck on penal law as well as on the law of fault-liability—the method of justice would have dug both its own grave and that of jurisprudence as represented by this method. It is certainly the method of justice which, with its idea of the legal reaction as motivated by the person having 'merited' it, lies in the background. *But the law-disintegrating consequences of the method of justice are checked by actually not using it!* This occurs, I repeat once

again, in such a way that one believes one can couple the justice of the legal reaction with only a *certain* condition—guilt or blame. In addition, this is constructed as a violation of a *legal* duty, i.e. an objective duty, whereas the justice-judgment stands in relation to the *feeling* of duty. This 'coupling' of the idea of justice with a single definite factor—namely guilt or blame, which in addition is given to imply the violation of an objective duty!—in reality means the abandonment of the method of justice. Here we are confronted with the phenomenon so common with jurisprudence, that one attempts to counteract the unacceptable consequences of an unrealistic construction by making one or several new such constructions which naturally also are out of touch with realities.[9]

The idea of justice—i.e. in this connection the idea that a coercive legal reaction is motivated by the victim having 'deserved' or 'merited' it—has for centuries been the basis for such reactions. But if we disregard the time before the 19th century, it is not until about the last quarter of that century, through the extended application of strict liability or responsibility, that justice, *independent of* guilt or blame, appears as an approved basis for legal reprisals. Previously, when not only punishment but also damages in principle presupposed the defendant's guilt or blame,[1] it was not necessary to speak expressly of justice as the legal motive. Guilt (or blame) as a presupposition for legal reaction surely implied that it was motivated as a retributive justice. And in the

[9] To avoid misunderstanding, I emphasize the difference between objective duty in criminal law, on the one hand, and objective duty according to the culpa-rule (fault-liability), on the other. In the latter case arises the extra construction with the 'normal person' (reasonably 'prudent' person or the like). It is this which I consider, as concerns fault-liability, the 'objectivating' of the blame. In both cases it is a question of a legal and thus an objective duty. In the former case this is believed to be based on a command of criminal law (or behind that law) directly aimed at the disregarded line of conduct; in the latter case on a command to act as a 'normal person', a 'reasonable man'. On this point there are, of course, within jurisprudence many different ideas, and I here have had to express myself rather summarily. However, the difference in question between criminal law and the culpa-rule is connected with the fact that, in the former case, it is commonly a question of intent *(dolus)*, in the latter, a question of negligence (*culpa lata* or *levis*).

[1] Thereby I do not consider the Anglo-Saxon law (of torts) but rather that of the Continent.

jurisprudence of criminal law it is still in fact a question of the justice of *retribution*. But because of the great importance which the justice not being determined by the idea of guilt has nowadays received in the province of the law of damages—I have the so-called strict liability in view—there is no reason not to stress in the case of criminal law how there, as well as in the province of fault-liability, the justice-idea, which is more extensive than the idea of guilt, has been 'bound' by the absolute coupling with this latter idea. Hence the express talk of justice especially in case of strict liability.

The method of justice as to strict liability

Concerning strict liability there can, as has been said, be no talk of guilt as supporting the application of the method of justice. Accordingly, as said above, one cannot have a retributive justice in view. Hence it comes that the balancing of the reasons for the mutual interests of the parties presents itself more clearly as determining the question of the justness of adjudging the defendant to pay damages. In the well-known case of Rylands v. Fletcher[2] we have an excellent example from common law in England. In forming an opinion of this judgment it must now first be observed in part that the defendants were found to be 'free from all blame' and in part that the fact, that third persons employed for the construction of the reservoir lacked the necessary carefulness, as far as can be understood, was without any significance for the judgment. Consequently this judgment should have remained the same even if these persons had been like the defendants themselves 'free from all blame'. It is with these starting points[3]—to which it should be added further that the plaintiff on his side was not either considered in any way to have been careless

[2] L.R. 1866, 1 Ex., pp. 265–287; L.R. 1868, 3 H.L., pp. 330–342. Curiously enough it was just during the time of this case (1866–1868) that the European continent resounded to Jhering's fascinating watchword of *der ewig wahre Satz: kein Übel ohne Schuld,* and, consequently: 'no damages without guilt'! See Jhering, *Schuldmoment,* p. 8 and pp. 40 ff.

[3] Salmond, *Torts,* pp. 239 f., means, however, that 'negligence' on the part of the contractors is to be considered a condition for the decision. Yet this opinion is not held in Salmond-Stallybrass, *Torts.* Cf. pp. 20 f. and 602.

—as the court has taken position to the question if the law is such that the damage to the plaintiff's coal mine shall remain his loss or such that the defendants instead are responsible and consequently have to pay damages.

In its statement in reply to this, the court began with the attempt to answer the question 'what is the obligation which the law casts on a person' in the situation of the defendants? There is no doubt that the court really means that an answer to this question would indeed provide the key to the solution of the question of damages. There is also no doubt that the 'law' from which the obligation is to emanate is 'common law', consequently certain imagined maxims whose bases shall consist of those principles which have been expressed in the judgments of so-called 'leading cases'. If we were now to assume 'obligation' to be something other than an empty word, the question arises: how would it be possible that these maxims would be able to occasion that a person be burdened with an obligation? Assuredly this question cannot be answered. However, there are not any obligations. These are only legal ideological effects, constructed in the fantasy of man by the imagined objective ought of the material law and consequently fall outside of the world of reality.[4] Properly speaking it was superfluous first to reason with the assumption that the 'obligation' was a reality. For the attitude of the court shows that with 'obligation' nothing other is considered than the legal duty which the law is imagined to apply to a person, consequently just the effect of the ought norms of the material law.

However, we also know that the situations, considered as obligations within legal ideology, are particularly characterized by the fact that the defendant can in a legal way be forced to pay, if he will not voluntarily do so.[5] An 'obligation situation' such as this now being discussed can on the whole have no other criterion than this coercion to pay an amount estimated according to certain principles. Already it follows that the court cannot receive any kind of help for judging questions of damages by seeking to establish the 'obligation'. On the contrary, the 'obligation' can,

[4] Concerning these questions see pp. 43 ff., 93–100, 109–118, above and below.

[5] See pp. 114 ff. below.

as far as one has something real in mind, only be ascertained by the question of damages being made clear.

Since the defendants were found to be 'free from all blame' and thus 'fault-liability' was excluded, the question before the court became whether or not 'the obligation cast on the defendants by the law' were an 'absolute duty', which is only a legal ideological periphrasis for the decision reached by the court, namely, the strict liability of the defendants, i.e. the coercion on them to pay damages although 'all reasonable and prudent precautions' were taken by them to prevent the discharge of the water to the injury of another. However the court—reasoning as if it did not yet know which point of view should be taken to the question of liability —answered the question affirmatively: there is an 'absolute duty' resting upon the defendants. The court held the opinion that 'the true rule of law' is such. And the basis for this opinion? It was considered to be 'on principle just'. This motivation was repeated thereafter not once but two times: 'seems but reasonable and just'; 'seems but just'. Consequently the court has found its way into that method of justice which is a natural consequence of the court's attitude towards legal ideology.

It is true that the guilt (blame) has been eliminated. But it is nevertheless the method of justice, directed as it is to a comparison and a balancing of the interests of the two parties, which has been applied. Let us examine more closely the motivation of the judgment. It can be summed up in the following points: (1) The plaintiff's colliery, i.e. his property, has been damaged without any defectiveness regarding the technical mining arrangements and without any 'blame' on the plaintiff. (2) The damage was caused by a flood of water from the reservoir of the defendants' land. (3) This water was not in the nature of things to be found on the defendants' land but had collected there because of the defendants' own lawful measures and 'for their own purposes'. (4) Although this water was not dangerous for the plaintiff-neighbor, as long as it was kept on the defendants' land, they knew, however, that it would become ruinous if it was not kept back, but flooded over onto the plaintiff's property. (5) Except for the measures of the defendants, mentioned in (3) above, no damage to the plaintiff's mine would have occurred. (2 and 3 certainly contain the last

point, which was, however, repeated with this formulation in the motivation of the judgment.)

One cannot understand that this now shall lead to the *justness,* as the court was so eager to show, of 'the law casting an absolute duty' on the defendants, and consequently of the plaintiff's claim for damages against the defendants, notwithstanding that they should be as free from 'blame' as the plaintiff, unless one takes into consideration the legal-ideological point of view in point (1). Through the damage the plaintiff's 'right of property' has been infringed. But 'rights' are something with the qualification 'ought' to be not only respected but realized too. This 'ought' remains there and demands indemnification, in order that—to the extent it is at all possible—the 'wrongful condition' which has arisen, or, as it is sometimes expressed, 'the lacking correspondence between fact and legal right', shall be leveled out. Such indemnification could surely not be thought of if the damage had been 'the consequence of *vis major,* or the act of God'. Then there was not even any 'wrong' present. But in our case the damage had been caused by the special measures on the defendants' land, *by their own instrumentality* and *for their own purposes,* while these defendants were fully conscious of the risk of damage, if the 'escape' of the water were to take place. A definite addressee for the claim to indemnification, caused by the 'ought' involved in the 'right', is thus rather drastically pointed out by the circumstances.

In spite of the fact that the defendants have not brought any blame upon themselves, the court thus found that the plaintiff's interest to obtain compensation must, because of the circumstances, be estimated in another way than the defendants' interest to be spared from paying damages. It is certain that the feeling of justice in a case like this can decide such a verdict. But it is not an especially cultivated feeling. It is of the same type as when two boys have had an accident together, and one of them bursts out indignantly: 'At all events, it was your fault', in which case 'fault' is not interpreted in a moral sense but only as if one of the boys' conduct actually constituted a condition for, i.e. caused, the accident.

By the court's finding itself forced to proceed from the view that also the defendants were free from all blame, the reasoning

of justice of the court came to be determined by valuings which must be regarded rudiments of highly primitive feelings of justice, resulting in the demand for compensation against the *very causer as such of the damage*—i.e. independent of all 'blame' on his side —for a 'wrong', a violation of 'right'. If ideas of this kind do not lie in the background, it would be impossible—the circumstances being that the defendants were regarded as equally free from 'blame' as the plaintiff—by means of the line of justice to reach the attitude that the loss should finally rest on the defendants. This opinion would then be, from the point of justice, completely arbitrary, even assuming that the belief in the plaintiff's 'property', in a legal-ideological sense, were reasonable. For the defendants must surely be assumed to have just as important a 'right of property' to the money which must be used for the payment of eventual damages. How could then justice demand that the infringement of the plaintiff's right to the colliery be redressed by forcing the defendants to pay damages? This coercion must surely imply the violation of their right of property to their money. If the feeling of justice demands compensation for the violation of the right in the former case, then it must also demand it in the latter case.[6] Of course one cannot object to this, that in the latter case it would not be a question of the violation of right, but of the execution of a legal judgment for payment. Such an objection includes a *petitio principii,* for here it was for the court a question precisely of motivating a legal rule of liability in the name of justice, which made the judgment in question possible. With the modern refined feeling of justice which deals with the demand for blame attaching to a person in a moral sense[7] one does not reach the desired goal. If justice is to be made use of here, it must, as has been stated

[6] The analogy is perhaps more striking if we assume that the financial circumstances of the defendants were such that the damages could not be paid except by forcing them to give up their real estate. Why should, in the name of justice, the defendants be forced to endure this encroachment upon their property right, more than the plaintiff the encroachment on his corresponding right to the colliery?

[7] That this demand cannot be kept and that one sees oneself forced to work with such a blame or guilt as implies the lack of a standardized, i.e. objectively determined carefulness is something which is not concerned with the original 'ethically' distinguished line of thought.

before, be of a more primitive type: the primitive 'guilt' in the shape of the *causing agent as such,* i.e. without consideration to blame in the modern sense, must be made use of. It is also justice in this form which appears between the lines in the judgment.

It is however paradoxically enough just this primitiveness of the justice-reasoning of the court which has saved the judgment and made it qualify as a 'leading case'. By being based on the 'innocent' cause—formed by using things, to a certain extent dangerously, on one's property adjacent to the damaged property—the justice-reasoning has become so worded in the judgment that this could hardly be considered as an expression for any maxim hostile to social economy. As a matter of fact it may even be suggested that this *decision* as such might have been motivated by points of view which are reasonable and accordingly quite free from the influence of any conceptions of justice. With reference to my expounding below concerning the method for a constructive legal science, freed from legal ideology, I wish here merely to indicate the framings of a question which according to my understanding should apply in a situation of the kind here considered.

A 'rule'—according to which a person in the position of the defendants and during such actual circumstances which were considered to exist in the case of Rylands v. Fletcher, would be liable —is not in accordance with real life unless its maintenance can be shown to fulfill a socially useful function. In order to find out how this may actually take place it must first be noticed that the law of damages, not only the so-called culpa-rule but to some extent strict liability too, exercises the function of stimulating people in society to a certain feeling of security and thereby making possible production in general and other enterprising activities, i.e. what I often call common transactions.[8] Thus when viewed immediately it is a question of the general security in the community. It is self-evident that the maintenance of the law of damages must have particular significance as contributing to the security of an owner's position. In this respect the question—as far as it concerns damage to the property of another person—can also be formulated thus: how should the law of damages be suitably

[8] Cf. the note immediately following the next.

arranged in order to satisfy in the best way the need of security, from the social point of view, to the position of an owner?

In connection with what has just been said it should be appropriate to consider first that a rule of damages applicable in Ryland's case—even though the analysis of the facts did not indicate anything but that the defendants observed the necessary carefulness in the building of the reservoir—might none the less be considered to exercise a practical influence on the modes of conduct towards the prevention of destructive accidents of this type. Logically there is always the possibility that the lack of carefulness existed although the investigation showed the contrary. Further, the question arises if from a general point of view it would not be desirable in an undertaking of this type that the person would observe a more strict carefulness than that which was considered heretofore as 'normal' carefulness (= freedom from 'blame').[9] If the defendants, when the pits under the reservoir were uncovered, had insisted upon deeper excavations or investigations concerning previous mining operations at the place, perhaps such an accident would not have happened. Maintenance of a rule of 'strict' liability is of course calculated to stimulate a person to be extremely careful in preventing injuries because he knows that he cannot in any way through his so-called exculpation elude the liability.

Against this it cannot be objected that the reasoning leads to the consequence that the traditional culpa-rule over the entire line must disappear and be replaced by strict liability. For the reasoning just made presupposes a situation of a certain disastrous character. The 'strict' liability can in comparison with the old culpa-rule from a soical point of view quite often be found to be two-edged. As will be clear from my method of social welfare, so-called strict liability as well as all law of damages (and for the rest, most of the law of contract and criminal law too) can have no other non-chimerical purpose than promoting common transactions[1] and their postulate: a general feeling of security. But one

[9] On this matter see the representation of my common rule of liability, constructed on the extended basis for the traditional culpa-rule below, pp. 258 ff.

[1] I am using the words 'common transactions' as a shortened term for such things as the common production of wealth, common exchange of commodities, trade, industry, commerce—in brief, all sorts of enterprises in the society. How-

must be very careful so that this purpose is not attained in a way which brings to the social economy harmful insecurity on *their* part which have to risk the liability in question. The extended liability can force them to an extraordinary care, perhaps to the pure pedantry, checking their enterprising spirit. It is this which has practically motivated the limiting in general of liability in accordance with the traditional culpa-rule. But when the situation distinguishes itself in a particular way—as in our case, in that the accident if it occurs can be so disastrous—the 'strict' liability may be considered to be motivated from the viewpoints now touched upon. By no means do I maintain that a more penetrating investigation along this line should absolutely lead us to the acceptance of 'strict' liability in Ryland's case. I have only tried to indicate how the questions are to be framed. In a case of the kind now before us one might perhaps find it most suitable to adhere to a strict liability of another type: one is liable for the culpa of those employed, here the engineer and the contractors.[2]

Even if considerations now touched upon could not alone lead to the social valuation of liability in situations of the present type, it nevertheless does not exclude the possibility that such a liability might be considered to be the expression for a 'rule' which had a social function to fulfill. The maintenance of a rule of liability can have significance for the general security in another way than by preventing injuries.[3] The public consciousness of the fact that the injury incurred on another's so-called property in certain situations brings with it a claim for compensation is naturally calculated to strengthen a person's feeling of security in his position as owner—even if one disregards entirely the significance of the rule of liability from the view point of prevention.[4] It can further be of interest to social economy that by means of the law the position of an owner becomes more secure against certain

ever, this terminology has not always been used quite consistently. Sometimes I speak, e.g., of common production together with 'common transactions'.

[2] It should be noticed that such a rule of liability lies outside *respondeat superior* as an expression for 'master's liability for the acts of his servant'. In the Rylands' case it is not a question of the acts of 'servants' but of 'independent contractors'.

[3] See pp. 255 ff., 261 f. 267 below.

[4] See the preceding note, and p. 100 below.

harms or injuries than against others. In this way one may make use of the formulation given above on p. 69 by putting the question in this way: which contents should the law of damages suitably have in order to satisfy in the best way, from a social point of view, the need of security for an owner against injury of such a type and under such conditions as appear from the investigation of the Rylands case? A uses his property for a mining operation or other industrial activity, and through actions arranged by his neighbor B on B's property a risk for the ruin of A's industry is brought about. May it not be suggested that it would be a matter of social concern that A against damage incurred in this way would feel the security brought about through his consciousness of being able to pass over the economic losses to B? A himself, of course, lacks in general all the possibilities of preventing such accidents! On the whole if there are any possibilities of preventing such accidents they are all on the side of B. In this way a certain preventive function of the damage actually appears in spite of there being no social interest in preventing, not even in checking, B's activity or line of conduct. We find how in *this* case the preventive function—also if with respect to our points of departure, B's complete freedom from 'blame' and the nature in other particulars of the situation, it has little practical significance—even here, as in case of 'fault-liability', co-operates with the social importance of the security of an owner through the compensation function of the law of damages to a motivation for B's strict liability in the meaning of liability irrespective of both his own and the culpa of the persons employed.[5]

With the above I have, as already noted, only wished to suggest those questions which in such a subject matter as this are to be discussed according to my understanding. To be sure, I lean to the opinion that the law of damages ought to be suitably estab-

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[5] Concerning a motivation of fault-liability in accordance with real life see pp. 252 ff. below. In the case just mentioned of strict liability we could not quite get away from the preventive function. To avoid unclearness of my meaning indicated in the text it may be noted that as to 'nuisances' in certain cases (e.g. water, smoke, smell, fumes, gas, noise, heat etc. from industrial operations) the strict liability can be motivated, although the preventive viewpoint must sometimes be considered to be completely minimized.

lished so that a person in such a position as that of the defendants in the Rylands' case is liable for the damage which occurred. But I will not state as my fixed opinion that he should be liable even from the point of view, in all probability taken in the motivation of the court, that 'the persons employed by them' (the engineer and contractors) were also 'free from all blame'. From the above it follows, however, that I do not criticize the *decision* in the Rylands' case as to its practical effect. Perhaps to this extent it is good; I think so. Here I have only aimed at showing that the *argumentation* for the decision is composed of empty phrases.

Let us now look at the French *théorie du risque créé (par le propriétaire d'une chose)*. The argument of this theory—also called *la responsabilité du fait des choses*—can in accordance with a French textbook, be briefly summarized as follows:

> To let the victim of an accident caused by chattels, only make use of Articles 1382 and 1383 (the culpa-rule in Code Civil), this is to add to it the often impossible substantiation of another person's fault, it is even to paralyze the claim of the victim. In comparison between the victim and the owner of the chattels, it is the victim who should have the preference. The person who introduces into the community, for his own pleasure or gain, a thing of danger, thereby endangers his fellow-men. Thus a steam-engine can explode and thereby injure or kill someone without the persons who owns it or who is in charge of it, being made responsible for even the 'slightest fault'. The real cause of the accident can still remain unknown. Now is it not *just* that the person who caused the risk should be made responsible for it, i.e. the person who made use of the thing, in accordance with the rule *ubi emolumentum ibi onus*.[6]

This way of reasoning cannot be regarded as any argumentation. It contains in reality only an appeal to our feelings for what can be just or unjust. As is usual in such an appeal, one focuses on the special situation in concreto, and consequently weighs the interests of the parties against each other in order to decide which of them was heaviest from the point of view of equity or justice. The result of such a balancing must always be dependent on the feelings. Among the reasons for this balancing of the interests

[6] Cf. Baudry-Lacantinerie, n. 729. The author mentions, as is the custom, only Article 1382 *(cupla in committendo)*. Art 1383 concerns *culpa in omittendo:* the defendant has caused the damage *non seulement par son fait, mais encore par sa négligence ou par son imprudence.*

resulting in the plaintiff's claim for damages there lies, of course, his *legal right having been violated* by the defendant. However, this 'fact' alone cannot be enough—from the viewpoint of equity and justice—for the claim mentioned, as the defendant has not brought any blame upon himself. Consequently a lot of other circumstances must be taken into consideration. But naturally these circumstances vary considerably in the different cases. In one case they argue in favor of the interest of the plaintiff, in another, in favor of the defendant. Thus, the court should now have to adjudge, now to acquit the defendant. However, such a method of proceeding would be contrasted to a *regular order,* to the very notion of law.

The situation is in a certain way analogous with that which I have set forth above relating to criminal law and the law of fault-liability. But in these provinces one 'solved' the problem—of using natural justice as the basis and yet getting a regular order—with the help of the guilt-condition as an overwhelming one and all sorts of fiction in connection therewith. As to strict liability, however, there can be no question of the defendant's guilt. Nevertheless, abstractions become necessary in order to effect a generalization, a rule. In reality a flagrant contradiction is committed here:

On the one hand one desires to build on equity, justice. In this case the decision can only react to a comparison between the circumstances in individual cases, circumstances which sometimes are an advantage, sometimes a disadvantage, for sometimes the injured person and sometimes his adversary. In the case of people with ordinary emotions, the feeling of justice is determined in favor of the one or the other, according to *all* the available and known circumstances of the case in question. As has just been said, these vary in different concrete cases, and consequently the feeling of justice in reality determines in one case in favor of the person who is damaged and in another case in favor of the adversary, and it is logically unreasonable to base a *rule* regarding damages on the feeling of justice, i.e. the feeling of what is equitable and just.

On the other hand it is precisely a *rule* which is aimed at. And this is now brought about by generalizing—caused by abstractions —and thus falsifying the individual situation, which one had in

mind: One generalizes *partly* by means of determining that an owner (or other user of the thing) always has use or pleasure of the thing himself, whether he actually has or not, and whether he had such an intention or not; *partly* by means of simply *excluding* all other circumstances imaginable in these situations, except *precisely the factor* that the defendant has had the use or the pleasure of that thing which caused the plaintiff to be injured. For example one disregards questions, so important for the feelings, such as whether the defendant perhaps had had other motives for his possession of the object which caused the damage than his own profit or pleasure—for example the purpose of benefiting science, of making a socially useful invention, of stimulating production in the society, of creating opportunities for work, of mitigating suffering for others, of supporting himself and his family in order to make possible his own work in the service of society, the upbringing of his family for such work, or at all events in order to provide against the possibility of becoming chargeable upon public assistance; in brief to be of value to society. One further disregards such questions, which are equally important for the emotional attitude, as how hard the damages would hit the defendant, in comparison with the plaintiff's economic ability to stand the loss. The feeling of justice is not satisfied with a way of reasoning which is so abstract and incomplete. The forming of a *rule* is consequently the *opposite* of permitting *justice* to be decisive. The latter would lead to chaos instead of to a legal order.[7]

Apart from that criticism of the method of justice, which is based directly on the erroneousness of the entire legal ideology,[8] the unscientificness of the justice-method in two respects has been

[7] I would like to draw attention to the fact that, in the preceding exemplification, I have made a considerable abstraction in favor of the method of justice insofar as I have argued as if the feeling of justice functioned and reacted completely uniformly in all ordinary people (consequently in all judges and in everyone taking part in legislative work), i.e in identically the same way faced with any definite action—assuming, of course, that everyone had exactly the same knowledge of the details and circumstances regarding the action. In spite of this obviously false hypothesis in favor of the method of justice, I dare claim, all the same, that its uselessness has been brought to light by means of my presentation.

[8] Cf. my remark above, pp. 52 f.

shown above. *Partly* one believes in justice as something objective, something true. This belief comes to nothing through the fact that the judgment of justice is a judgment of value and, like other judgments of value, is directed by the ordinary feelings of the individual, and consequently is neither true nor false. *Partly* the preservation of this belief is due to the fact that one outrages the actual situation by constructions contrary to reality, as well as absractions, and in this way is able to refer to a seemingly uniform justice-judgment, which thus can be used as a basis for a *rule,* i.e. becomes 'objectively binding'.[9]

[9] Of 'natural justice', the 'common sense of justice', 'common legal conscience' and the like as a fanciful construction on man's feelings of justice so as thereby to form the foundation of law see the remarks on pp. 159 f.

Legal Rights and Duties

Duty is a sentiment, a feeling, and consequently something quite subjective. 'Legal duty' presupposes that duty could be something obective and, therefore, is a meaningless word. Nevertheless one may use this word 'legal duty' but then only as a term, as a kind of label. This term lables the effect upon man's conduct of the maintenance of divers 'rules' of law bearing upon certain conduct, e.g. murder, manslaughter, slander, theft, embezzlement, harm, injury or other mischief to a person or his property. The application of the rules in question means that the defendant is punished or coerced to pay damages or to return the thing stolen or otherwise taken out of the owner's occupation. Because of these rules as valid law (in connection with certain other elements) a person generally avoids conduct of the kind indicated. Keeping e.g. to a civil harm or injury it is, consequently, unreasonable to consider compulsory damages as a reaction which follows the breach of a legal duty. *If* what is called a person's legal duty presupposes the maintenance of certain rules according to which he may be adjudged to pay damages, then there *can* be no sense in saying that he is adjudged to pay damages in consequence of his breach of a legal duty.[1]

Indeed it is so that B's legal duty towards A is often considered to correspond to a right of A's against B. In other words, they are correlated. The absurdity in speaking of legal duties thus follows from the absurdity in speaking of legal rights, a subject matter which I shall now consider.[1] Naturally, the *phrase* legal right can be used, but only as a term, a label on certain situations. Yet, there is now no question about that. Now I am going to show that the conception of legal rights usually held within the sphere of jurisprudence is completely illogical, accordingly untrue to real life.

[1] Concerning the logical impossibility of believing in legal duties see, for the rest, above pp. 35 ff. and the reference made to Hägerström, *Inquiries*.

Jhering's conception of right as a legally protected interest

Two principal comprehensions of the concept of right have still in our time been considered to oppose each other. This opposition is, however, only illusory. Of the comprehensions in question, the one is represented by Windscheid,[2] the other by Jhering. At times one of these views has been taken as an immediate pattern for later authors, sometimes the discussion that was occasioned by them has exercised influence in the way that a kind of combination of both views came about, with the emphasis placed now more on the one, now more on the other. This can in general be said not only about German legal writers, but about the Scandinavian, Anglo-Saxon and Romance legal authors as well.

First, Windscheid's conception will be briefly touched upon. He says (*Lehrbuch* I, § 37, pp. 156 and 164) *inter alia* as follows:

Recht ist eine von der Rechtsordnung verliehene Willensmacht oder Willensherrschaft. — Dass die Rechtsordnung dem Berechtigten auf sein Verlangen Zwangsmittel zur Durchsetzung der von ihr verliehenen Herrschaft gewähre, gehört zum Begriffe des Rechts nicht.[3]

I shall not at this point take up the inaccuracy clearly shown by experience, and admitted by Windscheid himself, which exists in the talk of *Willens-Macht,* so far as the will of the 'holder of the right' may be considered. This person does not need to have knowledge of his 'right'. One can 'infringe upon a right' without the knowledge of the 'possessor of the right' and consequently without this taking place against his will. Indeed infant children and lunatics are also considered able to have 'rights'. In short Winscheid emphasized in his later years—in part influenced by

[2] Called *der Klassiker des wissenschaftlichen Positivismus,* Wieacker, p. 253.

[3] Cf. Dernburg, *Bürgerl. Recht,* § 41: *Recht im subjektiven Sinn besteht in einem Anteile an den Lebensgütern, welchen der allgemeine Wille als einer Person zukommend anerkennt und ihr gewährleistet ... Das Recht im subjektiven Sinn wurzelt in der Persönlichkeit des Individuums. Der Staat erkennt es an, schützt es und stellt es näher fest. Er erschafft es nicht.* I cite Dernburg here as he emphasizes, if possible more unmistakably than Windscheid, the independence of the right from the actual maintenance of law. Cf. further Dernburg's statement in System, § 33: *Die Rechtsordnung gewährleistet und modelt die Rechte im subjektiven Sinne, aber ist nicht ihr Schöpfer.*

Thon, *Rechtsnorm,* pp. 115 ff.—*dass der im subjektiven Recht gebietende Wille nur der Wille der Rechtsordnung ist, nicht der Wille des Berechtigten.* He thereby kept in mind the necessary basis for the existence, according to his understanding, of the power for the holder of the right: the 'command' of the legal order to persons to conduct themselves during this or that circumstance in a certain way, which 'command' is transferred to the disposal of the 'holder of the right' to be used by him according to his will. In this way the will of the entitled person would nevertheless be of significance for the right, although the will itself decisive for the right would not be that of the entitled person but of the legal order. (Windscheid *I,* pp. 157 f.) The sophistry of the reasoning is obvious, but for the matter at hand is without immediate interest. I shall not consider further Windscheid's ideas on the commands of law. Such ideas are held by many other authors merely to give immediate rise to the legal duty of the 'person commanded'. From this the right shall follow as a necessary correlation. As said above (p. 41), there shall also exist rights independent of duties based on legal commands, either such rights shall have entitling legal maxims as the basis for their existence or be constructed in another way.[4] What should here be carefully observed is that Windscheid actually considered the right *in itself* as being something and something of power, thus, something independent of the *maintenance* of law. With such a view not only these commands, but also the right itself with its power become something not comprehensible to our reason.

With respect to the very frank legal ideological comprehension of jurisprudence as a *Geisteswissenschaft,* perhaps one need not, properly speaking, dwell very long on this metaphysical matter. But the great Jhering, possibly influenced to a certain extent by

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[4] The particular will-sophistry in Windscheid's doctrine has a possible psychological explanation in that he, in the same way as later on Duncker, *Besitzklage,* probably thought that commands of the legal order as such could not give rise to anything other than legal duties, consequently no rights. However, Duncker held that, on the whole, there are no legal rights, only duties. See Duncker, p. 263, and cf. pp. 252 ff. ibid. Referring to Binding's critcism of Thon, p. 556 f., Duncker held that also Thon *ought* to have arrived at the same result: no legal rights, only duties.

Comte's sociological positivism and (perhaps) by Bentham's utilitarianism too, evidently has—in spite of the deep foundation of his doctrines in legal ideology—a certain notion of the falseness of the belief in legal rights as existing irrespective of their legal enforcement. Jhering's well-known conception of legal right as a *legally protected interest* was a consequence of such a notion. This conception seems to take into consideration the significance of the complaint, the civil action at law, for the existence of the right, and appears thus to be more true to real life than other conceptions of right. Jhering's notion of right has been adopted by a great number of legal writers all over the world, of course also within Anglo-American jurisprudence. Therefore let us investigate Jhering's conception of right.[5] Among other things he says the following:

'The right is composed of two points *(Momente).* One is *substantial.* Herein lies the practical purpose of the right; i.e. the use, advantage, benefit, or profit that the right is to involve. The other is *formal,* and consists of the legal protection, the *complaint.* The former is the *kernel,* the latter the protective *shell* of the right. In itself the substantial point only implies a *fact* of use and advantage *(actual interest).* The actual interest becomes a *right* through *legal protection.* Consequently, *rights are legally protected interests.*' (Italics by Jhering.)

Thus, Jhering means obviously that the right is a summing up of two separate elements each one conceivable in itself. However, it is easily seen that the substantial element, the so-called actual interest, upon closer consideration is not apprehensible in thought, if one eliminates the formal element, the so-called legal protection. Let us now imagine a case of a right of property in which what Jhering calls legal protection would be absent. What then remains for a person of the so-called substantial interest? Nothing other than what exists, for example, for the thief in relation to stolen goods. As long as the thief actually possesses them, he can of course have all the advantages from them. But legal science cannot indeed really mean that the very kernel in the right of property should be the same as the thief's relation to the stolen goods. And in fact Jhering here inserts an extra element. The interest, which is to

[5] See his *Geist* III, pp. 339 ff.

form the kernel of the right, is said to require a certain quality: it must be an interest which is acknowledged as being both worthy of being protected and in need of such protection.[6] This statement however shows very little serious reflection.

For if we place to one side the so-called protection of rights, i.e. a very great part of the actually maintained legal order, *could there then be found any fixed point at all,* by means of which the intended significance could be attached to the valuation, which must lie included in the acknowledgment of a certain quality in that interest? What is lacking is such a maxim in respect to valuation, that this could bring about something objectively fixable by means of which these relationships—characterized as interests worthy of legal protection and in need of legal protection—could be distinguished. Here Jhering has simply glided over the decisive question.[7] The entire criterion of these relationships is and remains in its complete arbitrariness something absurd. Leave out of account the facts alluded to in the expression 'legal protection', then one cannot pick out any objective element to pay attention to. And it is of course also quite apparent that all these situations which lead Jhering and his echoers to talk about a person's interests worthy of legal protection, would not be conceivable with a social order, without the maintenance of all those rules, by means of which a 'holder of rights' is said to be protected.

Thus Jhering in all secrecy (to himself and to others) assumes that something of legal quality is a part of that element (i.e. the actual interest) which shall fall outside the 'legal protection' and be the object of this. Jhering proceeds, and perhaps without reflecting over it, from these only 'purely *actual* interests' as involving *objective* values. Such are, however, as absurd as the legal rights in the meaning of Windscheid. If one actually disregards 'legal protection', it is absolutely out of the question to allow the first element in Jhering's concept of right to be anything other than

[6] Jhering *III,* p. 343.

[7] How incorrectly Jhering treats the entire matter appears from his discussion —in this connection—on money as in general constituting economic value and measure of interest (p. 342 f.). What would the right's 'kernel' be valued at in money if the so-called legal protection was not to be found? And would on the whole what one imagines with the concept money be thinkable?

the thief's relation to the stolen goods,[8] for example, which relation could consequently, if one were to take Jhering's word, constitute the kernel of the right!

Now one will perhaps reply to this that a valuation of interests always presupposes a valuing person. But then, who would be this 'valuing person'? The answer: anybody whoever he may be. For with the abstraction made, every base of support is lacking for an authorization of the person or category of persons whose valuation in the present respect should be determining. To this one cannot, of course, object that such a valuation obviously should be undertaken by jurisprudence in an extensive sense (law-makers, courts of law and legal writers). For even keeping only to the 'right of property', one must question: if not the rules of law, which aim at making the thing an acquest, if not rules concerning the so-called 'right of vindication' of the owner, concerning punishment of the robber, the thief, the embezzler, the 'unlawful' user or disposer, the harm-doer, and concerning the compulsion of damages on such persons—if not all of these rules or at least certain of them really were *valid,* i.e. were *maintained,* how, on the whole, could any jurisprudence exist? And in order to make the absurd assumption, that it nevertheless existed, how would jurisprudence be able to come to such an idea that certain—just those aimed at by Jhering—actual possessions or holding of things were interests worthy of and in need of legal protection, others again were not? How would one in the event of this kind on the whole be able to talk about 'unlawful' possession of things? The conception of robbery, larceny, embezzlement, hurting, injuring, damaging or other modes of conduct 'wrongful' in the meaning now prevailing would not be possible. Expressing it briefly, with this separation of the 'actual interests' from the 'legal protection', one loses, so to speak, one's own conditions or presuppositions, or one saws off the limb one is already sitting on. What we call the interests of an owner or another holder of a right would of course

[8] This is said for the sake of clearness although naturally, with the abstraction made, such concepts as thief and stealing should disappear. Of course, the thought of 'legal protection' of rights and the like is no thought at all, whereof later on.

with this way of looking at things be non-existent. Cf. pp. 17 ff. above.

Consequently this valuation of jurisprudence is not thinkable if one abstracts from the maintenance of all these rules, by the means of which is brought forth precisely that which is called the legal protection of a right. Thus the entire matter becomes only a highly misleading restatement of the concept of right in Windscheid's formulation (leaving until later on the power of will of the holder of the right on one side). Thus, I repeat, Jhering in all secrecy assumes, no less than the representatives of the other line of opinion, something of legal quality *as having existence independent of legal protection.* One sees how it becomes necessary for legal ideologists to slip in such a quality in the ingredient in question of Jhering's concept of right, as soon as one wishes to preserve the appearance of logical reasoning. In the 'interest' which shall be protected is placed, e.g.—thus in the Italian Betti[9]—an *expectation* of enjoying the privileges which the 'interest' is directed towards. This expectation as an ingredient in the concept of right again is entirely meaningless if it be dependent on the person's comprehension, in the particular case, of its existence. *All* who stand in the situation in question should of course have this expectation. It must consequently be supported by something objective. Thus something of a legal quality is postulated—whether this be *called* a demand, a claim or anything else is of course quite indifferent—as existing independent of the legal protection and constituting the object for this. In such a way, Jhering's theory of right leads, as soon as it is going to be applied, to remolding already the *first* ingredient into something completely analogous with Windscheid's idea of right.

Jhering's concept of the substantial point of a right appears upon closer inspection to be by no means in any contradiction with that power of right in abstracto asserted by Windscheid, but must presuppose something comparable with it. These factors completely equivalent with each other—from the point of view of the criticism here presented—constitute, according to both authors, 'objects for legal protection' in processual meaning. However, Wind-

[9] Betti, *Il concetto della obbligazione,* p. 7 ff. Cf. Hägerström, *Obligationsbegriff,* pp. 605 ff.

scheid already uses for the factor in question such a word as right, while Jhering has this mode of expression for his factor only under the consideration that it is the object of 'legal protection'. If the *rights* in Windscheid's meaning have something sacred about them, then must not the *interests* of Jhering be just as holy? Their objective 'value of protection' is only another expression for such mysticism. It should be strongly emphasized that the mysticism of right has in no way been diminished by means of Jhering's contribution. The opposition between the concept of right of Windscheid, on the one hand, and that of Jhering, on the other (in addition to all the other legal writers who call in 'legal protection' in the determination of right) becomes only and solely terminological as far as it can be of interest in this presentation. Jhering postulates, although not quite consciously, the right in abstracto. But he does not use for this the *name* right but will, that this word also includes that 'legal protection' on the part of the State for which the abstract right of Windscheid shall be the object.

However we return to Jhering's formulation. The emptiness in his equation, to all appearances so logically set forth—the right = qualified interest + legal protection—can thus already be demonstrated through the simplest operation. For if one will take away only the one factor, legal protection—which is supposed to be only the shell around the kernel—the other factor too, the kernel in the idea of right, inexorably disappears. Let me, since the point is important and experience indicates that it is not without difficulty that one is able to follow the reasoning given—let me here summarize the argument in a way that after what has already been said, should be more easily understood. We shall go anew to the 'right of property' and try to realize what it would mean that the 'legal protection' did not exist—naturally only within the limited frame of our purpose, and consequently of course without entering into that anarchy and barbarization, caused on that account, and leading ultimately to the dissolution of the society. The concepts robbery, stealing, embezzlement, or other unlawful disposal, damage and injuries to things would not exist. Concerning things, land as well as chattels, a war of all against all would prevail. 'Legal acquisitions', i.e. by inheritance, last will, purchase, gift etc.; on the whole such positions or interests which we now call those of

an owner, would be unthinkable. Now please state something which could here be made the object of legal protection, other than such positions as are attained through factual occupation and genuine exploits of robbery! Such 'interests' as Jhering obviously has in view are not to be found. Accordingly: with the removal of only the second element in his concept of right, the first element in it completely vanishes also. From this follows of necessity that his conception of right is false. The absurdity of this position appears particularly obvious with so-called natural obligations. Take for instance a claim cancelled by prescription. Here exists, as has of course often been demonstrated, nothing of legal protection. On the other hand it is supposed to be only the legal protection which has fallen away. Consequently the kernel should remain. That is, the creditor should all the while have an interest to receive payment from the debtor, which interest should be both worthy of legal protection and in need of such protection. Nevertheless the *law-maker deliberately* has deprived the creditor of any legal protection. If Jhering's construction of right was correct, this should consequently imply a characterizing of the law-maker which would scarcely be flattering, but luckily it is altogether unfounded.

However, this construction of the legal right presents an additional false side, the demonstration of which should be able to help us illuminate the situation. Even disregarding the criticism now presented, it is, namely, incorrect to consider with Jhering that the interest described as the kernel of the right would be protected through the bringing about, by the holder of the right, of a processual claim against the infringer of his right. Again we may return to the right of property. The interest here must of course consist of exploiting the thing through using it or in another way being able to utilize it. But it is not true that the owner enjoys any protection for this interest through *his* processual claim. In spite of the possibility of this the thing can be stolen, otherwise 'unlawfully' disposed of, damaged etc. In relation to all such events the owner's claim indeed *comes too late.* And even if an enforced executive action may sometimes interrupt a violation of the owner's interest, he is in this way protected only sometimes against immediate repetition of the same and never from the action of an-

other 'trespasser'. It must *depend upon an oversight of facts* when one now says that an interest, which shall be implied in the right of property, enjoys legal protection through the fact in itself that the violation of it can lead to a legal reaction against the thief, embezzler, injurer, harm-doer or other 'trespasser'. Indeed, the situation is such that an owner *in general is not* attached by 'trespassers', but on the contrary, has as a rule the free possibility of enjoying those benefits which are associated with the 'right of property'. Of course, it is *this* state of affairs which actually lies in the background when one on the whole talks about the right of property. But *this* state of affairs cannot indeed emanate from the fact as such that the 'trespasser' in the case at hand is sentenced to punishment, adjudged to pay damages etc. But *this* condition is connected with the fact that *such reactions are repeated in all cases, the whole of them* not for the benefit of the owner in the case at hand but for the benefit of *all owners*. In other words, the condition in question depends upon the fact that the rules concerning the thing as being an acquest by a sale, barter, gift etc., concerning punishment for robbery, larceny, embezzlement, other unlawful disposal, trespass etc., concerning damages for trespass and injuries to another person's property (real estate as well as chattels) and concerning recovery of things have, as it is said, the character of *valid law,* i.e. actually are maintained practically consistent and with irresistable power. The common awareness or consciousness of this, and, thus, of the fact that the legal reactions indicated are, so to speak, bound to the lines of conduct in question with the necessity of physical law, produces a pressure on men which checks their impulses to follow their otherwise perhaps natural inclinations to make use of existing commodities within their reach.[1] It is in this way that the secure positions arise which one characterizes as a person's right of property. And quite correspondingly, such is the case as to other so-called rights.[2]

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[1] As presented in a later connection this matter is quite complicated, see pp. 227–235 below, and cf. pp. 252 ff. and 164 ff. This comment suffices for the present. However, see pp. 93–100 and 109–114 below.

[2] There is, however, something very peculiar as to Jhering's discussion of the legal protection of the interest. He does not seem to assign the *criminal* process to the legal protection of the interests in question. See presently below. *If*

One now understands what it is which has caused the immediate confusion of ideas in Jhering. Through believing in a purely metaphysical way in an interest worthy of protection, as the kernel of the right and as existing independent of the actually maintained legal order, he involves himself in a contradiction. Through this his declaration that the question would be only of an actual interest, i.e. an interest without legal character in itself, becomes empty words. For according to Jhering's own reasoning the interest in question shall have the *particular quality* of being able to attract to itself the legal protection. But it is then without any meaning to contest the legal character of this quality and thereby the interest itself. With the belief in these qualified interests based on themselves, i.e. on nothing, Jhering is forced—as other writers on jurisprudence—to regard the situation before him in an abrupt manner, putting it away from the connection to which it really and necessarily pertains. He sees only a certain so-called interest worthy and in need of protection—because of its lack of any foundation to distinguish in no way from the mystical power of right according to Windscheid and other authors—further the violating of this interest and the forced interference of the State against the violator. That is the end of that! And, as just indicated, neither Jhering nor other writers on jurisprudence can have any reason to notice here any larger connection. As he considers the matter, the starting point itself is given with this substantial element of the legal right (the actual interest) which shall have its existence independent of the maintenance of the legal order. With such a starting point, the restriction of the analysis made by Jhering is natural. With this *restricted* view of the matter, a lack of reality in Jhering's reasoning follows of necessity, as also in the views of the advocates of the other concept of right. This entire nearsighted way of looking at things leads unconditionally to this unfortunate division into two separate elements. Then from this, one also believes that the function of the legal order is to protect, in the *individual case before us* (of which an opinion is to be

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Jhering really means that the legal protection in question is not to include the maintenance of certain paragraphs of penal code then his view is completely inconceivable and there does not seem to be even a very superficial line of thought behind his world-renowned conception of legal rights.

formed by the judge or others), a situation which should have its *legal* or, in any event, *particularly qualified character given in itself,* i.e. independent of the maintenance of the legal order.[3]

Jhering's further analysis of the substantial element (*Geist* III: 1, pp. 339–350) and the formal element (pp. 351 ff.) of the right must, as one can understand of what is said, move in an unreal world. This introducing of the element of legal protection involves him in permanent contradictions. It is only an attempt, very little pondered upon, to free himself from the older ideas of right which at heart completely control him. Of particularly great interest in such a respect is that the criterion of a private legal right shall lie:

in der K l a g e, d. h. in der Anrufung des zur Gewährung dieses Schutzes verpflichteten C i v i l r i c h t e r s. Sonach lässt sich das Recht definiren als S e l b s t s c h u t z d e s I n t e r e s s e s. (Spaced by Jhering.)[4]

The criminal process seems to be treated by Jhering as something other than that protection belonging to the legal right.[5] However, in the quotation it is emphasized in an obvious way through Jhering's own words that his insertion of the element of legal protection cannot dislocate any of the old mysticism of rights. In fact there is now no longer any opposition founded on principle between Windscheid's power of will and Jhering's qualified interest. For the possessor of this interest shall *himself* in the quality mentioned have the possibility to *protect* it by making an appeal to the civil judge. And the judge certainly dare not refuse to comply with the appeal. Such is the situation according to Jhering's own words! How can one then dispute that the holder of the interest is to have a power of will? Particularly if one considers that criminal prosecution seems to fall outside the area for his *Selbstschutz,* indeed to be without significance for 'legal right' in the meaning of Jhering's.

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[3] Cf. pp. 55 ff. above.

[4] *Geist* III: 1, p. 353.

[5] As to this inconceivable point see p. 86 n. 2 above. Cf. *Geist* III, pp. 352 ff. Perhaps his dependence upon the Roman pandects has made him quite overlook the importance of certain paragraphs of criminal law to the realities behind the legal ideological idea of a right, particularly the so-called right of property.

Such a distinction between criminal and civil process cannot be explained in any other way than that the private interest worthy of legal protection should involve a position for the person *based on civil law*. By virtue of this position he should be able to challenge the civil judge, while the action at criminal law against the thief, for example, did not have anything to do with the position in question of the holder of the interest. If, as Jhering wants in principle to maintain, the protection from the side of the State really were to be something essential to the legal right, it would be entirely incomprehensible why it should belong to the right that the protection was dependent upon the *Selbstschutz* of the right-holder. It is obvious that this idea of the 'self-protection' of the interest implies the old conception of power as appertaining to a right, and certainly the conception of a genuine personal power. If here it were only a question of the fact that certain processual measures from the side of the holder of the interest by virtue of the maintenance of the rules of law brought about the protection of the interest, and if consequently the power in question were only a manifestation of the general power of the legal rules as being maintained, then there would be no reasonable possibility of discussing the 'self-protection' from the side of the holder of the right. When Jhering *nevertheless* talks about this self-protection as entering into the conception of right—*although there is really not a place* for any such self-protection—no other reason for this can be found than that Jhering in spite of everything has not succeeded in freeing himself from the idea of the right as a personal power existing independent of 'legal protection' through the process. Jhering seems to consider the situation of an action at civil law in this way, that the plaintiff, the holder of the interest, had some personal power over the judge, as if the judge in his quality of judge must be impressed by the personal conditions of the plaintiff. In reality the judge is determined exclusively by his position as judge, implying that he is influenced by psychological impulses arising through legal machinery and forcing him to observe a certain regularity in his judging activity. The error in thinking now touched upon may be made clear with an illustration: when a person brings about the lighting up of a room by turning a switch, this then has nothing to do with his personal

power but only exclusively with a certain (if quite superficial perhaps) knowledge of the physical laws.[6]

[6] It will be noted that I have referred to the 4th ed. of Jhering's work in question, published in 1888. Already from this it can be seen that Jhering in spite of certain formulations in his work *Der Zweck im Recht* (first ed. 1877, 1883) was a genuine legal ideologist and that his attempt to find a sociological foundation of law true to reality must have been doomed to failure. He never understood the incompatibility of a sociological attitude with the belief in law having its basis in legal ideology. Of course Jhering's dependence upon legal ideology appears clearly from his *Zweck im Recht* also. I need only cite his conception of law which as stated in this work is as follows. Law consists of norms emanating from the State, enforced by its power and, all the same, mutually binding, i.e. not only the people but the State power itself too has to respect and yield to the legal norms; see *Zweck* I pp. 249—280. As appears from Hägerström's *Inquiries* this is pure nonsense. Jhering's view, on the whole, of the importance to 'law' of the senses of justice is turned the wrong way, in spite of several correct observations. See his *Zweck* I, pp. 295 ff. and cf. my remarks on the matter, pp. 159—170 below. Under these circumstances Jhering's statement that law had the end of *securing the conditions of social life* cannot have any scientific importance. With my remarks about Jhering I of course do not wish to deny that he was an author within the legal profession who made a very profound impression on his contemporaries and whose influence has extended to the present day. Two years ago a German writer said of Jhering: *Es ist sein ausserordentliches Verdienst, die Wirklichkeitsgrundlage des Rechts, seine soziale Funktion, ohne die eine reflektierte Rechtspolitik nicht möglich ist, als erster innerhalb der Fachwissenschaft erschlossen zu haben;* see Wieacker p. 267. The statement is perhaps somewhat exaggerated. In some degree Jhering saw the untenableness of the method of jurisprudence but as already said, he did not understand that it is impossible for a legal ideologist actually to expound the social function of law. See *inter alia* pp. 281—285 below, compared with pp. 53—76 above. Of course nobody has suggested that Jhering has freed himself from legal ideology. On the contrary, against his *Zweckphilosophie* the reproach has been made that *die grundlegende Ethik und Metaphysik* is lacking. Nevertheless his work is said to have exercised a deep-reaching influence on legal science, and to form *die Grundlage unserer heutigen Rechtsteleologie.* 'The free judge movement perceives Jhering as its most important forerunner.' See Lange, *Wandlungen,* p. 98. At about the turn of the year 1858/59 Jhering is considered to have made his last change as to his view of legal matters (Lange, *Wandlungen,* pp. 69 ff.). Kantorowicz wrote of the 'conversion' the poetic words: *Die Neujahrsglocken von 1859 läuteten auch für die Rechtswissenschaft einen neuen Tag.* Among other things he was glad that the free research for law had been exercised quite honestly and openly. He also emphazised that Jhering now for the first time had clearly acknowledged and in a sure way made use of the new teleological method. Kantorowicz, *Jhering's Bekehrung,* Sp. 87. However,

There may be a certain interest in seeing how Jhering's concept of right is a simple travesty on Savigny's (forty years Jhering's senior) way of looking at the matter, although Savigny perhaps more than any other has emphasized exactly the domination of the will as the essential character of the right. In the first place, Savigny states that the legal relationship *(Rechtsverhältnis)* is a relationship between one person and another, which is determined by a rule of law in this way that the rule points out to a person the area in which his will has to rule without the impediment of every other will. *Daher,* says Savigny,

lassen sich in jedem Rechtsverhältnis zwei Stücke unterscheiden: erstlich ein Stoff, das heisst jene Beziehung an sich, und zweitens die rechtliche Bestimmung dieses Stoffs. Das erste Stück können wir als das materielle Element der Rechtsverhältnisse, oder als die blosse Tatsache in denselben bezeichnen: das zweite als ihr formelles Element, das heisst als dasjenige, wodurch die tatsächliche Beziehung zur Rechtsform erhoben wird. (Savigny I p. 333.)

The difference between Jhering and Savigny, as far as it appears from the cited words of the latter, may perhaps be formulated thus that Savigny considers the idea-content, as it were, of a rule of law, while Jhering *expressis verbis* only speaks of its processual application in the case lying before us. This difference of course lacks all real significance. Naturally Savigny meant as well as Jhering that an 'objective' ('material') rule of law of this kind corresponded to a 'formal' one (adjective or remedial), and *vice versa.*

What, among other things, has misguided writers on jurisprudence to the belief especially in the right of property, may be what I call the 'vindication right' of the owner, i.e. his so-called right to recover the thing stolen or otherwise taken out of his occupation. This 'law of recovery' will be discussed below on pp. 109 f.

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in all essentials Jhering must have been clear of his view on legal matters when he in 1872 published *Der Kampf um's Recht.* Here he repeats his definition of legal right as 'nothing but a legally protected interest', p. 44. — How far away Jhering is from understanding the matter shows this assertion of his: not the understanding, only the feeling is able to answer the question what the legal right is. Therefore the language rightly designates the psychological original source of all *Recht* as *Rechtsgefühl* (= feeling or sense of justice), *Kampf,* p. 46.

As mentioned above Jhering's notion of legal right has been adopted throughout the Western world by many legal writers. Even if authors in England and America do not feel bound to describe a legal right as a legally protected interest I think most of them would not object to such a description. Actually it is met very often in the literature.[7] However we have seen there is in fact no proper difference between legal right in Jhering's sense and in that of Windscheid's, at least no difference of any interest to a person who has in mind a real view of the realities behind what is called a legal right or a legally protected interest. When dwelling in a metaphysical world one can use formulas as one pleases. Thus it is not surprising to find in English literature such statements as:

> We are accustomed now to the distinction formulated on the continent as that between subjective and objective right, and a high percentage of theoretical law books, especially of English books on Jurisprudence, go on the assumption that to say a man has a (subjective) right, can only mean that objective right, i.e. law, has imposed a duty on someone else. Austin has worked this idea into our bones. But Austin got it from Bentham, though he used rather different language, and Bentham claims priority for his analysis, with at least some justification.[8]

This suggests somewhat Windscheid's formulations although it is evident that this author has not been influenced either by Austin or by Bentham. My experience with English literature on this subject indicates that legal rights are conferred and legal duties are imposed on persons by law.[9] If one here means 'positive' law as enforced by the State the matter becomes merely confusing, for the already existing legal right shall be the object of the law enforced by the State. Thus it is somewhat less challenging the logic to let the legal right be conferred by law in the meaning of substantive or material law. Only thus can an author such as Hol-

[7] See Goadby, p. 66; Salmond, *Jurisprudence,* p. 237; Paton, pp. 206 ff.; Harper, §§ 2–3 and throughout; Harper's work is considered at some length on pp. 356–370 below; Prosser, p. 1 and throughout his book. In this way legal right seems to be understood in *The Restatement of the Law by the American Law Institute.* See *The law of Property,* vol. I § 1, and *The law of Torts* where throughout is spoken of the invasion of interests as legally protected.

[8] Keeton and Schwarzenberger, p. 12.

[9] See e.g. Potts, p. 3 ff., Odgers I, p. 1 ff.

land—in this connection often referred to by writers on jurisprudence—talk of legal right 'as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others.[1] This is obviously what is meant.

Realities behind the false idea of legal rights

I now consider it appropriate to account for the realities in that situation which is called a legal right by writers on jurisprudence.[2] In so doing, I speak first about the right of property, in order later only to touch upon such a legal right which is called, in Germany (and Scandinavia), *Forderungsrecht* (obligation as a right), i.e. a claim on a person, of money, of other things, of services or other work. Consequently and for the sake of simplicity I shall at first keep to the situation which arises when A has *bought* a thing from B. In order to avoid special complications, let us assume that the question is about chattels, and not about real estate, neither about a building on non-freehold property; further that the thing has been left in A's possession and that it has been paid for. We can now observe several realities which, for the sake of clarity, I shall divide into three groups. By far the greatest part of the treatment must be given to group I. Between II and III, I shall insert a digression on some general observations concerning the institution of expropriation. Such observations it is hoped will contribute to some further understanding of the background for the idea of the right of property.

I

As a rule, after the sale the thing is actually at A's disposal. He can at will use and act with or otherwise in every possible

[1] Holland, *Jurisprudence,* p. 83. (Cf. ibid. p. 90.)

[2] The realities in question have of course appeared in part from the criticism already presented of Jhering's idea of legal right. Later on when expounding my view of the actual operation of the legal machinery, and in other connections, I shall at times have occasion to revert to this subject which is of paramount importance to an understanding of legal matters. These iterations, I think, are necessary to make my theories comprehensible to more than only a few readers.

way take advantage of the object, among other things, disposing of it to a third party, whether this is done for a reward or gratuitously. A *can* usually do all of this, and he can do it without thereby risking any legal reactions in the form of punishment or damages.[3] These risk-free possibilities of action of A's receive completely natural explanations—i.e. based on our experience—which will be evident from what I am about to advance:

If someone other than A, without his permission, in any way makes use of the thing or otherwise prevents A from disposing of it, he runs the risk, on account of this, of being subjected to legal reactions in the form of punishment and damages or one of these alternatives, to which can also be added the economic loss resulting from his own and his adversary's legal expenses. If he has any impulses to act in such a way, it is generally overcome either by his often purely instinctive sense of duty against acting thus, an instinct conditioned by the constancy of the legal reactions in question; or by his conscious reflections over the risks he would run by such a mode of action.[4] We can, to begin with, actually observe the following, which I will specify in four points, to which, for the sake of clarity, a fifth shall be added:

1. Everyone who without the consent of A performs certain manipulations with the thing can be sentenced to punishment and damages, if sufficient evidence is forthcoming. The manipulations in question consist in willfully causing damage to the thing, in appropriating it, or if one *with* A's permission already has possession of it, *without* his permission sells the thing, pawns it, or in any other way disposes of it to a third person.

2. Anyone who, even through slight negligence, hurts or spoils the thing will, if this fact is proved, on A's action, be adjudged

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[3] To the possibilities of action in question in respect to the thing, one cannot, however, count that A without risking legal reprisal would be able to deal with it in such a way that the person or property of someone else is damaged. There may be also other restrictions based on both common and special law. Above all, paragraphs as to bankruptcy and distraint, accompanied with threats of punishment, must not be disregarded. After this reminder, I can in my analysis disregard the restrictions in question.

[4] Cf. pp. 164–170, 227–235, 251 f., 254 and other pages below.

to pay damages. To this is also to be added that a person sometimes even without being able to be convicted of negligence can, on A's action, be forced to pay damages. (The latter is mentioned because also the so-called strict liability just touched upon can have importance as an incitement for others to conduct themselves so as to further the preservation of A's thing from damage.)

3. The person who is exposed to these legal reactions is also generally forced to pay both his own and A's expenses of the suit.

4. Finally we can also observe that people generally understand the legal reactions mentioned under points 1 and 2 as motivated by the fact that a violation of A's right of property has taken place and consequently a wrong has been done. This view depends on the legal ideology and thus implies a disregarding of facts empirically established. This oversight of facts is however itself a psychological reality, but does not, of course, transform the facts. It does not—on the whole—reduce the influence of the above-mentioned factors (1–3) on the people's conduct, but, on the contrary, generally increases this influence, in that it forms an extra contributive cause of a moral attitude consistent with the law. The belief in right as a power, the quality of which is that it *ought* to be realized, founds and strengthens the conception by the public, that is is *just and equitable* that A is allowed to have the thing without being troubled by encroachers. An environment filled with this conception forms a permanent and strong pressure on the individual to a mode of conduct in conformity with the conception and plays an extremely important part for the strength of the sometimes instinctive, sometimes conscious feelings of duty, which form a counterbalance to possible impulses to act obstructingly to A's possibilities of action in question.

We thus find among the real factors which give rise to A's more or less safe position regarding the thing after the sale, also this general ideological conception of A's relation to the thing as a *right*. No matter how the real state of things has been distorted by this ideologizing, one cannot escape the fact that it not only in the past contained but still does contain a momentous reality of essential importance for the safety of A's position in relation to the thing bought by him. Without this and similar realities, the construction of society through thousands of years would have

developed along other lines than it has; it would perhaps have become a pure fiasco.[5]

5. In order to understand how these possibilities of action have arisen, finally the actual condition must be taken into consideration that A's *own actions in regard to the thing*—with the restriction suggested above on p. 94 n. 3—*do not involve any risk for legal reprisals against himself.* Also another person than A (or his representatives) can, it is true, regard himself as temporarily having risk-free possibilities of action in regard to the thing—on the ground that he need not take into consideration that the exercising of such a possibility could be discovered and consequently lead to legal reprisals. But in most cases he is then held back by a more or less strongly pronounced moral instinct (feeling of justice) against performing the action. Therefore it is here suitable to draw attention to the fact that A's possibilities of handling and using the thing are not counterbalanced by such instincts, and that the ideological conception which heightens the feelings of duty in *others against* performing the action, on the contrary actually animates A *to* perform them, as the implication of it is that the actions fall *within his legal domain.*

In a *completely natural way* all this has the effect that all other persons than A (and his representatives or persons otherwise authorized by him) practically *always* refrain from actions of the type discussed in regard to the thing, i.e. such actions as would be obstacles in the way of A's taking advantage of it. After A's purchase of the thing, the situation actually becomes such that he stands there without competitors, *as the sole master over it,* and consequently that he has all types of risk-free possibilities of action in respect to it.

When I say that all this in a *perfectly natural way* causes the formation of this reality (or these realities) which I express as A's risk-free possibilities of action regarding the thing (i.e. of handling,

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[5] Below I shall show how the sentiments associated with the ideas of rights, duties, and the supposed objectively, i.e. universally, valid ought etc. are taken in the service of legal machinery, thereby making possible a more or less prospering society life. Concerning the social function of criminal law, see pp. 227–235 below. See also pp. 164–170 below and *Unw.* I pp. 240 ff.; *Unw.* II pp. 87–113; and *Superstition or Rationality?* pp. 47–49, 190–192.

using and utilizing it), I mean that it is only a question of *empirically* established psychological connection between, on the one hand, the facts dealt with in the above-mentioned five points, and on the other hand the conduct of third persons regarding the thing, and, consequently, A's possibilities mentioned regarding it. Concerning the connection between these conditions (i.e. those referred to in points 1—4) on the one hand and the conduct of third persons on the other, this connection is not always of the same type. Sometimes it is a question of a simple and easily intelligible psychological connection, somtimes of a more complicated one. It is easy to understand that the conscious reflection of certain legal coercive reactions as consequences of the conduct hindering A's possibility of exploiting and taking full advantage of the thing must act as a factor restraining such conduct. But how the maintenance of the legal rules in question to a great extent produces the effect of the quite spontaneous or instinctive averting of such actions is a more complicated matter. But also here it is only a question of a result of *man, with his social character and psychical disposition in general,* as *directly or indirectly influenced* by common knowledge of the *regularity* of the legal reactions following certain modes of conduct, among these reactions, first and foremost, *punishment.* The regular maintenance of the paragraphs of criminal law connected with this matter has influenced the mind of man partly in such a way that most people —even when actually an opportunity for them to do the actions now in question offers itself—do not even get an impulse to undertake them, and partly in such a way that if the temptation to perform such an action emerges, it is generally conquered by the moral instinct against it.[6]

However, as has been stated, after the sale has been effected between A and B, the result generally arises, that *in reality the former becomes sole master of the thing,* which thus implies that he has all kinds of risk-free possibilities in relation to it. If one desires, one can say that A is 'entitled' or 'authorized' etc. to these possibilities, but then one should know that this is equally as misleading as the talk of rights, if one is not careful and does not make intelligible the import which one personally gives the words.

[6] Cf. note on p. 96 above.

For it is behind the natural and general linguistic meaning of such expressions no less than of the expression 'rights', that the whole world of current legal conceptions, fundamentally false owing to the ideology, lies. All these expressions deal, in accordance both with the way in which they originated and their usage up to the present, with something advantageous for the person having the *quality* that it *ought* to be or take place in case of necessity at the expense of another person. This *ought* shall then have the power that—if the other person does not voluntarily render his assistance for its realization—the force of the law comes into operation. Regarding the expressions referred to,[7] the case is the same as with 'right': they have all originated, and are used as terms for something which is believed to be *primary* and *independent* in relation to legal coercive reactions instead of depending on them. In opposition to such a metaphysical view, it is of importance to understand that A's 'authority' or 'title' to the possibilities of action is *absolutely as natural,* i.e. empirically to establish, as, e.g. the 'authority' of the lion in the jungle to throw itself upon an antelope or a zebra and devour it.[8] In the former case the 'authority' is nothing but actual possibilities owing to the attitude of man as a consequence of legal machinery in operation (immediately the maintenance of certain so-called rules of law and its effect on man as a psycho-physical being). In the latter case (that of the lion) the possibilities implied in the 'authority' have and need no such a condition.

By what has now been said I should have indicated sufficiently clearly the *character* of the *realities* in that situation which, above all, from time immemorial have led to the construction of A as the owner,[9] in that he should possess the legal domination or power (according to later jurisprudence only of a relative type, it is true) over the thing.[1] But the 'power' which jurisprudence thus

[7] What I mean is equivalent to the German *Befugnis.*

[8] Cf. my remarks pp. 110 f. below regarding the use of the expression A's 'position' to the thing.

[9] The realities which are referred to below as belonging to the 2nd & 3rd reality groups are, of course, also important in this respect.

[1] In several places I have shown that it is equally metaphysical and therefore unreal to believe in relative rights as in absolute rights. See *Unw.* I, pp. 127–129, 213–216. See also p. 283 f. below.

believes in is a product of pure fantasy. For according to jurisprudence A's power in question shall be precisely a legal power, i.e. authorized by material (or substantive or positive) law, and consequently have an existence quite independent of the maintenance of those rules of law, according to which punishment and damages can strike those who have committed such actions in relation to the thing, as those I have indicated. This 'power' of A's over the thing, according to jurisprudence, creates a *point of departure* for the rules in question. Their application is thought to postulate that another person, without the permission of A, has encroached upon A's sphere of power (encroachment on or violation of A's right of property). The maintenance of these rules of law is regarded as having the purpose of constituting legal reactions against a person because he had omitted to respect A's legal power and has encroached upon it. Thus A's juridical power over the thing is believed to exist on a basis independent in relation to maintenance of the legal rules in question. However, it would be impossible to talk about this power which A shall have over the thing—not even fantasy could move in such a direction —if these rules were not maintained. Under these circumstances it is unreasonable to assert, as jurisprudence does, that the *application of these rules presupposes* the violation of or lack of respect for—consequently also the *existence* of—A's power or domination of the thing, which is called the right of property. On account of its ideological fancy, jurisprudence has literally come to confuse result and cause, for as we have seen, experience reveals that A's possibilities of action regarding the thing—let us say his actual power[2] over it—solely constitute a collective consequence of the maintenance of the rules of law in question, and the influence of this maintenance on people.[3] Consequently it is logically precluded that these possibilities of action could originate in something which constituted a presupposition for the maintenance of

[2] The misleading character of the power expression is pointed out below, p. 111.

[3] This influence is enormously fortified by the above-mentioned legal ideologizing. When I mention possibilities of action following from maintaining so-called legal rules—i.e. legal machinery—I imply with this the importance of the legal ideologizing in question.

the reaction-rules. Thus, jurisprudence has *turned the realities completely upside down.*

II

Once again the legal coercion to pay *damages* must be mentioned. Of course this has not only the significance of acting as a check on other people's lines of conduct, which would clash with A's possibilities of action regarding the thing, and prevent him from excercising them. It also has the significance of constituting a compensation for A for these possibilities, to the extent he has lost them through the above-mentioned conduct on the part of another person. Regarding so-called strict liability, this is the proper significance of the damages as a contribution to the advantages of the thing which A as a buyer gains by the sale.

As an example may be mentioned the liability (in most countries) for damage caused to another's thing by an act of necessity. Another example is the non-preventing liability for damage through certain so-called dangerous activity. In order further to illustrate this matter I must take exception from staying entirely with chattels. I can then mention liability for nuisances.[4] Further, liability in such a case as that of Rylands v. Fletcher (mentioned above on pp. 64 ff.). Even this is to be referred to as liability for dangerous or hazardous activity.

Next, consider, e.g. expropriation etc. as this institute is arranged in Scandinavia or on the European continent in general. Legal writers mean that it is here—as in the case of liability for damage through an act of necessity or nuisances—a question of lawful invasion of another's right or legally protected interest to property. For this lawful invasion the invader nevertheless in the name of equity and justice has to pay damages, or as stated in the case of expropriation, compensation or indemnification. This cannot be a logical reasoning, i.e. based on facts and unassailable conclusions drawn from these facts. In what follows I shall endeavor to elucidate this situation although even the general outline here presented takes up a considerable amount of space.[5]

[4] Liability for nuisances will be touched upon later on, pp. 377–379.

[5] Thereafter I shall briefly touch upon group III of the realities behind the conception of legal rights.

A digression on the fundamental principles of expropriation

In a real argumentation on this matter one may not start from the fact that here a 'rule' of compensation for loss is maintained, but must instead try to abstract from it. Otherwise one motivates the rule referred to with itself. Let us then suppose for a moment that it really were so that the owner in the situation of expropriation—i.e. in a case where all of the necessary conditions are at hand, and this includes the proceedings, preceded by authoritative permission—without receiving any damages (compensation) whatsoever had to surrender the property or a certain part of it, or let the expropriating 'person' (the state, a municipality, a company or, possibly, an individual) use it for certain assigned purposes! Then it would be sheer nonsense to talk of an invasion of the owner's property or legally protected interests. For he *had so far* no legally protected interests as against the expropriating 'person'! These interests were, in the situation before us, valueless. Compensation for something valueless cannot be demanded, even in the name of equity and justice!

From what has been said already it appears rather clearly how even the maintenance of the law of so-called strict liability contributes to that situation advantageous to A in relation to a thing, which relation one calls ownership or right of property. The liability of the expropriating 'person' to pay compensation to the owner is in situations of this kind the one and single element in an owner's so-called legally protected interests. Consequently, speaking of the invasion of another's legally protected interests as a just and equitable reason for compensation must in this case *particularly obviously* appear as nothing but empty talk.

Let us, however, now see if we cannot find a more reasonable explanation of the rule of 'compensation' in the case of expropriation. For the sake of simplicity I shall discuss only expropriation, properly so-called. The explanation rendered can only be followed with some insight into my method of social welfare of which I thus give here another intimation.[6] To begin with it is necessary

[6] The first I gave in pp. 69–73. The method is presented in greater detail on pp. 123–336 below.

to notice certain matters illustrating the importance to social welfare that man is able to come into and remain in such relations or positions to things as are falsely conceived as the rights of property. In such a respect it may be emphasized all over again that these relations can be nothing but indirect consequences of the maintenance of certain legal 'rules' for the conduct of man. If we seek in a very general way to direct our thoughts towards the forming of groups of men in very ancient times, it becomes quite obvious that already men in such a group must have tried to maintain some type of order through which certain instincts and ways of conduct were restrained and through which a person in respect to certain objects received the possibility of acting without hindrance by the other members of the group. Such a restriction on these members of the group was indeed necessary in certain consideration of the human egoism, instinct of self-preservation, or whatever one choses to call it. Who would devote toil and labor to the building of huts, and other cultivation of land and fields, risking life and limb to capture game, other food and necessities for the maintenance of life, if the lazy, indolent or cowardly member of the group had the same use of the results of the labor and the same possibility of having disposal over the products as the industrious man through whose energy and hardships all this was brought about? We can here disregard such factors as directing the conduct by means of despotism or class authocracy—whether or not appearing in forms resembling slavery or thraldom—all of which are without interest in illustrating the aspect of the subject before us. Disregarding such factors, even a most primitive union must have provided an order for its existence, through the maintenance of which such a restriction was placed on man's conduct that the individual thereby received a certain secure freedom of action in respect to goods which he himself had procured, in respect to land which he himself had broken, in respect to caves and other dwellings which he himself had furnished etc. Such an order need not be consciously established for the sake of the common life. It perhaps had its immediate basis in conceptions of magic. But these were then probably influenced by social instincts, in a certain analogy with the present-day feelings of justice or common sense of justice being

formed in a certain degree according to prevailing social valuations.[7]

When, after the development from the primitive family and tribe community and then further from the feudal state, the 'right of property' of the individual in the present way became the economic basis of society, this condition was associated, broadly speaking, with two things. *One* is the command over or better perhaps the exploitation of things, land, as well as chattels, which are of use to man and consequently something highly sought after by him. The possibilities to command things, have them at one's disposal, use and thus to exploit them are particularly desirable for human beings. The *other* is the situation that through the continued increase of the population, *productive work* has become a condition of human existence. Such work both increases the value of the existing utilities and creates new commodities. This work is not only useful but necessary for society, as well as the strain of the working-power must always be an extremely urgent matter from the viewpoint of social welfare. However, the incentive to work, i.e. to produce directly or indirectly, exists in that very prospect of acquiring possession of things more or less sought after by man in order to have them as completely as possible *at his disposal,* whether these things are now acquired directly by work or indirectly in exchange for labor. There is no doubt that the collective advantages embodied in what for ages has been called the right of property constitute the most important force as an incentive to productive work. This disposition over things is naturally more desirable the more free and comprehensive it is. And since it has been of the greatest importance actually to have as strong a stimulus to productive work as possible, it is not strange that an order in societies has prevailed and still prevails according to which man is able to acquire under certain conditions nearly unlimited possibilities of handling, using and utilizing things—possibilities which have led to the conception of the right of property to the things. These possibilities of action appertaining to the 'right of property' (at the present time perhaps somewhat more limited than in previous ages) have been brought about since

[7] Cf. pp. 164 ff. below.

time immemorial through the maintenance of rules about the things as an acquest, and rules connected herewith concerning punishment of thieves, embezzlers, injurers and other causers of mischief, rules of damages, and of vindication (recovery). From what has been said it is obvious that all these rules of law, each in its extent, have their social function in bringing about that security for the owner which is requisite in order that he shall be able to act with regard to the thing (in our time within certain limits) according to his will and pleasure.

However it is important to notice that a person now more than in former times makes one experience after the other, which shows that 'ownership' and 'ownership' cannot always be one and the same.[7a] These experiences should contribute to the realization of the fact that a person's 'right of property' to a thing, in reality can be nothing else than those possibilities of action in respect to it which I have pointed out above—to which also come the possible advantages of receiving damages and being able to recover the thing as the case may be. In former times such experiences did not appear in the same obvious way. The reason for this is quite clear. Consider the relatively simple structure of the machinery of the society at that time. The more or less simple lines along which the community moved in those times, have now been replaced by a network of the very finest threads, the most differentiated interests and contrasts, which must be taken into consideration if the machinery is to run smoothly and not fall into disrepair. Also, one must not overlook the former ages' lack of social insights and social interests of most of the people, as well as—after such have been aroused more or less—their inadequate power to carry into effect an order which would satisfy their interests. It stood in conformity to this simple, more rough-hewn legal mechanism that an owner in his 'capacity' as 'owner' had all conceivable possibilities to exercise command over the thing. From the social point of view there was no reason for anything but this simplified view of the matter. A closer investigation of the 'right of property' in order to establish its 'content' was un-

[7a] Also in more ancient times taxes and imposts, for example, could imply substantial encroachments on a persons 'rights of property' just as they do nowadays in many countries.

necessary. If a person *owned* a thing, this meant that it had *accrued* to him, to the exclusion of all others from the thing; that it was his *property* which *belonged* to him and with which he could do, in point of principle, what he wanted without any regard to others.

What should now be particularly noticed is that when the belief in the absolute character of the 'right of property' was developed, such an absolute right *did not then stand in obvious opposition to prevailing social valuations.* But on the other hand, one reflected just as little about this as about the fact that the 'right of property' was developed parallel with the society itself, indeed, that even the functioning of the community or society consisted in the maintenance of such rules, among other things, that thereby persons could come into this secure position of having things at their disposal. In this way one has quite overlooked that the 'right of property' was only a certain side of the social or legal machinery itself. Owing to this oversight one has come to these conceptions in general still prevalent that, in part, the right of property would be an attribute to man, in so far as based on itself, as it were, to be taken as a *starting point* when interpreting and making laws, and in part, that the right of property in its *proper character* would be absolute, i.e. unlimited. With no perception that the possibilities of action of the owner in respect to the thing are conditioned by maintaining certain legal rules, on the contrary, one sees the matter so that these possibilities of action emanate from his 'right of property', from the fact that the thing 'belongs to' him, is his 'property'. And now when one nevertheless cannot escape noticing that an owner by no means has all the possibilities of exploiting his 'property', but even as in the case of expropriation, must comply with losing completely every one of these possibilities, one says that there are *legal limitations* in the *right of property,* an imagination which becomes devoid of content as soon as one is capable of actualizing for oneself that the 'right of property' is only another side of the fact that certain so-called rules of law are maintained and of the effect on man's conduct of this maintenance.

Consequently it must be an established fact that this talk of the expropriation as a lawful invasion of the right of property,

which out of considerations of equity or in the name of the common sense or feeling of justice etc. required satisfaction, in the form of indemnity or compensation for loss occurred, is highly unreasonable. However, if one considers what has been written above about the introduction of the 'right of property' into the development of social life, then it will be easily seen that *compensation to the 'expropriated' person necessarily must be paid in order that this secure position vis à vis the thing which is called the right of property, may be sufficiently desirable and thus people through the prospect of coming into such positions should be incited to productivity or other work useful to society.*

However, an objection, which is certainly superficial but yet close at hand, must be met here. With this way of looking at things, one might perhaps think, no other property right could be motivated from the viewpoint of social welfare, other than that which a person has 'acquired' by way of direct or indirect *productive* contributions. But a person does obtain these secure positions vis à vis things also without doing something for it, e.g. through inheritance, last will, legacy or gift. Yet here too the work stimulating viewpoint is to be found. Naturally it can be an incentive to work so that I can thereby secure a good economic position, help or give pleasure not only to myself, but also to other persons as well who are close to me or whose interests otherwise lie close to my heart. Many persons work more energetically when they think about the future of their wife and children rather than about themselves.

However, in order to avoid misunderstanding this matter it is necessary to consider two elements in the relationship between social welfare and the legal order. A certain *generalization* of the legal rules always becomes necessary out of consideration for the social need of a *general* trust and feeling of security, based on the consciousness of the *regularity* itself of the rules of law. Moreover, particularly in former times, the viewpoints of social welfare owing to legal superstitions have not on the whole been able to influence *immediately* the development of the legal system of rules. They have indeed been in the background but immediately appeared disguised in the form of various sorts of irrational moments, the so-called common sense or feelings of justice or legal

conscience etc. The consideration hereof becomes especially important as to legal rules with such ancient traditions as inheritance law and the law of last will, for example. Present legislative tendencies in Sweden are apparently also determined by insight into the fact that our inheritance law has been too extensive in order to be looked upon as quite motivated by what is nowadays recognized as a consideration of social welfare. It is obvious that the point of view of incentive to useful work can argue only to a limited degree for the rise of so-called property rights, through inheritance, for more distant relatives. The possibility of inheritance can also not seldom be indirectly injurious to society in that it can encourage the laziness of heirs and repress their productive or useful activity to society.[8]

After these observations we may carry on with the question of compensation upon expropriation. The situation briefly and schematically is as follows. As it appears from what was said above, for the continued existence of the society organization it has been necessary that things, land as well as chattels, are divided, in the way indicated, between the individuals to be utilized by them (with certain restrictions) according to their own judgments. But if this position of the owner should mean that a person, concerning land—e.g. necessary for the construction of public highways, railroads, bridges or other means of communication, public buildings etc. or for other common purposes—could prevent the use of his 'property' for such purposes useful to the community, then his position would to that extent counteract the interests of the society as they are understood according to leading valuations. Therefore 'rules' must be maintained of such contents that he shall not have the possibility to hinder that the land in question, i.e. his 'property', may actually be used for any of the purposes indicated. But, on the other hand, what would happen if the

[8] Even other viewpoints than the incentive to work are applicable to the judgment of the inheritance law. Thus, e.g. the heir of the body being entitled to the 'legitimated portion', as being in opposition to the contents of a last will, cannot have its explanation as an incentive to the industriousness of the father, etc. Here the social interest in support of the survivor acts as well as social considerations inspired by equity and justice (inclusive piety). Nowadays such points of view have lost a good deal of their importance, as is shown by the heavily increased inheritance taxes.

owner in such a situation were forced to hand over the property *without receiving any compensation?* Who would ever dare to invest capital and labor in any real estate conscious of the risk that such property at some future date might be useful for one of the many social purposes which according to an expropriation law might lead to the expropriation of the 'property'? By such an arrangement the desirability to man of the 'right of property' to a real estate would naturally be lessened in a very marked degree. However it was exactly that desirability which lurked in the background for all those legal rules through the maintenance of which the 'right of property' received its existence as well as its consistency. By the arrangement mentioned the position of the owner of land—particularly of city properties—would not any longer be able to constitute the same important incentive as formerly to productivity and other useful work necessary for the economic prosperity in the community and finally making *raison d'être* of the maintenance of the 'legal rules' often touched upon in this discussion. Stated briefly: concurrence of these rules alone is not sufficient in order to satisfy indisputable social demands. The requsite social function could not be brought about before the legal machinery—after legally instituting expropriation—was completed with a rule of damages or compensation to the expropriated person.

It is this state of affairs which lies in the background and in all secrecy directs the so-called common sense of justice or the legal conscience when this in the name of equity and justice embraces the demand that 'compensation' be paid for the 'loss' which the expropriated person suffers through the 'invasion of his right of property', or of his 'legally protected interest'. Actually there is not at all any question of 'compensation' in the sense of logic. But in fact the position of the owner is such that he has not only all these risk-free possibilities of action in respect to the thing. In the event of expropriation, a sum of money corresponding to the value of the position in question—that economic value, namely, which could be discussed *if any expropriation were not legally instituted*—is also paid to him.[9]

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[9] The error in logic now touched upon is treated on pp. 370 ff. below.

From this digression on expropriation we shall now return to the analysis of the realities behind the idea or concept of legal right, thereby first considering group III.

III

Against every person who without A's permission has the thing in his possession and for such possession cannot refer to special circumstances—such as having received the thing in good faith —A has the possibility of having legal coercion exercised to get the thing surrendered to him (A's so-called vindication right, 'right' to recover). The rules of law appertaining to this matter have the significance which they actually have and no other. In other words, it is pure fantasy to imagine that by the maintenance of these rules A gets his power over the thing, his right of property, protected or enforced, and thus to conclude from this that a right of property exists. It is logically impossible to regard the more or less secure position for A—which has arisen only as a consequence of the maintenance of the legal reactions mentioned above—as something which could now constitute a presupposition for the application of the legal rules of recovery and become protected by the maintenance of these. Their application has empirically no other presuppositions than such as, that A had bought the thing, and that he has involuntarily lost the possession of it, or at all events did not grant a third person continued possession of the thing after a given moment etc. But this also indicates that A's 'legal power', as represented according to legal ideology, to recover the thing from a third person does not imply anything real, which is not *conditioned* by the maintenance of *inter alia* exactly these legal rules of recovery, and consequently cannot empirically form a starting-point or prerequisite for the application of the rules in question. The case is analogous regarding such questions as A's possibility to get the thing separated in the event of another person's bankruptcy, or to get it exempted from distraint as concerns the debt of another possessor. For the sake of simplicity I have also placed these rules of law under the same heading, rules of recovery. By the maintenance of the rules of recovery the possibilities of A to benefit by the advantage

or the advantages which are attached to the thing purchased are increased. Of course these rules also have a certain importance as *influencing other people's modes of action,* in regard to the thing, to A's benefit. The knowledge that the thing can be forcibly extracted from a third person, even at the expense of the latter, can constitute a special incentive for him to desist from taking possession of the thing, respectively to return it to A. From this point of view the importance of the rules of recovery is to be referred to under I. Their restituting effect, if I may put it like that, motivates however that they have been placed in a special group.

Additional remarks on the exposition of the realities behind the idea of legal rights

The rules of recovery as so-called valid law, together with the maintenance of the other coercive rules mentioned above, give rise to the more or less advantageous or secure position of A in regard to the thing, as to the handling or use of it in one way or another. Through legal ideology this has been misunderstood and has come to appear as A's legal power over the thing, arising out of the sale, as his right of property to it.[1] It should not be misunderstood when I talk of the 'position' of A in regard to the thing. The word can possibly be misleading. The maintenance of rules of law cannot lead to the rise of a person's *position,* in the proper meaning in regard to the thing. Position to the 'thing' denotes most closely something physical and it obviously cannot be a direct question of this here. But as soon as one uses a word with a specifically physical import in a figurative sense, metaphysical conceptions easily arise in the province of law—because of its ideological attitude. If the case were that it did not deal

[1] In the digression above on expropriation I touched briefly upon the question of how it has come that the rules of law have been molded in such a way that their maintenance leads to this more or less secure position which is transformed by ideology into a *right.* That social-economic points of view have lain and still lie in the background—even if they more or less strongly, according to the period, have been masked by the chimera of right and justice—can hardly be doubted. Detailed discussion of this question is beyond the subject matter of this present work.

with anything except A's legally risk-free possibilities to handle or use the thing then I should not use such a term as 'position'. But surely the realities are not exhausted by mentioning these possibilities of action. The recovery is something else, even though it can be a medium to realize the possibilities in question, and damages are an equivalent or a substitute for them. This is the reason why, now as previously for the sake of brevity, I say that the maintenance of all the rules of law relevant here gives rise to a certain more or less beneficial or secure 'position' for A in relation to the thing. I do not expect for this reason to be accused of dealing with conceptions contrary to reality. On similar grounds it can also be misleading to talk about A's power over the thing, however real it seems to be. In both cases the thought can be transferred to something which, from the point of view of the external world, was only given *in abstracto* and, so to speak, based on itself.

Finally we must dwell upon the rule of law which states that the buyer by the completed sale acquires the right of property to the thing (at least if the seller himself was owner). Such a 'rule' can—as the foregoing indicates—not be taken literally. For the words imply that by the sale a legal power over the thing was transferred to A, which power A could refer to in case of need in order to bring about coercive measures against the thief, the embezzler, the 'illicit' disposer, the injurer, the bailee who has delayed returning the thing, the trustee in bankruptcy, etc. But if one disregards A's possibility to bring about these measures, or more correctly, disregards the maintenance of the very rules of law through which maintenance he had these possibilities, then no form of power for A over the thing, as a result of the sale, can be discovered. The idea of the thing as being A's property would not have even any apparent foundation if anyone could, by force or cunning, deprive A of the thing, or if it could be destroyed or damaged *without* the person who acted in this manner thereby running the risk of legal coercive reaction (the recovery of the thing included). Why should the thing now be assumed to belong to A more than to any other person? The conceptions larceny, embezzlement, and 'illicit' disposal etc. would be unintelligible, and so would 'damage' in the meaning of loss

in any legal sense. It is certainly true that the sale as a fact constitutes a condition for A's getting into this more or less secure position in regard to the thing, which has supported the belief in the right of property to a thing; but the position itself is only a purely natural consequence of the maintenance of the said law-rules. This maintenance *partly* leads to the fact that, on the whole, all others see themselves caused, so to speak, to quit the field to the advantage of A himself and his representatives; and *partly* involves that A at times if the said effect has not been achieved is able to recover the thing by force or get damages, the latter either instead of the thing, or together with the thing which in this case perhaps has been injured.

It may very well be, one may object, that A's actual legally risk-free possibilities to exploit the thing are only consequences of the maintenance of the said rules of law (regarding punishment, damages and recovery). But the very rule of law by which *exactly A and no one else* obtains this advantageous position towards the thing—the law-rule of this 'position' being *legally acquired* by the buyer—surely this very rule must imply a (material-)legal, i.e. objective valid, 'ought' of the purport that the coercive rules in question as to the thing now, *after* the sale, *are to be* used for the benefit of A, whereas *before* the sale, they *were to be* used for the benefit of B? This is not the case. In respect to this rule of law it *can* just as little as in respect to any other one, be a question of the rise of any objective ought, because such an ought lies quite outside our experience. Neither are such metaphysical speculations in any way necessary, inasmuch as the significance of the rule of law in question is evident in a natural and reasonable way. It functions simply through its actual existence as a 'law-rule'. What this involves will be clear through the expounding of my method of social welfare and of the conception of 'rule' of law. (Cf. as to the latter question pp. 301–336.)

Now in a few words I shall try to forestall the objection that involuntarily I might let something metaphysical creep into the expression 'actual existence as a law-rule'. With this I mean only the circumstance that the 'rule' with its content—so far as this is realizable for thought—forms a factor or an element in the legal mechanism. This is something quite different than if the

question were about a principle of material law, i.e. a binding principle. For it only implies that the perfect sale between A and B constitutes a so-called legal fact, which the judge takes into consideration when he puts a number of other law-rules into practice, here for instance, the 'rules' upon which I have touched above. That is to say that the said fact enters into the actual foundation which is determinative for the application in certain cases of the legal rules concerned. That a judge regularly places the completed sale with the facts upon which he bases his judgment has nothing to do with any *objective* ought, but is connected with the pressure which causes the *subjective* ought under which he works himself. Whatever form this pressure may take it has a certain connection with the fact that the judge who in his judgment might neglect to take into consideration the proved or otherwise indisputable sale as a fact in the case, thereby would commit an offense and thus expose himself to the risk of being punished and forced to pay damages with the socially detrimental consequences which such coercive measures bring with them. There is much to say about this particular situation as will appear further on in the present work.

I have spoken above of certain rules of law or legal rules. In point of fact—as mentioned in the Introduction—there are no legal 'rules'.[2] But if one believes in the binding force of the law then the idea of a rule becomes quite natural. When, in spite of the fact that the law cannot be 'binding', I nevertheless in this work call a paragraph or section in a code or statute or an unwritten principle of common or customary law, a legal 'rule' or a 'rule' of law, I use the expression, as said in the Introduction—for lack of more suitable words—purely and simply as a *term* or *label* for something the *characterization* of which as a rule cannot, however, be quite correct from a scientific point of view.

That which I have now expounded regarding A's right of property to a thing he had bought can be applied quite analogously if he instead has inherited the thing or obtained it by last will, gift or exchange or by any other means of 'acquisition' whatever. For anyone interested in the matter it should be pos-

[2] See pp. 301—336 below.

sible to check for its correctness the concrete picture, which I have given here in order to demonstrate that which really happens within the law. It could also analogously be made use of in any province of law in order to gain knowledge of the completely empirical character of what we call law, and thereby also in order to gain basis for judging the question, whether it can be regarded as reasonable to continue, either openly or in a veiled way, the arguments based on legal-ideological superstition.

However, keeping to our main heading 'Legal rights and duties', I wish to point out that by what has now been said about the realities behind that which is called ownership or the right of property one must be able to understand that the state of the case as to 'legal duties' is actually what I stated it to be at the beginning of this section (p. 77).

Indeed, all these various legally risk-free possibilities of action and other possibilities in favor of the owner of a thing depend on other peoples' negative or positive actions in respect to the 'property', which actions in turn are conditioned by the maintenance of a number of the 'rules' of criminal and civil law mentioned in this connection. In other words the so-called legal duties to the owner are conditioned by the maintenance of the 'rules' in question, according to which people may be sentenced to punishment or adjudged to pay damages to the owner or to surrender the property to him and to pay the expenses of the suit. Consequently, as I have already said, there is no sense in asserting that a person is sentenced or judged according to the rules mentioned in consequence of his breach of legal duty.

The 'active' side of an obligation

While keeping to the subject of 'Legal rights and duties' I shall now consider some points concerning the obligation as a *legal right* (*Forderungsrecht* in German). Among other things such a right shall arise through a 'valid' agreement or contract.[3] What

[3] I often use the term 'contract'. Swedish law does not differentiate between agreements and contracts. Of course the legal 'validity' of some agreements or contracts have qualifying conditions.

the creditor shall now have a legal right to demand from the debtor is the performance of the agreement. We may take an example,[4] in which the parties involved are: C (= creditor or promisee), D (= debtor or promissor) and T (= third person).[5] C hires a thing (falling under chattels personal) from D. Generally one now means that C thereby received a legal right against D of surrendering the chattel to C, or, in every case of D's seeing to it that the chattel is given over to C in order to be disposed of by him. However this is contrary to facts. For D has the possibility of making such a 'right' completely illusory through destroying the chattel, concealing it effectively, selling or giving it to T. What C can depend on with some security is only that D —*if* C suffered a certain economic injury[6] by the non-performance of the agreement—can be coerced to pay a certain sum of money to C. Things are similar if the agreement concerns performing services or other kinds of work. In both cases C's 'right' is reduced to that that D is legally coerced to pay a certain amount of money, *if* the agreement is not fully completed and *if* C thereby suffers any so-called loss or damage.[7] Thus one may understand what I mean by saying that the essential criterion in these obligations is that D runs the risk of a double-conditioned coercion of paying a certain amount of money. But this can indeed not be identified with a 'legal right' for C either of D's handing over the thing to C or of D's performing the services or doing the work. It is true that there are other possibilities of coercion

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[4] As I cannot enter upon those particular conditions which are characteristic for Anglo-American law of contract, I adapt the following reasonings to the law in Sweden. Nevertheless this should not present any difficulty to jurists familiar with Continental or Anglo-American practice.

[5] By an agreement every part is a debtor or promisor as to his own engagement and a creditor or promisee as to that of the other.

[6] I disregard here possible so-called ideal injury.

[7] Here appears most obviously what was pointed out in the 'Introduction', namely that 'damage', 'loss', 'damages' etc. are *petitiones principii* in relation to the law in question. Without the maintenance of the law of agreement it would be impossible to imagine that any damage would occur through the breach or non-performance of an agreement; indeed, such a breach could not be imagined. The fact of *petitio principii* appears here more clearly because there is no question of a thing having been damaged. Cf. pp. 370—380 below.

against D.[8] But in part these have a more or less occasional character, and in part they could never be identified with those actions from D's own side which have been agreed upon and which C should accordingly have a legal right to claim. Therefore one can say that what characterizes the situation of a creditor after a valid agreement (contract) of the kind mentioned is the said double-conditioned coercion on the debtor of paying a certain amount to the creditor.[9] The conception of C's right and D's legal duty implies the following falsification: between the fact of an agreement and the effect involved in the application of 'law' in case of non-performance of the agreement one quite simply *inserts* in one's imagination a legal right of the one party (creditor) to the performance of the agreement and a legal duty, correlative to the right, as imposed upon the other party (debtor). The legal right as well as the legal duty in question is pure fancy which serves only to confuse and does not contribute in any way to the explanation of what actually happens.

What I have said holds true even if in the agreement the debtor has pledged himself to pay *money* to the creditor. However in this case the aforesaid must to some extent be differently framed. In particular it is obvious that in case of money directly promised by the debtor one must talk only about a conditioned and not a double-conditioned coercion to pay a sum of money. Since this entire matter perhaps needs further development in order to quite understand my meaning I refer to my German book[1] as space does not allow further discussion of this point here. For the present the following must suffice.

In general all that can be said about the 'character of an obli-

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[8] C can perhaps have the chattel delivered to him through the assistance of the bailiff. D may also be bound over by threat of fine to deliver the chattel to C. Yet, in every case only if it is still in D's possession. Ordinarily there is no question of these possibilities when services or other work is concerned.

[9] It is only for the sake of brevity that I express myself in this way. Of course I should not have so expressed myself if I had not carefully explained my meaning. The reproach of having sinned against *die moderne mathematische Logik* (Edlin, Review, pp. 189 f.) I could therefore, at that date, take calmly.

[1] See *Unw.* I, § 2, where I unfold my views of the conception of obligation in the light of facts.

gation' is as follows. This situation is of such a nature that *if* D acts or omits to act in a certain way and *if* thereby damage to C comes about, D can at the instance of C be compelled by executive action to pay to the extent of solvency to C (over and above legal expenses) a sum of money corresponding to the damage estimated according to certain calculations. Consequently the situation may be characterized so that on D, the debtor, for the benefit of C, the creditor, there rests a (double-) conditioned coercion to pay an amount of money. The line of conduct which has been omitted can quite naturally be more or less generally determined. A contract can be expressed in quite general terms, i.e. the 'obligated' conduct according to the contract can be rather undefined in its details. As a matter of fact there can be no difference founded on principle between the situation after a *contract* on the one hand, and on the other the situation of a person risking to be forced to pay money because of doing *non-contract* damage to another.[2] Then would one not come to this unreasonable result that there were 'attached' to every human being an infinity of obligations? No, for there *are* on the whole *no* 'obligations'. This is what I intend to demonstrate. In reality *there is nothing but these situations characterized by a conditioned coercion to pay a certain amount of money.* Of course it cannot be denied that in general a person has an *endless* number of possibilities to bring down upon himself such a coercion quite irrespective of all contract situations. That one finds it so self-evident that a fundamental difference from a legal point of view must exist accordingly as a person *outside a contract* (e.g. as a neighbor, as passing by the property of another or else in the situation of being physically able to injure the person or property of another) or *after a contract* (e.g. as a seller, buyer, landlord, hirer, depositee, trustee, administrator) has the possibility to inflict another with injury (leading to the coercion to pay damages) —this view, held in all quarters, depends indeed upon the traditional assumption of jurisprudence that on the whole there existed such legal conditions of power which are called obligations. For

[2] In the latter alternative there is not any question of 'obligation' *arising through* non-contract damage. What I consider is the situation *before* such a damage has been caused.

the matter is quite simply this that the absurdity in such constructions appear all the more obvious in the non-contract situations. The contract in this connection has, however, no other significance than that in certain determined respects it limits a person's (the debtor's) possibilities to act free from the risk of a coercion of payment. The contract is completely analogous for example with the facts which in the non-contract conditions just cited have made persons to be 'owners' of things, which others have the possibility to injure in all these situations often continuously succeeding each other in daily life. That the contract at times also can lead to the injunction of a fine on the debtor or the bailiff's assistance to enforce the performance is for the *general* judgment quite without significance since these eventualities are incidental and accordingly there are a great many contract situations which cannot be influenced by them. That the eventualities in question constitute unessentials in comparison with the coercion to pay an amount of money one already understands from the fact that the law of contract apparently would not become socially useless should the eventualities in question drop out of the picture. But eliminate the conditioned coercion of payment! Then practically speaking the law of contract would be unthinkable.

I have here compared the 'general situations' with 'contract obligations'. Naturally the former neither can be distinguished in principle from 'obligations' *after* an injury done outside a contract. Also here the situation is that if a person omits to act in a certain way (to pay the damages), then he can be coerced to do so. The comparison between the 'general situations' and the 'contract obligations' becomes more striking however since the 'contract-obligated' action itself need not be aimed at presenting an amount of money.

No fundamental antithesis between contract and non-contract damages

From what has just been said it appears that in reality there cannot be any fundamental antithesis between damage caused, on the one hand, through the breach of a contract, and on the other, through a civil 'wrong' outside a contract. Such a 'wrong',

however, is supposed to be a breach of a duty fixed by law and by law alone. But breach of contract whether wilful or not shall be the breach of duties which the parties have fixed for themselves. More explicitly stated the arguments are as follows.[3] Inasmuch as the exchange of commodities takes place by contracts, these constitute the stimulating power in economic life. Claims for non-contract damages are, however, compensatory. Their purpose is to nullify something that has already happened. As the law itself cannot conduct the exchange of commodities, individuals must do so by means of contracts. Towards these law stands mainly in the relation of a servant: it lends them its executive power. Hence as regards contracts there is a valid rule created by the parties, and thus lying outside the law, to which the law rule refers. If, on the other hand, it is a case of injurious acts, and the question of damages has to be considered, the law places itself above the will of the parties and prescribes itself what shall happen. Therefore as it cannot refer to a rule lying outside itself it must set up its own rule. This introduces an essential difference between the law of contract and the law of torts. The law of contract is mainly a logical application of the simple and fundamental principle that 'agreements must be kept'. Thus the law of contract has a solid starting-point, which cannot be displaced as long as the present social order is maintained. The situation is entirely different in the law of torts. Here the law has no fundamental principle to fall back upon and is thus forced to set up one of its own. Centuries of experience have, however, shown that this is extremely difficult.

If one now really takes the trouble to realize the significance of such a way of looking at the law, must one not discover that all this is nothing but naive and superficial imagination which fades away as soon as one tries to grasp it? Take first the view that the parties in a contract fix duties for themselves (as asserted by Pollock, for example), or that the law refers to an independent rule lying outside the law, which the parties are supposed to have set up (e.g. according to Stang). Then imagine the law to be absent. Would there now really remain anything whatsoever

[3] Here I follow Stang according to his book *Erstatningsansvar*. He has been considered a very modern and radical legal author.

of the parties' so-called duties towards each other? Would the 'rule' given by the parties have any force whatever? If legal duty is to be anything but an empty word it must involve some sort of advantageous possibilities in favor of the 'entitled' party. If, however, one turns aside from law as actually enforced, I challenge anyone to find any trace whatever of such possibilities. If they still exist they must therefore be of a mystical quality.

Furthermore the following should be noted. If the law of contract has a starting-point in the maxim that 'agreements must be kept', the non-contract law of damages must have a starting-point in this maxim: 'one must not injure anybody, neither his person nor his property'. The former maxim is not more solid as a starting-point than the latter. Indeed, as starting-points for scientific reasonings they are both of them equally useless. If one labors with abstract maxims of this kind, the true question nevertheless always will be: does the coercion to pay a certain amount of money ensue or not in the case of a conduct deviating from any of the maxims, i.e. which are the conditions for the coercion of payment in the case of a breach of contract, and which in the case of a civil 'wrong' outside any contract?

On the whole, this antithesis between non-contract civil wrongs and breaches of contracts does not exist in reality. The so-called obligation arising from an agreement implies as has been pointed out above the promisor's so-called liability to pay an amount of money if he causes damage by acting in a certain way. Thus, the 'obligation' mentioned is quite analogous to the situation in which a person has the possibility without breaching any contract to inflict damage on another's person or property. In both cases the state of things is that a certain mode of conduct is followed by the so-called liability to pay an amount of money (damages).

In this connection I have been quite anxious to speak of *payment*-coercion not *damages*-coercion. This has occurred in reference to the viewpoints noted above on p. 115 n. 7 and have nothing whatever to do with the fact that the performance of an agreement can consist now in handing over money, now again in delivering goods, work, services etc. If one here uses the word damages-coercion, one must insert into it the proceeding which, when 'obligated' *money* is not paid voluntarily, takes place by

deducting the amount (with or without interest) by process of distraint. Payment-coercion has entirely the same function from a legal point of view whether it refers to the non-payment of money or the non-fulfillment of delivering promised things, labor or services. That the amount in the former case is easier to determine than in the latter, and that different regulations concerning interest may be applicable is a point which need not be discussed in this connection. Indeed, within jurisprudence one often finds the *interest* alone—thus separated from the principal—as analogous with damages. From what I have said above this conflicts with the facts. It is the *entire* amount (principal + interest) taken out by executive action which corresponds to damages in case of non-rendering of promised things, chattels, labor or other services.

Naturally one might quite as well here make a distinction and in the first case talk about payment-coercion and in the second about damage-coercion—yet only if one thereupon made quite clear that in legal analyses of this kind, properly speaking the use of such conceptions as injury, damage and damages (other than as terms or labels) is a *petitio principii*. These concepts have been developed on the basis of ideas of legal rights and duties and various other types of legal relations. Already I have suggested the circularity in using such concepts as damage and damages.[4] However, that I have found it fitting and proper in this connection to talk about *payment of a sum* rather than about *damages* should be quite understandable, as well as, that I nevertheless consider that in general one can use such expressions as damage and damages. But the presupposition for the latter is that the reasonings by using them are not confused, which in turn presupposes that the circular character of the conceptions in question is of no consequence to those reasonings.

However, the obligation is usually fulfilled voluntarily and this of course contributes to the maintenance of the belief in legal rights and legal duties created through the agreement. And the voluntary performance of the obligation depends upon the very risk of the executive enforcement of payment or damages in connection with the prevalent conceptions of the creditor's legal right

[4] In the Introduction and p. 115 n. 7 above. Cf. further below pp. 372 ff.

and debtor's legal duty. But as it is not only the risk to have to pay damages but even the risk to have to pay the costs of the lawsuit which acts here and as the latter cannot possibly be considered as damages we have an additional reason to consider it most correct *in this connection* to use the expression payment-coercion instead of damages-coercion.

II

JURISPRUDENCE AS A SCIENCE

General remarks

From what has been stated above one may have been brought to the realization that legal authors allow for 'starting-points', 'facts' and 'connections' which are not given in time and space. To this extent jurisprudence is no science. Yet from the preceding one may also have reached the conclusion that in all of the aspects suggested above jurisprudence *can* be pursued as an empirically based investigation. From my exposition so far it should appear not only that the questions discussed above could be investigated quite empirically but even that reason is lacking for any other assertion than that jurisprudence can be carried out in all respects as a real science. What has hitherto hindered the foundation of a scientific jurisprudence is above all else the fancies of an objective or material law as constituted by this body of legal 'norms' or 'precepts', derived from natural justice and by means thereof having the power of making possible the creating of legal rights and duties.

These fancies, however, form an extremely primitive simplification of a particularly involved machinery built up and developed over thousands of years. The religious, magic and other superstitious conceptions of primitive man, probably in association with his community building instinct together with a certain order originating from this for the lines of conduct, may have been decisive for a community life through which man was gradually able to develop and perfect his social order during a *permanent reciprocity* between superstitious conceptions of justice and considerations of the common good. In the community life influenced in such a way, a *complex of psychical factors* has been gradually produced from which finally those countless threads run out which

help the modern legal or social machinery to keep going. Among all this there should in particular be noticed the pressure on the conduct of man. This pressure is brought about—thanks to certain reactions effected with a certain regularity on a number of modes of conduct—partly through conscious feelings of duty in the person acting and partly through powerful moral instincts in him engendered immediately through the social-psychical pressure from the entire environment's collected feelings of duty in respect to the conduct in question.[1] In order to express the matter briefly, as far as it is of interest here, one can say that—while jurisprudence believes that such reactions to a conduct as punishment and damages (owing to fault) are considered motivated by the person's omission of his legal duty—the real condition of matters is that the duty (i.e. feeling of duty) arises and is supported in the citizens through the maintenance of the legal rules of the reactions in question. Yet indeed in the criminals and the negligent persons, the 'rules' indicated have not been able to produce the necessary feeling of duty. If one in accordance with jurisprudence ignores the basic understanding of social or legal machinery and takes the fantasy of duty-producing legal norms as the point of departure for investigations, such investigations could never—although they may be carried out with the greatest acuteness—really be considered scientific work.

Naturally, legal activities (legislation and administration of law) as well as jurisprudence have always been strongly influenced by social viewpoints. Concerning jurisprudence I remind the readers of the state of affairs mentioned above: writers on jurisprudence have been forced—under the influence of considerations for social welfare—to distort their method of justice beyond recognition.[2] Of course, this distortion of the justice-method began to take place already from the childhood of jurisprudence and must be regarded as the most important manner in which writers on jurisprudence have let themselves be influenced—although more or less unaware of it—by viewpoints of social welfare. But even apart from this distortion of the method of justice one is within the sphere of jurisprudence (as well as in the body of judges) to a

[1] Cf. pp. 228–235 below.

[2] See above pp. 60–64; 73–75.

greater or lesser degree influenced by social points of view. But *openly* and *directly* legal ideology in general dominates, and it obscures the social considerations through new constructions of legal ideology.

Some short examples may be given. The will-theory in the province of the law of contract is (in Switzerland and Germany) completed with the construction (created by Jhering) of the 'negative interest of contract';[3] (in Scandinavia and certain other countries) with the 'theory of reliance'.[4] Another construction is that of relative rights in stead of those absolute ones. One makes, furthermore, such a dreadful construction as the 'abuse of rights'. Moreover, one allows certain invasions of legal rights or legally protected interests to be lawful in stead of wrongful.[5] One talks of social fault in stead of moral or legal fault, and of wrongfulness as a socially unreasonable conduct in stead of a conduct contrary to law. Finally in this connection I recall the fact that already at a very early stage of the development of society one has felt forced in point of principle to give up the demand of the feeling of justice for the exercise of self-help in order to realize legal rights and duties.[5a]

However, the most important ways in which legal ideology is counteracted by social valuations are, of course, those of legislation and, then, judicature. Here many instances could be given. For want of space; however, I must refrain therefrom.

If I disregard the legislation (which comes in a particular class) and keep only to jurisprudence and judicature the condition of things is that the social viewpoints are generally veiled by legal ideological lines of thought. As a fact it can be asserted that in matters of law there has since olden times been and there is all the while a struggle between two interests: the one is *unreal* emerging as it does out of the legal ideology and its basis, the idea of justice; the other is *real,* determined as it is by considerations for the actual endeavours and aspirations of men living in a society. Indeed it might be said that law to a great extent is a result of

[3] See Jhering, *Culpa in contrahendo,* pp. 1 ff.

[4] See pp. 241 ff. below.

[5] Cf. pp. 370 ff. below.

[5a] Cf. p. 168 below.

the struggle mentioned. It goes, however, without saying that it is *one* thing immediately to be lead by legal ideology, certainly squeezed and molded by social considerations, and that it is quite *another* thing to let oneself be determined directly and frankly by social realities without being forced to see them through that obscurity, through those veils which legal ideology has spread over the legal phenomena. In the former case all guarantees are excluded for the social viewpoints to be as far as possible determining for the solution or treatment of the legal questions. In this case also the possibility for jurisprudence to be a *science* of law is excluded.

As a science jurisprudence must be founded on experience, on observation of facts and actual connections, and consequently be a natural science. Experience belongs to and falls completely within reality, i.e. within nature. But jurisprudence as a real science cannot be any exact science, *partly* because in this province several connections do not allow themselves to be demarcated or determined exactly, and *partly* because in some questions one must be content, at least for the present, with more or less strong hypotheses instead of facts. However, jurisprudence does, to some extent at least, have this negative quality in common with most, perhaps all, other sciences except mathematics and theoretical philosophy in a certain rigorous meaning.

Jurisprudence as a science is concerned to a great extent with facts consisting of social valuations and other psychological causal connections. Here to produce clear facts of experience is often difficult, sometimes impossible. This is particularly so when psychological connections within the private individual are concerned. When causal connections of this kind are to be judged it is usually the judge, a psychiatrist or perhaps a witness (but not legal writers) who expresses his opinion. But undoubtedly legal science (with or without the help of another science) can as founded on facts treat such conditions as, e.g. that within a certain group of persons at least the overwhelming majority react so and so upon the consciousness of this or that legal rule as being 'in force'; or that the group have taken this or that moral or other emotional attitude regarding this or that proposal or other facts; that the reason for the reaction or attitude indicated need not

even always have been conscious for the persons in question in order to have these effects, but that they could arise quite spontaneously etc. However, when the problem is limited to the individual person, frequently the material is lacking for an empirical establishment of a causal connection now in question. One has only this individual to go by and the psychological course once occurred cannot be 'cranked up' again with sufficient exactness. Here the fact asserts itself too strongly that upon repetition the essential conditions cannot be identically the same as at the preceding and subsequent courses. One can probably never produce a guarantee for being able to develop a sufficiently comparable psychological course of 'events' in a person's mind so as to be judged by those who for one reason or another would undertake an investigation of what had psychologically taken place in the person in question. Even quite imperceptibly sources of error may creep in which would have the effect that one cannot establish the factual condition of matters but only the likelihood of it, perhaps not even that. This does not of course prevent an investigation of this kind from having a scientific character. Such character may not be denied only because one cannot attain the desired result: truth; but only probability, to say nothing of only possibility.

The individual sources of error become equalized when the question concerns psychological reactions in a large group of persons. But even here it is obvious that one cannot always achieve the result: certainty; but must frequently be content with probability or something even more uncertain. In this respect jurisprudence does not differ from a good many other sciences. Under all circumstances it is clear that jurisprudence is concerned with actual connections, i.e. connections in the world in which we live. In order to show this as well as that jurisprudence is not an exact science allow me to take the following example. The maintenance of criminal law has an influence on the minds of people and therewith on their modes of conduct. Consequently it is a question of psychological causal courses in man, a part of the nature, accordingly an object of natural science. This can be empirically established. It can also be empirically established in broad outline that criminal law and its maintenance in different ways,

now more directly, and now more indirectly influence persons' attitudes towards crime. But a complete analysis of the many causal connections relevant to this matter has not been effected; neither has an explanation been given of how certain causal connections are related to each other. It is possible that complete clarity in such things will only in the course of centuries, perhaps never, be brought about. But under all circumstances we have reason to hope that investigations shall arrive at greater clarity in these questions than is now prevalent. However, what has been said here should also hold true, in a similar manner, in several areas within other sciences.[6]

The fact that a legal science can be carried on by experience and so far as natural science can obviously not be generally recognized, since the majority of legal investigators have not freed themselves from legal ideology and consequently have more or less metaphysical starting points. It may appear strange that neither do such 'modern' investigators who wish to repudiate legal ideology on the whole seem to be agreed on the opinion that jurisprudence as a science must be a natural science. I believe that this depends on the fact that their repudiation of legal ide-

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[6] From our knowledge of the history of the life of man as well as our knowledge that the feelings of justice are to a great extent led and directed into social trends—partly, it is true, through the maintenance of certain laws —one may infer or conjecture that there is in man a social or community-building instinct. Above, p. 123, I have already touched upon this instinct and, as I shall emphasize later on, p. 167, it is in all probability an important fact. Of course, I have not even tried to establish it as a fact. And I do not know of anybody who really has been able to do so. Consequently, if the instinct in question cannot be looked upon as an existing fact, it may at least be considered a very strong assumption or hypothesis. Properly speaking, it is difficult to see why we should not reckon with the social instinct in man. His mind does not only comprise rationality, intentions and other such manifestations, but also sensations, feelings, emotions and instincts. I suppose nobody denies *social* instincts in ants and bees, for example. These animals have even 'complex societies' resulting 'from inherited reflexes and instincts' (Sorokin, p. 4). Why should social instincts be denied to human beings? However, with this remark I have only wished to point out a special example suggesting that legal science is no exact science. Since I have mentioned Sorokin I may add that he, indeed, does not seem himself to believe in the importance to society of social instincts in man. Cf. Sorokin, pp. 4, 25 f., 342 and 352 n. 21.

ology is quite incomplete, in effect superficial. This in its turn in general depends on the fact that the investigators in question imagine legal ideology only as something lying on the surface, as only a terminology, and have not understood that in fact it lies deeply anchored in a metaphysical world and consequently in a world out of touch with reality. Such a mistake can explain that one has not given any proper notice to the fact that the abandoning of legal ideology and therewith of what I call the method of justice inevitably demands a replacement which carried legal science directly into the world of the living life of man, into the pulsing activity of society. In this respect I have spoken ever since 1918 and since 1920 pleaded in print to replace the method of legal ideology, described more precisely perhaps as the method of justice, with what I from the very beginning have called the method of social welfare.

Owing to the fact that the essential part of this method has only been described in greater detail in my Swedish works, there has been no opportunity to take a position towards it outside of Scandinavia. When one is informed about the method one should be able to understand that the 'law' after my criticism of legal ideology must appear as a kind of machinery (legal or social machinery) and jurisprudence accordingly as a science of experience, i.e. *natural science.* Moreover it stands to reason that if jurisprudence cannot be considered as a *Geisteswissenschaft,* as hitherto in general has been the case, it *must* be a natural science, quite as well as all investigations directly concerned with the facts and connections belonging to nature, i.e. the world in which we live. Hitherto I have intentionally refrained from characterizing scientific jurisprudence as a natural science, as this seemed to be the wiser course. However, I have now wished to speak quite frankly. And it is perhaps fitting to bring to the attention of the reader the statement of the Dutch professor of law, Wertheim, where he characterizes my science in that way that I seek to construct a 'legal science quite belonging to natural or, one might rather say, to experimental science'.[7]

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[7] Wertheim in a paper, *Kernvragen van Wetgewing,* published immediately after he had read my *'Superstition or Rationality?',* misunderstood my view of

Those who peradventure are shocked at seeing jurisprudence characterized as a natural science may rest assured that I shall make no further use of this expression. Neither on the whole have I any intention of seeking to influence the general systematization of the sciences. This point is mentioned because self-evidently I find it appropriate to assign a very large group of scientific disciplines to the humanities and therewith distinguish them from several others which may then continue to be termed as natural sciences in a systematic meaning. What now is of primary importance for me is to emphasize with all the power and influence at my disposal that it will be absolutely impossible to comprehend what I assert and maintain within jurisprudence and wherein my work consists, if one overlooks what I have gradually come to call *constructive jurisprudence or constructive legal science*. What I mean by this will now be explained.

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legal matters. However after H. Pfeffer—mentioned above in the Introduction —called Wertheim's attention to my German book, Wertheim agreed wholeheartedly with my way of thinking. In 1936 when he delivered his inaugural lecture as professor at the legal university college of Batavia he said, among other things:

'Von den Schwierigkeiten, die man auf seinem Wege trifft, wenn man das Tatsächliche vom Normativen scheiden will, erhält man dann einen Begriff, wenn man sieht, welche übermenschlichen Anstrengungen der schwedische Gelehrte Lundstedt sich auferlegt bei seinem Versuch, eine rein naturwissenschaftliche, man möchte fast sagen experimentelle, Rechtswissenschaft aufzubauen, alles was an Recht und Rechtsauffassungen normativ ist, herauszuschneiden. Er gleicht fast einem Don Quichote in seinem unermüdlichen Kampf gegen alle Rechtsgelehrten, die er sieht, mit Ausnahme von einem (seinem Lehrer Hägerström), in seinem Eifer, zu beweisen, dass alle bisher verkündeten Theorien, auch wenn sie noch so überzeugt meinen, "das Recht der Wirklichkeit" wiederzugeben, doch wieder normativ gefärbt, naturrechtlich, superstitiös, metaphysisch, "schimärischer Natur" sind. — Doch müssen wir den Weg gehen, den Lundstedt uns gewiesen hat. Nur seine Auffassung vom Recht als einer Maschinerie, die in Bewegung gesetzt wird, um Lebenszwecke zu erreichen, kann uns die bunten Rechtserscheinungen in ihrer wahren Form begreifen lassen. Wir müssen einsehen, dass bei bewusster Rechtsformung der ganze Rechtsmechanismus nur Mittel ist, um andere, ausserrechtliche Ziele zu verwirklichen.'

This lecture was published with the title *De Verhouding tusschen Rechtswetenschap en Rechtspractijk*. The journal in which it appeared is not known to me and I have had available only the extract quoted here which was translated from Dutch and sent to me by Pfeffer.

Constructive jurisprudence

As a science jurisprudence investigates into and imparts knowledge about actual facts and (causal) connections as well as reasons from epistemological points of departure. It is in this respect that jurisprudence is a science. Provided that it is not a question of legal philosophy, properly so called, it is necessary, however, for jurisprudence also to make certain social evaluations. This can be understood from the fact that the rejection of legal ideology inevitably leads to the question of what could constitute a realistic motivation for the contents and the maintenance of laws. This question can be elucidated by the following one: What can the people in a society, or those that govern it or in some other way have a say, want, mean, or aim at with the continued interpretation and application of the laws, with the making of new laws and with the abolition of old ones, in short, with legal activities,[8] when they have come to realize that this cannot be exercised for satisfying the demands of justice or other points of view founded on legal ideology? This question can surely not be regarded as involving any metaphysics.

That reasonable persons do not generally exercise or make others exercise an activity without any motive for doing so is an assertion which experience continually confirms. That the activity now in question is exercised because of an interest in *human beings* must surely be obvious. What people, then, can take an interest in the activity in question, and of what type is their interest? This is the next question which may be answered by following through the thought-experiment now to be presented:

What would happen to human beings if legal activities were discontinued? Little imagination is necessary in order to understand that this would mean the collapse of society and thus the destruction of the human beings therein, to the extent that they could not find refuge in any other society where legal activities were perhaps still exercised and, consequently, a social order was

[8] I call attention to the fact that in the following I use 'legal activity' only to mean the work of legislating or judging (yet cf. p. 136 below): thus therein is not included the exercise of legal science, neither epistemologically nor constructively.

still functioning. Thus the following view seems well grounded: Legal activities are actually indispensable for the existence of society and thus for the people in a society. If this is taken into consideration, then no other interest as the incentive for legal activities can be discovered, which is not determined by ideological or otherwise false conceptions, than exactly the following: *Legal activities are indispensable for the existence of society.* If this statement cannot be refuted by the presentation of another interest, which is not dependent on false conceptions, in the exercise of legal activities, it must be accepted. For my own part I regard it as precluded that another interest of this kind could possibly be found. In the literature with which I am familiar it has never been possible to trace such an interest.

Thus there remains nothing for me but to assert the thesis, that for those who practice legal activity, those i.e. who have been freed from legal ideology and have a realistic eye for the activity in question, there is no other *raison d'être* for these activities, than their indispensability for the continuance of society. If thus the consideration to the preservation of society must form the incentive for the continued pursuance of legal activities at all, then the closer shaping of these activities by law-maker and courts must be determined out of regard to the most frictionless and undisturbed functioning of the legal machinery, the social organization. I have already emphasized, and it cannot be underlined emphatically enough, that this characterization of the incentive for legal activities assumes that those who practice them have freed themselves from all sorts of chimerical aims and purposes originating in legal ideology. Another self-evident assumption is, of course, that legal activities are pursued by people of a sound mind and those who are not corrupted by private interests.

To the science of (causal) connections and other facts in the province of law-life, and therefore also of the realities regarding legislation and administration of law, must, of course, be counted also the task of more closley investigating the state of the motives just mentioned above. The science which deals with these things may be called legal philosophy. But it has immediate importance for and can also be exercised within legal science or jurisprudence

in a restricted sense, i.e. as distinguished from legal philosophy. As jurisprudence in this sense is—and also surely suitably should be—organized in a country, however, in respect to other exacting tasks for jurisprudence, it becomes important that legal philosophy works in such a manner that the jurist can, as far as possible, make use of legal philosophy and to the extent it is feasible be freed from himself performing the epistemological investigations just touched upon. This is, however, at the moment, to be regarded as an unrealizable wish since legal philosophy at present is not in such condition that it can be approved of as a science. A jurist who really wishes to work as a man of science is nowadays forced to independent and tedious work in order to take up a position in regard to all kinds of epistemological questions in legal science.

However, the work of a man of legal science now includes, besides a purely epistemological or theoretical activity, also an activity aiming more practically and, as it were, more constructively at social life.[9] Here it is a question of such things as taking up an evaluating position in regard to the content of law and proposed legislation, further the interpretation of law in general as well as regarding its application in given cases, and finally also a systematization of the material appertaining hereto. As far as this constructive activity is concerned, the views advanced above occasion the formulation of the following thesis: The constructive *juridik*[1] (as distinguished from that epistemological one just touched upon) must—as long as the situation is such that no motive for legislation and administration of law, freed from chimerical ideas, can be discovered, except the *purpose to benefit society*—reckon with this purpose as a *starting point* for legal activities. In more detail this thesis implies the following:

1. Constructive *juridik* must in relation to its (indirect) contribution to the *legislation* of a country be determined exclusively by

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[9] The word 'constructive' has of course nothing to do with the 'constructions' of legal ideology. I use the word as referring to the contribution of jurisprudence to the construction of society.

[1] *Juridik* is a very comprehensive Swedish word. I use it for a moment in order to avoid formal contradiction. Constructive *juridik* should belong to the activity of jurisprudence, as distinguished from legal philosophy.

the question, whether the maintenance of a contemplated or already enacted law (or rule of law) can or cannot—after a comprehensive examination of the appertaining circumstances—be anticipated to ensure the greatest benefit to society, or, expressed in another way, to fulfill in the best way, a social function.

2. Constructive juridik must, regarding the *interpretation* of so-called valid law, in order to promote the training of jurists and lawyers, and to facilitate the administration of the law, expound the law, to the extent it is possible, so that its consistent application, in conformity with the exposition, can be anticipated to benefit society as much as possible, or, expressed in another way, cause the law to fulfill a social function in the best possible way.

3. Constructive juridik must, in its systematization of laws, and, in connection herewith, its treatment of legal institutions, certainly consider the historical as well as the actual significance of legal ideology. It must, however, always have its attention directed towards the fact that for a view of law which itself is freed from legal ideology there is nothing on which to base arguments except social realities, i.e. people, as they are physically and psychically constituted, the facts which form conditions necessary for people's relations to each other, these relations themselves, the actual aspirations of people, and the means of the promotion of these aspirations.

When I say that the constructive *juridik* 'must' be active in the manner advanced above, this indicates nothing except that this is necessary if it wishes to avoid coming into conflict with facts scientifically established, and always attempts to keep in direct touch with realities which are empirically given. 'Must' has in this case as little to do with an objective 'ought' or a 'categorical imperative' as, for instance, in the statement that one 'must' cross the water in order to get from England to America.[1a]

That the constructive *juridik* proceeds from the indicated aim of legal activities on the part of these who practice them implies —as is shown above—that one regards it possible to establish that the aim in question is commonly present. The adopting of

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[1a] Cf. M. R. Cohen, *Law and Social Order,* p. 242 (In Hall's *Readings,* pp. 806 f.) and Cairns, *Legal Science,* p. 140.

such a view is of course in itself not incompatible with science in an epistemological sense. Here everything depends on the adequateness of the argumentation. Surely nobody would wish to deny the *fact* that the aim in question is commonly present. But, on the other hand, it is clear that the constructive *juridik* is not pursued as a science when it takes up a position regarding the question whether a certain law in the most satisfactory manner fulfilled a social function or if the interpretation of law in general or in a certain case were in harmony with 'social welfare'. There it is not only a question of statements in a proper sense but also of evaluations. This is the reason why I have now talked of a *constructive* activity. After this indication one can, of course, speak of a constructive legal science as well as of a constructive jurisprudence and both in a restricted sense.[2] However, it should be —as I shall point out later[3]—an exaggerated cautiousness not to chracterize a scientific jurisprudence (in spite of the social evaluations mentioned) as a science without the addition of the attribute 'constructive'.[4]

Already here I wish briefly to mention—what will be treated in more detail below—that social welfare in my method is in essence quite something else than what both here in Scandinavia and elsewhere is *commonly* meant by such phrases as 'practical viewpoints', the 'demands of society', *die allgemeinen Verkehrsbedürfnisse, die Bedürfnisse des gesellschaftlichen Lebens, sozialer Zweck, Gemeinwohl,* 'social policy', 'common good', 'collectivist (social or public) welfare', etc. For all such things appear only either as *exceptions* from the legal ideological viewpoints or as leading the legal ideological conceptions into certain new grooves. The social point of view has been inserted under the aegis of the method of justice. And without legal writers being clearly conscious thereof, it has helped to *prevent disastrous* consequences of this method, and has accordingly effected a counteraction to

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[2] It is only in this sense, i.e. as distinguished from legal philosophy, that I use the terms legal science and jurisprudence, which terms are used interchangeably in my exposition.

[3] Pp. 203–216 below.

[4] Concerning an important difference between social and legal-ideological valuations see pp. 200 ff. below.

the method.[5] In fact, writers on jurisprudence have not understood, at any rate not acted as if they had understood, that there is nothing else to consider from a scientific point of view than what has been known of social realities, i.e. what I call legal or social machinery, to which again before everything else appertain the modes of conduct of man influenced by and influencing each other. The modes of conduct which form the community life are conditioned by a number of factors, of which it is sufficient to name the following for the general understanding of a scientific jurisprudence: the human beings themselves as psycho-physical beings with capacity to think and act, together with the capacity of both physical and psychical feelings, further written 'rules' of law, other so-called valid law as well as legal activities. The latter consist, *partly,* in legislation, *partly,* in interpreting and judging activities by the courts—the former activity sometimes stimulated by social valuations, such as they appear in the press or through public or private meetings, the latter started by or otherwise influenced by activity from the side of the police, prosecutors, parties, solicitors and barristers—*partly,* further, in execution of judgments through certain administrative authorities, and *partly,* finally, in certain other administrative activities. Legal science is occupied or in any case can be occupied with all of these activities and their incentives together with their influences on the modes of action of people. But there is now no reason for me to direct particular notice to other than the two first: legislation and the interpreting and judging activity by the courts. Consequently it is these activities which I all the while refer to with 'legal activities'. Thus with that expression, as I have already pointed out, the practicing of legal science (jurisprudence) is not concerned. (Cf. above p. 131 n. 8.)

General remarks on 'social welfare' in my thesis

In my exposition 'social welfare' has nothing to do with any *absolute* values, neither social nor ethical nor legal nor religious nor any other kind. On the whole it cannot be a question of any

[5] Cf. pp. 59 ff., 73 ff. above.

ideal or absolute notion. This has at times been misunderstood as if I meant that 'social welfare' were not influenced by ethical or religious conceptions or by feelings of justice. Social welfare depends on social valuations and these, in turn, in many fields and in many respects are more or less strongly affected by the religious and ethical ideas as well as by the feelings of justice and other humanitarian conceptions, by all of them as far as they prevail at the time in question. In addition, may I remind the reader of the self-evident fact that the ideas and feelings mentioned have the greatest importance to the public judicial conscience, the common sense of justice, which—as I have already mentioned and shall further discuss below—plays an *indespensable* part in the function of legal machinery. The common sense of justice belongs naturally to a moral category and is in some degree also affected by religious ideas.[6]

What I have just pointed out does not say anything but that 'social welfare' is something most realistic. It involves certain *actual* evaluations of that which is best for the society concerning the enactment of a law on a certain subject, or concerning interpretation of a certain law or finally concerning the setting forth of some maxim when an immediately applicable law is lacking. The 'social welfare' in my thesis means nothing other than something which is actually considered, i.e. evaluated, as useful to men in society with the way of life and the aspirations and struggles which they really have at a certain time. In general the matter can be expressed thus: socially useful is that which is actually evaluated as a social interest.[7] Sometimes this general word 'social welfare' without any specification can be quite expressive. As far as the legal areas, in which I am concerned, are involved—above all appertaining to the law of torts, law of contract and part of criminal law—one can, indeed continually generalizing, but yet to some extent specifying, characterize 'social welfare' as comprising the general spirit of enter-

[6] The common sense of justice as well as natural justice and public legal conscience is, however, nothing but a construction on the basis of the feelings of justice, a construction necessary to the fancies of legal ideology. Cf. p. 170 below.

[7] From whose side the valuation takes place is dealt with below.

prise and its postulate: a general sense of security as concerns enterprising activities as well as other modes of action not harmful from a social point of view. The *former* includes: such a condition of matters as the common production of wealth and common exchange of commodities (by means of industry, trade, commerce) as well as a common freedom of action (except certain specified lines of conduct)—in short all sorts of activities which are in some way or other calculated to advance what is estimated as pertinent to the prosperity of the community. The activities just mentioned I customarily refer to as 'common transactions'. The *latter,* the general sense of security just mentioned, includes: the reliability of agreements and promises and the harmlessness of the intercourse between people, in brief, the general sense of security in doings and dealings, of course, comprising also the sense of safety to life and limb.

What I have just said as a description of 'social welfare' in the areas mentioned is no doubt in accordance with prevailing social valuations. But very often when presenting an argument concerning this matter it is necessary to state in more or less detail what is considered to be the social interest in a certain respect. Thereby sometimes great difficulties appear. This one can see from committee reports, dissertations and other treatises in which writers have in vain sought to arrive at an understanding of the subject. These difficulties not seldom have their reason in the question having been obscured through the veils of legal ideology.

One may ask if then viewpoints of equity and justice should *never* be taken directly into consideration in the exercise of legal activities. The immediate reply to this is that, as has been said above, social valuations are of course greatly influenced by religious, humanitarian and other ethical ideas. As far as law is concerned these ideas consist to a great extent of ideas of natural justice and equity which by legal ideology are summed up under the concept 'the common sense of justice' or the like. The position and importance of this in legal machinery will be dealt with below.[8] However, now leaving the so-called common sense of justice out of account, the question in principle is to be answered

[8] See pp. 159–170.

in the negative. But it must be noticed that—as will be pointed out later[9]—at times it can be *in harmony with a social valuation* directly to urge viewpoints of equity and justice in support of this or that rule of law or this or that interpretation of law in a case at hand.

This may have greater importance in other legal areas than those in which I am concerned. But in the provinces of the law of torts and the law of contract there must, in the nature of things, be extremely little room for any consideration of the points of view of equity and justice. For the legal rules here referred to exist for the very purpose of promoting the 'common transactions'[9a] in the community. If the views of equity and justice were here really to be taken into consideration to any great extent, it would of necessity be *at the expense of* the regard for the economic prosperity of the community. For if the requirements of 'common transactions' were not satisfied, the entire social wealth would consequently suffer. Even the evaluation of the parties' interests made on the basis of equity and justice would then be of little value, since the very foundations of economic prosperity in the community would be undermined. It can scarcely be of any great significance to the individual to be treated 'equitably' or 'justly' if the general conditions of economic independence are lacking. However, the absence of these must of course be the consequence of the fact that the conditions necessary for the 'common transactions' are missing. A distribution of wealth on equitable principles is worth nothing if there *exists no wealth to be distributed.* Hence the legal rules in question must first of all be arranged in such a way that the necessary wealth is produced.

In my book *Superstition or Rationality?* I made some brief general comments on my theory of social welfare. These were misunderstood by some English readers to be associated with utilitarianism. This gave me reason to further clarify this matter in later writings. Among other things I emphasized that with the method of social welfare I did not consider any ethical[1] or

[9] See pp. 153 f. and 239 below.

[9a] Cf. p. 70 n. 1 above.

[1] Although, as has been said above, 'social welfare' is, of course, to a great extent influenced even by ethical (moral) valuations.

absolute principle and that, in order to avoid all misunderstanding, I did not either consider any specific philosophical principle. In the present connection I find it appropriate to reproduce a portion of this particular exposition with a few formal changes.

With the method of social welfare as a principle or, perhaps better, as a guiding motive for legal activities, I mean in the first place the encouragment 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.* This consists in such things as suitable and well-tasting food, appropriate and becoming clothes, according to one's own or the general taste, dwellings furnished in the best and most comfortable way, security of life, limb, and 'property', the greatest possible freedom of action and movement, therein also including limitation of the amount of work a person may be required to do within a specified period of time, possibilities for education etc.—in brief, all conceivable material comfort as well as the protection of spiritual interests. I do not take any standpoint at all as to the question of what man *ought* to aim to strive for, not at all to the question, if on the whole he *ought* to propose any goal for his labor, hardships and troubles. Every type of valuation in such a respect is absolutely detached from what I insert in my thesis of social welfare. I do not even seek to determine anything at all in the respect of whether it is of value for man to protect his possibilities of life and perhaps develop them, or whether it would instead be better to destroy them, or as it is said in Scandinavia 'put a torpedo under the Ark'. In such a respect I only establish as a *fact* what can be observed in general, namely, that the overwhelming majority of human beings (in Sweden as well as in all other countries of a comparable cultural development) *wish to live and develop their lives' possibilities.*

Starting from this state of affairs I have sought to show that —as far as those, which exercise influence on the organization and administration of society directly or indirectly, are freed from conceptions of legal-ideological interests—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 aspira-

tions of men just indicated may be realized to the most practicable extent.[2] As far as persons in general have these aspirations, as far as they are not controlled by the Indian principle of contemplation, for example (i.e. the lapsing into Nirvana, the absolute nothing as the final end)[3] or, perhaps, brought to the verge of despair by an inclination for positive activity directed towards destroying society—so far nothing but the aspirations just hinted at can be found out which has the power to arouse and maintain an interest so strong and so general that it can in process of time be decisive for legislation and the interpretation of law. It is obvious that the interest in legislation and the administration of law is indissolubly united with these aspirations. Without both of these legal activities no order would be conceivable, only chaos which in its turn would make the aspirations of mankind impossible.

For the rest, one can say—of the utilitarians—that, in the same way as almost all other legal philosophers, they overlook, in their estimation of the importance of law for the community, the fact that, from beginning to end the community organization presupposes or, perhaps more logically expressed, consists of the maintenance of what we call written and unwritten law. Through this oversight they have in their resonings as points of departure, i.e. as existing independent of the running of legal machinery, taken all sorts of facts that are in reality only consequences of or, at any rate, for their existence conditioned by the maintenance during centuries of legal machinery, of a social order. The facts in question are not without importance. They comprise, e.g. such things as that, on the whole, there are sciences and, consequently, that Bentham and other philosophers of law have had the possibility of investigating into law and social order; such things as the present thinking-faculty of men and their present feelings for truth and falsehood, for right and wrong; briefly and to the point, such things that men exist as civilized beings in civilized countries, utilizing the treasures of spiritual and material culture.[4]

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[2] However cf. just below.

[3] Of course it is not maintained by this that the Indian people are controlled by this maxim.

[4] Cf. pp. 17 f. above and 370 ff. below.

Exactly that view on law which allows this to be based on the common sense of justice or, in every case, on ideas that are conditioned by law—a view of legal matters from which well-nigh on every page in my expositions I seek to dissociate myself—exactly that view was actually an essential if even a silent part of the utilitarianism.

Certainly the utilitarians have successfully criticized some rough conceptions of natural law of the 18th and the beginning of the 19th century. As to rights and duties (obligations) Bentham's criticism had in view *natural* rights and duties and not *legal* rights and duties, which he accepted. Thus he says, for instance, that 'there is no natural property' and that 'property is entirely the creature of law'.[5] Earlier he had said that the right—which did not always include power, whereas power always meant 'a right to such a power'—was the result of some manifestation or other of the legislator's will. 'Every such manifestation is either a prohibition, a command, or their respective negations; viz. a permission, and the declaration which the legislator makes of his will when on any occasion he leaves an act uncommanded.'[6] The whole of the common legal ideology was actually swallowed by the utilitarians as by other positivists, for as such they may be classified.

As a matter of fact, there dominates in their view of law, as well as in the rest of jurisprudence, a hidden law of nature. In this respect I need only refer to Austin, one of Bentham's followers, whose doctrines may be regarded as a downright exposition of

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[5] *Bentham's Works* I, p. 308.

[6] *Works* I, pp. 105 f. Ibid.: 'For every right which the law confers on one party ... it thereby imposes on some other party a *duty* or *obligation*'. Cf. p. 151: 'A coercive law is a *command*.' It 'converts an act of some sort or other into an offence. It is only by so doing that it can *impose obligation*.' According to Keeton and Schwarzenberger, p. 25, Bentham has said that both 'rights and obligations are the children of the law'. In Bentham's works I have not been able to identify this quotation. On the page referred to, *Works* I, p. 166, Bentham says, *inter alia*, that a man's condition in life is constituted by the legal relation to others, 'that is by *duties*, which by being imposed on the one side, give birth to *rights* or *powers* on the other'. This and many other statements by Bentham indeed purport that 'rights and obligations are the children of the law'.

jurisprudence based on a hidden law of nature. It is sufficient to call to mind how Austin 'fancies' regarding legal commands, rights and duties, even regarding primary rights and duties and secondary, i.e. sanctioning and remedial, rights and duties etc.[7]

John Stuart Mill evinced no knowledge of the metaphysical character of the ideas of right and justice. In his writings no traces are to be found of what I maintain, namely, that the reality of the idea of right is merely another side of, on the whole, the impartial and consistent enforcement of the different laws. On the contrary, Mill works upon such absurd ideas as that of a 'right residing in the injured person', or 'belonging to him'. Note further the following statement in his summing-up: 'The idea of justice supposes two things: a rule of conduct and a *sentiment which sanctions the rule.*' The words in italics are exactly a drastic expression of the view which I have made the object of my criticism. And that 'rule of conduct' of which Mill speaks, what else is it but the conceptions current in the community *owing to* its present phase of development, which in its turn depends chiefly on the maintenance of law, since centuries? However, the sentiment of justice, according to Mill, depends on two things: partly the impulse of self-defense and the feeling of sympathy for those who have been hurt or damaged, partly 'the animal desire to repel or retaliate a hurt or damage'. The rule of conduct 'supposed' by the idea of justice shall, as we have seen, be sanctioned by a sentiment. This sentiment is characterized as 'the natural feeling of retaliation or vengance'. For it shall consist among other things of the desire to punish a person who had broken the rule of conduct by doing harm to some individual. 'It is natural to resent, and to repel or retaliate, any harm done or attempted against ourselves, or against those who with whom we sympathize.'[8] If the sentiments of justice really had that function in society which Mill believed in, then social life as we understand it would never have been brought into existence. Social life cannot be determined by the feelings of justice as in any way *guiding* factors.

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[7] As to Austin see *Unw.* I, pp. 191—198. Concerning Bentham see also the quotation from Keeton and Schwarzenberger on p. 92 above. In another connection I have touched upon Bentham on p. 238 n. 7 below.

[8] See Mill, *Utilitarianism,* chap. V, pp. 40—50.

Social life is conditioned by the fact that the feelings of justice *are guided and directed* by the laws as in force, i.e. as maintained. This fundamental point decisive for an understanding of social organization was unknown to the utilitarians. Indeed, I have met outside of Sweden no philosopher of law nor legal writer who has, in my humble opinion, really understood the relation between law and the senses of law, i.e. the sentiments or feelings of justice. Later on, pp. 164 ff., I shall touch upon this relation.

When I assert that social welfare includes 'in the first place' the encouragement of the actual aspirations or strivings of man in the community, the words within quotations marks should be noticed. The limitation concerns, *in part,* that such aspirations may depend upon what the legislator is convinced to be false conceptions, and, *in part,* that laws may be enacted which had reference to such things concerning which the valuations of man had not been sufficiently marked to lead to any determined striving. Naturally in the latter case the social welfare as determining for the measures of the legislator cannot be characterized as furthering of the actual endeavors of man. In general not in the former case either. Yet this is not without exception.[9] The assertion of social welfare as including the furthering of the actual strivings in the community will be clarified in what follows in other respects also. But now consider the following.

The aspirations of man are of course expressions for or depend in any case upon his valuations. The social valuations which become directly decisive for legislation (and interpretation of law), do not indeed come immediately from the 'people' but from the legislator (or interpreter) himself, with all that this concept can imply.[1] The law-maker (and the courts) can in their turn be more

[9] See pp. 152–154 below.

[1] Among other things—as far as Sweden is concerned—the notion of legislator applies not only to countersigning ministers, the Riksdag (particularly its committees, proposers, or other members actively concerned with a question), board of judges and law-committees but also the courts which in questions of interpretation can be considered as a kind of legislators *in casu.* With law interpretation I do not consider the using of clear and unequivocal written law or unwritten legal maxims but situations where even if there is written law, the wording of it leads to different means of its contents, or where written law is lacking and there exists neither clear and unequivocal 'customary law'. That

or less immediately influenced by legal science whether the comprehension of the matter within its sphere is based only on epistemological statements and investigations or depends also upon the social valuations made in its constructive function.[2] But the valuing subjects in question of course do not undertake the valuations on their personal account, but in their capacity of legislator or legal scientist. The law-maker makes the valuation because he understands the meaning with his activity to be to benefit society; legal scientists (in their constructive function) make it because they proceed from that meaning with legislation, and strive to serve society through being of help with their own activity to the law-maker (and courts, cf. p. 144 n. 1 above and p. 158 below). A presupposition for this statement is of course that they (legislators, judges and writers on jurisprudence) are not misled by conceptions of legal ideology. But with this presupposition it may in general be said that in our time no other motive can be picked out for them with proposing of the one or the other legal maxim than that its application serves as a benefit to that society for which the maxim is proposed and as whose servants they carry out their activity as lawmaker, judges or legal scientists.

Now it is indeed so all the way from ancient times until today that legal ideology has dominated and dominates the mind of man. This has had and continues to have as a consequence the fact that the influence of social interests on legal activities has been—according to different times and different provinces of legal activities—more or less kept back. Therefore, as mentioned above, the legal maxims maintained in a community have hitherto been and continue to be the result of a struggle between two entirely different ways of looking at things and of different valua-

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which is intended is well exemplified in the great numbers of cases in our reports of precedents in which the instances diverge without having that divergence dependent on differences concerning that which has been unrevealed from facts. To this it should yet be added that even such a difference *may* be a consequence of the lack of clear and unequivocal maxims in the area of the so-called law of evidence. Carefully considered, legal interpretation of the courts implies at all times that one judges without direct support of established law and accordingly that the judge functions as a quasi-legislator *in casu*.

[2] Cf. pp. 131 ff. above.

tions and interests associated therewith:[3] an *unreal* way, proceeding from the legal ideological ideas, and a *real* way, determined by consideration to the actual aspirations of people living in the community. In my Swedish writings I have tried to show how legal ideology hindered not only legal science, but the law-maker as well, although to a lesser degree, from being led completely and frankly by the viewpoints of social welfare.[4]

Therefore what I maintain is only that—if one really were freed from the legal ideological chimera—neither the law-maker nor the constructive legal scientist would reasonably be able to find any guidance for his activity but the purpose (the law-maker directly and the legal scientist indirectly through helping the law-maker) of being useful, with this activity, to that society whose servants they are, that is to say, in general, of promoting those objects which the citizens in common actually strive to realize. *Assuming the condition just stated about the freedom from legal ideology actually were at hand*[5], I shall now elucidate the meaning of 'social welfare' as a guiding motive for legal activities as well as legal science. This presentation is limited to the consideration of a country such as Sweden, i.e. a country with a so-called democratic constitution, democratic institutions and a generally democratic outlook among the majority of its citizens, i.e. a land of Western culture and civilization. It stands to reason that the question of both the meaning and importance of 'social welfare' for legal life comes in an essentially different situation in dicta-

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[3] See above p. 124. Perhaps it may be said that what was at first a struggle between the two ways of looking at things has gradually developed into a sort of cooperation.

[4] This appears, I think, already from the foregoing in the present work. Moreover I refer to *Obligationsbegreppet* II: 1, pp. 209–241. The exposition there can be completed with a reference to the discussion of penal legislation on p. 235 below and of civil legislation on pp. 258 ff. below.

[5] This fiction will not be made throughout already because—inasmuch as the prevailing jurisprudence in spite of its legal ideological viewpoints often declares itself to be determined by considerations of the common good—it becomes necessary to make certain observations concerning 'social welfare' in legal ideological reasonings. But even overlooking this, as the reader will find out, the fiction in question cannot be strictly maintained.

torially controlled countries as well as in a land undergoing a bloody revolution or otherwise under a reign of terror.

What now concerns dictatorships, the matter can of course vary according to the type of dictatorship. Yet certain common features as to the influences from 'social welfare' can be observed. It always plays the *formal* part that the persons in power continually have social welfare, the common good, etc. on the tips of their tounges and *must* do so, in order not to conjure up or stimulate those forces which should be able to crush them (see end of this paragraph). As concerns the *material* significance of social welfare as constituting a stimulus for legal activities (i.e. legislation and administration of law), it can be said that these indeed at first glance may seem to be determined by the interests of the person or persons in power to maintain the dictatorship and keep themselves in power. But this presupposes in turn that, to some extent at least, the peoples' interests have been taken into consideration. To what extent? The answer depends upon how the dictator has been able to organize his power, i.e. how the apparatus of power is administered. All of those people on whom he must rely in this respect, in order not to risk being overthrown by surprise, must be looked after in a particular way. But this becomes in the course of time impossible if even the minimum essentials of the social economic life cannot be maintained. This becomes necessary in order to hold back in some degree the common discontent and in this way maintain the 'confidence' of those who through their nearness to and influence on the apparatus of power could otherwise become dangerous for the dictator and his power.[6] But social economy is conditioned by rules of law as well as the administration of them and they must agree at least to some extent with the generally prevailing valuations. Certainly in opposition to these economic enterprise can be enforced, to some extent, through the threat of reprisals. But the result in course of time would become too meager. Therefore even to a markedly antisocial dictator the need of such legal activities makes its presence felt that a certain feeling of security

[6] In our times the apparatus of power can be more strongly organized in the hands of dictators than formerly. The stronger and firmer their power, the less do they need to feel forced to consider the wants of social economy.

in dealings and doings be maintained for the encouragement of production and all sorts of transactions in society. But not enough herewith! The dictator is also interested in the fact that the people through arbitrariness in making and administration of law do not feel themselves so wronged that the general dissatisfaction becomes mobilized to such extremes that—in spite of the manner of organizing the apparatus of power—danger arises for the breaking of the frame of that community, whose existence all the while constitutes the condition for his own power. This can also be expressed thus, that even under an antisocial dictatorial regime the considerations of social valuations will determine the laws and the application of them in so far as this becomes necessary for the social economy as a condition for the continuance of the society organization.

I have made these indications in order to remind the reader of the following. There has been no reason for me in my investigations of some of our dominating legal institutions (penal law, law of torts, law of contracts) and of the nature of legal machinery —investigations with which I, among other things, intend to contribute to guiding the law-maker and judges during *normal* circumstances in a country such as Sweden with its Western culture —to go in more detail into the state of things conditioned by reigns of terror. These have *just because of the lack of support in resources of moral power in the majority of the population* very little to do with the legal order in the ordinary meaning of Western civilization. Nevertheless the further observation can be made that even in terrorism striking evidence is found for the importance to legal machinery of considering the common interests, the interests of society. Indeed how could a terroristic regime, wherever it may have appeared—in the French Revolution, old and new Russia, Fascist Italy, Nazi Germany—on the whole be able to exist if the interests of the persons holding power had not attired themselves in the colors of *the general welfare* and if those terroristic measures were not depicted as being meted out to the *enemies of society!* And on the other hand: why just such an attire, if it had not maintained itself by experience, that during normal conditions any other motive were not to be found for the formation of legal order than the social welfare?

However as stated I shall limit my presentation to countries of Western civilization during normal conditions. For the sake of brevity in the following I speak only of the law-maker (including the judge as a quasi-legislator in casu) and only in certain places of (the constructive) legal science or jurisprudence. To a great extent the viewpoints are the same. A difference lies therein that the legal scientist according to the nature of the matter has greater freedom than the law-maker to urge his own value judgment of what is best for society in this or that respect.[7]

How the law-maker is influenced by social valuations

It is obvious enough that the social valuations of the law-maker as motives for his activity in many areas must stand in agreement with the general valuations prevailing in society.[8] Consequently it is manifest—to fill in somewhat the picture given on p. 140 above—that the law-maker does not in any way come into conflict with but on the contrary harmonizes with the attitude of the general public affected by respective questions of law when, for example, he considers (and accordingly acts): *that* improved roads are immediately useful to the common transactions,[9] and with this also to the common production; *that* it is important to the common security and therewith also at least to some extent encouraging for production and exchanges of commodities to control all types of so-called traffic terror, for example; *that* agricultural operations and therewith a part of the production depends in a certain way upon the arrangement of land partition; *that*

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[7] Cf. p. 152 n. 3 below. Indeed it is in my presentation a question of the method of what I have called *constructive legal science*. But this method will come of itself—as may be understood from pp. 131 ff. above—after clarity has been achieved concerning the *common purpose of legal activities*.

[8] With the 'general evaluations' in society is, of course, meant the valuations as far as they are on the whole undertaken by men in society. By the most widely different reasons (lack of knowledge, lack of general interest, lack of interest for a particular question, whether because this is the direct concern of only a minority or because it does not have the power to attract the general interest) greater or less numbers of the citizens can be more or less indifferent to a certain question of legislation.

[9] For the meaning of this expression see p. 138 above.

something of a similar nature applies to the law of waters; *that* the formation of the laws of landlord and tenant is of significance for the common security and therewith for common transactions;[9] *that* the maintenance of the laws last mentioned can also encourage the efforts of man to achieve hygiene, comfort, happiness and contentment; *that* the common transactions (not only limited to business and commercial life both small and great) and therewith also production and other enterprise depended upon the law of contract, and *that* it is important that this law, considering its significance just mentioned, be formed in the most practical way; *that* for the common security of life, limb and property it is important that criminal law in these respects be maintained; *that* the maintenance of the so-called culpa rule is of importance for the common security in doings and dealings and therewith for the encouragement of common transactions; *that* the same must be said also about certain maxims of so-called strict liability etc.

Where the social valuations of the law-maker and the public do not in the way just indicated obviously correspond with each other, the understanding of the law-maker concerning what is best for society is commonly influenced in one or another way by the valuations prevailing among the citizens. This follows already from the fact that the law-maker cannot reasonably escape being aware of the fact that the laws are not established for the sake of the law-maker but for the sake of society, i.e. for the members of it. However matters here stand in different ways. If the valuations of the public go in different directions, without any of them appearing to be more decisive than the other, or if one cannot on the whole speak of any valuation in the community as to a certain question concerned with a legislative project, then the law-maker has a more free position and he may then allow his valuation of the most appropriate measure to be determined exclusively by his knowledge of the construction of the society, which obviously includes knowledge of the citizens as psychophysical beings.[1]

[1] In this way 'indifferent' legal questions exist in all areas of civil law. Here common social valuations very often limit themselves to the need on the whole of this or that legal institution. Then there is the obvious starting point that

In such cases he can nevertheless have been influenced by valuations within the people, inasmuch as his measures have been determined by the fact that these valuations have not had any decisive significance but have left him a free hand. But the legislator may in situations now touched upon perhaps also be influenced in another way by the society valuation: he must sometimes consider the possibility according to circumstances that a proposed measure from his side might sharpen the valuations, or arouse the dormant interest on the part of the public more closely affected by the matter in question. He must allow for the possibility of criticism from such persons who feel themselves capable of it and who through their opposition may be able to lead the common valuation *against* the projected measure and thereby lessen its usefulness for the public. If the law-maker taking all of these possibilities into consideration is not certain of his ground, not confident thereof that the legislative measure with the motivation he is capable of giving the same will be accepted without grumbling, and consequently carry out its intended social function, then he of course takes up a hesitant attitude. In other words, it can be necessary for the law-maker even in situations of the type now indicated, before he definitely makes up his mind, to place before himself the question: how will the common opinion, i.e. the opinion of the public more closely affected by the matter in question, react upon the projected legal measure after an elucidation which can be achieved through an expert examination of it?

If in a legislative question there exists from the beginning a more compact valuation, contrary to the law-maker's original intentions, then at least theoretically one should distinguish between two situations. However before touching upon these a vulgar idea concerning the social valuations must be removed, an idea expressed with such phrases as that the valuations 'of course are not done with the reason, with the thought, but with the feeling'. Such a phrase is perhaps acquired from Hägerström's doctrine of value—in an unreflected way, without understanding the same. Otherwise one should yet be able to conceive that a foolish, coarse,

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the law-maker with his access to expert knowledge and experience is competent to carry out the detailed legal regulation, and in doing this he is guided by *his* social valuation in accordance with what follows in the text.

stupid individual can have the same both direction and strength in his feelings on the whole as an intelligent and learned person, but that nevertheless their valuations could go right ahead against each other. Indeed the value judgments (as we have seen above pp. 43 ff.) are expressions for our feelings. But these feelings are tied to our conceptions of reality. These conceptions are in their turn determined by our knowledge of facts, and of connections between facts. This knowledge varies greatly in different persons. It should also be noted that knowledge cannot always be acquired only through observation and study, it presupposes often a certain amount of intelligence on the part of the individual. The *conceptions* to which the feelings are tied and which consequently are decisive for the direction of the valuations can in other words *either be true to real life or false.* This obviously has the *greatest* significance for insight into the meaning of the method of social welfare.[2]

However, if the law-maker finds, when his own valuation concerning a projected measure conflicts with that of the public, that this has based its valuation on false conceptions of reality, then he cannot of course, at least not without further ado, follow the public opinion. According to circumstances he then probably chooses one of the following alternatives. He remains passive while waiting for the valuations of the public in the matter to be changed by means of elucidation and conviction.[3] He may also perhaps take action to a legislative measure in accordance with his own lines. But then the situation should be such that he feels himself confident to be able to produce so strong and effective conviction of the falsity in those conceptions on which the valuation of the public is based, that he need not be afraid that this valuation will cause any moral opposition against the new law or otherwise lead to any serious displeasure at it.[4] Finally the

[2] The question, therefore, is dealt with on pp. 200 ff. below.

[3] Here we have an example of an obvious difference between the attitudes of the law-maker and legal writers. The latter have no reason to remain passive but simply fulfill their function as being constructively active when they present and confirm with argumentation their viewpoints. In this way they can prepare the way for the law-maker.

[4] On the whole the legislative procedure itself contains significant guarantees against the danger just mentioned. A commission of jurists and the proper de-

law-maker may find it to be the best agreement with the interest of society to submit to the general evaluation in spite of the fact that he finds it tied to concepts based on imperfect knowledge of the actual conditions and consequently not tenable. With respect to the force and injuriousness of the moral indignation which could be anticipated as arising in the community if the law-maker acted contrary to the general valuation, he may find that the social welfare would only be served by his submitting to the valuation in question. Under quite normal conditions such concessions from the law-maker's side surely are rather infrequent if the valuations of the public result in demands for legislative measures. A situation in which a concession may be made must apparently be so characterized that on the one side there is a danger in delay, and on the other side an effective elucidation for the removing of the false conceptions would require a long period of time. However, it may not be considered so unusual that the law-maker conforms in *that* way to the general social valuations which according to him are based on false conceptions, that he relinquishes a legislative measure considered by him as useful to society.

In this connection one should observe the following, above all else. An enlightened legislator who sees through the falsity in certain conceptions can nevertheless in the interest of social welfare feel called upon to give in to valuations based on these conceptions, these valuations implying that a suggested law would bring with it injustices. Through a legislative measure contrary to such valuations one—however well considered the measure would be otherwise—can do the social life more injury than benefit. In this respect the following may be briefly stated. The socially useful effect of a new legislative measure can be lessened or even quite withdrawn, if the general feeling of justice is en-

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partment has usually investigated all sides of the situation in question. Several other authorities with competence concerning this or that aspect of the matter as well as 'lagrådet' (a standing committee of three judges from our Supreme Court of Justice and one from that of Administration) have usually been heard. If then finally the majority of a Riksdag Committee and the Riksdag Chambers approve of the proposal, this must in general signify that the apprehensions touched upon are unfounded.

croached upon too brusquely and in this manner the respect and veneration for law decrease. It is of great importance for the attainment of a socially useful effect, i.e. that the law may be able to perform its social function, that generally developed convictions of law be respected to a certain extent, even if they be determined by false conceptions. And one must therefore carefully see to it that the establishment of new or the abolition of old law does not come in such a conflict with what was before maintained within the country, that the changes in the eyes of general opinion assume the character of arbitrariness or of something unjust, to the advantage of certain persons, and to the disadvantage of others.

Now it remains that the valuations of the law-maker and those of the public differ from each other without this difference depending on one or the other side upon conceptions out of touch with reality. With this assumption which we shall soon see is not very practical, there can be no question of any attempts to correct the attitude of the public from the side of a wise law-maker. He must be able to understand that a correction of the *value judgments as such*—i.e. when the conceptions lying behind them cannot be attacked with arguments—must be irrational and hopeless. For one cannot by means of arguments founded on facts change what is based purely upon a person's emotional attitude.[5] Keeping all the while to this thought experiment, the legislator's value judgments thus would stand against those of the public, i.e. against the valuations prevalent in society.[6] It goes without say-

[5] It is true that the emotional attitude can be influenced through pure propaganda. But in a democratic community the law-maker has not access to a propaganda apparatus suitable for this. Moreover those who operated such an apparatus would never publicly admit otherwise than that the valuations worked upon would be a consequence of more or less ungrounded conceptions. See also the next note.

[6] As said already, only as a thought experiment can the matter be in this way simplified. If the law-maker really discusses taking a measure which would go against the general valuation in the society then he should never admit that the question limited itself to a difference concerning the bare valuations, but should always find out reasons upon which his own viewpoint would be motivated. But even irrespective of this, it must be said that the law-maker in the proper meaning—with the many heterogeneous elements which are concerned in this concept—could hardly be considered to have a clear valua-

ing that the former could not form a basis for legislation. Should a Minister of justice in Sweden try to effect such a piece of legislation, then he could perhaps receive support from a commission which he had himself appointed, and of a number of authorities, but the project would unerringly fall through owing to the opposition from the Riksdag, the representatives of the people, even if the majority of the Riksdag made the same valuation as the Minister of Justice. For it would in such a case never try to assert its own valuations.[7]

In order to clarify my method it is hardly necessary to discuss any further all the questions connected with 'social welfare' as directive for legislation and legal interpretation. Yet a greater completeness could possibly be appropriate for the prevention of misunderstanding of certain points belonging to this category. In particular it should be of some importance to point out that a law by no means needs to directly encourage the interests, in general, of the citizens affected by the law in order to be regarded as directed by the considerations of 'social welfare', indeed, that thus directed, can even be regarded such laws which are contrary to the immediate interests of the majority of people. This is understood when one pays attention to the more or less marked class opposition in a society. Laws can be maintained which at the first glance seem to serve a few at the expense of the many. It was almost the rule in former times, where moreover one need hardly go farther back than the last four or five decades. However it cannot be denied that even today, at least in some demo-

tion, which contrasted with the society valuation, from the assumption made: that the latter cannot be attacked owing to false ideas lying behind it. However if it is a question of legal interpretation by the judge as a quasilegislator *in casu,* then perhaps the difference in valuation referred to might be thought to occur. Then if the judge is wise and understanding and has a mind for how the legal mechanism operates, he will in his judgment give up his own valuation on behalf of that of the people in society.

[7] This, it is true, concerns literally only civil and criminal law. But a department head would indeed be too wise to introduce even a purely administrative decree opposing the general value judgments in the community. The knowledge of the opposition which he would have to experience from the Riksdag because of such a mode of action (although a decree of that kind would not be directly dealt with by the Riksdag) should be a sufficient safeguard against it on his part.

cratic countries, a so-called upper class through the maintenance of laws to a certain degree has its interest served at the expense of the numerically superior 'lower classes'. In proof of this statement it may merely be recalled how through our laws with their respect for imagined rights an order is brought about which in the struggle for existence gives to a minority quite other and better economic and social possibilities than to the great majority of people, and which sometimes makes the talk of free competition for the good which the community presents a thoughtless phrase. I shall not try in detail to enter the question whether in such a respect, on the whole, it would be possible to establish a quite free competition in the community. Without expounding my argumentation—which easily and unfortunately might lead to a political discussion not appropriate to a work of the present type —I limit myself to emphasizing the view that the economy of society would be too much suffering by an absolutely free competition as well as an attempt at socializing the community. My viewpoints are analogous with those already hinted at on p. 139 f. above. In this connection, however, I only maintain that the law of many countries continually promotes (to a greater or less extent) the possibilities of a few at the detriment of the many.

As has just been indicated such an order to a certain extent is necessary for the maintenance of the social economy. With the prevailing division of intellectual and otherwise of the production of social values capable resources a legal order of this kind is requisite. I have in view that a varying distribution of commodities and utilities is necessary for the stimulation, to directly or indirectly productive work, of more highly skilled and enterprising, and consequently, in respect to supply, more limited sources of labor. To one part, however, this varying distribution of commodities etc. is not necessary for the reasons intimated. As far as this is the case, of course, the legal order does not agree with the interests of the many. Because of conceptions deeply rooted in the common sense of justice this condition of affairs can sometimes be concealed even from those whose interests are neglected. However these interests often make themselves so strongly felt that the yoke of the traditional legal ideas is lifted and a clear insight is attained that the law without any 'reason founded on

justice' opposed the interests in question. Under such conditions it can appear backward to talk about the law as determined by that which according to generally prevailing valuations would be useful for society as a whole. Nevertheless it is so that even laws whose maintenance in this way appears unfavorable for the many must—if one disregards the greater or lesser influence from chimerical legal conceptions—be influenced by social welfare in the meaning in which this term has to be taken.

The state of matters is, namely, that the conditions of political power which prevail in the community can be such that they secure an order through which a minority interest is taken care of in a particular way. The majority then have nothing else to do than to subordinate themselves to such an order as far as they do not venture to attempt subversion or revolution in order to bring about a more equal division of power and on the basis thereof create for themselves favorable laws. However if they perceive that changes in the conditions of power cannot or only under great risk be carried out, then they will find it best to subordinate themselves to the prevailing system and adapt themselves to a peaceful way of approaching the minds of the people for the purposes of a rearrangement of the power conditions. Acting in the opposite way would of course lead only to a war of all against all, or in any case to disturbances from which the oppressed as well as the favored would suffer. Consequently the observance of the law even in such cases according to the general valuation is considered to be useful, although this usefulness for the great multitudes of people arises only in the indirect way now mentioned. It stands to reason, after what has been said, that nothing else can be decisive for the continued maintenance of laws of this kind than that they, by reasons now stated, must be considered useful for all.

However, should an equalization of the conditions of power between the classes take place, then it becomes immediately necessary for the former superior class—just in order to look after its own interests—to comply with such changes in the law which are calculated to bring about, under certain social-economic conditions, an improvement in the living conditions of the hitherto underprivileged. To the extent that a law is not essentially in-

fluenced by chimerical conceptions it can be said consequently that even with an unequal division of the conditions of power it is determined by that which according to prevailing valuation is found to be useful for about all people in the community, it may be that the majority of them at times are only indirectly able to have any benefit in submitting themselves to the law in question.

Before giving precision to some points, on account of objections made to my method of social welfare, the following statement needs to be considered. When I include the activity of the courts in 'legislation' or when at times I touch upon this activity as determined by social valuations, I always have only *law-interpretation* in view in the way that I have used this concept on p. 144 n. 1 above. Consequently in this connection I touch upon the activity of the judge only as far as he *does not have clear and unequivocal* law (including certain unwritten maxims) to follow. If such a law exists, then it belongs to the method of social welfare to apply such a law, even if the judge finds its contents, on whatever grounds possible, unsatisfactory, as not agreeing with his social valuations in accordance with what has been said above. Laws which because of their contents are estimated as socially useless should of course be abolished or changed. But as long as this has not taken place it must be an interest supported by the leading social valuations that they be applied. The general security is one of the bases for the smooth and noiseless operation of the social or legal machinery and therewith for the social economy too. The greatest possible security for the individuals of the society must consequently be something which belongs to those actual social aspirations. But such security presupposes among other things the greatest objectivity possible in the administration of law, in its turn icluding above all else that the laws to the extent that different interpretations are excluded, be applied according to their clear contents. It must be, so to speak, an axiom from the point of view of social welfare that the law courts may not begin to tamper with clear and unequivocal law[7a] and replace this with

[7a] I willingly admit that the concept 'clear and unequivocal law', to obtain a practical meaning, must be somewhat hazy. Yet this concept must not be dis-

their valuations, however strongly pierced these may be by socially emphasized conviction.[8]

To the above I will only add that I do not herewith seek to state any maxim which the judicature has to follow in regard to overruling former precedents. This is a vast subject and there is —I dare say—in this respect a difference between common law in England and customary law in other European countries. But all the same, the only possible method for solving the problem is that of 'social welfare'.

The importance to legal machinery of the feelings of justice

With feelings of justice I here mean such feelings (senses, sentiments or emotions) as far as they are rather common within the society or within that class or group which is in question. In current jurisprudence one often speaks of (natural) justice, common sense of justice, public judicial conscience and the like. All such phrases are abstractions through which one has come to believe in being able to erect on man's ordinary feelings of justice a power mighty enough to constitute the very *foundation* of law, a construction so much the more aimed at by legal writers as it harmonized with the Roman Ulpian's idea of *iustitia* as the substratum of *ius*. Jhering, however, did not approve of this construction which he called *eine Abstraction der Wissenschaft, die das Volk nicht kennt.*[9] Jhering spoke only of the *feeling* of justice (properly 'feeling of law'), but certainly he meant these feelings to be the proper basis of law. 'To the *Rechtsgefühl* truly the whole mystery of law is attached', he says, as well as that *die Kraft des Rechts ruht im Gefühl, ganz so wie die der Liebe.*[1] He

carded merely because different interpretations are possible. This is a vast subject for discussion. I cannot enter into it here.

[8] I do not wish to conceal that in my own country there is a certain tendency to tamper with clear and unequivocal rules of law. One has even gone so far that in the province of criminal law one has disregarded that maxim so important to the common feeling of security, *nulla poena sine lege poenali.* It is quite another thing if the law-courts *fail* to apply a paragraph of criminal as well as civil law because it has become 'dead letter' in the law.

[9] Jhering, *Kampf,* p. 46.

[1] Jhering, *Kampf,* p. 46.

then on the following pages further expounded his conception of the importance of the feeling of justice.

As concerns the ideological construction mentioned—called now justice, now judicial conscience, now common sense of justice, etc. —I shall generally use, in the following reasonings, the expression 'common sense of justice'. In Scandinavia as well as on the Continent writers on jurisprudence besides the 'feeling of justice' very often speak of 'the common consciousness (not conscience) of law' (here = justice). Probably this term (consciousness) has been retained owing to the influence of the historical school. I cannot say whether or not the 'common sense of justice' is the best term in English for the construction in question. Perhaps such phrases as 'common legal mind', 'public judicial conscience', 'general feeling (or sense) of justice' or 'of law and equity' may be used equally as well.[2]

It is not probable that without that fanciful construction, which I am now going to call the common sense of justice,[3] it would have been possible for the feelings of justice to play such a part in the history of legal doctrine as they actually have done and continue to do. Yet I do not maintain that within jurisprudence one has exaggerated the importance to law of the feelings of justice. But I do assert that their rôle is and has been of quite another kind than legal writers have imagined, an imagination due to the ideologizing of the feelings of justice into (natural) justice, legal conscience, or the common sense of justice. The legal or

[2] In 1920 or so I heard the late Professor Vinogradoff use the phrase 'the common sense of justice' (in a lecture here in Uppsala) in such a manner that I got the impression that it was to be the proper term for the Scandinavian and Continental *das allgemeine Rechtsbewusstsein*. Afterwards I have used it in my English writings although I have gradually become uncertain whether it really is the best term for what I have in view. — I do not very often use the word 'equity'. Leaving equity as law in England to one side, equity must be synonymous with (natural) justice (see *Report* 1950, pp. 9—13). A few authors characterize equity as (natural) justice of the particular case at hand (see Weigelin, pp. 18 ff.).

[3] Seeing, however, that people in general, i.e. not only jurists and lawyers but laymen too, use the expression 'common sense of justice' only as a term for the ordinary feelings of justice in man, I am going to use the expression in question also in this meaning. Indeed, it is impossible to maintain a clear distinction between the two meanings of the phrase.

judicial conscience is craracterized as *der oberste Geltungsgrund der Rechtsordnung*.[4] The sense of it—as far as it can be discovered from those many and involved ways of reasoning—may be that this *oberste Geltungsgrund* was the foundation of an objective or material law forming the substratum of valid law, not seldom called positive law.

However, I am now, first, going to make certain remarks in order, thereafter, to show how one can be deceived through founding one's reasoning on the common sense of justice. In order to understand these remarks more easily, I refer to my exposition on pp. 43 ff. above. It can be shown almost as a rule that the common judgments of persons—less often their conceptions as to a certain case—of what is righteous and just, indeed, only in very broad outline coincide, on the whole, with the prevailing comprehension of those benefits which can be realized through human social life. The attitude of the common sense of justice in the indicated way of agreeing with the interests of social welfare has different intermediary links. *In part,* a particular psychological process here comes about. In the common sense of justice there is no question of a *reflected* consideration of what is useful to mankind. But it is the emotional life of man which according to certain psychological laws is indirectly influenced thereby. *In part* these psychological laws are such that the uniformity prevailing to a great extent in the emotional life in question, which gives this life its characteristic of the '*common* sense of justice' is conditioned by the maintenance of a system of rules. Without this maintenance the common sense of justice would lack all bearing and run into sentiments determined by nothing other than the individual's most primitive egoism, consequently into pure anarchy. Briefly and to the highest degree schematically, the attitude of the common sense of justice in society may be expressed in the following way: *certain social welfare interests* leave their mark on legal machinery which in its turn guides and maintains, assisted by the nature of man, of course, the common sense of justice. This significance of legal machinery for the common sense of justice is in the long run and on the whole dependent

[4] Jung, *Subjectives,* pp. 109 ff.

upon the fact that legal machinery is organized according to the predominant valuation of what is useful for the general public.[5]

However the common sense of justice implies, among other things, conceptions of right and wrong, just and unjust conduct, legal rights and duties. The common sense of justice considers such things as actually existing. Consequently in the sense of justice, it is not at all *only* a question of certain emotional attitudes, even if the feelings through the so-called common sense of justice can receive a particular, purely fantastic power and, even if conversely, the actual formation of the common sense of justice in the one or the other direction is occasioned by certain feelings (e.g. social feelings of revenge). Consequently, since the common sense of justice implies conceptions of supposed facts, it is clear that such a way of conceiving or method of approach will also bind the thought when it concerns the formation of legal 'rules' and their application. However those facts which are characteristic of the common sense of justice are imaginary. In this way the deductions from the dogmas of the common sense of justice are determined by certain false conceptions instead of by considerations for the social welfare. Sometimes it may indeed appear as if these deductions should follow, with logical necessity, from undeniably socially useful abstract principles and dogmas. However this is only an illusion. The significance of the abstract legal conceptions of the common sense of justice lies in their power to call forth feelings in agreement with their contents. If this power is lacking in the legal conceptions, all their meaning is lost, i.e. the common sense of justice has exactly this characteristic as distinguished from the theoretical consciousness, that it degenerates and becomes empty words so that one cannot even any longer *believe* in the reality of what one says *if* this is not supported by the *feelings*.

It can now be so that an *abstract* general conception of the common sense of justice arouses the feelings of justice, while the deduction from this conception in respect to a certain case leaves the feelings untouched. The following examples illustrate this. To the common sense of justice appertain such general

[5] This point will be further discussed below.

theses—certainly considered socially useful—as that 'contracts must be maintained' and 'property of another person may not be damaged but should be treated carefully'. Such conceptions also bring the feelings of justice to life. But this does not prevent the feeling of justice from reacting *sometimes* very strongly against this, e.g. that upon a poor promisor or harm-doer (and their families) ruin shall be brought owing to the omission of fulfilling the promise, respective of paying the damage. In such cases the deduction of the special from the general is *not* the expression of a logical necessity.[6] The explanation of this is that there is something special about the conceptions right and wrong, lawful and unlawful which makes logic unusable. This particular characteristic of the conceptions of the common sense of justice is that which I just indicated, namely, that the *words* however well they may be combined do not receive any meaning, if they are not supported by *feelings*. If this characteristic of the basic conceptions of the common sense of justice is not seen, then the consequence may be that one imagines oneself able to undertake logical deductions from the abstract conceptions in question. However, such deductions have no valid foundation. They only *seem* to follow from the *words* which entered into the basic thoughts of the common sense of justice. Yet these words for want of supporting feelings of justice are pure nothingness. From this one must be able to comprehend that such juristic deductions can lead to the setting forth of legal maxims which oppose or at least do not have their support in the common sense of justice.

The two examples just given illustrate this point. If the judgment of the common sense of justice is applied in such cases, the result would be that the promisor would not be bound nor would the injurer have to pay damages. When writers on jurisprudence arrive at the opposite result, which certainly, at least in general, should be the acceptable course,[7] this depends immediately upon the fact that they have taken the *general abstract conceptions* of the common sense of justice literally, overlooking the fact

[6] i.e. the deduction that in such cases the defendant's conduct should be actionable.

[7] From the point of view of a legal order being in accordance with considerations for social welfare.

that the feelings of justice do not accompany the words. At the same time one seems to understand that these words without any support in the feelings of justice are meaningless, for one brings in elements which if they were actually present would arouse the feelings of justice. E.g., one says that even a poor promisor who does not redeem his promise, yet he does set aside a legal duty which he has taken upon himself, or that he injures the reliance of the promisee, and as to the poor damager that he has yet acted wrongfully, thus contrary to his legal duty and brought down guilt upon himself, which must now be expiated with the coercion of paying damages. All the same in the indicated examples the feelings of justice do not follow, and the deduction of the special from the general lacks all logic. Nevertheless, as has been mentioned, jurisprudence in these cases indeed comes to acceptable results. That acceptable results are attained by such irrational viewpoints depends upon the pressure which rests on jurisprudence as a feeling of responsibility to the society where it is active, and forces it, in spite of the useless means, to aim at the social welfare.[8]

However it can easily occur that the deductions of jurisprudence from the common sense of justice are made without sufficient regard, perhaps none at all, for what may be considered useful to the common good. Here I would be able to cite numerous examples from the provinces of the law of torts and the law of contract. But space does not permit it. However, in the examples just suggested the constraint of certain words of a basic idea or 'maxim' of the common sense of justice upon jurisprudence effects not only one's belief in having deduced something but also that this belief counteracts the feeling of responsibility in legal writers towards society.

Thus, what should be observed is that jurisprudence, whether or not it arrives—in its deductions from the fundamental ideas of the common sense of justice—at an acceptable result from the viewpoint of social welfare, lacks tenable bases for its reasonings.

Although the consideration up to now within jurisprudence of the feelings of justice has been not only useful to the develop-

[8] Cf. pp. 53–76 above.

ment of society, but has also played a fateful, indeed in some respects, a disastrous rôle to jurisprudence itself, they are nevertheless as I have alluded to above[9] indespensable to law, i.e. to society, to legal machinery.

When the jurist forms an opinion of or investigates legal machinery he must always keep in mind that the material of this machinery is not composed of tangible material in the usual meaning but of persons as psycho-physical beings, i.e. of their actions and modes of conduct as determined by factors which influence through cooperation between reason and feelings. Obviously this circumstance comprises an essential condition for the entire legal ideology. Because of inability to comprehend the relevant connections or because of oversight of them—or however the explanation should be expressed—the attitude of man towards the law has actually been idealized to the conception of an objective or material law elevated over time and space. In this work I am trying to clear up the actual state of conditions in a more or less purely schematic outline. At this point I wish to state as forcibly as possible that human society, i.e. the legal or social machinery —as far as it is conditioned by the nature of man—does not at all depend on man only as a thinking, i.e. rational being. Man's feelings or sentiments of duty toward individuals and society, his ideal demand for equity and justice aroused in connection with conceptions of rights and duties, his ideas of right and wrong, and his moral reactions against imagined injustices, all these too, form the *absolutely necessary* constitutent elements of the legal machinery. Without the senses indicated, a social organization would simply be unthinkable. In connection with the observation of the importance of the respect for the so-called right of property and therewith of the maintenance of legal machinery, I have already mentioned the fact that the idea of the right of property is commonly followed by the feeling that it *ought* to be *realized*.[1] In a similar way the feelings of justice have their great importance for the keeping of agreements[2] and

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[9] Cf. pp. 95 f. above.

[1] See pp. 94 f. above.

[2] See *Unw.* I, pp. 134--136.

abstaining from inflicting damage on others and, above all, from committing crimes.[3]

The rules of law and their application do not influence the conduct of man only by means of conscious reflection. The effect most important on man's conduct in society comes from the contact that divers rules of law are capable of establishing with certain chords in the *emotional* life of man. The application of the rules in question by law-courts and executives maintains and strengthens in man's emotional life the ideas, i.e. sentiments or feelings, just touched upon, of equity and justice, of rights and duties, of right and wrong. In this respect a paramount importance must be attributed to criminal law.

For the sake of brevity, one could put the matter thus. Criminal law as actually in force exercises its essential social function by means of seizing, as it were, the general moral instincts and of dragging or putting them with it against offenses and other crimes. To some extent the like may be said of the social effect of the maintenance of the law of fault-liability, although here the effect would not have occurred if the soil had not been prepared through the impulses of loyalty developed through the maintenance of the criminal law. Moreover, it may be said that criminal law and, to a certain degree, the law of damages too, outside their own provinces, exert an influence upon people to act spontaneously in accordance with the laws and to keep contracts and other agreements and promises. This matter is perhaps not easily understood without further consideration of my development of it. Yet in brief it may be noted that this actual condition—that the communities are not overrun with crimes, other injuries and actions hindering or otherwise obstructing social economy—would not have been brought about through laws and their maintenance, the so-called administration of law or justice, if the emotional life of man were not what it actually is. A necessary condition for the effect of the legal mechanism in certain areas, particularly criminal law, consists namely of the fact that the laws influence, broadly speaking, everybody in the community to a certain social-psychic attitude. Thereby, all things considered,

[3] This subject is dealt with in more detail further on. See pp. 228–235 below.

every man will live in and be influenced by a milieu where there is accumulated, so to speak, a moral power-generating center for the benefit of the obedience of the laws. It is, above all, the pressure from this milieu which produces and maintains the impulses against crimes and other so-called unlawful actions. And it is this which I have in mind when I say usually that criminal law in particular, if it is successful and fulfills its social function, has the effect of seizing, as it were, the general moral instincts and in effect turns them against 'wrongful' actions. This subject is developed below (pp. 228–235), but nevertheless this point should be noticed here.

As a matter of fact, however, the *power-generating center mentioned is the essence, the vital point, of legal machinery.* Without it social organization would be an impossibility. The genesis and the continued existence of this center of power we are not able to explain except through the assumption, confirmed by the history of the human race, of a certain psychological disposition in man, an instinct in him to build up a society and to maintain it in order to live there.[3a] Just as with other instincts in human beings as well as in animals, this one is explainable as an impulse to actions preserving the life of the race.

In fact, there is, concerning the so-called law, in the mind of man a mixture of rational conceptions on the one side, and on the other side of feelings or senses. With a conventional term calling this mixture—as has been done in this and other works of mine—the 'common sense of justice'[4] we must observe how this, although functioning quite irrationally, becomes the social instrument, of which I have spoken, by means of partly a social instinct, as it were, and partly the characteristic and intensive susceptibility of it to the influence of the law actually in force. This susceptibility is—I think we are bound to assume it—conditioned by a sort of social instinct in man. It is true that the ideological conceptions of the common sense of justice, confusing cause and effect, put nearly everything all topsy-turvy. But through the fact that in all probability there rings at its bottom so to speak a keynote socially attuned, the common sense of justice

[3a] See above p. 128 n. 6.

[4] Cf. pp. 159 ff., particularly 160 n. 3 above.

generally yields to points of view regarded as obviously useful to society, if these points only are asserted with due authority. Indeed, the necessary authority is exerted through the rules of law and their application by law courts and executives. A presupposition for this authority of legal rules is, however, that they themselves are in accordance with prevailing valuations as to what is best for social welfare.

In order to illustrate this matter I have sometimes mentioned the present relationship of the common sense of justice to self-help (in the meaning of oneself taking one's 'right' or 'taking the law in one's own hands'). In order to satisfy the viewpoints of the common sense of justice, the legal rights, properly speaking, *ought* to be realized at any cost. Therewith the consequence would arise that self-help would become a general legal institution. But the incompatibility of self-help with the interests of social welfare—as implying a war of all against all, should the consequent maintenance of the self-help render impossible the entire community organization—has carried the original *national* common sense of justice so far in the direction of yielding that the 'unlawfulness' of the so-called self-help can to a great degree now be said to have become the postulate of the common sense of justice itself.[5]

What I have now given on the last few pages is a brief description of the connection in which the 'common sense of justice'

[5] The common sense of justice in *international* relations has, of course, not given up the idea of a State itself asserting its own rights. Still in Oppenheim's *International Law* (6th ed.) one can read that 'States have on occasions to take the law into their own hands. Self-help, and intervention on the part of other States which sympathise with the wronged one, are the means by which the rules of the Law of Nations can be and actually are enforced.' See Oppenheim—Lauterpacht I, pp. 13 ff. The cited words are characteristic of the state of the continually prevailing jurisprudence. At least I myself can find no idea of reason in them. As to this one may read my book *Superstition or Rationality?*, pp. 161—239; as noted in the Introduction this work is unfortunately now out of print. However if one reads these pages it may be something of a surprise to learn that my view of the matter is not touched upon in any of the later editions of Oppenheim's *International Law*. In 1936 I published a brief work in Swedish, *The Law of Nations—a Deadly Peril to the Nations*. It was subsequently translated into English but difficulties arose which prevented its publication in England.

must be placed, to make it possible to understand the legal machinery and its way of functioning. As far as I know this connection has been overlooked. As a matter of fact, legal writers have considered the ideas of the common sense of justice more or less as rational manifestations, and have used them as discussable starting-points of scientific reasonings. The lack of comprehension of this great and important matter has always had a fatal significance to jurisprudence. Because of this lack the common sense of justice has come to constitute the source, now covert, now openly recognized, of the ideologies of the natural law, of the historical school, of positivism in all its forms, of the free law-school (including certain sociology of law and the jurisprudence of interests); circling all these ideologies around a higher, an objective or material law, out of which both written and unwritten law as well as the administration of law had to draw their authoritative power.

In my theories, I have never failed to observe the paramount importance in the legal machinery of the common sense of justice. But *this importance is the exact reverse of its importance according to the legal ideologies.* Far from being the source of any 'higher' law, the common sense of justice is characterized by and its peculiar importance in legal machinery is conditioned by the most primitive feelings *for* 'the right' and *against* 'the wrong'. To a certain extent guided by social instincts these feelings in the course of the centuries have been refined by means of the maintenance of the social organization, i.e. the legal machinery. It is only as bridled and checked by the legal machinery that the feelings of equity and justice render to society their indispensable service. Their originally *spontaneous* nature—so very important to society—is not suppressed by the refining, at any rate only in part. That is why they have such an extraordinarily great importance to social life.

However, *basing* law on the common sense of justice is the same as putting the cart before the horse. Certainly, there is a kind of interaction between the common sense of justice and the contents of the rules of law: the common sense of justice, developed and cultivated through the maintenance of the said rules, in its turn, exercises an influence upon the development of customary law

as well as upon legislation. That is, however, a matter apart without which, to be sure, legal ideologies could not have arisen and flourished. Writers on jurisprudence have let themselves be deceived by the interaction just mentioned. But what in this connection is of crucial interest is that *without the 'rules' of law actually maintained the common sense of justice would lose precisely the points of support which are absolutely necessary for the indispensable rôle which it plays in the social organization, in the legal machinery.*

Therefore, basing law on the common sense of justice presupposes, if again I may use a figure of speech, the technique more familiarly known as biting one's own back. If the legal machinery stopped functioning the feelings of justice would lose all bearing and control. By means of all sorts of sophistry they would be linked into quite other paths, for the benefit of the individual interests, and at the expense of the social ones. Gradually they would be transformed into purest passions of vengeance and become an instrument of the primitive instincts of animal egotism. With certainty the social structure would at least be fully disorganized. If in this way the whole connection is considered, one will be able to understand how radically reality is distorted by those who believe in rights and duties etc. and believe in law as being based on the common sense of justice. One will also be able to understand that there is in reality no equity, no (natural) justice, either beside the law or opposed to it, and consequently, that the conception of needing at times 'to go beyond the law, or even contrary to law' by 'administering equity as opposed to law',[6] is highly imaginative.[7]

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[6] Cf. Salmond—Parker, *Jurisprudence*, p. 105.

[7] In his criticism of Timasheff's work, *An Introduction ... etc.*, Olivecrona expresses himself in the concentrated and pregnant form distinguishing this scholar: 'The error consists of cutting away the legal order from the causal connection on purpose, thereafter to explain that order out of the (common) sense of justice.' See Olivecrona, *En sociologisk rättslära*, p. 173. Olivecrona made this statement with reference to my representation in *Obligationsbegreppet* II, pp. 71 ff. Olivecrona thereby turned against the doctrine of Leo Petrazhitsky which has influenced the views of Timasheff. Cf. Olivecrona, *Sociological Explanation of Law?*, pp. 180 f.

Social welfare—no principle but merely a practical guide

A Danish legal philosopher, Alf Ross, has stated that I have used 'social welfare' as a 'principle', i.e. as a maxim which has an 'univocal' meaning and which upon the judgment of legal-political questions is always able to indicate the one and only solution which agrees with the concept of social welfare.[8] It is quite true that I have at times spoken of 'social welfare' as a principle for legislation and legal interpretation. But it ought to be clear to anyone who had endeavored to learn more completely the workings of my method, that I have not thereby used the word 'principle' as a technical philosophical term. This would have implied that I had accepted social welfare as an absolute value, a conception from which I have dissociated myself from the very beginning. With regard to this one need not even upbraid me for having made an inappropriate choice of words, i.e. 'social welfare', from a linguistic point of view. If a person says that he wishes in this or that respect to seek a benefit for himself or for another, this means only that he will act in the way which according to *his* conviction, i.e. *his* valuation, is of benefit in the respect in question. In other words with 'social welfare' I have chosen only to give an abbreviated expression for that which according to certain valuations is considered to be the best for the society with regard to the question of legislation (or interpretation of law) in this or that respect. Already through the fact that there can never be a question of only a single person's social valuation, it must indeed be clear that the 'univocalness' asserted by Ross must be foreign to the 'social welfare' in my terminology. A characteristic of the *valuations* of *many* persons is, among other things, that owing to their subjectivity they need not at all be univocal. I have here used the word principle in the same way as a librarian or an industrialist may talk about 'principles' for managing a library or a factory. These 'principles' are of course consistent with the fact that one now and then may be on the horns of a dilemma concerning the best, i.e. the most practical solution, and that one in such situations, after discussing the circumstances, makes one's *choice* whether this is to be realized

[8] *SvJT* 1933, p. 117.

through the decision of one man, the majority, or by a certain other plan determined beforehand. Even if I sometimes have called 'social welfare' a principle, it has in other words only been a question of a *method* for legislation and legal interpretation and, naturally, also for constructive legal science.

No enterprise is ever successful if the person who directs it does not know what he *wants* to do with it. Consequently the purpose of the enterpriser's activity becomes determinative for his decisions and actions, to the extent that he is a reasonable person and has knowledge of the matter at hand. In a similar manner it must be so with the 'enterprise' called by myself the legal machinery. Because of its complicated nature—which depends not only upon its scope but above all upon its nature and continued development over many centuries—the 'enterpriser' indeed still today does not always have quite a clear idea of what exactly in detail is the purpose for which he is active, and yet even more obscure does this sometimes appear to his expert advisers, i.e. here writers on jurisprudence. But that is another matter. It is still something else that the legal ideological starting points have become mixed with the realistic viewpoints and have obscured the latter so that they have, sometimes only in an unclear manner, been taken as motives and become determinative for the decisions of the legislator and the courts as well as for the activity of jurisprudence. My thesis of social welfare, as we have seen, has as its primary purpose to remove completely the legal ideological chimera thus enabling persons concerned with legal activities and jurisprudence to be influenced *exclusively* by realistic viewpoints, which one must place clearly and directly before oneself in the activity under consideration.[9] I have sum-

[9] When I occasionally mention for my own part that one 'should' or that one 'has to do' something, there is of course never a question of any objectively valid 'ought' but only of a way of acting which is placed in relation to a certain purpose which one has placed in front of oneself. If a person is in a sailboat crusing, he 'ought' to haul home the sheets, if he then goes with the wind he 'ought' to slacken them accordingly, assuming all the while that he intends to sail as fast as possible. (Cf. above p. 134 and the note referring to Cohen and Cairns.) The word 'ought' in this usuage has nothing to do with metaphysics. I have unfortunately been obliged to enlighten Ross on this matter, see *SvJT* 1932, p. 541 ff.

marized the points of view referred to by using the term 'social welfare' because, in part, they must of course be determined by some purpose which the law-maker in his activity places in front of himself, and in part, because no other purpose, after legal ideology is rejected, has been found out than this: to benefit the society, whose servant the law-maker actually is, accordingly the people who are organized into the society—in other words, to promote and encourage those activities through which people in general may be able to attain what they attach value to and strive for.[1]

The matter can be illustrated by comparing the community or society with an enterprise in which several persons have united under common leadership. If the leader is reasonable and not corrupt he will then consider the success of the enterprise as the aim of his activity. But this does not mean that he may not at times experience grave difficulties because in a situation which arises he does not feel convinced of what is best for the success of the enterprise. Should he accept a certain quotation offered or instead draw up another transaction? Or perhaps because of unsettled market conditions, should he remain for the present passive? Should a suggested addition to the business complex be effected, should the activity be extended with a new branch, or perhaps should the enterprise be restricted or part of the organization converted to a new line? Etc. These questions according to the nature and extent of the enterprise can be very difficult for the manager to answer, and they demand thorough investigations which often he is not capable of carrying out himself, but for which he is forced to seek the advice and expert knowledge of others. And in spite of the greatest care and energy it may just as well happen that he cannot convince himself which alternative is best suited to the prosperity of the enterprise. He can then decide to remain passive, but he may also choose to take a certain risk because he finds it appropriate to take the risk, inasmuch as passivity is out of the question. But whatever the result becomes, he has—presuming he is reasonable and honest—considered and tried to answer the questions with the best interests of the enterprise, i.e. of the participants therein, before his eyes.

[1] Cf. p. 131 ff. above.

Similarly now is the situation with 'social welfare' as decisive for the leadership of the society, which for the sake of clearness we can liken to a cooperative enterprise. That person has excluded his reason from every possibility of understanding my writings who—in spite of what I have done for the prevention thereof—keeps harassing my thesis of social welfare with ties, bonds or links to metaphysics or transcendental views in any sense at all. As little as the economical manager with reference only to the prosperity of the enterprise can be thought to have figured out a certain solution for every conceivable situation and excluded another, as little, indeed, to a decidedly lesser degree—because of the difficulty of perceiving the 'society'-enterprise and its complicated nature—can the law-maker and the legal interpreter, only by placing the community's prosperity before themselves as the object for their activities, be said to have determined for the future, the lines for their actions (other than in such general outlines as I have stated previously).

That my thesis concerning social welfare has this meaning must be apparent from the development of the subject which, although in different words, has been given earlier. When Ross was not influenced by it, but persisted in his talk of the 'univocalness' in my 'principle', i.e. concerning its absolute or objective character, this may perhaps be connected with a certain subtleness in his statement of wherein the objective character should lie. Namely, the 'univocalness' of social welfare shall appear in that I consider it 'determined through a quantitative maximum of the satisfaction of needs effected by the different solutions possible'.[2] The meaning may indeed be that I, in any case, however I seek to wriggle out of it, must comprehend it as something useful in an absolute and objective meaning, that the greatest possible satisfaction of needs be achieved, even if the means for this end depend upon subjective valuations. Yet this is pure romance from Ross' side. I have as emphatically as possible proclaimed that I proceed from the establishable *factual* aspirations and efforts of men for taking care of their possibilities of life; in doing so I leave aside entirely the question of whether men *ought* to have

[2] Ross in *SvJT* 1933, p. 117.

these aspirations or not. If this starting point of mine is not illogical—something which Ross has not dared to assert—then his attempt to represent me as a metaphysician is hopeless.

I have mentioned this strange persistency of Ross in order to suggest, as a possible explanation for it, that he may have been led astray by a particular oversight, namely, of the fact that the valuations which I refer to as in their turn decisive for the law-maker—although obviously subjective—do indeed have a certain, if only relative *homogeneity*. Ross has possibly considered this 'homogeneity' as a metaphysical fantasy of my way of thinking. However it is based on experience concerning those valuations which are significant in the investigations of mine in question. Actually the condition of matters is the following which I believe it appropriate to relate briefly, irrespective of those apparent misunderstandings which have been expressed by Ross.

That which is decisive throughout for my reasoning is this, that no other valuations can have significance as a basis for legislation which will achieve moral power, and so be able to perform its social function than such as those in which one evaluates in the consciousness of one's *mutual connection with other individuals.* In other words it is a question of *social* valuations. One evaluates with respect to a certain social condition, whereby consequently the thought of the mutual connection with others constantly enters into the valuation. In spite of the social attitude, the valuations naturally can come out differently according to various social environments, different political, ethical or religious views, different social knowledge, etc. Thereby various scales of social values arise. This I have never denied, but on the contrary, to prevent misunderstanding, have often pointed this out. But in spite of all divergencies there is yet a great deal which is in common. There are always certain elementary needs which mankind in general have, e.g. those interests of food, shelter, comfort etc. mentioned on pp. 140, 149 f. above. Such elementary needs lead to the following common interests, among others: to counteract a great number of actions (e.g. most crimes, breaches of contract, bodily harms and other injuries); to stimulate other actions (encouragement of common transactions, including common production, as well as spiritual culture); and both by these and in

other ways to provide for the people. Thereby, then, also exists on the whole a common attitude for the maintenance of penal law, law of torts, law of contracts, laws of corporation, and of incorporation, law of land partition, law of waters, and various so-called social laws etc. Of course the valuations can diverge when details are concerned, both in regard to the existing interest itself and the means for realizing it. Thereby, however, it is of a particular significance that the various evaluations do not take place in such a way in abstracto, that they are undertaken irrespective of the conditions of power within society. However much the social ideals which enter the minds of the various groups in the community may distinguish themselves, yet every group in its valuations is always forced to consider the actual conditions of power. Thereby an equalization takes place, a *platform is brought about,* so to speak, *on which the social aspirations of the various groups meet.* E.g. an extreme radical group would not seriously seek to bring about a complete adoption of its ideals but is satisfied with attaining the state of affairs which provide only a *certain* consideration towards its interests; while on the other side, a group with conservative interests, in order to check subversive tendencies finds it most appropriate to make concessions in favor of radical groups. In this way, in spite of all differences, there arises a *certain identity of social valuations.* An easily understood example can perhaps make clear how a result can be attained on the basis of originally different valuations. Let us suppose that 20 men from various places are assembled to move a boulder or save a building from the danger of fire etc. No person of authority appears. Some find one method, others another, a third group still another etc., to be the most appropriate. However, finally after a compromise of one kind or another a cooperative work is carried out. The unifying interest of bringing about *something* at least which all consider worth working for, makes the conflicting groups subordinate in one way or another separate valuations which in themselves were disapproved by each one of the groups. Of course it can also happen that the controversy in the valuations will lead to an entire fiasco. But returning to the social valuations, the situation is more favorable in so far as it is the valuation of the law-maker which is im-

mediately decisive and the law-maker has time and resources to survey his selection of the best possible unifying line of action. Naturally the law-maker can fail in his attempt to find an acceptable line and thereby a legislative measure will not be forthcoming. Of course with such a measure he can also be mistaken in that one or the other valuation, which has been satisfied only in part or not at all, will not be silenced and thereby the enacted law does not obtain the necessary moral power. The legislator may then take into consideration whether the malfunctioning of the legal machinery thus occasioned should be endured or should changes of one kind or another be introduced.

Concerning the relativity in the homogeneity of the social valuations it may be pointed out that there are of course large areas in which they may be practically speaking completely homogeneous. Here belong such things as the question of punishment for a number of crimes such as murder, robbery, assault and battery, larceny, embezzlement etc. Yet naturally even here differences of valuation arise concerning the borderline between what should be punishable and what should be free from punishment. In addition, the estimations of the social value—considered infringed by a certain crime—which influence the law-maker's determination of the scales of punishment, may differ. But in both of these respects the situation can also be that no difference in valuation makes its presence felt among people in society. And as far as this is the case it can be said that the social valuations concerning a certain conduct being made a criminal offence are practically speaking homogeneous. The *relativity* in the homogeneity of the social valuations is however illustrated when the question—to remain continually within the field of criminal law —is of such things as punishment for the arrangement of a certain type of boycott, for participating in a certain type of strike, for coercion or force against strike breakers, for certain *attempts* at crime or *preparations* for crime, for abortion, for furnishing of contraceptives, for homosexual actions etc. In the field of civil law the social valuations concerning the laws of landlord and tenant offer a good example of the relativity in their homogeneity. Moreover reference can be made to a large part of the so-called social legislation. In all of the cases indicated, one finds how the

social valuations have clashed more or less strongly with each other or perhaps even constantly oppose each other, diverging now through various estimations of what is most useful to society, now through various more pronounced opinions of morality and the like. The struggle which arises between the different valuations when these are, so to speak, actualized can effect an equalization and results perhaps gradually therein that one for practical reasons, i.e. in order to actually achieve *something* on boths sides, at least, 'yields' so much that a legislative measure becomes possible.

To return finally to Ross' reproach against me for metaphysical reasoning, one may perhaps as a contributory reason for it also consider the possibility that he has misunderstood the import of one of my starting points, namely, that legislation must have a purpose or aim. Yet, I mean, as everybody must be able to understand, nothing other than that the 'legislator' as consisting of reasonable persons, must have some motive for his activity. No activity can indeed be possibly exercised by a sane person without some *meaning* being connected with it.[3] Accordingly the starting point in question must be empirically established. Ross' entire criticism of me appears to depend upon his inability to follow my reasoning. What this inability may depend upon is indeed not of any great interest.

However, an additional strange misunderstanding by Ross may be touched upon here. As we have seen above on p. 140 f. (cf. p. 149 f.), to illuminate the meaning of 'social welfare' as referring to realities and not to any absolute values, I have established certain obvious actual aspirations and endeavors of man, and characterized the furthering of these efforts as included in 'social welfare'. As an example I cited, *inter alia,* the effort to have 'dwellings furnished in the best and most comfortable way'. This has caused Ross to characterize it as a 'falsity' when I speak of public welfare. For, he says, A aspires to have a good dwelling for A, B a good dwelling for B, etc. Now if circumstances do not allow all of these desires to be fulfilled, then it here becomes a question of discordant, competing interests. According to Ross,

[3] Cf. p. 131 above.

in using the concept of *social* welfare I covered over this disharmony and only feigned that harmony prevailed between the interests in question of the various individuals.[4] A great deal can be said in reply to this curious interpretation. However, it is hoped that the following will prove sufficient.

It goes without saying that with social welfare I did not mean the sum of the various individuals' interests or the like. If I had given any expression to such a meaning, then Ross' objection should have indeed been understandable. However, such conceptions belong to the very things which I oppose so entirely and completely.[5] It is, as I have always maintained, on the whole, not the valuations of the *individuals* of the community which become *directly* decisive for the legislation, but those of the 'law-maker'. If it is now unavoidable that, practically speaking, all of the adults in the community *each one for himself* is desirious of having the best possible dwellings, then the *law-maker* is of course able to establish this condition or, what amounts to the same thing, that 'men in general'—it may be *everybody* for his own personal interest—have this interest, which thereby from the *law-maker's* viewpoint must be a *social* interest. Naturally the individuals also should, on the whole, understand this as a social interest if they actually thought about it more closely. But perhaps they do not do this; most of them have no direct reason to do so, since they are not otherwise than by chance concerned with social questions. Anyone who reflects at all over the matter would indeed think that it would not be desirable only for himself and nobody else to have access to acceptable dwellings, already because in such a case the distress or jealousy around him would make his own situation unpleasant, not to say unsafe. But further it must be kept in mind what the social community (with all that this word implies as to the influence upon the mind of man by social considerations) actually has meant for the humanizing of man, in part in a deeper meaning, in part also superficially, i.e. in that, however he may feel inside himself, he cannot escape, at

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[4] Ross in *SvJT* 1932, p. 347.

[5] See *Unw.* II, pp. 319 f. and cf. my exposition of the absurdity of the method of justice pp. 53–64 and 73 ff. above as well as pp. 281–285 below.

least in his outward appearance, from concurring with such valuations as are of benefit to mankind.[6]

Prof. Björling—my teacher of civil law at the University of Lund—never accepted my views on legal matters. Along with many others he meant that social welfare alone could not suffice. A multitude of 'principles' must be necessary. To this I need make only two comments. (1) The 'principles' outside of the regard for social welfare which Björling has thus revealed himself to be considering, either belong to legal ideology or are fictions. And indeed, how could it be otherwise? (2) Any other motive (that is not chimerical) for legislation and the administration of 'justice' has never been found than the purpose of being useful to society in some way or other according to certain social valuations.[7] After my statements on pp. 131 ff. above, the burden of proof must rest on him who asserts that other purposes could be found out according to which reasonable, non-corrupted people exercise legal activities in democracies.

However, I shall now formulate a few comments on the subject. But first a few of Björling's examples of criticism will be considered. He quotes an assertion by me that murder, deception, mischief (on another's land) etc. were no doubt actions which as estimated as being detrimental from a social point of view should be prevented, and that criminal law thereby were better motivated than by such as the 'wrongfulness' of the conduct in question. To this quotation Björling then adds:

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[6] Cf. p. 174 ff. above. — In 1953, twenty years after my refutation (in *SvJT* 1932 and 1933) of Ross' 'criticism' of my thesis, he repeated the same thing in his work *Ret og Retfærdighed,* p. 381 f., without giving the slightest indication that I had *answered* him twenty years ago, not to mention that I had refuted him. I commented on this matter in my book *Strikt ansvar* II: 2, pp. 554 ff., published in 1953. The attack made by Ross in his book *Virkelighed... etc.* him. I commented on this matter in my book *Strikt ansvar* II:2, pp. 554 ff., pp. 172–177.

[7] Indeed the laws under various earlier forms of government (not to mention modern dictators) immediately looked after certain person's interests only or after those of a certain class. But even here it must have been so that they were ultimately determined by the interests of society inasmuch as those persons immediately interested in satisfying their own interests were dependent upon the existence and maintenance of society. Cf. pp. 147 ff. above.

How much does the notion murder imply? Is it murder when the physician yields to the prayers of the diseased patient beyond recovery and shortens his torment by means of a dose of poison? Or when a customhouse officer fires at the boat of the smuggler but hits the smuggler himself? And where is the line to be drawn between punishable deception on the one side, and, on the other, non-punishable deceit or a conduct only too 'smart'? Or between punishable mischief on another's land and non-punishable invasion of another's right to land?[8]

These questions may not be considered motivated as far as they are prompted by my view. Apparently Björling wants to point out that the reference to 'social welfare' alone is here insufficient and that it must be completed with 'principles' extracted from the doctrine of wrongfulness (at the last question, from the rights-chimera, as well). Thus Björling has passed completely over my investigations into this matter. I have of course been very solicitous in my criticism of the conception of wrongfulness (or unlawfulness) to make clear that, among other things, the requirement of an action being wrongful in criminal law is nothing but a legal ideological veil placed over the otherwise crystal clear situation that the law-maker of the community cannot reasonably make criminal, and accordingly counteract, lines of conduct which in respect to prevailing humanitarian valuations in the community or because of social economic considerations it must be desirable to encourage or in any case not to counteract.[9] With his questions Björling seems to wish to carry the discussion into certain borderline cases where the question of liability to penalty is considered doubtful. He means that any talk here about social welfare does not help as a motive for the judge's interpretation of the law. First, I retort that the concept of 'wrongful' cannot in any way come to our rescue. But further, if the judge really is freed from the legal ideological encumbrance, there *is* then no other possibility for him to resolve the doubts than to seek clarity through finding out the interpretation whose consequences harmonize best with the understanding he has of the signification of the social welfare in such cases as that before him.

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[8] See *SvJT* 1924, p. 433.

[9] Cf. *Unw.* II, pp. 125 ff. See also 32 ff. above and pp. 218 and pp. 228 ff. below.

Perhaps in a certain case, however carefully and comprehensively he may reason in order to reach a clear decision, the judge is unable to free himself from doubts. Often such doubts are stronger in one direction than in the other, then the judge states his decision accordingly. If because of scruples of conscience he dares not to venture a decision, he may then ask to be excused and be replaced by another judge. For the matter at hand must be adjudged. That the doubts concerning judging in accordance with the thesis of social welfare may perchance in some exceptional case overpower the judge cannot indeed constitute any positive objection against the thesis in question. And how could the concept of wrongfulness be of any help to the judge? In order to assume the wrongful character of the action, he must *already* actually *know* that the action falls under criminal law (see pp. 37 ff. above). But he can only obtain this knowledge by applying the viewpoints of 'social welfare'! On the whole it must be obvious that no *real* help can be attained by means of the ideas of legal ideology or other chimerical points of view.

However, confining ourselves now to the case of the physician, the matter can be briefly stated in the following way. Those humanitarian valuations which generally prevail in society would —provided they alone would be decisive for that which could be considered useful from the social point of view in such a question—certainly lead to the action of the physician as not being punishable at all. As this is so, the lack in Sweden's criminal code of every possibility in this particular case of measuring out the punishment with regard to mitigating circumstances[1] becomes particularly important. It is beyond all doubt that the physician's action—even after consideration of the viewpoints to be mentioned below presently, which possibly run counter to the humanitarian —cannot according to general social valuations have violated *such a significant social value* that a sentence to life imprisonment could in any way be considered reasonable. Accordingly such a sentence should to a great extent act to challenge the common sense of

[1] The Swedish Penal Code does not recognize any other punishment for murder than penal servitude for life. Murder means intentional killing of malice prepense, thus not implying manslaughter. In our case the physician killed his patient deliberately. See S. L. 14: 1 (Swedish Penal Code, chap. 14, sect. 1).

justice and in general evoke reflections concerning the absurdity of the viewpoint of the law applied, of the judgment or both, reflections to some extent contributing to the depreciation of veneration for criminal law and its administration. It is certainly true that legal ideological, ethical or religious viewpoints, or a combination of these, influence a not insignificant number of persons in the society to the valuation that nobody under any circumstances (disregarding the executioner of a person sentenced to death or soldiers in time of war, for example) has the 'right' to take the life of another person, except when such an action might be necessary in certain situations (of self-defence and necessity[2]) to save one's own or the life of a third person; consequently not even the physician may be entitled to release his incurable patient who lies tormented on his death bed and pleads for the doctor to administer the poison. But even those persons who have the attitude mentioned are also in general animated by other less dogmatic humanitarian evaluations. However much they may disapprove of the physician's conduct, they would certainly feel towards the same in such a way that they would gladly agree with others protesting against a sentence of penal servitude for *life* for the doctor.

From this it appears that even in such a case of legal interpretation as this, one achieves clear result by allowing oneself to be guided by social welfare as a motive for the interpretation: as far as 14: 1 S.L. is so construed that the physician's action comprised murder and would fall under it, the paragraph in question fulfills no social function but serves to inflict social injury. However there is another social aspect which, perhaps, somewhat complicates the question. The judge can reason in the following way. Through the interpretation just made, which freed the physician, certain risks are revealed by the fact that persons could be put to death and the perpetrator would remain free from punishment without the situation *in reality* having been what it was assumed to be in our case. Of course the physician—or

[2] In *Strikt ansvar* II: 1, pp. 119–258, I have made some remarks partly on the history of the doctrines about the law of necessity, partly on the present state of the law of necessity in different countries, partly on the question whether damage inflicted under necessity should be actionable.

whoever performed the action—must have convinced the judge of the particular circumstances, or at any rate, have made them probable in order to be freed from punishment. But even if the judge in the particular case feels completely convinced, he can mean that a consequence of an acquitting sentence may be that it opens new possibilities for a real murderer to go free, in that the necessary evidence in a particular case can easily be *arranged* so that no risk exists for the matter to be disclosed. The sick person is buried and accordingly cannot contradict either the excruciating pains or the prayers for deliverance. The argumentation for the incurableness of the disease may even have been false without this fact having been revealed afterwards. But even the viewpoint just mentioned is entirely social, originating as it does in consideration for the social valuation of security of life and limb for man.[3]

Whatever result the judge arrives at after deliberation upon all of these viewpoints, when he takes everything into consideration, is, properly speaking, quite indifferent to the subject now treated. For whether he frees or condemns the physician, he has made himself abide by his social valuations. Even if in different judges the social valuations in a case of this type would diverge and one judge would free, another condemn, this could not—as must appear from my comments on pp. 171 ff. above—be taken as an objection to my thesis of social welfare. However it appears hardly probable that any difference in understanding of the way of reasoning in accordance with this method would arise in such a case as that before us between different judges, assuming that they are freed from the legal ideological ways of thinking and the manner of legal interpretation associated with it. The absurdity of sentencing the physician to *life* imprisonment must be quite striking from the social point of view itself. The viewpoint mentioned which perhaps complicated the matter somewhat must be taken quite simply for what it is and nothing else, i.e. as a reminder that here we may have a gap in our criminal law. Perhaps the risk hinted at above (through releasing the physician) should be removed by inserting a new paragraph in the light of

[3] If the physician because of the point just discussed was sentenced to life imprinsonment, the possibility always remains to 'sue for (the King's) pardon'.

such a case as has now been discussed.[4] But a prudent judge does not allow the present circumstance of the indicated gap to lead to an absurd judgment framed according to the *letter* of the law. For he knows that he cannot by the mere words in a criminal paragraph be bound to pass the sentence of punishment, because this always shall be conditioned by the so-called wrongfulness of the action. I have shown above that this condition cannot have any other realizable meaning than to lead to the very discussions which I have now outlined. 'Wrongfulness' as opposed to 'lawfulness' is the veil with which legal ideology obscures such matters as the viewpoints just indicated.

After this I do not consider it necessary to take up the three remaining questions in the quotation from Björling. The possibility of receiving any support from the concept of wrongfulness for replying to these questions is just as meager. The 'application' of this concept includes going around the question by replacing it with another which in its turn is only a cover for that which one feels by instinct ought to be discussed. What the fourth and last of Björling's questions concerns—about the boundary 'between punishable mischief on and non-punishable invasion of another person's right to land'—it is apparently not only the distinction of wrongful as opposed to lawful but the ideological doctrine of legal right as well, which according to Björling (against or along side of social welfare?) supplies the guidance for bringing about the answer. This enlargement of viewpoints cannot strengthen his position. That another's right to land which Björling here mentions shall above all be the right of property in the legal ideological meaning. There cannot be the slightest doubt about this. Yet there are no rights. The more or less secure position vis à vis property which has been ideologized by writers on jurisprudence to the right of property is, as we have seen previously,[5] only a consequence of or—perhaps more correctly—conditioned by certain legal 'rules' of coercive measures (including, among other things, punishment) maintained against an 'invader' and by the

[4] A paragraph perhaps of a light punishment and of freedom from punishment in case of the observance of a certain procedure (e.g. the presence of impartial witnesses).

[5] See pp. 78 ff. and 93 ff. above.

influence of the maintenance of such rules upon the common sense of justice. Accordingly, however it may be twisted and turned, it is logically impossible to achieve any help in answering Björling's question through an analysis of the conditions of the legal right or rights in respect to the land in question. What in return *does* help us and is the only thing that *can* help us to answer Björling's question is an analysis of the consequences from a social point of view, according as, in such a case as this, one considers the 'invasion' as punishable or free from punishment. To further illustrate this subject with examples would take up too much space here.

Although Björling has not fully considered what actually is concerned in my thesis of social welfare—perhaps understandable as at that time (1924) I had not yet evolved more completely its contents—it is of course quite correct that different meanings of what is useful or best for society may often come about. But if this is to constitute an objection against my doctrine, then that objection is truly incorrect and, as must appear from well nigh every line of this exposition, serves only to 'force the open doors'. I have never given the slightest indication that my aspirations should extend to the point of furnishing some kind of a key whereby one could unlock the gate of knowledge in the territory of law. With my theory I have sought to show that *way*—revealed by the nature of the questions—*easier or more difficult to follow,* which one within constructive jurisprudence has to proceed along in order to work for its further improvement and development according to the best possible epistemological insights into the functioning of legal mechanism. I have maintained that legal ideology as being untrue to real life must be cast overboard, also that one has not found out any other method which does not oppose scientifically established viewpoints, than that which I call the method of social welfare; a method whose use can sometimes presuppose a great deal of discernment, knowledge and perseverance. If even an investigator qualified in this respect does not yet feel convinced of the way the problem presented should be solved, i.e. convinced of what in the existing question is to be understood as useful, respectively most useful, to society, or of the contents of that maxim of action through whose maintenance

the interest considered by him as socially useful could be provided for, so may he act accordingly and then present his reasons for doing so. Another investigator may perhaps correct him or complete his analysis. Nothing can be done about this. The valuations within the sphere of constructive jurisprudence can be very exacting because of the intricate objects which they concern: the legal machinery with its network of innumerable threads, invisible to the naked eye, which run now one way now another, certainly in an order which is causally bound but yet where the larger causal connections because of the countless number and unique type of cogs in the machinery, with the fact of the successive forming of the causalities themselves, are sometimes so complicated that even after the most diligent investigation one cannot be quite clear about how and where the threads run.

In this way if an 'unsolvable' question has been of current interest for the law-maker or the judge as interpreter of the law, it stands to reason that upon my thesis, free as it is from all absolute points of view, must be placed the motto: the *best* need not blot out the *good*. This means that the law-maker or the judge must act in the situation that has arisen according to his best understanding, to which it appertains that attention is constantly directed toward the consequences to society of the contemplated or projected action. Accordingly, perhaps the law-maker will refrain from the planned measure or arrange things so that the difficult question can be avoided or challenged as little as possible. But it can also happen, because of a more or less importunate valuation prevalent in society, that he believes that he may best comply with the interest of the society by an attempt at 'solving the question' by means of legislative measures.[6] As to what concerns the interpretative judge he is of course always forced to proceed to a decision. He can do nothing else but hand down such a decision which in spite of doubts as to interpretation yet appears to him, with respect to its consequences, the most advantageous from social viewpoints. If there have been precedents in the matter which through the incomplete investigations now indicated have been made doubtful, generally the judge may be

[6] Cf. p. 150 ff. above.

acting according to the method of social welfare when he simply continues on that path which practice up to that point has followed.[7]

Hereafter it should be understood that this assertion against my thesis—that one (i.e. particularly the law-maker and judge but, of course, also what I call constructive jurisprudence) is not always able to determine what in a certain question would be socially useful or what would be required in order that an interest specified under the 'social welfare' may be looked after in the best possible way—to be sure in itself is quite correct, but as directed against the thesis in question can have no reasonable bearing and only forms a completely meaningless remark or objection. Indeed, is there anyone who is prepared to state another realizable, and accordingly not chimerical, motive or purpose for legal activity other than that which I have here sought to describe and which I in quite general terms denote as social welfare? If so, then, please present it! Every purpose such as realizing the ideas of 'right' or 'equity and justice' or any other manifestation whatsoever of the common sense of justice cannot lead to anything other than attempts at the impossible. Aims of the type just quoted can only be 'anchored' in the legal ideological chimera with its fantasy of an objective or material law.

It is true and follows from what I have said previously that even an enlightened law-maker quite freed from legal ideological prejudices may at times feel constrained to yield to a valuation which is based upon legal ideological conceptions of absolute duties and of legal rights (which are always absolute even if they

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[7] I repeat what was said on p. 158 (cf. p. 144 n. 1) above, that I have only legal *interpretation* in a restricted sense in view and that the judge in general must follow clear and univocal law and not his social valuations that may possibly oppose the same. I say 'in general', considering such cases as that of the physician noted above and the absolute prescription in S.L. 14: 1. It must also be noted that, particularly in criminal law, there can arise the question of whether the legal reaction is to be adjudged even though the conduct verbatim falls under the section (or unwritten law-rule) in question. Circumstances obscured by the doctrine of wrongfulness and lawfulness can make it obvious that an application of the rule in such cases would be contrary to social welfare.

should be termed 'relative'[8]), on the whole, of all types of objective values. Yet such a law-maker perceives that such conceptions are foreign to reality. Accordingly he cannot allow their contents to enter into the purpose before him. For this would mean that he would allow himself to be lead by a pure chimera. In such a situation the purpose he accomplishes can therefore only be to benefit the community by giving way to the valuation in question in spite of its dependance upon false conceptions. The circumstances have been such that they have caused the law-maker to consider the setting aside of such a valuation, although disapproved by him, as being more harmful than useful to society.[9]

Through a law which has come into existence by means of a concession to a 'social' valuation based on legal ideology, that *line of conduct* can certainly be encouraged which is believed to be objectively just. But never through such a law can the purpose of *carrying out what is objectively just* be realized. The 'objectively just or rightful' cannot be realized even by the maintenance of laws most carefully pondered upon, for the objectively just or rightful is always only a figment of the imagination.

A Swedish judge's misunderstanding of my thesis concerning social welfare

A more balanced criticism than that of Professor Ross was made by a Swedish judge, Harry Guldberg,[9a] formerly a member of our Supreme Court, now Chief Justice of Svea Hovrätt (Sweden's oldest Court of Appeal). Guldberg maintains that it may be reasonably questioned whether it is profitable to resort to social welfare as a purely practical principle, i.e. as a guide for legislation and application of law. He says one has 'a more immediate object, even in very important cases and with the best of intentions'. He takes as an example that one wishes to propose new rules to control the administration of a joint-stock company, ltd. Then, citing my words, he says it is not so much a question of 'suitable and well tasting food, appropriate etc.... as well as the protection of

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[8] Cf. pp. 283 f. below.

[9] Cf. pp. 138 f., 153 above.

[9a] *Teori och verklighet,* pp. 553 ff.

spiritual interests'.[1] Now opposed to this Guldberg maintains that the law-maker ought simply to aim at an order which in the best possible way provides for those interests associated with the company. If he succeeds, Guldberg continues:

> One can of course maintain that the regulations serve the social welfare, but the insertion of this concept hardly implies any obvious benefit, as far as the decision which the law-maker has to make is concerned. As to several statutes, particularly in the province of commercial law, it can be said with good reason that they have been enacted in the interest of 'common transactions' and promote the security in doings and dealings. So far a certain abstraction is made from the particulars which these rules fulfill. But there is not even here a reason to drive the abstraction any further and refer to social welfare.[2]

That the Dane Ross has continually misunderstood my method has perhaps its particular explanation which I have as yet refrained from stating here. But that a learned Swedish jurist—who has had better reason than Ross to follow my dispute with Thyrén and my exchange of opinions with Björling and others, and to see what I have had to reply to the attacks against my work, and who has also probably had occasion to read my reply to Ross in *SvJT,* 1932 and who can hardly be presumed, as perhaps it may be with Ross, to have had any prejudices against my theories—that such a jurist should be able *in this way* to misunderstand my positive way of thinking was indeed quite discouraging.

I shall present here the essential part of my reply to Guldberg which was published in *SvJT,* 1933 (p. 124 ff.):

> It is obvious that with the formation of 'rules for the control of a joint-stock company' it would never occur to me in general and directly to adduce man's aspirations for 'suitable and well tasting food etc.'. In view of my analysis, how a writer could receive such an understanding of my method is incomprehensible to me. Company law as well as its development is, of course, determined with regard to the need, constantly emphasized by myself, of providing for production and business life. But neither company law nor, on the whole, business activity would be conceivable without the maintenance of criminal law, the law of torts and the law of contract. And *that* the need of business activity

[1] The same words which are given on p. 140 above.

[2] *Teori och verklighet,* p. 555.

becomes determinative for the law-maker in these areas (although of course, concerning criminal law in particular, also other interests are included) as well as within company law, has its empirical explanation in the fact that man generally strives to attain such things as 'suitable and well tasting food' etc., and that the law-maker cannot avoid considering these aspirations.[3]

When Guldberg opposing my view says that the enactment of the rules in question 'should be directed quite simply towards an order which looks in the best possible way after the interests associated with the company', such a statement has the same meaningless import as if concerning the repairing of a locomotive one asserted that this provided for the interests associated with the locomotive but not the interests of the traffic. Guldberg's statements must further be understood as saying that the company regulations in question belonged to such legal rules which are not set forth in the interest of 'common transactions' and do not further 'security in doings and dealings'. It is unnecessary to refute in more detail such a view. The 'common transactions' is indeed an expression for all kinds of production and commercial intercourse, among other things. Just as the joint-stock company as a legal institution cannot —if one is freed from the belief in objective values and the legal scholastic constructions associated therewith—be motivated by anything other than the interest to encourage production and commercial life in the existing private-economic society, so must the same be said, of course, about new rules of company law which are calculated to improve that law as regards the security in this province. These regulations obviously contribute to an increase of that feeling of security which stimulates the formation and operation of companies and thereby also the production and business activity in general. That the rules mentioned should not 'encourage security in doings and dealings' is therefore inconceivable, unless peradventure Guldberg had in view the condition that these regulations could not, of course, in any directly noticeable way encourage security in commercial life falling *outside of company activities*. However, if the matter at hand is misunderstood to such a degree that viewpoints of this kind are introduced, then an exchange of opinions becomes too irksome. What Guldberg has alleged concerning 'social welfare' turns my method completely upside down.

To this I appended the following:

I am sorry to have to say that Guldberg's very courteous criticism is based on a misunderstanding of my way of thinking. Were this really so short-sighted and disconnected as Guldberg presents it, it indeed deserved nothing but the contempt of silence.

[3] What I have indicated above on p. 150, including the footnote, should also be observed.

Apparently Guldberg has not understood that 'social welfare' in my thesis is the significative phrase, in which I choose to *summarize all of those realities* which should be determinative for legislation and legal interpretation. If he had understood this he would then not have been able to criticize me for 'inserting this concept'. In my exposition it is so far from a question of 'inserting' this concept that I quite on the contrary, after presenting a detailed argumentation of a critical as well as a positive kind, have maintained that providing for 'social welfare' should be the common aim of *all* legal activity, and so far form a *point of departure* for such activity. If a person is inclined towards scientific methods of working then he does not 'insert' points of departure in his reasonings but takes them for what they are, i.e. just starting-points which may rather be considered as contrary to insertions. If one realizes this one must perceive the unreasonableness in the objection against me, that I should 'drive the abstraction' too far through referring to 'social welfare'.

I could, of course, have used another term than 'social welfare'. However, I have adopted this phrase because it had appeared so characteristic as a *summing up* of all of the realities in question. As I have sometimes said in my lectures, it has been quite impossible for me to express at every instance everything that is included in my view and which is necessary to know in order to understand what I am speaking of. But anyone who has had the opportunity to study my entire presentation of the method of social welfare should understand that I have never intended to express myself in such a way that in the discussion of certain definite legislative projects it would be sufficient for the formation of the law merely to refer to social welfare. Obviously one must make clear which particular interest or interests of 'social welfare' one will provide for with a contemplated law. What I have said in this respect has the import that the law becomes unsatisfactory and for this reason must be changed if one is influenced by an interest which does not harmonize with social welfare, such as this, in accordance with what I have here developed, appears from the social valuations.

This means that in every case where the import of social welfare in this meaning is not clear and manifest to the legislator

he must more closely investigate the relevant social valuations in doing which are to be considered: first, that the valuations are determined over and above the emotional situation by conceptions which in their turn depend upon the knowledge and intellectual qualifications of the valuing person; second, that it is the law-maker's valuations which are decisive; and finally, that these in their turn in the way I have said above must be influenced by the valuations of the citizens. If one observes furthermore that these valuations, which directly or indirectly determine the legislation, are able to consider actual conditions and actions of the most varying types in society, one then understands that social welfare in my thesis has nothing to do with such a stupid assumption that the 'method of social welfare' would imply an 'Open Sesame!' and accordingly that in every case one had only to ask 'Does this project agree with social welfare or not?' On the contrary, the *application of the method of social welfare must give jurisprudence* (including legislation and administration of law) *plenty to do in succeeding generations* as long as our society remains approximately in its present form. And then one also understands that the purpose I fulfill with my theory of social welfare has, so to speak, two sides. First I call attention to the fact that it must be so that a legal activity (or the jurisprudence) freed from legal ideology must let itself constantly be led by what it—when everything is taken into consideration—evaluates as useful to the community. Second, I point out in my discussion of particular questions the more detailed type of viewpoints useful to the community which are applicable. Accordingly I have discussed 'social welfare' both in its more general and in its more special meaning. Here I shall in a few words only touch upon social welfare in its more general meaning.

When I have spoken of social welfare without finding it necessary to specify further the social viewpoints, this has been done only to make quite clear my complete repudiation of legal ideology. Thereby my intention has been to point out the general type of those real viewpoints (which always exercised a greater or less influence on law), which according to the nature of the thing must become *wholly* dominating, as soon as one has succeeded in releasing oneself from legal ideological conceptions. In

such a respect the very phrase 'social welfare' seems to me to be particularly expressive. I have chosen this phrase as a generally characterizing guiding incentive for a legal activity freed from legal ideological motives. An epitome of my way of thinking can perhaps be formulated as follows. The law, as everything else in our world of space and time, must have a quite natural explanation. Accordingly the law from beginning to end must be a work of human beings granted that it may be strongly influenced by the mystical and ideologizing disposition of man. This human work forms a power conglomerate of factors sometimes influenced and sometimes influencing each other by means of a network of psychological threads. This power conglomerate can be likened to a machine through which the individuals are and remain organized into the co-operate entity which we call the community or society in the meaning of the nation.[4] As far as the human beings are enlightened and not dominated by superstitious representations concerning law and the community, they cannot reasonably *allow themselves in their activity for the making and the maintenance of law to be influenced by other factors than their valuations of what is best for the organization mentioned, i.e. best for society.*

It is with respect to this that I have spoken of 'social welfare' in such a way *in abstracto* that I have not pointed out in detail the type of one or more social interests which are looked after in various situations through a present law, or would be looked after through a new law. When legal ideology is discarded it is of course necessary to replace it with something else. It is in this meaning that I have then quite generally established 'social welfare' as the guiding motive, and in so doing explaining why I did so. When in such a connection, without either specifying or differentiating but rather in a very general sense, I have made use of the term 'social welfare', this has been done quite intentionally, and fully conscious of two facts: first, that there is nothing other than the viewpoints of social welfare which could be determinative for a law which had the necessary moral power and thus could permanently fulfill a social function[5]; and second,

[4] Cf. e.g. pp. 164 ff., 186 f. above and 233–235 below.

[5] Cf. pp. 164 ff. above.

that the viewpoints of social welfare which could have this significance are not limited to certain categories, but that any viewpoint in such a respect could be taken into account. I have not been able to select any term which more closely describes just exactly what I want to discuss than 'social welfare' or other cognate phrases as: public welfare, collectivist welfare, common good etc.

The meaning of 'social welfare', in addition to the general aspect now touched upon, has in my thesis, of course, also a specialized aspect which emerges upon a closer study of my thesis. This side in turn must be developed if one is to contribute to a detailed method of approach towards a constructive jurisprudence freed from legal ideology.

However, even from this point of view, there is no clear line of demarcation between both sides of the thesis. Indeed there cannot be, by the very nature of the subject. The specialized aspect appears more or less sharply as soon as the question concerns the treatment of definite areas of law. In a later connection I shall give some instances of social welfare in a more specific sense,[6] although this has been indicated several times in what has been presented so far.[7]

The method of social welfare given axiomatically

That those persons who pursue legal activities are influenced by certain motives and do not act at random is, as has been stated previously, empirically demonstrable. It may also be considered empirically demonstrable that any other non-chimerical motive for the activities mentioned than their being regarded as indispensable or useful to society and the persons who constitute it has never been found. One may safely add, as I have frequently done, that reason is lacking for considering the possibility that any other such incentive could be found. Consequently when legal activities are practiced for the sake of mankind, this is done in order to serve that which is considered to be to their advantage or benefit, to a greater or lesser degree, or at least not to their

[6] Under the heading 'Social valuations' etc., pp. 217 ff., and, in some sense, under the heading 'The importance for legal writers' etc., pp. 370 ff.

[7] See above pp. 101 ff., 136 ff., 149 ff.

disadvantage, although legal activities may be pursued so that certain groups of persons are favored more than others and this, of course, to the detriment of the possibilities of the latter group.[8] But how can I maintain that *experience* shows that legal activity is carried on for the sake of man and for that which is valued as his benefit and not as his destruction? Indeed, I have said that one believes, at least in general, in the realization of justice! Certainly, but justice is only an ideological fantasy which according to what the experience of centuries has revealed has not been able to prevent the interest of social welfare from emerging, although legal ideology with its veils has been in a greater or less degree prejudicial to the consideration of the social realities and the valuations made with respect to them. And jurisprudence as a science must not only itself seek to be released from legal ideology but also seek to influence legal activities to effect their release from legal ideology with its chimera of justice belonging to a metaphysical world, i.e. a world outside of our experience. But jurisprudence is now and has indeed at all times been considered as belonging to *die Geisteswissenschaft,* i.e. not to a natural but to a spiritual science! I can do nothing about this. *If* one considers that legal science as other scientific disciplines consists of acquiring knowledge about reality, i.e. clarity as to connections in time and space, *then* legal ideology and that conception, which forms its basis, of a material law, founded on natural justice, must as belonging to a metaphysical world be removed from legal science. The person who sees the matter in this way cannot find any other motive for or purpose of legal activities then to serve the society, i.e. those human beings who live in it. He bases this attitude—in addition to the incentive, just pointed out, for the exercising of legal activities—*partly* on the very experience proving that the social interests have broken through the veils of legal ideology, and *partly* on the fact that no other incentive or purpose for legal activity has ever been maintained or pointed out than what I summarize with the term social welfare, no other incentive or purpose, I mean, which was *not* of a metaphysical nature and which accordingly was *not* useless because of its un-

[8] Cf. pp. 147–149 and 155–158 above.

real character for us and our world, all determined entirely by time and space.

'Social welfare' as a guiding motive for legal activities implies that these are exercised with a *certain* consideration for what can be established as to the material and spiritual needs or interests of man living in society and as to the social valuations made accordingly. I say only a 'certain' consideration. For legal activities, of course, are exercised according to the *practitioner's understanding* of the significance of what has thus been established concerning the people in the community. Usually these understandings themselves depend upon valuations of the social significance of the more direct valuations prevailing among people in society. When this is not the case, but the understanding, decisive for the legal activity, depends immediately upon the establishment of the valuation prevalent in society, then the situation is such that either this valuation is a general one or in any case quite widely observed, or it is represented by one or more powerful groups in the society.[9] All of the valuations now mentioned are in general and briefly called by myself the one or more 'leading social valuations'. Either already the immediate valuations of people in society or of certain groups within it are leading in that sense in which they are (theoretically) understood by the exercisers of the legal activities, or the said valuations cause these exercisers to undertake their own evaluations of what is best for the social welfare. They are then guided by these evaluations. However, the exercisers are often forced to make social valuations without being (properly speaking) supported by any immediate valuations prevalent in the country.

Indeed it is not at all inconceivable that one or, possibly, more of the practitioners of legal activities would be completely indifferent to all social considerations, to the future of society, in order to be incited entirely by his or their own interests, e.g.

[9] This is not expressed quite correctly, for even in this case it is a question either of a valuation on the part of the exercisers of legal activities, coincident with the immediate valuation of people, or yet of that valuation on the part of the exercisers mentioned that it is better to the social welfare to follow the immediate valuation, in spite of its opposition to the valuation of the exercisers themselves.

merely to earn their pay at this kind of work (because they find such an occupation considerably more pleasant or comfortable than any other work) or driven by the hunger for career, distinctions or ambition etc. But they are not able to provide for such personal interests if they do not actually arrange their activities according to the trends of social evaluations. As an empirical principle it may be stated that those persons engaged in legal activities who consciously set aside the consideration for values regarded as social would lose their future prospects in their chosen profession, or if they have already arrived at their goal and could not be legally separated from their position, they would nevertheless be deprived of their social prestige.

If all of these *theoretical* and not *value* judgments are correct, it then goes without saying that legal *science*, if it is to be based on facts, must proceed therefrom as an actual condition of operation that legal activities cannot have any other non-chimerical aim than 'social welfare' and that for the attainment of this end they cannot be guided by anything other than the indicated social valuations. It is with this point of departure that legal science itself has to take up a position towards questions of legislation and legal interpretation, in so far as it now takes such a position and not only establishes the measures through the legal activities and the consequences of these measures as well as those valuations which determined the measures in question.

From the whole of my exposition above it is certainly clear that I am convinced that legal science should include the attitude of social evaluations. However, there are legal writers who maintain that the scientifically working jurist should on principle refrain from valuations and limit himself as strictly as possible to an activity of investigating actual facts and causal connections and establishing the results obtained thereby. Which of these standpoints should have preference is of course itself a question of evaluation which I shall for the sake of completeness touch upon below, pp. 203 ff. It is my conviction that it would be unfortunate for both society and legal science if the latter desisted in point of principle from the presentation of its social valuations.

If one does not consider the positive side of my view on legal matters, a side which forms a necessary complement to my criti-

cism of the method of justice, it is not possible to reach any understanding of my view. Actually I have not been able to find many authors who after the first more detailed presentation of my 'method of social welfare'[1] have either concurred with it or refuted it on the basis of facts. A possible explanation of this may in several quarters be that what I presented in this respect was both obvious and therefore, independent of my analyses, already quite adequately considered. However, to regard the matter in this way is to make a mistake. One has then not paid attention to the fact that current jurisprudence is dominated by the method of justice. This method with its weighing against each other of the interests of both parties and the reasons for them enters into a direct conflict with my method of social welfare, as far as I can see the only one method true to reality.[2] Taking what I have said concerning the availability of this method as motivated by experience—granted that it may be more or less strongly neutralized by legal ideological veils—one must consider it unscientific to quote 'social welfare' or something similar without having the understanding of this as *exclusively* and *consistently* determinative for the *entire* system of law; allowing of course the observation of the tensibility of the social valuations because of their more or less prominently subjective character. Such an understanding of the significance of 'social welfare' in law has, as far as I know, not been mentioned by any writer on contemporary or even the most modern jurisprudence.

Of course I cannot state precisely the extent to which I have succeeded in freeing myself from legal ideological remnants in my way of thinking. In any event I have tried in those questions which I hav treated positively to reason exclusively according to that method. The effort of reasoning according to this new method without the support of the old legal ideological concepts has proved to be a very demanding task now at the very beginning of using it. It may appear to be simple enough but it has not been easy. This point is mentioned only in explanation of the fact that—as a critic of one of my Swedish works pointed out—my exposition was 'uneven'. That a work according to my method

[1] In *Obligationsbegreppet* II, pp. 187–273.

[2] Cf., *inter alia,* pp. 123–136 above, and pp. 269 ff. below.

can be so time-consuming may however not be a deterrent if, as I maintain, it *is* the only method possible from a scientific point of view.

Legal ideological and social valuations

During a lecture to an audience which was on the whole unfamiliar with my views it occurred to me that one was perhaps not able to understand that on the one hand I dismissed legal ideology among other things on the ground that it rested on the false belief in objective values or value judgments, but on the other hand I nevertheless wanted to incite law-makers, courts (and other legal interpreting authorities) as well as jurisprudence in its more proper meaning,[3] to form their opinions, e.g. of the maintenance, abolition, enactment or interpretation of a certain rule of law according to social valuations which obviously must exist in the making of value judgments. One fine day perhaps such an objection may crop up against my view, if I do not seek to forestall it, and accordingly I shall now attempt to do so. In doing this I am again forced to emphasize a few points already discussed.

It is undeniable that social value judgments, like other value judgments are expressions for feelings, and as such do not directly state anything concerned with reality, and accordingly cannot be either true or false. But the *social valuations themselves,* as a condition in which social value judgments are expressed, are of course factual, i.e. realities.

Although these value judgments do not state anything directly concerning reality, it is nevertheless our *very conceptions of the reality* which *lead to* those feelings for which the value judgments are expressions. Accordingly, the contents of the value judgments depend upon the direct conceptions of the reality of the person making the valuation, and these are in their turn dependent upon his intellectual capacity as well as his knowledge as to this or that subject which is concerned with his value judgments.

Ordinary people, i.e. people who are not insane, unbalanced,

[3] Here legal science is meant. The term 'jurisprudence' is perhaps somewhat doubtful. In France 'la jurisprudence' means about the same as the judicature.

obtuse etc., generally act, as pointed out above, not at random, but are motivated by certain incentive, some purpose for their activities. This can be established. And—what is here important to establish—all of the persons who stand behind activities such as legislation, administration of law and legal science, are, all of them, practically speaking, more or less strongly permeated with a number of purposes or aims connected with their activities. These purposes or aims are determined by social valuations (in accordance with what I have previously indicated)—of course only in so far as these valuations are not hindered to a greater or lesser extent by the shackles of legal ideological ideas.

This may be so, but—as a possible reply—the *legal ideological* valuations must indeed *also* be factual. Even if this is granted,[4] the analogy with the social valuations is nothing more than that. For it is only the latter and not the former which are determined by direct conceptions of reality! The legal ideological valuations are either pure modes of expression or determined by dogmatic or doctrinaire conceptions of reality which originate in the belief in justice and in other legal ideological factors as something existing, given objectively, even if the consistent legal ideologist must admit that they fall outside of the world of experience owing to their belonging to an ideal world, *eine Geisteswelt*.[5] It is true that this belief is formed to a certain degree under the influence of social valuations. But that does not suffice! If legal activities are to be motivated throughout by reason and a scientific work of legal knowledge is to be produced, one *must* strive to present the social realities, as far as knowledge about them extends, directly and openly in front of oneself, and be determined by those value judgments which such presentations of reality can lead to.[6]

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[4] I say 'even if' deliberately. As will be pointed out in the text shortly, these valuations—that something *ought* to be done, that someone had a legal duty, that someone brought down *guilt* upon himself, that *justice* requires the approval or disapproval of a certain claim, etc.—are often more routine than adequate expressions for a person's feelings. Cf. pp. 162 f. above.

[5] See my exposition and criticism of Walz in *Obligationsbegreppet* II, pp. 275–292. See also *Strikt ansvar* I pp. 535–545.

[6] This is not as simple as it may seem. Thus I refer to the analyses presented in *Obligationsbegreppet* II, pp. 187–273, and *Strikt ansvar* I pp. 549–603 as

Thus it is *one* thing not to be able to consider the content in a social value judgment more than in other value judgments as true, as agreeing with reality, and accordingly not to be able to base any reasoning on its contents, i.e. take it as a starting point or premise in and for pure thinking activity. But it is quite *another* matter that the valuations themselves, this condition that value judgments are made by all of us every hour every day, is something factual and real, and further that the *social* valuations as distinguished from the *legal ideological,* depend upon direct conceptions of reality and consequently upon the evaluator's knowledge of the society and the causal connections there prevailing together with his intellectual capacity to use this knowledge. Of course, his intellectual capacity has also been decisive for his acquisition of social knowledge.

The legal ideological value judgments as such cannot furnish any reliable support for the society organization and its development, simply because they lack contact with direct conceptions of reality. It is a matter apart that the feelings within a people which often lead to these judgments must nevertheless be considered as indispensable for the social organization, the legal machinery, whereby I mean, of course, the tremendous importance of the so-called common sense of justice, the feelings of justice, to the operation of legal machinery. This matter has been discussed previously. Here I shall only point out that the feelings in question—however irrational they may be in their lack of closer contact with reality—and the influence of these feelings on the legal machinery, i.e. on its way of functioning, as belonging to real life, of course are an object for knowledge, and accordingly must be made the object of juridical investigations. However, in the *present* connection it is *that* observation that the legal ideological value judgments, even in so far as they now constitute real valuations, i.e. are expressions of feelings, cannot be taken as a guide for legal activities however important they may be for the society organization and its development—in the present connection it is *that* observation which interests us. The significance of

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well as in this work. Also these analyses are, of necessity—and this cannot be emphasized too strongly—incomplete. I have only attempted to give as much guidance as I have been able to do in addition to my remaining work and writings.

the so-called common sense or feelings of justice is in other words —as I have frequently pointed out—directly opposite to the meaning given to them according to the method of justice. The feelings of justice do not direct law. On the contrary, they *are directed* by law! They are taken in the service of law!

Finally it should again be emphasized that those persons who exercise legislation, or administer and interpret the law must on the whole—with psychological necessity—be more or less strongly influenced in such activities by those social valuations which prevail in that society which they serve in their capacities as legislators, administrators and interpreters of law. They must be so influenced in spite of being fettered by legal ideology. They must also, as far as their own social valuations are called for, by acquiring knowledge of social realities be prepared to undertake 'according to the best of their knowledge and belief' these valuations with their understanding of the social welfare before their eyes.[7] As far as they actually allow themselves to be led only by the legal ideological value judgments they would counteract the legal organization.

Should social valuations as a matter of principle be excluded from the science of law?

It should appear from what has been said previously that properly speaking only formal considerations led me to introduce the concept 'constructive legal science'. Had I not risked facing the objection that I mixed up valuations with logically established reasonings, I should not have sought to bring forth this concept of 'constructive' legal science. Now it should not be harmful to utilize such a distinction, for I believe the same to be quite correct. Of course I could have stated, characterizing jurisprudence in my meaning as a science, that this *science* is *also* 'constructive', or as expressed by the Swedish legal author Ekelöf, an 'applied' science.[8] Both of these expressions consider that practitioners of legal science do not only investigate in order to be able to establish facts and causal connections but, supported

[7] Cf. pp. 131 ff.

[8] Ekelöf, *Teknik eller vetenskap?*, p. 7.

by the results of their investigations, undertake certain social valuations as well. I mean that it depends upon formalism not without restrictions to classify jurisprudence—as far as it keeps itself *à jour* with realities and does not work according to the method of justice—in the category of a science. Not to act so may lead to something quite ridiculous. This is obvious, e.g. in the case of evaluating the qualifications of a person who seeks a university appointment as professor of law here in Sweden. One may then of course not limit the reasons for 'the degree of proved scientific competence' (Statutes of the University § 53) to what remains in the works of the person applying for the post after taking away his own legal interpretation, his own judging of legal practice and his own statements *de lege ferenda,* as far as these activities of his depended upon valuations, which they most certainly did to a very great extent.

More or less the same thing may be said concerning several sciences other than jurisprudence, particularly as far as the investigations of certain pioneer workers are concerned. After reading a number of descriptions of the contributions by medical scientists to combat such diseases as childbed fever, tuberculosis, diabetes, syphilis, pernicious anemia, malaria, pleurisy and other infectious diseases, even a layman understands at least so much that without *some* measure of evaluation these contributions would never have been made. Those 'trials' which finally produced results must have been conditioned by certain valuations. Or, to turn to quite another scientific discipline which every now and then has aroused my interest as a layman—what indeed would a Schliemann have been able to accomplish for classicial archeology and how would the finds at Troy and the royal tombs at Mycenae have been uncovered, if this unique pioneer of archeological excavations had not allowed his work to be influenced to a significant degree by what we must call valuations? In cases of the sort now discussed one does indeed not talk about valuations but uses instead some such expression as 'the stroke of genius' by which is meant a combination of knowledge, acuteness and intuition, the third element containing at least in addition valuations fortunate for attaining the result.

However, it stands to reason that it is not only those pioneer

activities which may be influenced by valuations. I do not believe it necessary to point out that in the field of economics often this or that theory is proposed in order to attain this or that end and that then from another quarter it is argued that it would be better to propound another purpose and thereafter adapt the theory. Also in evolving a certain theory within this science occasionally valuations may be undertaken.[9]

Even several branches of medical science cannot escape being influenced by the valuations of the scientist. I need only mention therapeutics in which the scientists are first and formmost led by certain general valuations depending upon such purposes as: to save lives, to prevent or alleviate illness and pain, perhaps to undertake or omit surgical treatment etc. Of course I think of the physicians's activity as a scientist and not as a medical practitioner. It is perhaps more important to notice that the activity is not only determined in this general way by valuations, but that its exercising can at any time be influenced by the question: in a given situation what is best to state as a guide to others—not least to the young students of medicine—whereby the choice may be between several alternatives with their respective pros and cons? The scientist may finally, by means of valuations, decide upon one of them as the 'better' or the 'best' or also leave it to other investigators to prefer one or two alternatives to the remaining. I do not dare to go any further into questions of evaluation within medical science. But I suppose that even in medical writings and lectures concerning diagnosis and prognosis, recommendations based on valuations may be given to the reader and listener respectively. Moreover, without valuations scientists would not have achieved the results they now have in, e.g. physiology, chemistry, physics, biology, 'practical' astronomy, and in general, all of those sciences in which experimentations or investigations by means of instruments, including improvement and refinement of the instruments, may play a part in the practice and further development of the science.

What I mean to say with all of this is that one must—for prac-

[9] Here I have in mind nothing other than actual valuations, and consequently no possible belief in objective values within economics. Cf. Hägerström, *Moralpsykologi,* p. 84 ff.

tical reasons, i.e. to avoid disorder, not to mention confusion—distinguish between science as an *activity* as it is practiced and science as a *theoretical philosophical concept* or, if you will, an *epistemological distinction,* as e.g. in an analysis of the principle of science *(Prinzip der Wissenschaft,* to cite the title of one of Hägerström's pioneer works). Here one should remember, however, that philosophy, i.e. theoretical philosophy as distinguished from most of the other sciences, shall be an *exact* science, and that neither legal science nor any of the other scientific disciplines just touched upon as far as I know make any claim to such an *absolute* characterization.

It is possible that upon comparing legal science on the one hand and the scientific disciplines indicated above on the other, one may be tempted to object that in these last-named sciences the evaluating activity takes up very little room in comparison with the epistemological or theoretical activity, i.e. the purely investigating and establishing work. To such an objection I reply with three points. First: it goes without saying that the relation between the quantities of evaluating and theoretical activity are, of course, not the same within all the sciences mentioned here. Second: the valuations made in the practice of these sciences have in general been *necessary.* Without them more or less stagnation in scientific development would have occured. Third: the following, above all, appears to me worthy of consideration.

Social valuations of legal science—as do also the valuations within the sphere of the other sciences just mentioned—depend upon obtaining knowledge of reality, thus upon *epistemological* activity, to an overwhelming degree in relation to the valuations. Only a few indications can be given here. Legal science has to investigate the entire legal machinery. This activity includes, among other things, the attempt to establish how legal institutions have evolved, to take critical attitudes towards all of the manifestations of legal ideology, i.e. by analyzing the relevant concepts remove the veils which obscure the realities in the legal machinery, to clarify these realities, to establish the linguistic and logical content of law and the preliminary work connected with them, of judgments and of judicial premises. Further, legal science must seek through studies and analyses of juristic literature, through

analyses of legal concepts used in laws and judgments, through comparisons between paragraphs of law and statements of the preliminary works and through comparisons between judgments concerning analogous questions—all of this considering social realities—to present what the law-maker and judge really intended to state in their laws and judgments. Legal science must in addition seek to clarify certain conditions prevailing between persons or groups in the community, also how this or that valid law influences these conditions, i.e. particularly, the actions of persons and what influence thereupon my be anticipated by certain changes in a law or by new laws. Here legal science needs the support of knowledge proceeding from investigations—carried on within or outside the field of legal science itself—knowledge, in part, of certain general human ways of reacting and, in part, of the influence of the maintenance of certain laws upon the conduct of man. Moreover it belongs to legal science to try to ascertain—with or without the help of other sciences—what persons in the society or this or that group within it may have for needs, desires or interests in such concerns as are affected or could be affected by certain laws, in other words, how the social valuations move among people or particular groups in such questions, or whether peradventure the situation is the one that sufficiently pronounced valuations of a certain question did not develop. Finally legal science has to investigate what social valuations the law-maker may possibly have proceeded from in the case of a certain law or the judge in the case of a certain judgment. All of what has just been pointed to belongs to an *epistemological* activity. For the sake of completeness, it may be added that certain work within legal systematization should also be classified here. It stands to reason—and it was expressly presupposed in the foregoing—that jurisprudence in point of principle cannot be encumbered with the exercising of *all* of this epistemological activity. But it must feel rather constrained to try to carry out the same, i.e. to the extent that it is not in a position to utilize acceptable results achieved in other sciences, e.g. psychology, legal philosophy, sociology and statistics.

As to what concerns the *social valuations* on the part of legal science these should not—at least not exclusively—be obligatory

but should be dependent upon the task that the legal scholar in question places in front of himself, which in turn has a certain connection with which branch of jurisprudence he is occupied. An historian of law e.g. may carry on his research activity to perfection in his service to the university and society without making any personal social valuations whatsoever. If he works in this way he does not, of course, pursue any constructive jurisprudence. However, I cannot take up the separate disciplines here, but choose rather to exemplify the question with my own juridical activity as I now discuss the question of whether a scientist of law in the practice of his profession should in point of principle refrain from making his own social valuations because they may happen to fall outside of legal science in a purely philosophical sense. Before citing these examples from my own activity the following should be noted.

During the last 15 years in Sweden there has been a certain tendency to maintain that not even social valuations should be allowed within jurisprudence as a real science. I believe that this attitude is the result of 'speeding' in excess of the authorized limit, or perhaps viewed a bit differently, as 'running ahead of oneself'. In either event one is not able to stop at the proper destination. If owing to Hägerström's philosophy of law, criticism of legal ideology had not been touched off and soon gained several adherents, here in Sweden hardly anybody would have attempted to maintain that it was beyond the field of activity of legal scientists to make their own social valuations and from them take a position on legislation and judicature.

In the criticism of legal ideology it has been shown that not only legal activities but also current jurisprudence have been based on legal ideological value judgments as if these had an objective character. This criticism maintains in addition that legal activities had instead—with consideration of their purpose revealed by experience—to place the social realities in front of them and to be led by the social valuations which appear from these realities. Since the legal ideological value judgments have been allotted objective character, it has been important, of course, to point out the falsity of such a viewpoint. However, one has of course not been able to overlook that *all* valuations, even those which are

determined by conceptions of social realities, lack objective character and accordingly fall outside an activity which is concerned only with investigating and establishing factual connections, i.e. outside of an epistemological activity. If the legal ideological valuations are outside the realm of legal science, then the social valuations are also. I have this somewhat dubious conclusion in mind when I speak about proceeding without any proper meaning.

Here, according to my understanding, three circumstances have been overlooked, or perhaps more correctly, been given too little consideration. The first is that no critic of legal ideology suggests the possibility of considering social value judgments as proper judgments, i.e. judgments directly concerned with reality. The second—which has already been stated in a previous connection—is that these value judgments as distinguished from the legal ideological ones are still occasioned by conceptions directly pertaining to reality. The third is that legal activities themselves, as freed from the conceptions of legal ideology, must be determined exactly by social valuations. If these circumstances had been sufficiently considered, I believe that one—in respect to a jurisprudence which considers itself to be free from legal ideology—should never have made this fuss with social valuations, that by reason of their existence within jurisprudence one should have chosen to contest the scientific character of this or in any case reject them from legal sience. It is of particular interest to point out the second of these three circumstances. Had this been carefully considered, perhaps a Swedish author would not have had to ask so emphatically for the meaning of arguing for a valuation which however, as he wrote, cannot rationally be argued for.[1] Formally speaking this is correct, but nevertheless somewhat misleading or, perhaps more properly, it impedes seeing how it develops in human life.

For the revelation that the assumption of a certain actual connection was false can in many instances immediately convince practically speaking every reasonable person, and, accordingly, the practitioner of legal activities, of the *unsuitableness* of this or that social valuation, i.e. even of this or that legal rule or judicial

[1] Rodhe, *Gränsbestämning*, p. 5.

decision. In other words it appears to me in certain discussions on the matter that one overlooks a fact of unusual importance, namely, that the social valuations often follow more or less obviously from the clarity achieved through establishments in an epistemological sense. It very often happens that an argumentation for certain social *realities,* practically speaking, acts as an argument for those social *valuations* which are called forth by the conception of these realities.

Yet this last point is not to be understood as meaning that practitioners of legal activities on the whole should already be helped by receiving information on the factual social connections and accordingly should not need any further help for their social valuations. It is above all in a negative direction that a new piece of knowledge can act practically speaking as an argument as to evaluations: the new knowledge causes the relinquishing of a valuation considered valid up until that time. Also in the positive direction a new knowledge may sometimes act so that people (or perhaps more accurately that category of people which is affected by an existing question) can agree on one and the same social valuation. But greater or less difference in the valuations may obviously often arise. Hence it may then be particularly important that *jurisprudence* carries out its social valuations. The person who is informed by *others* of the actual facts and connections does not in general control these intellectually in the same way as the person who investigated them. Therefore the practitioners of legal activities may actually need guidance from jurisprudence also in their social valuations. To that there is to be added that social valuations on the part of legal science, as I have pointed out elsewhere, must be highly important for legal education within a country.[1a]

It is, properly speaking, rather ridiculous to support with examples the often very intimate connection between knowledge about social realities on the one hand and the social valuations on the other, because they press upon us wherever we look. Our knowledge that the maintenance of this or that paragraph of the criminal code acts in such and such a way upon the general modes of

[1a] For general considerations concerning the social valuations by jurisprudence see Ekelöf, *Teknik eller vetenskap?,* pp. 41–48.

conduct, makes the social valuations either simply adopt the continued maintenance of the paragraph in question or, possibly, its completion, alteration or abolition. Our knowledge that a social economy would be impossible without the so-called validity of contracts makes us all estimate the law of contract as belonging to those conditions which are necessary for production, common transactions, in short all the enterprising spirit within the community. What has just been said with the utmost generality about the law of contract has its counterpart in the more detailed questions pertaining to this province of law, i.e. concerning the modifying, changing, completing or abolishing of certain legal maxims, concerning introduction of new ones and concerning interpretation of written and customary law on the province in question. The decisive instances here, i.e. the legal activities, must to the extent of their freedom from legal ideology *in general base their valuations on the knowledge of actual conditions,* among others, how these are influenced by various actions of man, how the maintenance of a paragraph of this or that content or another 'legal rule' may have influenced or be foreseen to influence the conduct of man, and, in case of need, how relevant social valuations may move within the people in general or particular groups of them. In accordance with the proper person's knowledge now mentioned are generally also his valuations in respective legislative questions. With this, of course, I do not mean to say that the same knowledge concerning social realities in different persons leads to the same social valuations in all of these persons. This *can,* however, very well be the case, particularly when questions vital to the building of the society and to the social intercourse associated therewith are concerned. And if, nevertheless, different social valuations move among the masses themselves, one may often be able to predict which will become the leading social valuations from a concurring knowledge of the social reality situation.[2] All of this is stated with two reservations, first with respect to the legal ideological conceptions as more or less of an obstacle for the consideration of the social realities, and second

[2] Cf. pp. 175 ff. above. A field where this is not the case is that which I treated in my report on the reforms of the law of landlord and tenant (*SOU* 1923: 76). Cf. *Obligationsbegreppet* II, pp. 232–239.

—which fortunately as yet has to a very slight degree had any bearing on the administration of law—speculations of party politics. But these reservations cannot of course in any way be taken as support for the standpoint which I have now refuted. For the authors here in question have not chosen to express themselves either as legal ideologists or party politicians but only as learned jurists.

The recapitulation of the above is as follows. A connection between acquired knowledge about certain social realities on the one hand, and on the other, a generally prevailing accordance among the subjects of such knowledge concerning the social valuations occasioned by the said knowledge can quite often be established. Consequently this connection frequently forms a factual condition. Pretending not to recognize this is unreal, however incontrovertible it may be that social value judgments as well as other judgments of value are expressions of feelings and therefore do not state anything concerning reality. That the failure to consider the connection in question has occurred to such a great extent may, as already noted, in some way depend upon the repudiation from the legal ideological valuations. However, it has been overlooked that even if these are not merely routine patterns, nevertheless they cannot have been evoked by true conceptions of reality and consequently have only a very remote contact with it.

To avoid misunderstanding I find it important to touch upon a possible objection to my comparison between jurisprudence and certain other sciences in respect to evaluations, i.e. the comparison which has already been made. This objection may perhaps be stated as follows. Concerning the works of pioneers in scientific fields and several scientific activities, which are more or less pursued with the assistance of 'trials', experiments, instrumental techniques etc., the valuations have not been the *final stages* but *preceeded* an activity which as a final result establishes the existence or non-existence of certain facts and causal connections or that a definite statement in the question cannot be brought about. As far as *legal science* again appears as an evaluating activity, it often *results* in valuations: legal practice in situations of this or that type are disapproved; recommendations are made to guide

practice in cases of this or that type; pleading takes place for the abolition or changing of a statute because of its social harmfulness or unsuitability; new enactments are proposed owing to their social usefulness etc.—all of this according to and as the result of epistemological statements. This *order* between epistemology and evaluating activity is not however confined only to legal science. At least within the fields of economics and medicine it is certainly in effect also.

In any event it is quite clear that none of the scientific activities which I have pointed out consist exclusively of pure science, in the theoretical-philosophical sense. Thus in all of these branches of science we *can* now and then find ourselves *outside* the limits of 'science' as an *epistemological* distinction. The question—whether these intermingled epistemological and evaluating activities in their entirety should in the usual systematizing be classified under the *term* science or not—is only a question of terminology, in this connection without any further interest. What is of interest *here* is whether the evaluating activity should be *separated* from that purely scientific one and *entrusted to others.* It can be important for the answer to this question whether the evaluating activity has any *positive significance for the epistemological activity* or whether the former as regards the latter could be easily done away with. Here, as indicated above, is at least a formal difference between jurisprudence, on the one hand, and certain of the other sciences mentioned, e.g. chemistry and physics. Those disciplines which for their *evolution* presuppose 'trials', experiments, improvements of instruments, etc. most assuredly presuppose the valuations necessary in such connections. Consequently there can be no question of excluding these valuations. *Complete* correspondence to this is, as just noted, lacking as far as jurisprudence among the other disciplines is concerned. Notice that only *complete* equivalence is lacking. In the long run evaluations within jurisprudence may also lead to increased knowledge of legal or social machinery, i.e. to the evolution of jurisprudence as a science in the strict meaning. For the evaluations within jurisprudence influence legal activities which in turn cause phenomena which become the objects of investigations by legal writers. More important is, however, that valuations undertaken

by legal scientists moreover can have an extremely important significance for the society: in part for the direction of legal activities and in part for the education of jurists and lawyers in the society, and thereby also indirectly for the legal activities.[3] Since it is the society which keeps jurisprudence as a science in active use, it must belong to this science to undertake social evaluations to the extent that its practitioners in their capacity as servants of the society find themselves with the valuations in question to be of use for legal activities and hence also in other respects of use to the society, or more exactly, to the legal or social machinery.

This point actually appears to me to be *decisive* against the idea that social valuations should be excluded from jurisprudence. The reason now given for the social valuations belonging to legal science cannot be less strong than the previously indicated basis for certain evaluations belonging e.g. to physics and chemistry. For we are not yet entirely ready with this comparison in respect to evaluations between legal science and certain other sciences. When it is clear that the indicated valuations within e.g. physics and chemistry must belong to these sciences, since they are necessary for the evolution of the sciences in question, one should not forget that these sciences themselves as well as their evolution are *conditioned* by the society, i.e. by the legal machinery. Every science and each of its developments receives all of its possibilities and its entire significance only and entirely through the existence of the legal machinery, of the society. Since it may be inevitable—as I have maintained—that the social valuations within jurisprudence must be both more directly and indirectly useful to the society, it also appears to me, when everything is taken into consideration, that there is really good reason for the assertion that in *no* scientific discipline in practice can valuations be better motivated than the social valuations within legal science. But I repeat my previous statement: it is purely a question of terms without any real interest in *this* connection, whether in the *systematization of sciences* one should let the word legal science be

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[3] Cf. *Strikt ansvar* I, pp. 553–558 and Ekelöf, *Teknik eller vetenskap?* pp. 41–48.

limited to epistemological activity and thus state specifically that authors on jurisprudence *also* undertake social valuations, or let the word within the scientific system cover the jurist's entire activity. That the practitioners of legal science may in this capacity perform social valuations of their own I consider very important to vindicate.

However, as we all know, neither the law-maker nor (perhaps even less) the law courts in their activities have consistently placed the social realities, among them certain social valuations, directly and openly in front of themselves, but they have to a great extent been immediately led by legal ideology supported by the demand for natural justice in laws and judgments. As long as the method of justice still controls the law-maker and the courts, or in any case, as long as these do not yet quite comprehend that to legal activities, as far as one knows up to the present time, there *is* nothing which is non-chimerical to follow other than the valuations of what appears to be best for the society—so long a legal science critically directed against legal ideology fulfills a particular function by elucidating both laws and judicature as well as the legal institutions with not only established prevailing valuations but also its own valuations. But we must consider the possibility that the method of justice may at some future time be completely overthrown and replaced by what I call the method of social welfare. Then the legal activities, i.e. legislation and administration of law, will inevitably by degrees be determined by social valuations made out of consideration for more or less complete knowledge of facts and causal connections in the society. These social valuations may consist now of the prevailing valuations in the society or certain groups within the same, now of valuations immediately undertaken—under the influence of the former valuations—indeed by the practitioners of legal activities themselves. It belongs then to legal science to establish—in case of need—these valuations. It would make its own social valuations only when it feels competent to show that the valuations of legal activities more or less probably depend upon an erroneous or incomplete understanding of certain social realities or the import of them, or when legal writers think appropriate to make statements de lege ferenda, even in the latter case, of course, proceed-

ing only from established social facts and connections. One should again notice that when legal writers thus present their own valuations, this always occurs after their own epistemological activity or with consideration of knowledge achieved through the epistemological activity of others. We again stand in front of what must never be forgotten, namely, that the feelings for which social valuations are expressions, are always occasioned by and dependent upon the conceptions directly of reality on the part of the evaluating person, i.e. upon his purely epistemological attitude. I have repeated this many times, but I sincerely believe that this point is important enough to merit such emphasis. As noted previously it appears—when with respect to valuations within jurisprudence, one either challenges its character as a science or requires it to abstain from all valuations—as if no clear understanding has been established as to this difference between the legal ideological and the social valuations, i.e. valuations which are evoked by conceptions epistemologically founded.

Social Valuations in my Own Writings

On p. 208 above I stated that I would later give some instances of social welfare in a more specific sense. This will now be done, illustrating with reference to my own writings *that* evaluation on my part that it may be necessary for a legal writer to make social valuations. 'Necessary' to the extent that I as a servant of the society in the capacity of a legal scientist have felt that I had certain tasks and that these cannot be completed in a satisfactory manner without my undertaking certain social valuations supported by my knowledge of law and society.[4] First I shall deal with criminal law and thereafter with civil law.

Criminal law

In 1920 and 1921 I presented my criticism of the basic considerations underlying the science of criminal law. These may be summarized in brief as follows: the punishment is in the name of natural justice deserved by the criminal owing to his wrongful conduct implying the violation of a legal duty, through which transgression—by reason of his *dolus* (or, possibly, recklessness)—he has brought guilt upon himself. This was the general legal foundation of punishment. Moreover, with punishment (as which I do not consider here a fine but only the loss of liberty) one pursued certain purposes.[5] I showed that everything—as it was then understood—depended upon the confusion resulting from legal ideology. From what I have shown above it should be understood that the so-called legal basis of punishment, in the meaning of justifying it, is pure nonsense. After rejecting the method of

[4] Cf. p. 134 n. 1a above.

[5] Among these purposes of punishment are noted particularly: to improve the criminal, to deter him and others from criminal actions, also sometimes to render the criminal harmless.

justice and replacing the same with the method of social welfare, the social function of criminal *law—N.B., not* the social function of *punishment*—must be the guiding viewpoint in the science of criminal law. By criminal law as contrasted to punishment I mean the sections (paragraphs or prescriptions) of the criminal code or a particular criminal statute.[6] In other words, in using this term I refer only to those countries which have a complete criminal law based on legislation. The social function of criminal law was evident from my investigation into and from the establishment of certain connections between the maintenance of criminal law and the modes of conduct of the individuals. It could actually be established that it was the general awareness or consciousness of the maintenance of a criminal paragraph or prescription—not the particular punishment *in concreto*—which was in the background and worked to impede the criminality. The concrete punishment's positive social significance in accordance with this was nothing other than to be an expression for criminal law as being in force, an expression for the criminal law's continued 'validity'. It could further be established that the valuation in general prevailed within society that it would be important to counteract as effectively as possible those actions considered in the criminal law.[7] Accordingly it must be valued as a social concern that the particular or concrete punishment, i.e. the execution of the punishment, is suited so that criminal law acted in as effective a general-preventive way as possible. Both at that time and later I showed that the prevalent elevation of individual prevention as the essential determining principle of the execution of the punishment would be a valuation which depended on not considering the social function of criminal *law*.[8]

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[6] Thus I do not consider here the particular condition of Anglo-American criminal law in which crimes are punished according to common as well as statutory law. When speaking of criminal law in the following I mean a criminal code or statute. Such a phrase as the 'science of criminal law' is, of course, something else.

[7] For the sake of simplicity I disregard the fact that the valuations could be divided concerning certain penal paragraphs.

[8] See my *Principinledning,* pp. 21—50; *Svar till professor Thyrén,* pp. 105—135; *Unw.* II, §§ 2—4; *Straffverkställighet,* pp. 641 ff., and my statement in the Second Chamber of the Riksdag, 5 Dec. 1945, *A.K.* 1945 Nr 40, pp. 37—40. In

As I have never, for explicable reasons, found in the relevant literature any clear statement of the logical impossibility to unite a reasonable understanding of the social function of criminal law with the belief in natural justice and the guilt of the criminal as a legal basis for punishment, I shall here make a few observations on the subject. In some of my scientific publications I have brought up this matter, also in the Swedish Riksdag and elsewhere in discussions concerning the type of penalty of imprisonment and, moreover, concerning certain changes in the criminal law which were unsuitable according to my valuation. I have pointed out that the entire frame of reference should be altered here. The individual principle dominates. I refer to it by this name because one has in view not only the *prevention* of criminal relapses (individual prevention) but also *other* additional factors, particularly the ridiculous idea of *improving* morally or socially the condemned criminal. One can say that the idea of general prevention has in fact been almost completely set aside.

This dominance of the individual principle is based on the power of legal ideology and consequently of the method of justice over the science of criminal law. Since the perpetrator's guilt on the one hand made a necessary presupposition for punishment and on the other completely justified the same, it became actually a logical impossibility and accordingly completely meaningless to consider the punishment, i.e. the relevant prescription in criminal law, from a general point of view. As long as the idea of guilt had this significance, there was no reason to judge the function of punishment otherwise than as a reaction in the concrete case, and consequently no reason to consider in another way the punishment's importance for the society organization.

It may possibly be retorted that one should consult Feuerbach

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general one thinks about the justice of *punishment* and the purpose of *punishment*. Those who understand that the general-preventive function is the foremost element can certainly not avoid dealing with the question of an effect of criminal *law*. But they generally end up by talking about the purpose, aim or end of *punishment*. Cf. Salmond, *Jurisprudence*, pp. 121 ff., and Kenny, e.g. pp. 28 ff., who throughout seem to speak of the purpose of criminal *punishment*. However, here too there are exceptions. Cf. Miller, *Handbook*, pp. 17 f. 'Of course', he says, p. 19, 'punishment has no purpose except as it works out a larger purpose of the criminal law itself.'

and his followers. In fact Feuerbach considered the significance of the *threat* of punishment in the struggle for suppressing crime and, accordingly, the significance of the preventive social function of the criminal *code*.[9] But what actually did happen? It was not very long nevertheless before the individual principle took the lead. This must be so as long as the requirement of guilt is maintained.

It is actually this guilt requirement which has distorted the framing of the questions and brought about the consideration of the significance of the *punishment* and then, naturally, for the (individual) *criminal*. It has indeed been averred that a question about the justifying basis of the punishment is *one* thing and that the purpose of the punishment is *another*. But this can be scarcely anything other than an empty way of talking with which one attempts to bring together two lines that cannot be united: the legal ideological, i.e. the line of justice, on the one hand, and certain social viewpoints on the other. *If* the perpetrator's *guilt* is the legal, i.e. justifying, basis for the punishment, then the end of the punishment must obviously be determined thereby and consequently be to exercise the retribution of justice through which the crime is expiated and the guilt obliterated. To maintain at the same time that the object of the punishment is something else, does not go well together at all. Now when without comprehending the chimerical nature of the method of guilt-justice, one nevertheless cannot escape being influenced by the pressure of the social points of view, i.e. cannot escape being influenced by the clear necessity of the maintenance of criminal law for the organization and existence of society, yet an essential part of this influence has been repressed just because it cannot be com-

[9] Feuerbach, *Revision* I, pp. 43–53, and *Lehrbuch*, §§ 13–20. *N.B.* that on p. 75 in *Revision* he emphasizes once again that it is the *law* (das *Gesetz*) which acts. Hall, *General Principles*, p. 416, n. 22 says that Feuerbach's theory has been endorsed by Salmond, *Jurisprudence*, and Kenny, *Outlines*, among others. Cf. pp. 237 f. in the text below. Hall also says that Austin here followed Feuerbach and refers specifically to Austin's *Jurisprudence* (4th ed.). Only Austin's *Province of Jurisprudence* (1861) and *Lectures on Jurisprudence* (II & III) 1863 have been available to me. In these I have found no support for Hall's statement; Hall claims that also Bentham 'endorsed' Feuerbach's theory. Cf. p. 237 n. 2 below. Perhaps Hall only means to say that Bentham had the same opinion as Feuerbach.

patible with the starting point of guilt as the just and rightful basis for the punishment. This point of departure has constantly come up and effected the forcing of the aspect into the frame of the particular case, consequently limiting the entire perspective and cutting off the view from the social horizon.

One has not, of course, been able to avoid seeing that the regular punishment of certain actions, i.e. the so-called crimes, was a condition necessary for the society's existence and peaceful development. However, laymen socially interested have understood this just as well as criminalists. But when the experts on criminal law would utilize this point they have quite simply been forced to mishandle it entirely because it has not fitted into their basic doctrine of guilt as the just foundation of punishment. *If* it is so that certain actions may be punished in order that man *in general* may abstain therefrom, and the society accordingly may exist, then there *can* be no other reason for the particular punishment than that it is an element in the maintenance of the criminal code as a law in force. The question then becomes: what is the foundation for the maintenance of the criminal *law?* Again no other answer can be given than that the maintenance of the criminal law is necessary so that the society may not be overrun by those actions which we call crimes and all society life may not be stifled, in brief, so that society may be able to live. But if this is actually the state of affairs, and the reason for the criminal law as well as for the punishment in the concrete case is thereby given, then it is completely meaningless to motivate the punishment with any points of view of justice and to proclaim the guilt of the criminal (or his antisocial will etc.) as the legal or just basis of the punishment. If, on the contrary, one has the attitude that such a foundation of punishment exists in the guilt of the criminal or, to use a more 'modern' phrase, in his antisocial will, then one is *logically prevented* from maintaining the general preventive function (not of the punishment, but) of the criminal *law,* i.e. criminal *code.*

Notice that I say *logically* prevented. The pressure of social life itself always affects the judgment to a greater or lesser extent. It is not my concern to state further in this distorted matter how this pressure more or less unconsciously and irresistibly cuts into

the lines of guilt-justice. But it is certainly these lines which caused Feuerbach's great thought of the significance of the *threat* of punishment, or the preventive function of criminal *law*,[1] to be bungled so that the thought in question has, practically speaking, in the science of criminal law become an almost empty formula in spite of all of the phrases of its overwhelming importance. The thought can of course not be denied, but one appears to feel instinctively that it cannot be utilized with any force or advocated without coming into logical conflict with the basic doctrine about punishment as having its just and rightful foundation in the guilt of the criminal.

With this doctrine nothing is compatible other than to consider punishment merely as a reaction against the particular criminal. With this, as noted above, the entire social perspective is cut off, and the pressure from the community life and its requirements can essentially make its presence felt only within the frame of the consequently constricted perspective, i.e. within the limits of the individual case. *In this lies the explanation for the domination in criminal science of the individual principle.* With the conception of punishment as a reaction following on the criminal's guilt and consequently that the punishment has its proper *raison d'être* in the particular case before us, actually all the punishing purposes, properly, i.e. originally, falling under the individual principle, are compatible. Obviously the purposes of preventing the criminal's relapse, of improving him morally or guiding him socially are in excellent harmony with this conception.

For the sake of clarity may I recall that my criticism is directed, not only precisely against the idea of guilt and its expiation as a legal title for punishment, but on the whole against the method of justice with its forcing of one's view upon the special case. The late Professor Thyrén, generally considered to be Sweden's foremost contemporary expert on criminal law and perhaps Scandinavia's most widely recognized authority in this field, did not

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[1] While by no means an authority on the history of the doctrine here in question I should like to point out that Feuerbach was apparently not the first to express this idea. For example, Kant presupposed the same thing in *Metaphysische Anfangsgründe,* Einleitung p. XLI.

work directly with the guilt idea. He did, however, have a view which quite as much as this idea logically excludes the possibility of the general-preventative function of criminal law receiving fundamental significance and which directly encourages the individual preventive theory of punishment. Thyrén held that the punishment in the particular case must have a *legal title* and assuredly of such a kind that the society thereby has the *right* to punish the delinquent. This legal title should consist of the socially dangerous character of the criminal's will. This was a cardinal point in Thyrén's view.[2] My idea of basing criminal law only upon its necessity for the society as a crime-repressing factor was characterized by Thyrén as a 'shocking piece of cynicism' and as a theory that treats the criminal as an 'innocent beast of sacrifice' (see Thyrén, *Rektorsprogram,* pp. 8, 9, 12, 33). From such a view it is simply impossible to understand the social function of criminal law as being generally preventive. If the criminal action as an expression for the antisocial will of the delinquent motivates the punishment as being its legal title, and the purpose of the punishment must accordingly be to react against this will, how can there be any real possibility to work the point of *general* prevention into the *motives* of punishing? As far as the general prevention is really considered, the criminals are only drops in the sea of people. One can of course both see and say—although one asserts the view just touched upon—that it *is* actually so that the maintenance of criminal law has a general preventing effect against crimes. But this then, considering the view in question, is only a chance observation, so to speak, pasted over the entire matter. In this way the theory of the general prevention has *de facto* been treated more and more within the science of criminal law, and in this way this theory has been treated here in Sweden when working out the recent statute (1945)

[2] The legal right of the society (or the State) to punish the criminal could not logically be founded on any paragraphs in the criminal code (or other criminal statutes), for this were only to shove off the matter and ask the reason for the society keeping a criminal code. The right in question therefore must be assumed to have its basis in an 'underlying' law, i.e. material law, which shall in turn—as I have often pointed out—be founded on natural (or social) justice.

concerning the *kind* of penalty of imprisonment. My objections were all to no effect.

Proceeding to the science of criminal law in general, the following should be noted. That crime should be a deed prohibited by law and that the criminal must have *mens rea* (criminal guilt) are the two most essential ingredients of crime according to the view in England and America. Considering historically the origin and the development of the maxim of the common law *actus non facit reum nisi mens sit rea*[3] there can be no doubt that according to common law the punishment as presupposing *mens rea* is considered all the while to be founded on natural justice. In the case The Queen v. Tolson ([1889] 23 Q.B.D. 168)[4] the well-known Wills, J., cited Lord Kenyon, C.J.: 'It is a principle of natural justice and of our law, that actus non facit reum nisi mens sit rea.' Wills, J., himself said that the guilty intent must at least be the intention to do something *wrong*. This point must be considered. Against the background of it one must see such a statement as that of Sayre that 'up until modern times all have agreed that there can be no crime without a criminal intent'.[5] For criminal intent means the intention to do a *wrong*, i.e. something contrary to a legal command, thus involving the violation of a legal duty. There we have the expression for natural justice as the basis of punishment. Of course, the doer's intention concerning the action as a condition for punishment has not in itself anything to do with legal ideology.

Ten years afterwards, in the case Williamson v. Norris ([1899] 1 Q.B. 7), Lord Russel of Killowen, C.J., admitted of the fact that, as an exception to the general rule of law, there is a particular class of cases in which a man were to be treated as guilty, although he had no guilty mind. But, he said, 'the general rule of English law is, that no crime can be committed unless there is a mens rea'. In the case before the court he could not suggest

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[3] In The Queen v. Tolson, to be discussed immediately, Stephen, J., said the earliest use of this Latin maxim he had found was in the 'Leges Henrici Primi' v. 28 (c. 5, § 28 according to Sayre, *Present Signification*, p. 399 n. 10). Henry I reigned during the first decades of 1100.

[4] Cited by Sayre, *Present Signification*, p. 399 n. 10 as a leading case.

[5] Sayre ibid., p. 400. Cf. p. 236 below.

that the respondent had such a guilty mind as to be liable to a criminal conviction. Would it then be 'fair or equitable', would it be 'just' to hold that the respondent had committed a crime? So Lord Russel asked. No doubt, his view of punishment as being in conformity to equity and justice is in general continually embraced by judges and legal writers in England and, indeed, in America as well.[6]

The same view is, of course, held on the Continent too. In short, the reasoning is as follows. The crime is contrary to a legal command, consequently, a legally forbidden conduct. For that reason, it involves the violation of a duty (cf. pp. 34 ff. above). Therefore, and since the criminal was in a certain mental state (ordinarily criminal intent), he is considered to have brought guilt upon himself and to deserve to be punished. Punishment, accordingly, is a just retribution against the criminal because of his guilty mind *(mens rea)*. The justness of punishment is not always emphasized. It is, however, a matter of course, seeing that crime is considered to be a conduct, subjective as well as objective, a conduct implying the violation of a legal duty. It is true that after the acknowledgement of the 'relative' theories of punishment the scholars on criminal law cannot regard the just retribution as the (one and only) end of punishment. But at the least, one holds that punishment must be in accordance with justice. For instance, French authors rather frequently state this as follows: The law combines two ideas, those of social utility and of justice. The law 'ne peut et ne doit les [les actes] punir que si cela est conforme à la *justice* et dans les *limites de cette justice*. La peine est contenue dans une double limite: *pas plus qu'il n'est nécessaire et pas plus qu'il n'est juste*' (quoted from Vidal–Magnol, p. 61. Cf. Donnedieu de Vabres, p. 31, and Mezger, *Strafrecht,* p. 513).[7]

[6] Harris–Wilshere, *Principles and Practice,* pp. 8 ff.; Kenny–Phillips, *Outlines,* pp. 11 f., 40; Russel–Turner, *On Crime,* p. 24 f.; Turner in *Collected Essays,* pp. 195 ff.; Stallybrass ibid. pp. 406 ff.; Wharton–Ruppenthal I, § 10; Hall, *General Principles,* pp. 11, 129 f., 138 ff., 372 ff. etc.; Sayre, *Mens rea,* pp. 974 ff.; cf. Sayre, *Present Signification,* pp. 399 ff. Miller, *Handbook,* pp. 52 ff. seems to present a more careful attitude towards the matter. Cf. Snyder, p. 8, 118.

[7] Concerning pertinent Continental literature see: Liszt–Schmidt, § 36; Mezger, *Lehrbuch,* § 75, II; Welzel, pp. 19 f., 74, 76, 112 f., 121 etc;. Vidal–Magnol,

It is important to notice that already by considering the criminal's guilt a mental element in crime one has acknowledged that justice lies in the background of the punishment. In this respect I need only refer to Kantorowicz. He declares that a criminal law is determined by ethics—and, of course, he means it should be so determined—only to the extent that it realizes the idea of guilt, i.e. the idea that the personal guilt of the criminal is both a condition precedent for his being punished and the measure of his punishment. He continues much in the following way:

> The threat of punishment cannot deter a person who acts without a guilty mind; society has no reason to exclude such a person or to educate him; the very idea of retribution makes it out of the question to avenge his conduct. Consequently, in criminal law one can always characterize as just what corresponds to the idea of the personal guilt of the accused. Guilt in the sense of criminal law is said to be *dasjenige im inneren Verhalten dessen, der einer Strafrechtsnorm zuwider gehandelt hat, woraus ihm persönlich ein* Vorwurf *gemacht werden muss, der Vorwurf nämlich, dass er nicht so gehandelt hat, wie er persönlich zu handeln verpflichtet war.*[8]

Associated with this opinion of punishment as owing to the criminal's guilt or *mens rea* having its foundation in natural justice is—as already said—the fact that writers on criminal law have concentrated their interest on the punishment in the individual case believing in the social function of *punishment* instead of that of criminal *law* or *code*. The function of punishment then is to a great extent supposed to be individual prevention, i.e. the prevention of new crimes on the part of the convicted criminal, such prevention being effected by deterring him, reforming his character or making him harmless to society in some other way. It was in this manner that the fantastic idea evolved of punishment having almost its chief aim in changing the criminal for the better by educating him morally and socially.

The naked reality is just the other way around: the penalty of imprisonment morally breaks down the criminal and not seldom

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Cours I, pp. 57 ff.; Donnedieu de Vabres, *Traité*, pp. 31, 74 ff.; Vouin, *Manuel*, pp. 15, 161 f. Finally I may mention the annotator of the Danish penal code (1930) Krabbe, *Borgerlig Straffelov*, pp. 68, 131, 139, 144.

[8] Kantorowicz, *Tat und Schuld*, pp. 15 ff.

pushes him into the socially branded class of people known as convicts, or convicted criminals. If the punishment owing to prescription, want of evidence or some other reason is not forthcoming, the perpetrator—even if his deed is known by people—frequently can mix in society without any social stigma, or at least without being outlawed to such an extent as would have been the case had he actually served the penalty due to his crime.

For the rest, it is an undisputed fact that one can show the worst and most immoral tendencies without ever committing a crime. A person with such tendencies may need moral improvement just as much if not more than many a convict. However, as yet no moralizer has ever taken the fancy of recommending such persons to be quartered in Dartmoor or Sing Sing or other similar institutions within which they should be morally educated together with the regular inmates.

What has just been mentioned does of course not alter the fact that it is an important social interest to be concerned with *slowing down* as far as possible the *unavoidable demoralizing effect* of punishment. But notice how writers on criminal law and criminology distort the entire situation! Because the *prevention* of the demoralizing effect of punishment is as difficult to bring about as it is socially important to obtain, the writers indicated have felt obliged to do their very utmost in order to ascribe to the punishment a moral value for the convict. All through these fervent endeavors the most striking facts have been obscured in such a way that finally the sheer nonsense was promulgated that the punishment aimed at changing the criminal for the better, this moral purpose among others! The next thing to do for the advocates of such doctrines, it would seem, is to send their own more obstinate and stubborn sons and daughters to penal institutions to participate in such moral improvement.

In opposition to the attitude now pointed out within criminal law and criminology—whether such an attitude as appears from the international literature, is in general dominated by the doctrine of guilt, or is representative of a so-called more modern view, Thyrén's, for example, in both instances forcing the legal scientist, the judge or other observers to direct themselves to an isolated situation, cut off from the social perspective—I maintain

that the particular punishment can have *no other* reason or basis than that it is a necessary consequence of a paragraph or section of the penal *code* as being valid law. It is the criminal *law* that is involved. To inquire for its legal title is as senseless as to inquire for the legal title of the society itself. The society depends quite simply upon the maintenance of criminal law, among other things. In other words: the maintenance of criminal law is necessary in order that the society organization shall not succumb owing to a flood of scuh actions, which we can now characterize —because we have a criminal law—as crimes. It is with respect to this social function of criminal law that the punishment and its execution must be determined, and shaped so that it must in principle include a certain measure of suffering, varying according to different crimes, for the person subjected to it. The precise measure which is requisite for the purpose can obviously not be fixed. One must be content with what can be established with the help of the graduated scales of previous ages, as well as psychological experiences. However much the law-maker may feel exhorted in the name of humanity to show consideration for the situation and future prospects of the criminals subjected to punishment, he must never forget that he is one of the masters of *social machinery* and that criminal law is maintained for the benefit of *society* and not for the benefit of *criminals*. Accordingly, he confuses his own tasks if he, *contrary to* the viewpoints just suggested, allows the punishment to be mitigated owing to the humanitarian views that have been mentioned. He makes this confusion quite forgetting that the proper social function of criminal law concerns the *millions* in the society and not the very *few* individuals sentenced to punishment.

With this evaluation—probably rather common among people who have seriously pondered over the matter—it is necessary to consider restraining the millions from committing crimes as the social function of criminal law, and it becomes a *main* task to see to it that the execution of the punishment is so formed that this social function of criminal *law* does not fall short. Therewith is then also contained a limitation for the arrangement of the execution of punishment with respect to the welfare of the individuals undergoing it. This welfare may not be otherwise considered than

as within the limits of shaping the punishment in such a way that criminal *law* is not thereby hindered from fulfilling its social function!

Here a few indications of the way for criminal law to exercise general prevention against crime may be given. This does not at all occur only or even in the first place by *deterring* people from committing crimes. Upon closer reflection it stands to reason that if criminal law operated only as a deterrent, then such crimes as larceny, embezzlement and burglary, even assault and battery, and robbery would happen everywhere everyday, namely, as soon as the perpetrators felt convinced that they could escape detection. The social function of criminal law consists essentially in fostering and maintaining spontaneous feelings, moral instincts as it were, against those actions encumbered with punishment, i.e. crimes, or so to speak, to stir up the general, spontaneous morale against these.[9] To understand this it is necessary first to consider that the very primitive idea of retribution in criminal law has a reasonable meaning in so far as according to such an idea the criminal *effect* has significance for the question of punishment and for the measure of the same. The idea of retribution has now indeed, as all other emotional thinking, always been unreasonable in itself and the idea in question has been quite injurious to jurisprudence. But it has nevertheless brought about significant social utility through implying the supposition that an act must bring with it a criminal *effect* in order to be able to lead to criminal responsibility, and through placing the measure of the punishment in relation to this effect.

That one has allowed the effect to play this part has quite simply made a condition for the criminal law's social function of creating and stimulating the moral instincts against crimes. This function depends upon the ability of the criminal code section to impress upon the general public the idea of *absolute* inadmissibility of the punishable conduct. *One* presupposition for this impression on the public of the crime as an absolutely forbidden

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[9] See *Unw.* II, pp. 87—113. I have sometimes expressed this by saying that the criminal law maintained seizes the general morality and drags or puts it with itself against offences and other crimes.

deed is that punishment appears as a *regular* consequence of it, following so to speak *with the necessity of a physical law.* Only in this way will it be rejected in its *common* character as a *type,* i.e. without any possibility of justifying it with all sorts of sophistry owing to the *individual* moral situation of the doer of the deed. An *other* presupposition for the impression mentioned is evident from the following: As human beings are psychologically conditioned, this impression cannot be brought about without it being clear to them that the conduct in question is aggressive to one or more social values. It is the inviolability of certain social values which is impressed through the maintenance of criminal law. It is with respect to this that the punishment must depend upon the effect, i.e. on the *actual violation* of a social value, in order that criminal law may be able to fulfill its social function.[1] The *mere* intention to undertake such a violation—without such an intention being expressed in a certain way in the outer world —ought not to be able to occasion punishment according to a reasonable criminal law. As has been said it is only through attaching such a great importance to the *effect* that the way becomes clear for the stimulation in human beings in general of these spontaneous feelings against crime as absolutely unpermissible, i.e. clear for the criminal law to fulfill its social function of forming in a certain meaning the morality against crime.

From this it is seen that punishment must, in order that criminal law may fulfill its social function, be a suffering which stands in a certain proportion to the social values which are considered to be attacked through crime. This suffering must be greater accordingly as higher values are at stake and as consequently a higher degree of stability in the moral instincts against crime is necessary from the viewpoint of social welfare.[2]

At the last legal reform of punishment here in Sweden the understanding was that the essential principle in penal suffering should be the loss of freedom and that accordingly the general

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[1] With the expression 'actual violation' is not excluded the mere threat of a social value under particular circumstances, e.g. by advancing attempts at crime in a certain way. See *Unw.* II, pp. 114 ff.

[2] Cf. *Unw.* II, pp. 114 ff. Concerning 'moral-forming' there is here of course no question of morality in any profound ethical sense. Cf. *Unw.* II, pp. 97 f.

preventive effect of criminal law was not lessened through the fact that the loss of freedom by means of various kinds of modifications—such as permission, reception of visitors, smoking, freedom of movement over greater areas within the prison grounds, certain possibilities for entertainment and comfort previously unknown within the prison—became as little paining or straining as possible. However, if one considers the more heinous crimes such as murder, manslaughter, gross assault, offenses against women, robbery etc. this opinion cannot be correct. Also a very protracted punishment of this milder type just described would not be able to maintain, in a sufficient degree, the strength of the moral power accumulated within the entire social milieu, from which in turn is derived that *spontaneous,* i.e. unreflectedly working, instinctive abhorrence of such crimes, which would be necessary to subdue those *passions,* i.e. equally unreflectedly working temptations, which without this restraint would run their course in criminal actions such as have just been indicated. From this it is perhaps not quite apparent how according to my opinion criminal law functions as a general preventive factor through fostering, maintaining and stirring up the moral instincts in society against crimes. Therefore my presentation of this matter may be developed somewhat further.

As far as injurious consequences of a certain degree of severity or risk for such consequences appear *consistently* from our actions, gradually in the consciousness a rejection of the action in question arises. This rejection is unreflected inasmuch as one does not at all think about the injurious effect of the action. One says to oneself simply: you must not do this, i.e. the action appears contrary to one's sense or instinct of duty. The force in this sense of duty stands in proportion to the injury I risked to suffer if I did undertake the act. A woman's sense of duty of chastity, for example, may have arisen in this way gradually from the awareness of the injurious consequences, particularly for her, of sexual intercourse out of wedlock.

This is one of the viewpoints from which one has to consider the moral forming effect of the threat of punishment. Through the regular maintenance of the sections in the criminal code, punishment appears to the general consciousness as a *necessary,*

and not merely a possible consequence of the crime. Already thereby a particular stability in the moral attitude against crime arises. However in such a consideration it is important to emphasize the significance of the legal *punishment* as distinguished from the significance of the *moral* and *religious* reactions to a certain conduct. These can also give rise to a sense or instinct of duty against the conduct in question. Such reactions are pangs of conscience and remorse and perhaps also fear of punishments based on religious convictions. However, the reactions in question may often easily be reasoned away by means of sophistically utilizing certain circumstances in the case at hand. But the legal punishment directs the duty-sense, the moral instincts, against the action *as such,* as a *type,* consequently without regard to the individual case and the possibility that one reasons oneself into believing by means of all sorts of sophistries that in just this particular case the circumstances are 'different', with the result that the reaction fails to appear. The moral senses or instincts against crimes fostered by the maintenance of criminal law receive their *particular inevitableness* exactly in that they are directed against the *type* of the action and are accordingly *not* dependent on those feelings of what may be right or wrong, which arise at the occasion of the action in the particular case with its unique circumstances, very often tempting to a sophistical justification of the action in question.

It is seen, however, that it is this very inevitableness of the general moral senses or instincts against crime, which is something absolutely necessary for society, when one considers how much the so-called morality is observed provided penal sanction is lacking. Is there any way to compare, e.g. the frequency of lying and dishonesty *outside* of the area of criminal law and the *criminalized* cheating, deception or fraud? Upon closer consideration it appears quite simply necessary to society to resort to this very punishment-reaction in order to direct, with some *firmness,* the general morality against such actions which we call crimes. Is it then possible to avoid understanding that this direction is the very social function of criminal law?

This question appears so much the more difficult to answer with 'no' as it can be shown—although I shall not at this time

enter into this demonstration[3]—that there actually exists in society such a general moral attitude against crime which is *conditioned by the maintenance of criminal law.* I venture to maintain that in this attitude we have the *most significant influence of criminal law.* As it appears that no further notice has been taken of the expounding which I have presented on this matter, I shall summarize it here.

That legal writers attach such great importance to the deterrent effect of punishment depends probably on overlooking two things, among others. One, which shall not be discussed here at all, is the significance to the culprit of his conviction or strong feeling that the crime will not, or in all probability will not, be found out. The other overlooked factor is the *force* of the moral *instinct* against the crime which comes about through the pressure on the potential criminal, i.e. the individual criminal candidate, from the *outside,* by means of the social psychological influence on him from the milieu, the persons around him in his daily life.

It should be noted that when I have *up to now* discussed the influence of the maintenance of criminal law on the general moral attitude towards crime I have had in mind everyday people, all of us, with no particular consideration for the situation of those persons who are faced with the actual possibility of committing a crime. I have had in mind all kinds of people from judges of the highest courts to the humblest unskilled worker, persons in whom the possibility of committing this or that crime never need knowingly occur as an actual factor to take into consideration. *Now* I talk about the 'criminal candidate' (the potential criminal) meaning thereby the person in whom, because of circumstances, the maintenance of the criminal law has not in this way (directly, or perhaps more so, indirectly) been able *completely* to stifle all criminal impulses and who accordingly has met a more or less difficult temptation to commit crime.

If one considers such a person alone and mentally isolated faced with a temptation to commit a crime, his sense of duty or moral instinct against the crime would often not have much value. This

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[3] Cf. *Unw.* II, pp. 95–97 (compared with pp. 91–95 ibid.). For my view on criminal law on the whole see ibid. pp. 25–131.

sense or instinct would not be able to react freely but would either be lulled to sleep by the person's own sophistic reasoning or be more openly counteracted by his interest to commit the crime. However, the moral reaction against a crime is given full rein and is entirely disengaged when it is directed against an action in so far contained *completely within the imagination,* as the person is merely a *materially disinterested* observer of the actions of others. Therefore it is those moral senses or instincts—widely distributed within the social milieu surrounding the 'criminal candidate', increased through mutual influence on each other and reacting without any restraining influences—it is just those moral senses against the crime which receive such a firmness and strength. This accumulated power of moral senses (more or less reflected or unreflected) is transformed and transmitted, figuratively speaking, in currents of suggestive, unreflected emotions against the crime—to complete this metaphor—in waves of moral sparks which bombard the person when he stands before the temptation to commit a crime. His own reflected sense of duty, as I have said above, need perhaps not be worth so much. The decisive restraint against his criminal impulses is then brought about by the moral instinct against the deed, which instinct—having arisen in the indicated indirect way—is the spontaneous, non-reflexively working feeling that the deed must *absolutely* not occur, whichever incentives may be alleged to it.

What I have just pointed out is of decisive importance to the understanding of my theory of the general moral-forming significance of the maintenance of criminal law. For it is that *instinctive* rejection by man of the potential criminal deed which is the society's foremost guarantee against certain more heinous crimes where the situation is often such that (and, for all human beings, can be imagined to be such that) all possibilities are excluded of *reflecting* about the consequences of the deed or its moral nature. All reflection is suppressed by the power of the potential criminal's passions whether these may involve ingrained or impetuous feelings of hate and revenge or other passions. Here it is a question of the direction of pure instinctive powers toward crime, powers not bound by reason, and accordingly not even influenceable by fear of a punishment which must *with certainty* follow from the

deed. A deterring effect presupposes the very thing which is here excluded, namely, the reflection upon the consequences of the deed. The reflectionless powers now suggested, acting *towards* committing the crime, can only be counteracted by equally reflectionless powers which work *against* the crime. These latter powers are made up of those moral *instincts* against crime in the potential criminal which have arisen in the indirect way just described.[4]

On the basis of my criticism of criminal law I naturally made the social valuation that the proposal for the Swedish reform of punishment (1945) should be overruled. A number of years previous to this I had made other evaluations based on my criticism. During 1920–22 I worked against the project to introduce total prohibition of alcoholic liquor in Sweden. I showed that such a prohibition law could be based only on terror, that it thus could not seize, as it were, the general moral instincts and drag or pull them with it, and accordingly would accomplish more harm than good.[5] I tried to limit the extent of the punishableness of attempts to commit crimes. I maintained that the relapsing or habitual criminal should *partly* be punished according to the penal code for his criminal deed, and *partly* afterwards should be the object of particular measures, a detention regulated by law which had the least possible character of punishment. I pleaded for the abolition, on principle, of punishment for homosexual actions, and for criminal abortion as far as the pregnant woman herself was concerned. I stated further that psychiatry as an aid to the administration of criminal law should be alloted a much more

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[4] It is evident that the pressure streaming out from the accumulated moral power complex within the milieu acts instinctively on the 'criminal candidate' also in the case of temptations to less serious crimes than those indicated above. However, the pressure in question cannot then have the same dominating significance because a more reflected sense of duty enters and combines to work towards the crime temptation. However, it is quite apparent that on the whole even the strength of such a sense of duty against the crime has been influenced by he fact that the person belongs to the society, i.e. by that pressure which the individuals' moral reactions exercise mutually on each other.

[5] See my 'Prohibition from a legal point of view' (1920) and 'Why should total prohibition not be introduced?' (1922), both written in Swedish.

limited task than hitherto had been the case. Nothing has appeared worse in my eyes than the talk, now becoming more and more common, about the perpetrator's (moral) susceptibility or non-susceptibility to punishment and in the latter case his punishment-free explanation, entirely as if penal institutions could really be institutions for moral improvement![6] (Cf. pp. 219 and 226 f. above.) I maintained that 'abnormity' as a reason for freedom from punishment might arise *only* if the psychic situation in question were so strange to the citizens in general that they could not even feel or understand any tendencies towards a conduct determined by such motives as those present in the case. If, on the other hand, the motives were not in this way strange to the citizens in general, then it is socially harmful to use the concept 'abnormity' as a basis of an acquitting sentence.[7]

Certainly in the great majority of cases a crime is conditioned by the criminal's intention. The error in jurisprudence is that this intention is regarded as *mens rea,* a guilty mind, and by that means forms a *just* ground for punishment.[8] Quite simply it would be imprudent to let other actions, in general, be punished rather than the intentional ones, i.e. imprudent from the view of social welfare. It would be harmful to the whole of the social economy, as this presupposes: an enterprising spirit in the community, production of wealth, the common exchange of commodities, trade, industry and commerce. These all have the postulate: a common sense of security in all sorts of enterprises in all of a person's ways and works.[9] This sense of security would not be possible if people were exposed to the risk of criminal procedure and of punishment, disastrous to them and their families, owing to effects caused

[6] Quite as if the worst crimes were not crimes at all; quite as if the penal law was to *protect* the worst and most dangerous criminals, to *protect* them against the society, i.e the law-abiding citizens who not seldom may sacrifice their own life, health or property because of these criminals! What kind of humanity unfamilar with reality has not indeed been required to turn this, one of our foremost social concerns, completely upside down!

[7] Cf. *Unw.* II pp. 130 f.

[8] Cf. p. 224 above.

[9] As previously noted I occasionally use the phrase *common transactions* (being conditioned by the indicated common sense of security) for all of these presuppositions for social economy.

without any intention to produce such effects. Therefore crime in general should presuppose criminal intention.[1]

However, in considering the intention (and recklessness) as *mens rea,* the entire view is distorted. One concentrates on punishment and the criminal in the particular case instead of realizing that it must always be a question of criminal *law* and *its* significance for society. Certainly it is said very often that the purpose of the penal institutions is the protection of society. But when the question is raised of how penal institutions can best contribute to this objective, not seldom one receives the short-sighted answer: 'There seems but one answer possible—by reformation of the criminal.'[2] Hall states several wise views concerning the significance of penal law, but their scientific worth is lessened through his belief in justice as the principal end of criminal law and his idea that punishment ought to be proportioned to moral culpability.[3]

We have seen previously that Salmond and Kenny, among others, should, according to Hall, have endorsed Feuerbach's doctrine.[4] This doctrine implied the importance of consistently maintained criminal *law* as preventing the public from committing crimes. This prevention would occur through the *threat* of punishment, thus through deterring people from committing crimes. But this can hardly be said to be the view of Salmond and Kenny. Feuerbach was indeed a legal ideologist.[5] This did not, however, prevent him from perceiving that it was clearly criminal *law* not *punishment* whose social effect must be considered. Actually Sal-

[1] It may be socially desirable to have *certain* types of negligent conduct placed under the jurisdiction of penal law, but I shall not enter into this question, nor into the discussion of the significance to criminal law of the concept (after Austin) of recklessness. See e.g. Russel—Turner I, pp. 35—39; Hall, *General Principles,* pp. 215 ff. It seems to me that 'recklessness' must comprise parts of what is meant with *dolus eventualis* as well as *culpa lata,* whereas 'negligence' means 'inadvertence', embracing also part of *culpa lata.*

[2] Tannenbaum, *Crime,* p. 292 f.

[3] Hall, *General Principles,* p. 129 f., p. 415 ff.

[4] Above p. 220 n. 9.

[5] See 'Einleitung' of his *Revision* and ibid. pp. 53 ff. The one and only method for him was the method of justice. However, more than other authors contemporary with himself, Feuerbach allowed 'justice' in criminal law to be directed by considerations of social welfare.

mond and Kenny speak of *punishment* as deterring. The idea of *mens rea* or a guilty mind in the criminal has apparently led them to pay attention to the demand for justice in the particular case. In this way it has become a question concerning the purpose of *punishment*. These authors then came to the result that punishment has several purposes even if deterring is considered the most important one.[6] Neither Salmond nor Kenny make any mention of the importance of getting a clear idea of the fact that in the first place it is a question of criminal *law* (the criminal code) and that punishment is thereby only an expression for criminal law as being actually maintained, i.e. in force.[7]

[6] Salmond says that besides its deterring purpose, punishment has, whenever possible, 'to prevent a repetition of wrongdoing by the disablement of the offender'. In addition punishment should be reformative and, lastly, retributive. See Salmond, *Jurisprudence,* pp. 121—130, and p. 380. Cf. Kenny—Phillips, *Outlines,* pp. 33 ff., 39 ff.

[7] It is not for me to decide whether the view of Salmond or Kenny is derived from Feuerbach's or Bentham's conception of criminal law. (Cf. p. 220 n. 9 above.) Of course, Bentham understood that criminal *law* has a generally preventive effect. But he hardly understood the importance of underlining or emphasizing 'law' as opposed to 'punishment'. Under the heading 'Of the ends of punishment' he states, *inter alia:* 'The prevention of offences divides itself into two branches: *Particular prevention* ... and *general prevention* ...' As to general prevention Bentham says it 'ought to be the chief end of punishment as it is its real justification'. This statement was preceded by the following paragraph: 'General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, *serves for an example.* The punishment suffered by the offended presents to every one an example of what he himself will have to suffer, if he is guilty of the same offence.' (See Bentham's Works I p. 396.) It is not very likely that Bentham could have been influenced by Feuerbach's theories. Bentham's prototype as far as criminal law is concerned appears to be the Italian author Beccaria (*Dei Delitti e della Pene,* 1764). See Hepp, pp. 7 ff., and Keeton and Schwarzenberger, pp. 24 ff. Bentham may possibly have read Feuerbach's *Revision,* although he was 27 years older than Feuerbach and, as far as I have been able to ascertain, he wrote his work on criminal law in 1790 or so, although it was not published until 1802 in the French translation made by Dumont and entitled *Traités de législation civile et pénale* (3 vols.). Feuerbach's *Revision* appeared in 1799. Hepp, who was a German professor of law, does not even mention Feuerbach in his book on Bentham's theories of criminal law—a man who became the most world renowned criminologist of this time. Any possible influence Feuerbach may have had on Bentham was apparently not known by Hepp. Neither is Feuerbach mentioned by Keeton and Schwarzenberger.

By keeping to punishment instead of to criminal law, writers on criminal law unintentionally dwell too long on the effect of punishment on the offender in the individual case. In this way the important question of how to treat the backsliders is overlooked. Concerning this see p. 235 above. And—what is far more important—it seems on the whole to be disregarded that the interest of society in having crimes punished is a fact that *overshadows everything else.* It is through disregarding this condition of paramount significance that the criminal policies and criminology too, for that matter, have been distorted. As has been pointed out above, even those authors who underline the general prevention as the 'essential and all important' purpose of *punishment*[8] confound punishment with criminal law. Partially owing to this very confusion they do not understand that the general prevention is not essentially effected by intimidation, i.e. by deterrence. Society can to a very slight extent build upon the deterrent effect of criminal law, as has been said before. The essential social function of criminal law is to arouse or excite in people moral feelings or instincts against crimes and to support such instincts. It is here that we have the *great* and *crucial* importance of criminal law. It is in this way that society is prevented from being overwhelmed by crimes.

I should like to touch briefly upon the importance for the application of criminal law of the *motive* for committing the crime. Here two interests oppose one another. However, the consideration of both interests is necessary for the social function of a section of the criminal code. It is essential that certain *types* of conduct stand out as punishable, however good or even noble the motive of the action in the case may appear to the public as well as to the authorities. This is necessary in order that through the maintenance of criminal law a contribution may always be made to the understanding etched into peoples' minds of moral senses or instincts as linked—with the necessity, as it were, of a physical law—to the disregarded conduct *as such,* i.e. as a *type.* Such moral senses or instincts, so to speak of an abstract kind, are a condition for the maintenance of a social order. Otherwise

[8] e.g. Salmond, p. 121.

crimes of all sorts, through miscellaneous sophistries and individualizing conscientious feelings, could be justified by the doer of the deed and thus lead to a common insecurity. Therefore moral motives *occasionally* existing may not exclude the punishability of the conduct. On the other hand, it is equally important that morally different motives really lead to varying strong punishments. For it is clear that the feelings or instincts of duty cannot react with the same strength against modes of conduct which themselves have individual moral motivations. The elements considered as morally good in a crime will quite naturally lessen the general moral reaction against it. The *social value* which is violated through such a crime appears to be diminished and causes accordingly, as previously noted, a milder punishment.

From cases of *mitigated* punishment now indicated those cases must be carefully distinguished in which the moral motives for a criminal conduct are not of an *individual* nature but arise from prevailing interests within classes or groups of society, cases that is in which entire parts of the community actually approve of that kind of conduct. Here it is hardly possible through the maintenance of sections of the criminal code to impress any feelings or instincts of duty in respect to the conduct in question among a sufficiently great number of the members of society. It follows in such cases that punishment of the conduct is not only void of any socially useful effect but introduces a particular social evil. The punishment has now a demoralizing influence through reducing the authority of the criminal law in general. Therefore those actions should not be punished which certainly involve attacks upon the person or property of others but come about from such situations which exist, e.g., on certain occasions of a strike when it is clear that the general moral consciousness of the strikers reacts against particular actions by their comrades (i.e. other workers who are strikebreakers). In order to prevent acts of terror and violence which are always harmful, necessary protective measures must be taken on the part of society. However, such protective measures should not in any way have the character of punishment.

Civil law

Upon entering my own province of law (civil or private law) I should like to point out that some instances of reasoning according to my method have been given already, *inter alia,* certain viewpoints on Ryland v. Fletcher and the illustration of the rule of compensation owing to the expropriation of land (pp. 68 ff. and 101 ff. above). Now I am going first to elucidate the false reasonings within jurisprudence by considering the question of the basis of the validity of an agreement. Interest here is concentrated on the age-old question: why do the parties to an agreement have mutual rights and duties? Among writers on jurisprudence there have been two main theories, for the sake of brevity here called the theory of will and that of reliance. It should first be noted that in general neither of these theories considers so-called positive law as playing any real part in the explanation of the 'existence' of the parties' rights and duties. Evidently they are regarded as based on natural justice, or, as expressed by Pollock (*Essays,* p. 31), in that unwritten 'ultimate principle of fitness with regard to the nature of man as a rational and social being'.

Thus, according to the will-theory, it is 'natural' and 'just' that these rights and duties should be founded on the consent of the parties. For a person's will is considered as possessing autonomous power over him. However, even if we admit the old and false dogma of the freedom of the will[9] as our starting-point, such an explanation can be no more than an arbitrary declaration, in fact, a *petitio principii.* For it is obvious that so long as one cannot afford a real explanation of this wonderful effect of the will, one takes for granted the very thing one is supposed to prove, namely, that the wills of the parties produce legal effects due to their own capacity. It is obvious that rational people could not direct their wills to the origin of rights and duties, *if they did not know* that their wills really were able to produce such an effect. If a person holds a gun in his hand, he cannot *wish* or *intend* to shoot another with it if he does not know that it is a shooting weapon, and, consequently, does not know the connec-

[9] Of this see above pp. 55 f.

tion between the pressure on the trigger and the shot. Inasmuch as the theory of will claims to explain the rights of the parties arising from the agreement, it thus argues in a circle. In the background there certainly lies the experience of agreements in case of need being actionable. Yet one means the rights and duties, which have already arisen by virtue of the agreement, are in case of need to be legally enforced. However, this implies that the agreements created rights and duties which afterwards might be made objects for a lawsuit, a way of reasoning completely untrue to facts, as has been shown above in the chapter on legal rights and duties.

As already pointed out, this opinion is based on the old conception that a person's will has autonomous power over him. Such a view was held not only by older legal writers, e.g. a Savigny, a Windscheid[1], but even by the adherents in general of the will-theory. Realizing the weakness of such a basis of the theory later authors have tried to attain a better explanation of the validity of an agreement according to the will-theory. For instance, ten Hompel holds that it is the common will of the parties that has the legal power.[2] Such a will is considered to look after the interests of both parties. Owing to this character of the common will as *Verständigungswille* the individual will of each party must subordinate itself to their common will.[3] However, it is obvious that such a good quality of the common will could not be assumed if it not really looked after the interests of both parties. Indeed, it were not able to do so, *if* it were not legally binding but could be withdrawn one-sidedly without any legal consequences injurious to the withdrawing party. Accordingly, the validity of

[1] Savigny III, pp. 257 f., p. 309; Windscheid I, § 69.

[2] Cf. ten Hompel, *Verständigungszweck,* p. 17. Throughout he distinguishes between *Wirkungswille* (and *Erklärungswille*) and what he calls *Verständigungswille,* which latter is always common to both parties of an agreement. The *Verständigungswille* is claimed to be the common source of the *Wirkungswille* and *Erklärungswille,* pp. 17 and 96.

[3] This seems to be the gist in this point of ten Hompel's book. However, it follows only indirectly from his exposition. See e.g. §§ 5, 8, 10 and 13. ten Hompel does not mention Hegel. This philosopher, however, considers the common will as superior to the individual one, because the common will is the very rational. See his *Philosophie des Rechts,* §§ 5, 258 and others.

the agreement *presupposes* that it is legally binding, i.e. that a rule of law is maintained of its validity. Thus, the agreement bases its legal validity on—its legal validity.

The theory of reliance—which is today perhaps more widely accepted and, on the whole, seems to be applied in Anglo-American jurisprudence too—means also that the rights and duties of the parties arise from the consent of the parties.[4] However, in addition, a comparison of the interests of the parties from a 'reasonable', i.e. a 'just', point of view makes B get a right against A even if A may have given his promise by mistake. For—so one reasons—the interests of the parties have to be compared the one with the other from a 'reasonable', i.e. just point of view. If A has given the promise by mistake, so that his mind did not go with the promise and consequently the consent of the parties could not be present, B's interest inasmuch as he acted in 'good faith' is in any case assumed to be of a higher value from the point of view of justness than that of A. For, it is argued, through the *expression* of his will A has made B justly to *rely* on this expression as being correct. Now, however, what else is this way of arguing but pure caprice, at least in all cases when A's mistake has been done entirely in 'good faith', i.e. without any fault at all? Certainly, the theory of reliance has in such cases its practical preference over the theory of will. For if A's promise has been given by mistake, negligently or else not in good faith one might have special possibilities for keeping him bound by his promise even according to the will-theory. But if A has acted completely carefully, on what reason can one then argue, according to the theory of reliance, that the interest of the promisee is to be preferred to that of the promisor? No positive reason at all can be found, for the theory is based on error. Its argument is as follows:

> The promise entitles the promisee to rely on the promise in spite of the promisor's mistake. This reliance, which places the promisee's interest on a higher plane on grounds of natural justice than that of the promisor, ought in its turn to lead to the liability of the latter.

Arguing in such a way, one assumes, however, quite arbitrarily that the promisee has a just reliance on the promisor's acting in

[4] This theory has in German often been called *Erklärungstheorie*.

accordance with his promise. But how could the promisee acquire such a reliance if he did not *know* that a promise generally 'binds' the promisor, i.e. that by the operation of the law the promisor is 'liable' to fulfill his expressed intentions? To state it briefly, *the liability of the promisor is explained by the reliance of the promisee on the said liability.* Thus it appears that the famous theory of reliance is also nothing but a vicious circle.

I have now expounded the theory of reliance according to the Scandinavian view of the matter. It is obvious that the theory of reliance in this form *presupposes* the circular argument of the will-theory, to which is *added* the vicious circle just mentioned. Indeed, it is not only in Scandinavia that one has reasoned in this way. However, many adherents of the reliance-theory motivate the validity of an agreement, on the whole (i.e. even if no mistake has been made by the promisor and, thus, there is in every respect the full consent of the parties), with the higher value residing in the reasonableness or justness of the promisee's interest because of the promisor having made him justly to rely on the promise as an expression of the will of the promisor.[5] Schlossmann, among others, properly speaking, left the will of the promisor quite on one side.[6]

Of course, not only according to the reliance-theory but even according to the will-theory one means that the interest of the promisee in the performance of the promise is to be higher in regard to its reasonableness than the promisor's interest in being freed from the promise. In both cases this is, as we know, only a way of saying more explicitly that natural justice is the foundation of the validity of agreements, i.e. natural justice as resulting from balancing the party interests against each other.

The fundamental error as to the whole of this matter lies in the belief in agreements, promises etc. being able in some way or other to create legal effects (rights and duties and other possible legal relationships).

It is not at all any progress towards clearness of thought to say that the ability of the agreeing parties to engender legal rights

[5] Cf. ten Hompel, *Verständigungszweck,* pp. 6 ff.

[6] Schlossmann, pp. 306 ff. On Schlossmann's theory see my remarks in *Unw.* II, pp. 201–210.

and duties depends upon the law. Either one therewith means material or objective law. This does not exist. Or one means so-called positive law, that law by which promises and contracts are said to be enforced. But how should such law possibly be able to provide persons with an incomprehensible power? The causal connection indicated cannot be experienced in the world we live in. Nevertheless Josserand, for example, says as follows: 'the contracts are not able themselves to produce obligations otherwise than by virtue of the permission of the legislator'.[7] This is only to move the wonder from one stead to another. For what Josserand there says is contradicted by the logical impossibility for the legislator of imposing any powers in man, be they supernatural or not. It is of no use to refer to C. civ. art. 1134. The conception in question cannot overcome experience. Yet the view just mentioned of Josserand seems to be rather common all over the Western world! As to legal writers in France see moreover Laborde-Lacoste, *Exposé méthodique,* e.g. *Titre IV* on *La source des droits* etc., pp. 84—106.

In fact, the whole of the idea of the declared will being able to produce legal effects is preposterous. It follows already from what has been said above, pp. 78—122, of the erroneousness of the belief in legal rights, duties, obligations (and other legal relationships) to come into being. For obviously it is first and foremost such 'effects' that are held to be created by the will in question. However, let me furthermore point out a few remarks on the matter.

Of course, these effects presuppose the will having directly or indirectly been declared or expressed. In those cases which here are of interest this expression is called 'declaration of will'.[8] In such a case it is impossible that the will has caused anything but its own expression, i.e. the declaration in question, and the psy-

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[7] *Cours* I n. 117.

[8] Verbal translation from the Swedish *viljeförklaring* (German: *Willenserklärung*). In English the term 'declaration of intention' would perhaps be more suitable, one of the reasons being to avoid misunderstandings due to 'will' in the sense of 'last will and testament'. In Hägerström, *Inquiries,* the term 'declaration of intention' is used; see pp. 299 ff. However, Hägerström used himself the term *viljeförklaring.*

chological influence that this perhaps exercises upon another. Certainly, in a number of situations so-called declarations of will are considered as legal facts in a judicial procedure. But in point of principle this does not distinguish itself from the fact that other actual conditions or things *also* may be considered by the judge and, therefore, are called legal facts too. The 'legal will'[9] expressed in a so-called declaration of will has *just as little power of producing legal effects as has a grey stone.* Even such a thing (its position, dimensions, consistency, form etc.) may be considered in a judicial procedure and enter into the complex of facts, so-called legal facts, which determine the judgment. To return to the declarations of will (e.g. an offer, an acceptance, a promise, an agreement etc.) they are considered legal facts of a more or less definite significance to the judgment, immediately only because such a consideration belongs to the 'rules' of law which the judge applies if and when he really carries out his task as judge. And *that* such rules are maintained cannot in point of facts be motivated by anything but the social interest that the 'declarations of will', above all the agreements, may be as reliable as possible and thereby as useful as possible in the service of common transactions and social economy.[1]

The fact that the 'declarations of will' have in this way a legal significance cannot, of course, depend upon any 'will to produce legal effects' *(Rechtswirkungswille).* No man in his senses could be the subject of such a will. This will could lead to nothing but the decision through the 'declaration of will', an offer for example, to engender a certain legal effect. However, as already said above[2], such a decision nobody would make if he did not *know* that he were able through his decision to create the legal effect in question. But how would one be capable of *knowing* this, *if* the offer did not actually have the legal effect in question—owing to the maintenance of certain rules of law? Accordingly, the so-called *Rechtswirkungswille* must in its decision *presuppose* that the offer has the intended legal effect, a presupposition not to be found if the rules hinted at were not maintained. Therefore,

[9] i.e. the so-called will to produce legal effects *(Rechtswirkungswille).*

[1] Cf. pp. 247 ff. below.

[2] See pp. 241 f. above.

the *Rechtswirkungswille* as such, declared or not, cannot in any way be the cause of this effect. As already said, the will, even declared, could not have greater power in this respect than a grey stone. However, a will that in general actually exists behind a so-called declaration of will is the will to make the declaration in question. Obviously this is quite a different matter from the will of producing a certain legal effect by the declaration.

Throughout I have discussed the *so-called* declaration of will. For the whole concept depends upon a vicious circle. Indeed, the phrase must comprise the declaration of a certain will in the person. But this will must first and foremost be the will to make the 'declaration of will'. Therewith, however, the content of the phrase is exhausted. Take for instance the offer, just used as an example of the 'declaration of will'. This offer would, accordingly, be a declaration of the will to make the offer in question, which again must be a declaration of the will to make the offer, which again ... and so forth *ad infinitum*. What here is overlooked is that it is logically impossible to declare a certain will in case this will cannot be determined without the declaration itself entering into the content of the will.[3] An offer, of course, may be denoted as an expression of will (being often a statement or question). This expression together with other facts are considered by the judge according to certain 'rules'. And there is an end of it.

Instead of all the nonsense, just presented, of legal ideology let us see what then may be a more real basis of the legal significance of a promise. Actually I think this matter is stated clearly enough as follows:

If promises did not give rise to so-called rights and duties as between the parties, contracts would be useless as instruments for the exchange of commodities and for all sorts of common transactions. But how could society do without such instruments? Explained more fully, the position is as follows. There are certain social necessities, which are indispensable to the common welfare of society, and even more so for the creating of social wealth. By way of illustration, let us glance at a more primitive society. One can here imagine an individual who by his own work obtains

[3] Cf. Hägerström, *Inquiries*, pp. 300 ff.

goods, or else by his own effort produces things which he cannot personally have any use for, but which may be extremely useful to others. On the other hand, he may personally require things which he cannot produce or obtain at all, or at least only with much greater difficulty than others, or require work to be done which he cannot perform himself, or at any rate only with greater difficulty than others. Thus one finds that, even at a very early stage in the development of the community, the need must have made itself felt for an exchange of articles of value and other commodities over which different people, by their own ability or by other individual circumstances, have the disposition. If there were no laws to incite people to fulfill their agreements, such exchanges could, of course, not take place, except in cases of barter and cash transactions. But if such an *exchange of commodities* were needed even in olden times, it is needed in present-day communities in an entirely different manner. Modern requirements absolutely demand the *specialization* of energy arising from the division of labor in order to increase the product of all effort expended. However, the production may be increased no matter how much and it would still not be of any help to society if the exchange of the products did not stand in proportion to the increased production. Such an increase is of no use to society if the resultant commodities are only to be stored. Indeed the view of stockpiling them instead of distributing them to buyers and consumers is hardly an incentive to enterprising producers. Such a situation would serve most effectively to cut off the supply of capital—if, under the assumption made, there would exist any capital at all.

From what has been said it follows that social welfare, i.e. *inter alia* consideration for the creating of wealth, the common production, the exchange of commodities, in short, common transactions, and all sorts of enterprises, of necessity requires that individuals should, according to their requirements and—as there cannot in general be any suitable control of these requirements —their wills and desires, be allowed to determine for themselves their own economic advantage. But how could this be done, if the expression of will made manifest in the promise *were not 'legally binding'*? Who would dare, or care, to make a contract,

or, in general, to rely upon a promise made? In order that the promise may acquire such significance, it is absolutely necessary that it should be accompanied by some 'legally binding' effect. Thus: the reliance of the promisee on the promise is so *far from being the basis* of the legal effect of the promise, that this effect, *on the contrary,* is brought about *in order that people may place such reliance* on the promise that promises and agreements may be useful for common transactions and all sorts of enterprises, thereby also for maintaining and increasing the social welfare. That is to say: in order to attain the legal effect hinted at by the promise, legal machinery is made to function in such a way that the promisor in general performs what he has promised to do and, in case of need, can be subjected to certain coercive measures in favour of the promisee.

Has not a terrible mistake, then, been made? An error of such extreme magnitude has been committed that the *consequence* of the liability of the promisor has been given the quality of the *precedent* for this liability. In view of these facts it ought to be especially clear how absurd is also the assumption of the autonomy of the will as the ground of the validity of a promise, and how perverted is the supposed greater reasonableness or justness of the interest of the promisee as compared with that of the promisor. The fact that the *wills* of the individuals enter in should not cause confusion. Indeed, that is easily accounted for even on a rational view of the matter. For we are here concerned with a common exchange of articles of value in accordance with the needs of individuals themselves, which latter they may determine as they please. Hence, the declarations or expressions of the parties' wills (or desires) must be coupled with the legal effect mentioned. But it must, of course, also be taken into consideration that regard for the *common sense of security* is an element in the promotion of the common exchange of commodities and all sorts of transactions in the community, for without such a sense of security the exchange of commodities, etc. and consequently the social welfare, cannot prevail. But in its turn the common sense of security presupposes that not only such promises as are *true* expressions of the promisor's will are coupled with a 'legally binding' effect, but also those which, *by mistake or otherwise,* are

not in accordance with his will but nevertheless calculated to appear in accordance with it.

It has been objected to this view of the matter, by Swedish writers on jurisprudence, that there are times in the development of the law when reliance is placed on promises long before the law has held the promises binding. Thus the legal rule is said only to give a sanction to a reliance already present. Later the legal rule produces, as it were, a reflex effect: a still more confirmed reliance on the promises. I shall now make a few brief remarks on this form of argument.

If it is not legal machinery that engenders and maintains a common sense of reliance on a promise, on what can it be based? The answer is, of course, on the moral sentiment or sense of one's duty to keep one's promises. This, however, leads us in turn to another question: on what are such moral sentiments based? In answering this question it is first of all to be noted that the sentiments of duty in question cannot be based on the idea of any common reliance on the keeping of promises. For if the sense of a duty to keep one's promises did not exist, it would be pure unreason to say that a promisee could rely on a promise. Thus the idea of the duty in question cannot logically be based on any confidence reposed in the very promise as such. If one further sets aside the entire superstition of the law of nature, which derives those sentiments of duty from Heaven or considers them innate, one is forced to realize that their *raison d'être* is connected with the manner in which legal machinery functions as to the conduct of man, and especially as to the performance of promises. This manner in turn is conditioned *inter alia* by valuations of the necessity of promises being held for all sorts of communications between people, thus, for society life, and for social welfare.[4]

Anyhow, no common reliance on promises is likely to be based merely on the power of moral conceptions. In business life a

[4] Cf. pp. 167 f. and p. 128 n. 6 above. Of course, also criminal law against all sorts of deceit, fraud and swindle as well as some part of the law of damages contribute to promises and agreements being voluntarily performed. Together with some part of the law of contract they have combined to bring about a certain general honest attitude in man towards his fellow-creatures. To be sure, it is no question of honesty in any deeper sense.

promisee who relied on the performance of a promise merely on the basis of the moral obligation that arose, presumably, between the parties, would of course be considered an inveterate dreamer or an idiot. Take, for instance, a merchant, who, on conditions that subsequently prove very disadvantageous, has contracted to deliver goods. Through some loophole in the contract, however, he can worm himself out of the legal liability arising from it. In such situations, would every tenth, even every fiftieth seller bother to deliver the goods, if special circumstances (regard for the reputation of the firm, desire to retain the customer, etc.—*circumstances entirely insignificant from a moral point of view)* did not stimulate him to do so? Yet a common reliance on the moral duty based on a promise were to form the foundation of the liability of the promisor! Kindly let us consider for a moment just what such a theory implies: the legal effect of the promise were to be based on an idea that could only be held by a couple of dreamers or idiots! Under these circumstances, who can possibly fail to realize that *without the so-called legal rule as to the validity of a promise,* common reliance upon the effect of promises would be an impossibility? Thus we are now face to face with the usual phenomenon that, when estimating the significance of law (= legal machinery) to the society, jurisprudence does not consider the influence on man of the operation of law, but believes this influence to be due to causes lying outside law.[5] It is the maintenance of the law of contract and other laws during centuries that has made the phrase 'agreements must be kept' appear in the public consciousness as something valid in itself, as a principle founded on natural justice or the 'nature of man as a rational and social being'.

Perhaps the following should be added. In general people have the sense of duty to keep their promises. It should however be noted that—according to a view freed from metaphysics—it is not at all because they satisfy moral demands that the legal 'rules' concerning the effect of a promise need be maintained in society. It suffices to say that the *maintenance* of such 'rules' is *necessary* in order that the society in a not too primitive sense may exist

[5] Cf. pp. 17 f. above.

and that the potentialities of the earth for culture and civilization may be exploited. It is this easily understood explanation of the background for the legal validity of a promise that I wish to give in place of the strained and absurd assumptions of current jurisprudence. On the other hand it is obvious that the functioning of legal machinery as to the performance of promises—through the accordance of this functioning with social instincts and valuations of man—creates as well as supports the moral attitude among people to keep their promises and agreements.[6] If in this way the senses of justice in question were not taken into the service of legal machinery then this alone would not do. The fact that legal machinery is able in this way to carry the senses of justice with itself is—as repeatedly pointed out—connected with the fact that the common keeping of promises is a matter of life and death to social economy.

Now I shall show how valuations come about in connection with my critique of the so-called culpa-rule which corresponds approximately to the Anglo-American maxim of fault-liability. Fault implies 'negligence' as also culpa here implies blame for 'neglect'.[7] All the while the usual reasoning within jurisprudence as concerns this liability is that the defendant has caused harm to the plaintiff through his conduct by which he has disregarded 'due care', i.e. the care of a 'reasonably prudent man', and accordingly that he has drawn guilt or blame upon himself. Through this guilt he has deserved to be liable to the plaintiff for the

[6] That the functioning of legal machinery in other provinces also indirectly contributes to the moral attitude in question has been noted on p. 166 f. above. Also cf. p. 169 above for a kind of interaction between the common sense of justice and the contents of the rules of law. Compare the preceding note too.

[7] Cf. Ehrenzweig, *Negligence,* p. 2; See also Charlesworth, *Negligence,* pp. 1, 2 and 7 f. I have no occasion to touch upon the English judicial writing of the recent decades in which the expression for the 'duty of care', which formed the postulate for negligence, could be an 'absolute' duty. Such an expression exists when one characterizes the violation of a 'statutory duty' which is obviously of an absolute character, as negligent conduct. See the judgments of Lords Atkin and Wright in Lochgelly Iron and Coal Co. v. M'Mullan, L.R. 1934, App. Cas. 23. Notice in particular Lord Wright's statements, p. 26 f., ibid., concerning the case of Groves v. Lord Wimbourne (1898). Concerning negligence without fault in America see the work of Ehrenzweig just cited.

damage. Since I had demonstrated that this motivation for 'fault-liability' or the liability according to the culpa-rule was nonsense, I raised the question: can the culpa-rule then not be motivated by reason? There was every probability that this question could be answered in the affirmative. Reasons true to reality *must* be able to be stated for the maintenance of a legal maxim which has been valid for hundreds of years. Indeed we have seen how the culpa-rule has been forced to adapt itself to the pressure of social life. As a matter of fact the guilt of the *defendant* is not presupposed any longer. The guilt has been 'objectified'. One asks if such conduct as that of the *defendant* would imply the want of due care in a *reasonably prudent man* or not! That is to ask in effect if the reasonably prudent man would have drawn guilt upon himself if *he* had conducted himself as the defendant did.

Here as well as elsewhere one of course has to use the method of social welfare for answering the question if and to what extent the culpa-rule would be useful in the legal system. In this respect I have found it to be the most simple way to make a pure and simple thought-experiment by posing the following question: What would take place in the community if such a maxim were not maintained? The answer in brief is as follows. In general, carelessness with other peoples' 'property' affairs would prevail. Willfully or negligently one would fail to carry out agreements and other 'obligations'. On the whole such 'obligations' would simply not exist. As we have seen on pp. 114 ff. above a *legal obligation* implies essentially nothing other than that a person becomes liable to pay an amount of money if he does not act in a certain way. One should not be surprised that I have brought up so-called obligations in this connection. It should be remembered that on principle there is no reason to differentiate between modes of conduct within or outside of a contract.[8] Concerning the general basis for a culpa-rule one can reason correctly without distinguishing between contract and non-contract situations. Consequently the result would be that there were no means of exchanging commodities and that one would prevent people from contact with one's property and economic interests. A general

[8] Cf. pp. 116–120 above.

stagnation would prevail instead of common transactions. The conditions necessary for all production, for social economy as well as for private economy, would disappear. What, e.g., would be the right of property and the significance of it as a production-stimulating factor if one's fellow citizens without the risk of any legal reactions could recklessly deal with one's 'possessions'? Indeed this right of property is nothing other than the security which follows from the maintenance of *inter alia* the culpa-rule. Gradually even punishment with its preventive effect against crime would cease. For how could prisons be built? How could the entire penal establishment be maintained on the whole, if agreements or contracts had no meaning and one could without the slightest risk act as arbitrarily as one pleased? A civilized community would be inconceivable. Because of hunger and the lack of conditions necessary for life, the great mass of the civilized population would gradually disappear. The remainder—if we carry this thought-experiment to its conclusion—would finally roam about as barbarians and savages. From this it must be evident that it is necessary not only for the development of society, but even for its very existence that the citizens be incited to fulfill contracts and promises, that they be prevailed upon to exercise a certain amount of care in dealing with the 'property' and affairs of others, and that they be spurred on to observe a manner in general consonant with the existence and development of society.

However, I return to the culpa-rule or fault-liability in the ordinary sense, i.e. as limited to non-contract situations. As a matter of fact, the same disastrous consequences might probably have followed even if only the rule so limited had been absent. Would not the common, gradually increasing carelessness and recklessness as concerns people's lines of conduct at last lead to general anarchy and barbarism? In any case nobody should be able to avoid seeing the importance not to say the necessity to society of the maintenance of the culpa-rule, according to which a person runs the risk—if he does not observe a certain care in his manner of conduct but does instead act 'negligently'—of having to pay a sum of money to the person injured through the 'negligent' action, being the sum estimated according to the extent

of the damage. The fact that the payment coercion becomes in this way a damages coercion has a social significance. For the interest of society in counteracting such acts of negligence is, upon closer inspection, simply the interest that the citizens may, as far as possible, be able to act and deal *in security* against injuries caused by so-called carelessness or negligence on the part of fellow citizens. Such an interest consists not only in that the threat of a payment coercion restrains people from causing damage through careless actions, but also that this coercion becomes a coercion of paying *damages to the plaintiff:* that injury is compensated, which was brought about by such an action as from the social viewpoint should be prevented. It is extremely important to make quite clear that the maintenance of the rule of fault-liability thus contributes to the general sense of security, necessary to community life, particularly to the production of wealth and the common transactions, in *two separate* respects:

First. The general consciousness of the coercion to pay a sum of money as a regular reaction on negligent conduct is calculated to counteract such actions and reduce them to a minimum.[9] Actually the damaging actions in this way—when viewed against the background of a fictitious situation in which such a counteracting factor is lacking—are reduced to pure exceptions. There can be no doubt that already this *preventive* function of the law of fault-liability would be sufficient to form as strong a sense of security in respect to the damaging actions so that a social economy approximately like that which now exists would be brought about.

Second. The feeling of security thus produced is *strengthened,* however, through the general consciousness that the sum to be paid is regularly formed as *damages,* i.e. constitutes *compensation* to the injured party and is not fulfilled by paying a fine to the state, for example. The general consciousness of this *compensative, repairing* function of the so-called culpa-rule effects a certain

[9] The maintenance of the rule of fault-liability is necessary for the effect in question. However, a complex of factors contribute to this effect, among them: the general respect for law and order, senses of duty to respect another's property, moral instincts of carefulness etc. All of these factors in turn presuppose the maintenance of law in general and certain laws in particular. Cf. pp. 250 n. 4 and 252 n. 6 above.

feeling of security upon man even with regard to those more rare cases when damaging actions are going to happen in spite of the preventive function just mentioned.

Two things should be noticed with respect to this *double* function of the damages-coercion according to the rule of fault-liability. First, compensation may in point of principle be considered a subordinate function. Compared with the social interest to prevent and minimize the damage-actions themselves as far as possible, it is secondary from a *social* point of view what happens in the more *rare cases* where an injury has occurred. Yet it is apparent that this latter question gets *somewhat* increasingly important through the prevailing false conceptions of justice. The common sense of justice is strongly attached to the belief that the damaging action forms a violation of right which in the name of justice demands satisfaction. Actually it may be an interest of *social* welfare to respect to a certain extent prevailing feelings of justice.[1] Notice that I say that the preventive function is in point of *principle* superior from a social viewpoint. In certain situations the compensation function can be the most important from the said viewpoint. This then depends upon the preventive function being satisfied partly in such other ways as were suggested in the note on p. 255 and partly by particular instincts (e.g. self-preservation independent of laws) which strongly counteract the careless actions. Here I need only refer to certain injuries caused by traffic accidents.

This is one point to consider. The other which is especially important in order to understand my critique of the prevailing law of fault-liability is that the compensating function has, properly speaking, not the slightest concern with considerations of justice, nor with any interest towards freeing the injured part—since he was 'undeservedly' harmed through the 'blame' of another—from the loss and 'transferring' this damage to the person who caused it.[2] Such views are imaginary as I have pointed out in

[1] I have touched upon this point in other connections. Cf. pp. 138 ff., 153 and 188 f. above.

[2] I say 'properly speaking' as a reminder of the fact that people, jurists as well as laymen, commonly mean that damages are justified exactly as a compensating factor and then in the name of natural justice. This common attitude, as noted above, increases the compensating point of view of damages.

many of my writings. It is simply a question of finding a *factual* basis for the *law* of fault-liability, i.e. to see to what extent the culpa-rule can be motivated from external social realities. In this respect it is uncontestable that the greatest possible sense of security is of interest to social life and that the feeling of security engendered through the preventive influence of the payment coercion is *increased* through the general awareness that in the exceptional cases where damage does occur the *payment* coercion is formed into a coercion to pay damages to the injured person. In this way the damage can be said actually to be transferred from the person harmed to the person who caused the damage. However, it is a disastrous mistake to believe from this that the social function of the law of fault-liability is to make such a transfer in the case at hand. It is logically impossible to adopt such a view, if one seeks the basis for the law mentioned in the interest of social welfare. The absurdity of considering the damages from the viewpoint of the individual case is quickly seen by noting the questions raised on p. 58 above. I remind my readers of these questions. If attention is paid to them and to the connection where they are framed it must be easy to understand that even the forming of the legal reaction to a *compensating* one, to *damages*—as far as the social interest is considered—must have its reason in the significance thereof to the *general* sense of security and therewith to the *social* economy.

It stands to reason that a maxim of damages based on the points just given must include limiting the compensation to foreseeable injury or damage. Indeed, the essence of the question is to effect a pressure on people to act 'carefully', to avoid causing injury. It is a matter of inciting people to avoid causing exactly that injury which a so-called careful person would have foreseen and which is what is commonly called a 'foreseeable' injury. In order to constitute a psychological incentive for such lines of conduct the damages need not imply more than the estimated *foreseeable* damage just mentioned.[3]

[3] How to determine more closely in a rational way the compensatory damage and whether thereby consideration should be taken to the extent to which the harm-doer deviated from the desired standard of carefulness is a special problem which I shall not attempt to analyze here. In a Swedish work of mine (Bd II: 1,

It is obvious from this view of the culpa-rule or rule of fault-liability that all liability is strict. That no liability can with reason be based on guilt or fault has appeared from the foregoing, particularly pp. 32 ff. and 43 ff. above. If at times I discuss strict liability as distinguished from fault-liability, it is only a matter of terminology where the word in question is used as a label. Fault-liability and strict liability actually only differentiate the areas of liability. 'Strict' liability has neither more nor less 'strict' a character than 'fault'-liability. On the whole there is no question of characterizing but rather a purely formal distinction, comparable with numbering objects of the same class to distinguish them, for example. In other words: all liability is strict.

Considering the background which has now been given for the rule of fault-liability, the question then arises of whether the area for applying this rule should not be widened substantially and thus allow the rule a greater range of usage. When the concepts guilt, blame, fault, wrongfulness and the 'basis' for these, the ought-attribute with the idea of a legal duty, disappear, no other characterizing of the cases under the rule in question can be given than that they are actions that with regard to the circumstances under which they have been committed, were of such a type from the viewpoint of social evaluations that the *contrary*, i.e. the disregarded modes of conduct had been desirable and that therefore it should be important to impose upon the doer of actions of this kind the coercion to pay damages. This is the content of that rule for which I plead instead of the traditional culpa-rule.

According to the traditional rule of fault-liability, applied up to now, the conception of the conduct of a 'normal' person, i.e. a 'reasonably prudent' person, was introduced as determining how the conduct should be estimated in respect to carefulness or carelessness and, consequently, to the question if the defendant should be liable or not. However, this conception is a pure fancy. Actually one only asks: how do people *generally* act in situations of the present kind? If the defendant has not acted as carefully as

pp. 23 ff.) I have shown the untenability of the construction of 'normal care', of the 'care of a reasonably prudent man'. Cf. Brodmann, *Haftung für Fahrlässigkeit*, pp. 344 f.; Eldridge, pp. 1 ff.

people generally do in such a case, he will then be adjudged to pay damages. Very often—and this is the point—people *do not* in general act in the way that is desirable from the social welfare viewpoint. Accordingly my rule becomes substantially more comprehensive than the rule of fault-liability. Over and beyond the extent of the culpa-rule, according to my 'rule' damages should be adjudged in all such cases where the standard of conduct, that has been used up to now, has not been sufficient from the social welfare view, but a higher standard had been desirable from this standpoint.

This rule of liability I have in my more recent works called the general or common rule of liability to pay damages or, more accurately, the general or common rule of the coercion to pay damages and in turn shortened to the 'general' or 'common' rule when cited in treatises on the civil law of liability. I shall not discuss the contents of this rule at greater length, only sketch it in general outline.[4]

First and foremost, the entire area of the rule of fault-liability is considered under the common rule. Of course, conduct and actions within the traditional culpa-rule must commonly be evaluated as socially undesirable. Further, a large area of liability for so-called *dangerous* acts belongs here, namely, dangerous acts which are actually considered socially undesirable although they have up to the present time fallen *within* the common standard of conduct. Consequently it is a question of such a liability for dangerous acts as is motivated by *preventing* viewpoints. This liability is not to be confused with *another* liability for *dangerous* acts. I have in view the liability for damage arising through an activity that is considered socially desirable or at least not socially undesirable and is therefore *not* to be *prevented* from a social

[4] I call the rule in question 'common' or 'general' in order to distinguish it from other rules of liability, e.g. for acts of necessity (cf. pp. 380 f. below), immissions (=nuisances, cf. pp. 377 ff. below), *specificatio* (p. 374 below), so-called hazardous activities, not undesirable from the viewpoint of social welfare (and therefore non-preventing, see the text immediately following). Here mention should also be made of the compensation for expropriation of real estates (cf. pp. 105 f. above and 375 ff. below), as well as master's liability for the acts of his servant (not discussed in this book but treated in great detail in my Swedish book *Strikt ansvar*.

point of view—in spite of the activity in question including a certain hazard of damage. Within Scandinavia the Norwegian judicature is held to be the most advanced in the province of liability for hazardous or dangerous acts. Through investigations of the judicature mentioned I have found a confirmation of my conception that a *preventing* liability for dangerous acts—i.e. as this liability might appear according to the common or general rule founded, as just observed, on the extended basis of the traditional culpa-rule—should be very important from social-economic aspects. In all probability this arrangment, with two different categories of liability for dangerous activities, would be more in accordance with the viewpoints of social welfare than a common liability for dangerous activities, a liability not especially conditioned by its preventive function.

Within the province of the common rule should also fall such actions (over and above the traditional culpa-rule) which in common parlance are not considered dangerous, if they have only a certain tendency towards dangerousness, so that according to the leading social evaluations—i.e. according to the method of social welfare as this has been expounded above—it should be desirable to prevent them by the maintenance of the rule in question. The lines of conduct now touched upon may be characterized as undesirable according to social valuations and consequently estimated as in need of being legally prevented, although they neither fall under the traditional culpa-rule nor are considered dangerous.

On the basis of what has now been stated the common or general rule of liability should concern the following categories: the traditional culpa-rule; and in addition to the lines of conduct under the same: *partly* dangerous actions socially undesirable, *partly* other actions considered socially undesirable.

Also all actions which are included within the traditional rule of fault-liability are, literally speaking, dangerous at least in some degree. It is obvious that actions evaluated as careless, negligent etc. imply a danger for the injury which is actually met through such modes of conduct. But as to these actions coming under the traditional rule of fault-liability, to speak of liability for dangerous acts would directly oppose usage of a long established terminology. This is quite unnecessary and would also cause too much con-

fusion. The traditional culpa-rule is to be absorbed by the common rule and this applies even to certain other kinds of conduct not called dangerous. It is to be noticed that, as has already been said, there must also be a *non-preventing* law of liability for dangerous acts or activities. Of course, such a liability falls outside the common rule. Some general remarks on my common or general rule of damages follow.

There seems to be no denying that this rule is a definite step towards order and system. No 'culpa' fictions in the real meaning, either concealed or more open, need ever be made. Viewpoints untrue to real life may be avoided completely. If the objection is raised that the social evaluation of a conduct which must be undertaken by this rule is something too vague, I reply that if one desires to achieve a workable rule no other position more fixed or better established than this can be maintained. I do not find it possible to eschew considering the social aspect of a conduct in question. It is however an error to believe that in using the old culpa-rule one would be exonerated from considering such valuations. With the requirements of the 'wrongfulness' of the action and the 'guilt' of the actor as conditions for the liability, in reality one only veils the social consideration. What is thought to be achieved with these requirements is merely a principle for limiting the liability so as not to inhibit those activities which are valued from the social viewpoint as being useful and therefore desirable.

With the acceptance of the common rule of damages one avoids such fanciful concepts as wrongfulness and guilt, whether the latter be taken in the subjective meaning or is 'objectified' to the designation of actions falling below the degree of carefulness observed by a 'reasonably prudent man'. Nevertheless one can make use of the same means—as long as they last—as were *actually* applied[5] to the old culpa-rule, namely, investigations of how one *generally acts* in situations of the type that are in question. Further, such questions concerning the significance for the judgment of the action as: the occupation of the defendant, the actual situation in other respects, his particular purpose with

[5] I say *actually* because my method, of course, neither agrees with guilt as the ground for the liability nor, if the 'guilt' is 'objectified', with its basis upon the lack of a 'normal degree of care', i.e the *diligentia boni patris familias*.

the act and otherwise his subjective attitude towards it, his physical strength or health, his spiritual capacity, his present mental constitution etc., such questions receive quite another and more reasonable background. In applying the old culpa-rule questions of this kind have been discussed in such a way as to derive therefrom guidance in answering whether the defendant brought an imaginary guilt upon himself through the action or not, granted that one here has been involved in a contradiction by 'objectifying' the guilt. In any case such questions have been considered principally from the view of the *just* character of the damages-reaction and accordingly only with respect to the *individual* case at hand and to certain circumstances associated with it. When my rule is applied, the questions now indicated are to be phrased thus: What is the significance from the point of view of the common transactions[6], whether *such* tradesmen or craftsmen as the defendant or persons otherwise in *such* situations as that of the defendant, at the occasion of actions of the present kind, are obstructed or not obstructed through liability because of the damage-risk contained in them; whether purposes of such a kind as in the present case are counteracted through the liability in question, or whether this liability ensues or is dispensed with according as the actor has such a low degree of intelligence as the defendant or upon such an occasion as that before us is found to be in the same frightened frame of mind as the defendant etc.? Obviously with this, no so-called rule of law ready for immediate application is given. Legal practice has here to work out such a rule. I have sought to establish the *framework of questions* by which legal practice, as I understand it, must proceed in order gradually to attain the greatest possible stability in the matter.

Finally, I wish to emphasize in this connection the significance of having eliminated the question of guilt or blame. Even if the ethical aspect of this question is already blotted out by the guilt being 'objectified', a sense still inheres to this concept that something has been committed which is blameworthy and for which the defendant can be reproached. By 'objectifying' the guilt, i.e. by placing it alongside the action which had not attained the

[6] As to this concept see p. 70 n. 1 above.

'normal degree of care', certainly the reprehensibility in the 'guilt', properly speaking, should be eliminated *de facto* and consequently also the imagined 'guilt' itself.[7] But the power of words over thoughts can be so strong that retaining the term guilt for actions which have had nothing to do with any imagined blame or guilt can result in the actions nevertheless being considered as reprehensible and thereby bringing with them guilt. This power of the *word* guilt has been stimulated, because one has not *recognized* that the *idea* of guilt has been abandoned through the 'objectifying', but has understood the failure of so-called normal care to be blameworthy. In short, we must consider the possibility that 'guilt' as a prerequisite for the liability can psychologically influence the judge to an unmotivated caution or temperateness as to judgment of liability. The judge may reason that although the defendant did not perhaps act altogether with 'normal carefulness', i.e. in reality the care as observed by most people, yet he did not act in such a way as to incur guilt. Therefore the judge will not characterize the defendant as blameworthy by a judgment of liability. There may of course be various meanings of how large a part the conception of guilt plays in this way. Yet it cannot be quite without any significance.

The idea of guilt thus must have a certain repressive influence on the application of the present culpa-rule, even if this rule is applied after 'objectifying the guilt'. To this is to be added the significance of the idea of guilt in counteracting the development of the culpa-rule by hindering the extension of liability in the way that has just been discussed.[8]

[7] In Pollock's *Law of Torts* I have found a formulation, in this respect somewhat illustrating, from a judgment of the Supreme Court of Massachusetts: 'If a man's conduct is such as would be reckless in a man of ordinary prudence it is reckless in him. Unless he can bring himself with some broadly defined exception to general rules, the law deliberately leaves his personal equation or idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and foresee consequences as a man of ordinary prudence would have in the same situation.' See Pollock-Landon, p. 352. The case here in question, Commonwealth v. Pierce (1884), is not reported in the collections of American cases that have been available to me.

[8] What the idea of guilt in the culpa-rule further signifies as an impediment to a treatment founded on facts, of 'strict liability', shall not be entered into here. Concerning this matter see pp. 53–76 above.

What has just been stated should indicate that the use of that principle set forth by myself presents no greater difficulties to the judge than the old culpa-rule, but rather quite the contrary. Naturally it would have been simpler and easier if the judgment could have been based on established facts and not been dependent on any evaluations. But how would such a rule work out? It is certainly true that the legal machinery at times fares better with a regulation in which some of its comprehensive and complete requirements are waived in order to achieve a more simple application. Yet in general it is necessary that a judgment presuppose evaluations to a certain extent, whether the judge ascertains social valuations of other persons or contributes his own. And the rule of damages without valuations limiting the possibility of liability would be clearly unsuitable. The maintenance of a common or general rule of damages according to the provisions of which a person was liable quite independently of any ideas of his of the danger of his own conduct, would actually have a more or less preventive influence on *all* the actions and movements of loyal citizens, even on those actions of everyday occurrence. On the other hand such a regulation according to which freedom from liability took effect as soon as insight into the risk of damage was not perceived would obviously not be effective enough because a number of socially undesirable actions would not be counteracted through the maintenance of such a rule. To be effective in this respect it is necessary for the liability to embrace even such actions upon the committing of which it was important from the point of view of common transactions that an actor procured an understanding of whether the action involved the existing damage-risk or not. Moreover valuations must be undertaken considering the social desirability or nondesirability of actions of such types and under such conditions as existed in the case. All of these valuations are necessary in order to maintain a regulation so constituted that it affects and *only* affects those actions which it is from a social point of view—considering all the actual circumstances *characterizing* the situation at the occasion of the action—important or desirable to counteract.

Since the defendant's insight into the dangerousness of the act

has just been touched upon I will try to make clear in general terms the question of how one has to consider, according to the common rule of damages, the situation usually expressed so that the defendant 'did not know but ought to have known'[9] of a certain damage-risk in the action. The formulation 'ought to have known' is a contraction of 'would have known if he had acted as he ought to act'. Thus it appears obvious that the formulation is merely an expression for the imagined fact that the setting aside of an *objective ought,* a legal duty, has occurred[1] which shall involve the guilt of the defendant. However such a mode of action *cannot* take place.[2] On the other hand the situation may be such that if the defendant had not neglected to make certain observations, inquiries, other investigations and reflections, he would have reached an understanding of the danger involved in the act in question and for that reason would have acted in another way. Therefore according to the common rule, the question becomes: whether in situations of such a type and characterized by such circumstances as those in the existing case, it would be desirable or not from the viewpoint of common transactions and social security, that one (not only the defendant but anybody who may ever be in such a situation as the defendant's) made such observations, inquiries, investigations or reflections as were just indicated, and thereupon guided one's actions accordingly? If this would be estimated as desirable then the defendant should be adjudged to pay damages.

Notice that formulating the question in this way need not, indeed *cannot,* lead to any irrational speculations. The judge or whoever may give his opinion on the matter will, of course, in case of need and if he has the opportunity to do so, acquaint himself with how persons in general act in situations of the present

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[9] Cf. BGB: *kannte oder kennen musste,* §§ 123, 142, cf. § 122.

[1] The formulation 'ought to have known' agrees well with the conception of guilt in its proper meaning. It is indeed an expression for such a meaning. After the 'guilt' having been 'objectified', the 'ought' is, however, determined according to the attitude of a 'man of ordinary prudence', but in practice this 'ought' has been transposed so as to harmonize with the usual standard of action, i.e. people's common modes of conduct.

[2] Cf. p. 189 above.

kind (or at least in those of a similar nature) and thereby obtain a certain amount of guidance. If he then would find that the conduct of the defendant were less careful than the usual actions in such instances he is then assured with good reason to consider the conduct contrary to that of the defendant as desirable from a social point of view. For, on the one hand, the defendant's conduct has caused damage, and on the other, the judge through his knowledge of the type of conduct that is customary in such situations must have been convinced that the consciousness of the liability for such damaging conduct cannot inflict any restraint injurious, from the viewpoint of common transactions, to the freedom of movement and action within society.

If the judge is of the opinion that the conduct of the defendant conforms to the prevailing standard of conduct in situations of the existing kind, his valuation commonly goes in the contrary direction. He does not hold it socially suitable to counteract such a conduct with a rule of liability, *provided that,* considering the degree of the risk of damage, he does not find the prevailing standard of conduct *insufficient* and thus finds it important, from the viewpoint of social welfare, to *raise* the prevailing standard of the conduct of the type in question.

If it is not feasible to be guided by knowledge of the usual way of action, the judge may seek to reach a decision on the social evaluation of the mode of conduct by means of his judiciousness developed as it has perhaps been through experience and psychological insights as well as knowledges, in various areas, of the social mechanism and its conditions. As soon as the situation becomes doubtful to him in one direction or another, he must ask the following question: Considering the common transactions what, then, is the significance for the necessary freedom of action and movement within society of the fact that such actions as that of the defendant's bring in their wake coercion to pay damages?

Obviously the situation may develop so that the judge, in spite of all efforts to make a definite evaluation, is to the very last doubtful concerning the social desirability of the conduct in question or its opposite. Such doubtfulness should of course lead to freedom from liability. There need be no apprehension of this already because the doubt in question may not appear in other

cases than those which are outside the application of the traditional culpa-rule.

After this there should be no possibility for a misunderstanding to arise when, considering the subjective attitude in question, I formulate the conditions for liability as: the defendant's understanding of a certain risk of damage or want of such understanding in spite of the desirability, from the viewpoint of the common transactions, to have procured such an understanding in situations of the type in question. Through this formulation one is led to a maxim which extends the liability over and above the traditional rule of fault-liability in the manner indicated above.

From the foregoing it is evident that as to liability for dangerous or hazardous activity I distinguish between the preventing liability, which comes under the general rule, and the non-preventing liability. Parenthetically it may be added that even the non-preventing liability actually in general has a more or less preventive effect. Indeed this is true of every valid legal maxim of damages. However, what may be said of the law of non-preventing liability just mentioned is that according to social evaluations it *does not aim at* preventing the so-called dangerous activity in question.

Concerning liability in both cases of liability for dangerous activities, it is quite clear that my own social evaluations have had a much greater scope when I have had to determine, in my Swedish writings, the 'rules' in question in more detail for the guidance of judges and students. Space does here not allow of a further discussion of this point. What I have just stated about the scope for my own evaluations holds good even with regard to my Swedish treatises on liability for 'immissions' (equivalent in part to private nuisances in Anglo-American law), on liability for acts done of necessity[3], and on master's liability for the acts of his servant. A great part of my Swedish work on the law of (non-contract) damages has been devoted to this last type of liability. In this book I have had no special reason for touching upon this interesting matter.

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[3] On these two categories of liability only a few incidental remarks have been made in this book. See pp. 377 ff. and 380 ff. below.

My writings on the questions treated in this chapter, of criminal law, law of contract and law of torts have been largely of an epistemological character. However, they do outline not only those social evaluations which are made by the legislator, the courts and the public, but many evaluations made by myself. Without the latter valuations I should not have been able to develop my method of social welfare. Further, I think it may be said that, on the whole, a jurist may not be able to make any significant contribution to any of the matters that have now been discussed if he does not make constant use of his social evaluations as well as his professional knowledge.[4]

Hereafter I limit myself to establishing that science in the philosophical, i.e. epistemological, sense is one thing, while science as practiced in society is another. The former is quite naturally entirely epistemological. The latter need not always be limited in such a way. As concerns legal science or jurisprudence as practiced or exercised it can also be evaluating as well. It would quite often lessen or even lose its significance for the legal machinery, for society, if writers on jurisprudence refrained from certain social valuations. It seems to me pure formalism to maintain that undertaking these valuations falls outside the sphere of legal science as an activity practiced in society. Obviously there is no reason due to the evaluations just indicated to oppose the character of jurisprudence as an empirical science. But one can of course express oneself in this way: legal science or jurisprudence is a purely epistemological, thus empirically established science; its practitioners—provided the subject is appropriate and the practitioners consider themselves to contribute therewith towards the social welfare—*also* undertake social valuations based upon their epistemological attitude. Or, as I have said above, jurisprudence as exercised in schools of law is a constructive science.

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[4] Readers of Swedish who are interested in following up this matter are referred to *Strikt ansvar* II: 1, pp. 216–258; 287–350; II: 2, pp. 269–310; 348–358; 498–553. These references primarily concern evaluations, but my criticisms of judicature and doctrine, of course, contain evaluations throughout. For Anglo-American law in this respect see *Strikt ansvar* I, pp. 211–517, and the same for French law see ibid. I, pp. 32–210.

The method of justice and the method of social welfare are logically incompatible

From what I have stated so often previously, it is psychologically necessary for writers on jurisprudence to have at least an inkling of a satisfactory law as harmonizing with, indeed in its essentials, as being determined by the needs of society, of social welfare. Often legal writers seem to have a clear understanding of this point. But this 'clear understanding' then appears to have been only an illusion. For while they maintain the significance of the social aspect, at the same time they indicate that their views are deeply rooted in legal ideology. Accordingly, they apply the method of justice. Now with examples I shall show that the method of justice has been generally applied, in spite of the fact that the writers in question have apparently had at least some suspicion that law if it is to be satisfactory must be determined essentially by the wants of social welfare.

First I shall consider the well-known Swiss author Germann. He emphasizes that a section of law ought to be interpreted with respect to its social end *(sozialer Zweck),* understood in such a way that the interpreter should not feel bound by manifestations of *der Wille des damaligen Gesetzgebers.*[5] This sounds quite good, yet it is nothing to be happy about. For he means that laws are expressions of the will of society and that their validity depends primarily on *die Anerkennung der Beteiligten,* which otherwise, i.e. in the absence of this *Anerkennung,* should annul or change them. That a legal provision is not declared null and void or otherwise changed depends accordingly on the fact that it all the while until this very day served a social end acknowledged by the members of the society. Therefore at the interpretation and application of a legal provision the judge had to ask *welchem s o z i a l e n Z w e c k die Bestimmung heute tatsächlich dient und daher auch ihre Geltung verdankt.*[6]

That this *autonome Rechtsauffassung,* as it is called, has nothing to do with real, epistomological understanding of law is another

[5] Germann, *Imperative,* p. 205 f.

[6] Germann, *Imperative,* p. 205 f.

matter.[7] What is here to be noticed in particular is that in spite of all the talk about *sozialer Zweck* as determinative for laws and their interpretation, Germann's system of law takes its origin entirely from the method of justice. From his work just cited it is clear that he approves the doctrine of the 'school of free jurisprudence'[8], and according to him the kernel of its doctrine is that when the law does not give any basis for settling the dispute,

> gerade da erst wächst er [der Richter] zur vollen Grösse seines Berufs: Schiedsrichter zu sein. Aber auch hier (bei völligen Wertungslücken) wird er nicht einfach willkürlich, aus staatlicher Machtvollkommenheit entscheiden, sondern gewissermassen als der Vertrauensmann der Parteien, die von ihm ein Urteil *nach Recht und Gerechtigkeit* erwarten: er wird die in Betracht kommenden Interessen im Hinblick auf ihre generelle Tragweite (ohne Ansehen der Person) gegeneinander abwägen nach dem Gesichtspunkt des sozialen Ideals.[8a]

A little further on Germann summarizes that the judge (according to *autonome Auffassung*) is again,

> ein Schiedsrichter, der ebenso unerschrocken wie bescheiden das Ziel verfolgt, bei unüberbrückbaren Differenzen zwischen den Parteien ohne Ansehen der Person nach Recht und Billigkeit zu entscheiden.[9]

Nothing further need be said to understand that however much Germann may emphasize *den sozialen Zweck,* his method is nevertheless the method of justice. He is concerned with reaching a settlement by weighing against each other the interests of the respective parties (more accurately the reasons for these interests) according to 'law and justice'. But he says that the interests should be considered *im Hinblick auf ihre generelle Tragweite!* With this does he mean anything other than that the judge should be consistent in his judging activity? Does he mean that the weighing

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[7] Cf. Hägerström, *Inquiries,* pp. 17–55, 56 ff., and Olivecrona, *Viljan bakom rätten.*

[8] Germann, ibid. pp. 207 ff., 227. He considers such doctrine to belong to the *autonome Rechtsauffassung.* Already here his sympathies for the *Interessenjurisprudenz* are apparent. He emphasizes on p. 204 that the judge has other legal sources than the *Gesetz (= code), welchem a priori keine ausgezeichnete Bedeutung zukommt.*

[8a] Germann, p. 208.

[9] Germann, p. 208 f.

of the interests of the parties shall be done in such a way that what is understood as the community's interest according to social evaluations becomes satisfied through the weighing? If so the phrase *die generelle Tragweite* is only incoherent chatter that lacks all traces of logic. And as far as *der Gesichtspunkt des sozialen Ideals* is concerned, it is obvious that this is to harmonize with *Gerechtigkeit and Billigkeit*[9a] and that it is to be formed by that image which the judge makes himself from the legal ideology and the chimera of justice, i.e. without, on principle, considering *exclusively* those social valuations which assert themselves in one way or another. In other words this viewpoint is also only an empty phrase.

This view has been maintained by Germann in his later works, including his monograph published in 1950.[1] In spite of his many reasonable statements, when these are considered apart from their larger context he is apparently not in the least inclined to attempt to free himself from legal ideology. Justice is placed to the fore. The foreword concludes with the assertion that law appears not only as an anonymous system of norms but above all as a product of far-seeing men who served society devotedly filled with the ideals of justice. This view is somewhat mysterious. The 'far-seeing men' in question cannot, indeed, all of them be anonymous and their contributions must be something as distinguished from the 'anonymous system of norms'. Does this mean that an incomprehensible *dualism* exists in the law? This would consist partly of an anonymous system of norms and partly of the product of broadminded, tolerant men imbued with the ideal of justice. Then should not the ideal of justice characterize the anonymous norms? Yes, indeed, but more about this shortly. Then, however, the simplest solution would be to have the 'anonymous system of norms' incorporate within itself the product of the 'far-seeing men'! However on p. 13 the law is said to be '*determined to serve the justice* and therewith ultimately the moral idea'. The work concludes with an exposition of the relationship between law and

[9a] Similarly, another supporter of the *Interessenjurisprudenz,* Ernst Weigelin, in his work *Die Lücken im Recht* (p. 18) places an equal sign between *sociales Ideal* and *Idee der Gerechtigkeit.*

[1] Germann, *Grundlagen.*

justice, of which on p. 225 ff. law is said to be 'a system of social norms discovered by means of the *guiding star of justice*'. Germann is clearly a follower of legal ideology in its entirety. He believes in rights, and claims supported by them, all of which is held to depend 'upon the objective norms of law'. On p. 96 ff. he says that rights should be both personal and absolute but in every case always signify *eine rechtlich gewährleistete Willensmacht.* Apparently Germann has taken his stand in favor of Windscheid's view opposed to that of Jhering as to the right as a legally protected interest.[2] The right is always answered by a legal duty and this too is of course, believed to be based on objective law.[3] On p. 30, the purpose of a rule of law is to answer to the *vernünftige Sinn des Gesetzes* (its *ratio legis*). Of this one need not take notice, for Germann says himself that *Wert- und Zweckgesichtspunkte* [*sind*] *für den Inhalt des Rechts und seine Geltung massgebend* (p. 55). That social points of view are concerned here, appears in several places, particularly on p. 49 f.[4]

But in spite of the very readable language, which is in itself rather unusual among German legal authors, the exposition is contradictory and confused. We just observed that *Wert- und Zweckgesichtspunkte* should determine the contents of the law. But on p. 49 it is said that *die Gesetze der Rechtsordnung* (in contrast to the natural laws) *sind Normen, Beurteilungsmasstäbe.* This seems to mean that the *law* gives the norms for the valuations as well. How then can these valuations and the purposes which stem from them, on the contrary, determine the content of the law and its validity? However I do not attach any greater significance to this observation.

I have treated Germann's method somewhat exhaustively as a reminder that both this and *all* the other doctrines—which are based on legal ideology and justice and seek to show the purpose of law as depending upon social valuations—are all completely

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[2] Germann, *Grundlagen,* p. 99, and cf. above pp. 78 ff. This opposition between Windscheid and Jhering dates from about 1860!

[3] Germann, *Grundlagen,* p. 98. On p. 15: *Er* [= *der Rechtssatz*] *begründet Rechtspflichten.*

[4] On p. 18 statements or declarations of law *(Rechtssätze)* are said to be *Regeln (= Normen) des sozialen Verhaltens.*

unscientific. That Germann, because of ZGB Art. 1:2 should adhere to a method, particularly natural for him as a Swiss, of *freie* or *ergänzende Rechtsfindung* does not make his teachings any less unscientific.

But to proceed. Whether it is a question of the historical school, legal positivism or these 'newer' doctrines of the free law research by the judge, such as the original so-called school of free research (founded by Gény and Ehrlich)[5], the 'sociological law-school' (as Ehrlich later called his doctrine) and the 'jurisprudence of interests' from Tübingen (also an offshoot of the school of free research[6])—in all cases it is that method of justice which prevails. Since the conceptions of justice are meant to have their source in the so-called common sense of justice (*das allgemeine Rechtsbewusstsein,* cf. p. 159), there is a certain interest in citing a rather well-known Swiss author, Egger, who in repudiating *die Methode der Begriffs- und Systementwicklung*[7] says that this method never 'is able to show the fitness of the result, the quality of it as concerns justice'. *Das juristische Denken,* he continues, *ist ein vom Rechtsbewusstsein beherrschtes Denken.*[8] It should be noted here how legal positivism is dismissed on behalf of the primate of the undisguised justice or the undisguised common sense of justice as the bearer of the law. Nobody who is at all acquainted with even the barest historical outlines of natural law would dare to contest that the common judicial consciousness (= *das allgemeine Rechtsbewusstsein,* in this work called the common sense of justice) as a basis for law is just a product of natural law. It is obvious that the historical school was never released from the main outlines of natural law. Historical legal positivism again sought—although in vain, as mentioned above—to conceal its dependence on the common sense of justice and thereby its foundation on the law of nature.

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[5] See *Unw.* I, p. 342, n. 1. For my criticism of Gény's doctrine see ibid. p. 342 ff.

[6] Its best known proponents were Max Rümelin, Müller-Erzbach, and Heck. Concerning Rümelin see *Jurisprudence of Interests,* pp. xviii ff. and 3–27. As to Heck see below p. 276.

[7] He had historical legal positivism in view.

[8] See Egger I, pp. 48 f.

There is great interest, it seems to me, in seeing today in Switzerland, Germany, even France, and several places in America how that view is maintained (occasionally supported by the prescriptions of ZGB Art. 1), whether it be called free law research, jurisprudence of interests, sociological law school or what you will, which has abandoned legal positivism only to fall quite *openly* into the arms of the natural law chimera. *This* is just what happens when one openly and unreservedly asserts justice as the basis for law and that 'legal thinking is a thinking mastered by the (common) sense of justice'.

To the so-called free judge movement I assign not only the original school of 'free law', so called, but also the jurisprudence of interests. The differences between them are of no consequence to my criticism. They are both equally untenable from a scientific point of view. While they have attacked, side by side, the 'conceptional jurisprudence'[9], they differ in some points. The school of free law is said only to be concerned with the finding of law by the judge. The jurisprudence of interests, however, treats also the establishing of 'norms' through the legislator. This is connected with the fact that the jurisprudence of interests is claimed to recognize the will—not the psychological but the normative will—of the legislator, who is neither a fiction nor a phantom. The word legislator is said to be rather an abstract of those community interests which have acquired validity in law. This is called the historical will of the legislator. However, Stoll, one of the adherents of the jurisprudence of interests, leaves the question open whether this 'historical interpretation of law' necessarily follows from the jurisprudence of interests. In any case, it is claimed to be characteristic of this jurisprudence, as we have already understood from Germann's view on the matter (p. 269 f. above).[1]

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[9] Or 'jurisprudence of concepts'. Above p. 23 I have used the phrase 'notion-building' jurisprudence.

[1] See Heck, *Gesetzesauslegung,* pp. 59 ff.; Stoll, *Begriff und Konstruktion,* pp. 70 ff.; Isay, *Die Methode,* pp. 34 ff. Of the school of free law as a sociological one see next page and cf. p. 292 f. below. See also Heck, *Begriffsbildung,* pp. 9 ff., and cf. *Jurisprudence of Interests,* pp. 107 ff. As to the relation between Heck and Ehrlich see p. 25 n. 5 above.

It is the matter that must be noted, not how it is formulated. Therefore it is meaningless to dispute that the historical school with its view of the proper foundation of the law in 'the common consciousness of the people' was in its essentials a pure law of nature, although with nuances so as to be able to develop.[2] Even if the social basis of law is not very often and expressly emphasized by authors of the historical school or by legal positivists, this aspect must lie within those tendencies according to which law was supported by the common consciousness of the people or by a common will of the state, nation, society or the like. Indeed rules of law not seldom are motivated with social points of view by authors representative of some of the two schools mentioned.

When the school of free research maintains *die Gerechtigkeit* (justice) as the reason for law, this indicates that it is no more released from reasoning according to natural law than was the historical school. This has not prevented its founder in Germany, Ehrlich, as well as other adherents from describing the school as sociological. It is of great interest to consider statements as the following made by the founder of 'the sociological law-school':

> Unter dem Einflusse der Gerechtigkeit vollzieht sich überall die Bildung des Rechtssatzes; auf Grund der Gerechtigkeit findet der Richter die Entscheidungsnorm; der Individualismus gipfelt in dem Grundsatze, jeder Mensch sei Selbstzweck . . .; der soziale Gerechtigkeitsgedanke hat daher den Gerechtigkeitsgedanken des Individualismus nicht aufgehoben.[3]

Based on the law of nature with its foundation in natural justice is of course even the jurisprudence of interests, which Germann seems to consider as foremost. He describes this method as *eine Methode der Rechtsfindung, nach der die entgegengesetzten Interessen der Beteiligten gegeneinander abzuwägen sind.*[4] To describe the method of justice more exactly is impossible. In express terms the method is here said to consist of a weighing against each other of the interests of the parties. Nevertheless Germann repeatedly emphasizes the *social* end as the reason for law! Germann has here a good example in Heck, one of the foremost representatives of the jurisprudence of interests. However much

[2] See *Unw.* I, pp. 150–157.

[3] See Ehrlich, *Grundlegung,* pp. 173, 189, 198.

[4] Germann, *Grundlagen* p. 55. Cf. Heck, *Interessenjurisprudenz,* pp. 1, 20 ff.

Heck and his followers talk of law as sociologically based, nevertheless they maintain that law is to protect both private interests (those of individuals as well as artificial persons) and those of the state.[5] Among 'the elements of our Method', in a later work, Heck includes: *Das staatliche Recht schützt die Interessen der Gemeinschaft, die Interessen Einzelner nur deshalb, weil sie zugleich Gemeinschaftsinteressen sind.*[6] The vacuities in such talk appear already when one sees that these private interests are none other than those expressed in the chimera of legal ideology.[7]

On the whole there is nobody associated with any of the various lines of the free judge movement who does not consider the common sense of justice and the background of it—natural justice —as the basis for law. It has already been pointed out that Art. 1 of ZGB is an expression for the judge's *freie oder ergänzende Rechtsfindung.* In Art. 4 it is stated how the judge has to proceed: *Er hat seine Entscheidung nach R e c h t u n d B i l l i g k e i t zu treffen.* (Letter spacing by myself.) Ernst Fuchs, one of the leaders of the school of free research, is quite pleased that the Swiss civil code has formulated *die neue Methode* which he, as do Ehrlich and others, calls *die soziologische Methode oder Rechtslehre.*[8] Fuchs claims that the first paragraph of every code should be so framed,

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[5] See Heck, *Begriffsbildung,* pp. 4, 36 ff., 104 ff.

[6] Heck, *Rechtserneuerung,* p. 9. Heck speaks of 'our method'. There can, however, be no method in the jurisprudence of interests. This has clearly been shown in the interesting paper by Isay, *Die Methode der Interessenjurisprudenz,* translated and edited in *Jurisprudence of Interests,* pp. 315 ff. Heck immediately replied in the article *Die Leugnung der Interessen-Jurisprudenz durch Hermann Isay.*

[7] Heck's statement is an empty phrase not clearly thought out compared with what I have said above on pp. 57 ff. and what will be found on pp. 281 ff. below. When Heck in his works *Grundriss* I and II believes that he is applying the method of the *Interessenjurisprudenz* (see the prefaces) he only deceives himself. With that 'method' he would everywhere arrive at obviously untenable results. See pp. 55—76 above and pp. 281 ff. below. Cf. the foregoing note. Heck's *Interessenjurisprudenz* has been published in translation in *Jurisprudence of Interests,* pp. 31—48; likewise his *Begriffsbildung,* ibid. pp. 99—252. See also p. xxi, ibid. Also Stoll, *Begriff und Konstruktion* (mentioned above) has been published in *Jurisprudence of Interests* (pp. 259—276).

[8] Cf. Fuchs, *Recht und Wahrheit,* p. 1 ff., *Kulturkampf,* e.g. pp. 51—121.

dass man den Kern der gesetzgeberischen Tätigkeit hineinnimmt, also etwa: Wo das Gesetz für einen Fall keine klare Vorschrift enthält und sich noch kein Gewohnheitsrecht oder bewährter Gerichtsgebrauch gebildet hat, sind die sich einander gegenüberstehenden Interessen zu erforschen und abzuwägen, welches Interesse vom Standpunkt der allgemeinen Wohlfahrt aus das vorwiegende ist.[9]

Here we have a clear and concise expression of the significance for law of the feelings of justice determined by social evaluations. This reappears in Fuchs' later writings. Indeed he repudiates not only the *Begriffsjurisprudenz* but also what he calls *Gefühlsjurisprudenz* or *Kryptosoziologie,* to which according to Fuchs one is forced to within legal positivism because 'positive law' would not at all, as the *Begriffsjurisprudenz* believed in, be *lückenlos.*[1] Fuchs says that in reality the *Begriffsjurisprudenz* was impelled to fill the actual gaps in the law through an instinct which is called *Gerechtigkeitsgefühl oder Rechtsgefühl.*[2] Even according to Fuch, of course, a correct judgment must agree completely with *Gerechtigkeit und Verkehrsbedürfnis.* But such factors should not exist to be cited in abstracto but the judge must state, *warum das gefundene Ergebnis gerecht und praktisch ist.*[3] The answer to that question cannot appear through *unmethodische 'Freirechtlerei'* but through *soziologische Interessenwägung.*[4]

[9] Fuchs, *Recht und Wahrheit,* p. 15.

[1] With *Begriffsjurisprudenz* Fuchs means what I in general have characterized as the historical legal positivism.

[2] Fuchs, *Kulturkampf,* p. 35 ff.

[3] Quotation taken from Hedemann, *Einführung,* p. 197, where he cites a work of Fuchs that has not been available to me.

[4] Fuchs, *Kulturkampf,* p. 151, 157 ff. As to the *Rechtsfindung* (as distinguished from the *Wahrheitsfindung)* according to Fuchs, ibid. p. 157, the concern is *vor allem die Beantwortung der Frage, welche Seite bei der zwischen den Parteien streitigen rechtlichen Kontroverse Billigkeit und Gerechtigkeit für sich habe und warum?* The meaning of the last word is apparently that through the *motivated* existence of justice one should escape what Fuchs calls *Gefühlsjurisprudenz* or *Kryptosoziologie.* For he says on p. 120 f.: *Beim Kryptosoziologen ist die Gefahr gross, dass er die Billigkeit des Einzelfalles Ausschlag geben lässt, ohne ihn unter dem Gesichtspunkt der g e n e r e l l e n Interessenwägung zu sehen, ja, dass er sogar seine subjektiven Billigkeitsgefühle und 'Sentiments' unbewusst auf die Wahrheitsfindung und die Beurteilung der Beweise abfärbt.* That the weighing of interests shall be *generell* does not in the least mean that it is not limited to the case to be adjudged, but is only a consequence of

Jung, a well-known author typical of or in any case close to the free judge movement, says:

Überall da, wo ein Urteil nicht aus einzelnen positiven Gesetzesstellen begründet ist, sondern durch Berufung auf das Verkehrsbedürfnis, auf die Interessenlage, auf die Natur der Sache, auf die Zweckmässigkeit, Vernunft, Treu und Glauben, Billigkeit, Gerechtigkeit usw., zustande kommt, liegt das tatsächlich Ausschlaggebende, die wirkliche ratio sufficiens cognoscendi, darin dass das Einzelergebnis an den allgemeinsten Unterlagen des Rechtsempfindens geprüft worden ist und dieses für die eine oder andere Seite entschieden hat.[5]

Jung calls this *induktive Rechtsfindung,* in contrast to a judgment based on *einzelne positive Gesetzesstellen* and which accordingly follows from the deductive method.[6] On p. 35 Jung says that for working with such concepts as *Verkehrsbedürfnis, Interessengrundlage usw.* a value judgment would be necessary. This judgment always includes *ein Zurückgreifen auf die allerletzten und allgemeinsten Grundlagen des rechtlichen Urteils, nämlich*

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the postulate that one may not, as does the *Begriffsjurisprudenz,* proceed from the fact that *die den Streit entscheidende Rechtsnorm sei—mit Ausnahme der seltenen Fälle der sog. echten Lücken—bereits vorhanden und deduktiv aus dem grundsätzlich lükenlos vorgestellten Gesetzes- oder Gewohnheitsrecht abzuleiten.* From this 'formal logic' releases itself *die soziologische Rechtslehre* (which was essentially concerned *mit der 'Materie' des gesellschaftlichen Lebens,* ibid. p. 62) through considering that *besondere Umstände des Falles können stets besondere Gestaltung verlangen. Für diese ist eine andere Regel zu finden.* Accordingly, the general character in the weighing of interests lies only in the release from the constriction of the *Begriffsjurisprudenz* and in the consideration of those *besondere Umstände* in the particular case which are offered by the changing possibilities and fluctuating situations of life. See Fuchs, *Kulturkampf,* pp. 158–160. It is perhaps not easy for the general reader to extract the real meaning from the verbose writings of this author.

[5] Jung, *Problem,* p. 43. The passage quoted is not from a recent work, but his ideology was still quite marked in a work he published in 1939 and which will be considered shortly.

[6] Cf. *Problem,* p. 47. It must be admitted that Jung less ostentatiously than other representatives of *die freie Rechtsfindung* maintained the social foundation of law. His view on this matter comes through now and then. Cf., for instance, his citation of Saleilles which he seems to endorse as far as it goes. Cf. *Problem,* pp. 5 f., 55 ff. and Jung's passages given in the text above taken from *Problem,* p. 43, where *Verkehrsbedürfnis* and *Zweckmässigkeit* are blended as a matter of course with the obvious legal ideology.

auf die Empfindung, ob dieses Ergebnis der Gerechtigkeit entspreche oder nicht entspreche. In conclusion, on p. 328, he says that in the concrete case *Unrecht* (= wrong) established on the basis of *Rechtsfindung* and *regelhaftes Recht* always signified *einen Rückgriff auf die letzte Grundlage der Unterscheidung von Recht und Unrecht.* Here is the whole of legal ideology right in a nutshell, and Jung's reference to § 2 of the same work indicates that 'this ultimate foundation' is constituted of *die Empfindung, ob das Ergebnis der Gerechtigkeit* (= justice) *entspreche oder nicht entspreche.*[7]

Jung develops this view further in later works. He explains the *Rechtsgewinnung* as depending ultimately upon *einem eingeschöpften Werturteil über das vorliegende Verhalten der Beteiligten,* i.e. on *dem eigenen freilich zunächst persönlichen Rechtsgewissen* (legal conscience) *des Aussagenden,* or, as he has stated shortly before, on *dem triebhaften Rechtsempfinden, der Billigkeit, dem bon sens.*[8] Actually this is nothing other than what Germann recommends, i.e. to weigh the interests of both parties on the balance of feelings. This same idea is obvious when according to Jung it 'proves extremely correct' that the Supreme Court of Germany *(Reichsgericht)* phrased a judgment in this way: *nach den Umständen des Falles, d. h. nach den Grundsätzen der Billigkeit.*[9] According to Weigelin the Supreme Court of Germany speaks quite seldom of *Gerechtigkeit* but more often of *Rechtsempfinden* and *Rechtsgefühl.*[1] The method of justice is equally well pronounced, however, whether one resorts to the sensations or sentiments of law, to the feelings of law or to justice.

After Weigelin had said that the points of equity are, on the whole, nothing less than ideas of justice, he goes on to say that *Billigkeit eigentlich die Gerechtigkeit des besondern Einzelfalles im Auge hat.* Jung cites this with approval although cautioning that one must determine the content of *Gerechtigkeit des besonderen Falls* which he treats in a chapter entitled: *Der oberste*

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[7] *Problem,* p. 39.

[8] Jung, *Subjektives etc.,* p. 23.

[9] Jung, *Subjektives etc.,* p. 34.

[1] See Weigelin, *Die Lücken im Recht,* p. 18.

Geltungsgrund der Rechtsordnung, das Rechtsgewissen (= judicial or legal conscience).[2] Jung has not, as far as I know, been placed among the representatives of the jurisprudence of interests, but that seems to be where he most nearly belongs, when he characterizes *das Unrecht* as *friedenstörende Interessenverletzung* and is not satisfied with *Nichtübereinstimmung eines bestimmten Verhaltens mit gewissen Regeln.*[3] How according to Jung *das Rechtsleben* (the life of law) with interests and counterinterests floats in mid-air is illustrated in this statement inspired by Jhering:

> Die Reaktion des einzelnen Interessenten gegen ein Verhalten, das er als Verletzung empfindet, unterstützt von dem Empfinden der anderen Unbeteiligten und von der köperlichen Hilfe seiner Sippe und schliesslich der organisierten Gesamtheit, ist die Urerscheinung des Rechtslebens.[4]

I pay no attention to this statement in itself, for nobody can have any detailed knowledge of what took place in primitive ages. It is interesting, however, to observe how this statement is used in Jung's own view of law: legal rights or legal interests resting on themselves, originally lacking any support in 'law', are considered as objects of violations, against which in olden times a simple revenge and self-help is exercised and thereafter a reaction by means of a very primitive social order occurs. It is *purposely* that Jung placed *'subjektives Recht'* first in the title of his later work *Subjektives und objektives Recht.* For this is connected with his view that rights should exist independently of any positivistic-formalistic source of law.[5] Quoting Schopenhauer, Jung

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[2] See Jung, *Subjektives etc.*, pp. 34, 109 ff.

[3] Jung, *Problem,* p. 104. Cf. Weigelin, p. 15. Jurisprudence of interests in Germany is most commonly associated with the school at Tübingen, although there are also other representatives. Jung would not have used a slogan that was not his own. With a certain pride he says, I have *mich von Beginn meiner wissenschaftlichen Tätigkeit ab mit der Rechtsquellenfrage befasst und darf sagen, dass eine Veröffentlichung von mir vom Jahre 1900 den zeitlich ersten grundsätzlichen Angriff auf die positivistisch-formalistische Rechtsquellenlehre oder die Aufstellung vom 'Richterautomaten' bezeichnet.* See his *Vorwort* to *Subjektives.* What such authors as Ehrlich and Gény would have said of this statement of Jung's is quite another matter. Cf. *Unw.* I, p. 342, n. 1.

[4] Jung, *Problem,* p. 65.

[5] See the note preceding the last one.

says: *Der Begriff des Unrechts ist der ursprüngliche und positive, der ihm entgegengesetzte des Rechts ist der abgeleitete und negative.* Consequently this latter concept characterizes those actions which do not include 'Unrecht'.[6] The meaning is clear when Jung says that the violation (here = wronging) *ist die erste soziale Erscheinung.*[7]

Finally I should like to point out how Kantorowicz, one of the protagonists of the 'free judge movement', declares quite simply in his account of the fundamental significance of justice that *der als ungerecht empfundene Entscheid de lege lata gar nicht notwendig sei, sondern auf schlechter Auslegungsmethode beruhe.*[8]

The listing of these and similar authors can be extended indefinitely. Whenever one turns within jurisprudence refrains are heard from those twofold melodies which maintain the balancing of the interests of the respective parties, i.e. natural justice, and at the same time assert that law is determined by: the 'common good', 'the practical needs of society life', 'social end', 'social or public policy', 'collectivist welfare', etc.

It always has been and will remain contradictory, illogical and, consequently, untrue to life and science to believe at the same time in natural justice and social welfare as guiding lines in the science of law. This has been shown above on pp. 55–76, but I find it important at this point to revert to the matter with the utmost brevity.

Briefly stated the idea of justice is: to every man his due! Ulpian said this by describing justice as *voluntas ius suum cuique tribuendi.* The problem is to achieve a balance between the interests (based on certain circumstances and reasons) of the oppos-

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[6] See Jung, *Problem,* p. 65.

[7] *Problem,* p. 65, where immediately previous to this he quoted from Jhering, *Geist* I, p. 118: *Die ersten unausbleiblichen Regungen* [read *Regeln,* error by Jung] *des verletzten Rechtsgefühls bestehen in der gewaltsamen Reaktion gegen das zugefügte Unrecht, in Selbsthilfe und Rache.*

[8] Quoted from Germann, *Grundsätze der Gesetzesauslegung,* p. 203, where reference is made to Kantorowicz, *Rechtswissenschaft und Soziologie,* 1911, p. 8, which has not been available to me. On p. 226 above I have shown how Kantorowicz asserted the justice of punishment in his work *Tat und Schuld,* p. 15 ff. Cf. *Unw.* II, pp. 43 ff.

ing parties. When this results natural justice has been administered. Consider now a typical case of damages. What one now believes to take place and even believes that it ought to take place is as follows.

The reasons for the interest of the injured plaintiff to receive a certain amount of damages are weighed against the reasons for the interest of the defendant to avoid paying any damages, or to pay a lesser sum than the amount of damages claimed by the plaintiff. If the reasons of the defendant are strong enough the scale is tipped in his favor and it can be equalized only by approving of his claim, i.e. he avoids paying the damages or part of them. If the plaintiff has better reasons the scale can be balanced against that of the defendant only by the approval of his claim which means that the defendant's scale is weighed down with the sum of the damages. How, then, is the weight of the respective reasons determined? This can and must—in order that the ideal of justice may be looked for—only be done through the feelings of justice, i.e. through the valuations of the so-called common sense of justice, however checked and smoothed they may have been by means of the latter's chastisement through the maintenance of written and unwritten rules of law. As we have seen so clearly previous to this, such legal ideological evaluations are certainly nothing to build upon scientifically, but this is not the point to be emphasized here. The concern now is to prevent *that* false belief, which has spread all over the world, England and America not excepted, that the *social* function of *law* should be to regulate the relation between the parties in a ligitation, i.e. a judicial controversy. This idea of legal contests has no correspondence with reality. There are no legal conflicts in the usual meaning of the phrase. Actually here these words conceal nothing other than that a person has possibly set aside such an action which the great majority of persons are prevailed upon to observe particularly becaue of those legal reactions which, on the whole, consistently and irresistibly strike those who have set aside an action of the kind in question. Or again, the phrase 'legal conflict' conceals simply the disregarding of such an action which people in general are induced to observe on account of the maintenance of certain *laws*. From this one can se how perverted the idea is

that the so-called legal order exists so as to regulate 'legal relationships' between parties after 'legal conflicts' have arisen. Indeed the legal order itself forms a necessary condition for the logical possibility of discussing such things as are considered to be 'legal conflicts' and 'legal relationships'. Its essential social function can never be to regulate such 'relationships' after legal conflicts have arisen.[9]

What has been said above can also be expressed in the following way: it is an urgent matter to eradicate that fatal confusion so prevalent everywhere within jurisprudence that a genuine science of law could be achieved through trumpeting right in the middle of legal ideology, i.e. the legal chimeras, this talk of 'the interests of society', *die Bedürfnisse des allgemeinen Verkehrs, sozialer Zweck,* 'collectivist welfare' or 'social policy' as determining the appropriate principles of law. This has been discussed above on pp. 55–76. Here I point out simply that one—through the constraint of the ideas of justice and the resultant confinement of one's view to the particular case, i.e. a comparison of the reasons for the interests of the litigant parties—has been prevented from surveying the great social connection in which the particular case is only an insignificant episode. Such near-sightedness hides the entire social horizon completely from view. One is simply deprived of the logical possibility of considering the interests of the society, which verily is something quite different from the two parties in a litigation.

One must understand that it is logically impossible for a legal maxim which might be derived as a result of weighing the interests of the respective parties' to have a social purpose. Such an idea has always distinguished the method of justice ever since the time when it was, as noted above, formally recognized by Ulpian in Roman law: the idea of seeing to it that the rights were realized, that a party may draw out or maintain what was due to him as his right (or his *Rechtsgut, legally protected in-*

[9] Concerning the social function e.g. of the culpa-rule (the law of fault liability) see pp. 253 ff. above, compared with what I say thereafter of my common or general rule of liability to pay damages, pp. 258 ff.

[1] D. 1. 10. pr. (Ulp.): *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.*

terest, etc.).[1] As 'justice' is believed to be the foundation for all of legal ideology and also for the origin of rights, so is it justice which is believed to be the background for the demand for realizing the rights. But this demand has in view the holder of the right as an individual[2], i.e. as having himself his own object or end.[3] In none of the doctrines cited above does one deny that the legal right belongs to the individual as such, i.e. belongs to him as an object or end in himself and not as an element in the community. From this point of view to assert that the law fulfilled a social function is simply not understandable because it is a contradiction.[4]

Attempts have been made to avoid this contradiction by classifying the rights as *relative,* not *absolute,* as at least the right of property was considered in older times: it should be only in his capacity of a member of the society and not as an object or end in himself that man were subject to rights. Thus the belief in the rights of the individual would not conflict with the conditions of the maintenance and development of the society, i.e. with social viewpoints. However it is not only the belief in the *absolute* rights but the belief, on the whole, in the concept of legal right, which results in an unsolvable contradiction to the view that it were only in their capacity as members of the State organization that the individuals could claim something with respect to law. Whether absolute or relative the conception of right implies that the individual stands as a *self-dependent* subject of the right; and this is so just as much when the right is directed against a private individual as when it is considered to be directed against the State. None of these assumptions are in the slightest degree consistent with the understanding that the right belongs to the individual only in his capacity as a member of the State organization. Both the so-called relative and absolute rights include the concept that a person as the *subject of a right* can *lodge a claim,* i.e. the situation is considered such that it would be *unjust against the person* himself *as the subject of the right,* if he were

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[2] Unless it is a question of the 'right' of the State, the community or the like.

[3] Cf. Ehrlich's statement quoted on p. 275 above.

[4] Cf. pp. 220 f. above.

prevented from exercising it. It is obvious, thus, that the relative as well as the absolute right is considered to belong to the individual as constituting an object or end in himself, and consequently cannot belong to him merely because he is a member of the society. The assertion that man on the one side in respect to law cannot be considered as an isolated individual but only as a member of society and on the other side is a subject of rights —this assertion is nothing more than meaningless words because the one is an unavoidable contradiction of the other.[5] What now has been said of legal rights holds true also of legal relationships, *Rechtsgüter,* legally protected interests and other such concepts. From what has been said it follows that the conception of relative rights (*Rechtsgüter* etc.) has an absolute character as well as the conception of absolute rights.

The method of justice seems to dominate the whole of jurisprudence on the continent of Europe

The various authors, schools, trends etc, which have been discussed in the preceeding section do not equally stress the significance of the social aspects of law alongside of natural justice. In the writings of Jung, for example, as already pointed out, the social viewpoints appear rather infrequently, but there is no doubt that he was influenced by such views. If he had allowed himself to be led *only* by what follows from natural justice, the common judicial conscience etc. his works would have resulted in such complete absurdities that no judicious person would desire to have anything to do with them. This is apparent from my analysis above on pp. 55–76. From the preceeding section it should be quite clear that no investigation into law can be classed as scientific merely by applying social viewpoints alongside natural justice. To carry out a science of law *only* social realities can be considered. Jurisprudence must indeed clear away legal ideology and its associated conceptions of natural justice as the basis of

[5] Cf. the untenable proposition cited from Heck on p. 276 above.

law. That is why I have been so anxious to show that the belief in justice as the foundation for law is logically incompatible with the understanding that law is to be formed according to the points of view of social welfare. Expressed in another way, I emphasize that however much legal authors may have served practical life in the community by introducing social viewpoints into the fancies of natural justice such a composite is never anything more than a muddle when judged according to scientific principles.

Now I shall mention further a number of contemporary European legal authors whose views cannot possibly be scientifically established.[6] After the foregoing no further specification of the non-scientificness of a view is required than the fact that it is not freed from legal ideology.

Legal ideology was believed in by the German Kohler, the Hungarian Somló and Armin Ehrenzweig from Austria.[7] Perhaps the objection may be raised that these authors do not belong to our time. However, according to my way of looking at things, the jurisprudence of this very day is just as chained to legal ideology as the jurisprudence was in the lifetime of the authors mentioned. I speak of them as leading authors in their respective countries. In fact, the view of legal matters of Kohler, the senior of the three, was estimated by many legal scholars to belong to the future. However, to continue.

Bernhard Kübler, an authority on Roman law, in a review of Hägerström's *Röm. Oblationsbegriff* wrote that law is a spiritual world which rises over the material world, is nourished from this and in turn influences it. Law attaches legal consequences to

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[6] For the sake of time and space this discussion is confined in general to the German-speaking jurisprudence.

[7] According to Kohler, *Einführung,* § 4, the right is *die subjektive Beziehung, die von der Rechtsordnung* (i.e. objective or material law) *als unverletzlich erklärt wird.* Somló, *Grundlehre,* p. 469, says that right is *der durch eine Rechtsnorm geschaffene Anspruch.* Jhering's conception of a right as a legally protected interest is adopted with some comments by Ehrenzweig, *System* I § 31. He says that rights exist because of the interests, and in § 41 he describes legal duty as determined by legal norms. Such comments only help to confuse the matter further.

connections of events that we observe with our senses. The legal consequences themselves, as well as the causal connection between them and the events in the material world, thus lie outside of this world and belong to 'the intellectual realm of law' (cf. Kant's *mundus intelligibilis* as contrasted to *mundus sensibilis*). The explanation of all this is, according to Kübler, 'a hitherto unsolved enigma' which it is the task of legal philosophy to unravel.

Indeed legal ideologists who take their work seriously must understand that the legal ideological substratum for their science cannot be identified in time and space and that it belongs accordingly to a world other than the natural, i.e. to the spiritual world of law. A prominent German jurist, Walz, has been caused by one of my writings to admit this fact rather bluntly.[8] He will probably not contest my opinion that jurisprudence can be a real science only insofar as it is based on experience, but illuminates the implications of my presentations significantly by observing that nowhere have I *shown* that only the space-time phenomena and occurrences could be the object of our experience.[9] It is remarkable indeed that a jurist of Walz' stature and attainments should attack my view by demanding evidence that human beings cannot have experiences in the spiritual world! Walz has however pressed the flimsy but yet deciding point. If jurisprudence grants that legal science cannot be concerned with things other than those which are given by experience, since jurisprudence hat not the power of freeing itself from legal ideology, its scientific face must be saved by the absurdity of allowing the experiences to extend from the world of time and space into the domains of the spiritual world.[1]

According to the Italian philosopher of law Del Vecchio, the notion of law is supernatural, i.e. the law never states any physical

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[8] Walz, pp. 145 ff.

[9] Walz, p. 147.

[1] Walz' criticism of my *Superstition or Rationality*, a criticism which supposes the existence of two worlds (after Kant's *mundus sensibilis* and *mundus intelligibilis*), has been answered by me, see *Obligationsbegreppet* II, pp. 282–287. Such a criticism seems utterly fantastic: the legal ideologist reasons logically from his points of departure and then moves into the two worlds, or he contests the two world-theory and then his reasonings become pure whimsey.

truths. Thus, it always presents truths superior to the reality of natural phenomena.[2] Del Vecchio has also written a book on *justice* itself where this is said to be a higher measure of right and wrong than law, a measure superior to all provisions of positive law. Consequently justice cannot be based on such provisions. The relation between law and justice, he says, is a problem from which our consciousness cannot withdraw, a problem that on the whole presents philosophy with its highest task. The notion of justice, says Del Vecchio, comes immediately from the most profound nature of the consciousness. According to him, justice represents one of consciousness' necessary and basic modes of reaction.[3]

Ten years after the German edition of Del Vecchio's work appeared, Helmut Coing published his *Grundzüge der Rechtsphilosophie*. This work is completely metaphysical and will be discussed below.

'This American "Socialbehaviorismus"' is the greeting with which Prof. Erik Wolf attacked my book *Unw.* I. That Prof. Wolf did not understand my work is of no consequence. His interesting point is that my assertion of the non-existence of the legal 'ought' and the legal imperative leads to such an immoral conception of law that the profound unpopularity of my doctrine should show me its essential untruthfulness and contrariness to reality.[4]

[2] Del Vecchio, *Lehrbuch,* pp. 240–243.

[3] Del Vecchio, *Gerechtigkeit,* pp. 1, 45. This is a substantial work, but the reasonings are mainly quite metaphysical as the statements summarized in the text here would evince. In 1940 the German edition appeared, having gone through two editions in Italy previously. It was published in Spain, entitled *La Justicia,* with an introduction by Prof. Q. Saldaña. Editions with scholarly introductions appeared in Bulgaria and Rumania. The French edition with an introduction by Prof. Levy-Ullman, entitled *Justice, Droit, Etat,* was published in 1938.

[4] Wolf, *Literaturbericht,* pp. 162 f. Because of a book by Jaehner (noted below) Wolf is not able, he says, to understand that legal thinkers actually exist who sense in law, to be sure, some metaphysical, even mythical, force which exacts emotional and intellectual veneration of the jurist but who believe in all seriousness that they can spirit away the myth of law by 'bringing it back to its empirical foundations', ibid. p. 163. These words were written by a well-known jurist in 1936! In 1950 he edited the 4th edition of Radbruch's *Rechtsphilosophy.*

Hans Reichel reacted to *Unw.* I by writing indignantly that in questions of legal science, because it is a spiritual science, using the Neanderthal man is not an argument. Accordingly, he continued, fettered in a commonplace naturalism Lundstedt lacks every understanding of the science of law as belonging to ethics and it is only consistent that he (Lundstedt) should deny objective morality. This excitement was spurred on no doubt because I did not even spare conceptions such as rules of law, legal imperatives, positive law etc. Reichel epitomizes my criticism as not only eroding the fundamental principles of law but decomposing them.[5] Reichel's indignation against me on account of my attitude to the relation between law and ethics calls for the remark that he obviously has not noticed my exposition of the indispensability for society of the feelings of justice and of the fact that they are taken in the service of legal machinery. This exposition had been given already in *Unw.* I, even if the moral effect of criminal law was not explained in German language until *Unw.* II (cf. pp. 136 ff. above).

More moderate criticism of *Unw.* I was voiced by the criminologist Edmund Mezger who raised the question: Is it then scientific from the very beginning to wish to forbid all investigation into that which lies on the other side of what is immediately given and observed in space and time? Mezger was not prepared to answer this question in the affirmative.[6]

'Science of Law as a Science of Justice' was written by Wilhelm Fuchs in 1933, but the work was not actually published until two years later. Before this work was brought out Fuchs read my *Unw.* I and appended a criticism of my work to his own book. This criticism I have touched upon in the Introduction. I should only mention here that Fuchs concludes by saying that his investigation into my doctrine has caused no essential change in his view of jurisprudence as a science of justice, meaning natural justice, of course.[7]

[5] See Reichel, *Review,* p. 183 f. Another German critic, Hofacker, p. 227, spoke so kindly of my book that he felt it to be like a refreshing north wind that dispersed the fog that hangs over our juridical system. This could, of course, find no approval with Reichel.

[6] Mezger, *Review,* p. 47.

[7] Fuchs, p. 74.

Before concluding this exemplification of German representations of legal ideology I wish to discuss or perhaps just touch upon a few others among this group.

Commenting on my book *Unw.* II, a Swiss author said that I was way off the track because I asserted that science had nothing to do with anything other than facts, i.e. reality.[8] And another legal writer claimed that I obviously was devoid of the function of the intellectual lifelike sense for the entire province of the ethical order.[9]

From Radbruch's *Rechtsphilosophie* I have already given a very significant quotation in another connection (p. 43 n. 3 above). From the introduction by Erik Wolf (the editor of the 4th edition of this work of Radbruch, an edition published in 1950) it appears that Radbruch always had been a legal ideologist and that over the years he developed more and more as such. Of course Radbruch had for a long time believed in an idea of law *(Rechtsidee)* in the sense of neo-Kantianism. This idea contained *justice* and *legal security*. But seeing that these points often tended to collide with each other he believed in subordinating them to a common legal ideal, namely, that of legal expediency. Later on he placed the 'idea of law' with a metaphysical pathos into the foreground or, perhaps more correct, on the top, and also as embracing justice, security and expediency. As late as 1946 Radbruch for the first time seems to have spoken of *übergesetzliches Recht* implying that the formal legal security was subordinated to the formal *Gerechtigkeitswert* (value of justice). However, Wolf states that even in his later writings and literary remains Radbruch has not traced out any systematic doctrine of material justice. Indeed, says Wolf, such a thing would have been impossible because Radbruch in that time had perceived the 'really existing paradox of all law': the conflict between justice and security, between security and expediency, between expediency

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[8] W. Burckhardt, *Review*. Burckhardt is surely identical with the author of *Einführung in die Rechtswissenschaft*. This book is throughout based on legal ideology.

[9] Hürth, *Scholastik*, p. 474 f. (Cf. my comment just made on Reichel's indignation.)

and justice.[1] The *wish* that material justice *did* dominate is obviously there. But its realization appears to be impossible! This ought, one might think, to make legal writers understand, not that law is paradoxical, but that the method of justice is completely useless. However, such an understanding is conspicuous by its absence.

This seems to be the place to mention Coing, one of Germany's more recent philosophers of law. This author surely comprehends that law is a creation of man. But he believes that certain *Gesetzlichkeiten wären dem Recht vorgegeben.* Thereby he has in view the *Rechtsidee,* perhaps here best translated as the idea of law and right, which shall be

> die Summe der sittlichen Gehalte (Werte), die wesensgemäss mit der Ausbildung des Rechtes verbunden sind. Im Mittelpunkt stehen Gerechtigkeit und Personwürde des Menschen. Die Gerechtigkeit verweist uns auf die Natur der Sache. Dadurch geht die Seinsordnung, soweit sie dem Menschen erkennbar ist, in gewissem Sinn in die Rechtsidee ein. Die Natur der Sache wird zur Norm.[2]

Coing tries to show that the ethical values as they are given in our ethical consciousness 'with a certain degree of objective correctness are possible to transcribe'.[3] As a matter of fact he treats the justice—existing 'in the center of the moral values'—as an objective value. This justice demands equality. However, Coing distinguishes between the justice of law and the personal justice. The former is of an abstract kind. Its formula is: equal cases are to be treated equally. This justice of law thus is only fragmentary, but the 'idea of right and law' itself points out a second *Ansatzpunkt für die Suche nach dem Urbilde des Rechtes: die Natur der Sache.*[4] This concept is thereafter made an object of a detailed exposition in which at last it is said that *die Natur der Sache* leads back to a *moral* gradation, where the justice finds its measures. And it becomes clear according to Coing that the

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[1] Cf. Radbruch, *Rechtsphilosophie* (Wolf's Introduction), e.g. pp. 41, 70 ff.
[2] Coing, p. 147. (Cf. pp. 90–147.)
[3] Coing, pp. 106 ff.
[4] Coing, pp. 111–118.

Rechtsidee in accord with its contents goes beyond the simple demands of the justice. 'Die Rechtsidee', he states

'fordert die Versittlichung des Rechtes überhaupt. Der Gedanke der Rechtsidee begreift nicht nur die Gerechtigkeit in sich sondern alle sittlichen Forderungen, deren Verwirklichung im Rechte möglich ist.'[5]

After this Coing gives an exposition of 'the further moral contents' of the *Rechtsidee*.[6] A summary of the essence of the *Rechtsidee* follows which is introduced with the words which I quoted at the beginning of my discussion of Coing.[7] Finally it may be mentioned that Coing, under the heading 'The principles of justice', according to Aristotle distinguishes between *iustitia commutativa* and *iustitia distributiva*. To these he adds *iustitia protectiva* which limits the power of the State or individuals over other individuals. This idea, claimed to have been first completely understood in Teutonic law, has its full expression in the idea of 'Rule of Law' in English law.[8]

I may not need to say any more about Coing's legal philosophy in this connection. If my critical view on jurisprudence is essentially correct as well as my positive view on law as a legal machinery—all of which has been expounded above—I think that everything that Coing has tried to discuss on so many hundreds of pages can hardly be considered anything other than empty talk.

In 1920 Ignatz Kornfeld called attention to his 'sociological legal doctrine'. This doctrine in many a passage seemed to be realistic. He said, he would have nothing to do with the 'so-called sociological jurisprudence'. Here, he says, the word 'sociological' is not used in an exact way because it does not mean the socially *useful* or *desirable* but what within the human *community* is *lawful* or *regular*.[9] In spite of this promising attitude and in spite of a great many positive observations and acute reflections Kornfeld's doctrine lands in conceptions so void of all foundation that one first believes in having completely misunderstood him. His

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[5] Coing, pp. 130 f.
[6] Coing, pp. 131 ff.
[7] Coing, pp. 147 ff. (Cf. pp. 90–147.)
[8] Coing, pp. 179 ff.
[9] Kornfeld, p. 65.

discussion of *soziale Machtverhältnisse* or 'the legal relationships of social power and social limitation of power' (privileges and obligations); his idea of the *relative* regularity (as contrasted with the *absolute* regularity of the physical laws) of *Sukzessionen and Koexistenzen*[1]—all of this depends upon the most violent abstractions of facts which our experience gives us to understand. I cannot further dwell on Kornfeld's view of legal matters here, the less so since I have given, in my *Unw.* I, a rather detailed criticism of Kornfeld's doctrine which may be referred to.[2]

When I first read Julius Binder's book *Rechtsnorm etc.,* it seemed to me, in spite of some illogical statements he made[3], that he was on the way towards a realistic view of law and legal matters. But his later works have shown that such an impression was a mistake. I need only mention Binder's *Philosophie des Rechts.* In this great work he dissociates himself from certain earlier 'attempts of philosophy of law' (cf. preface, p. v). It is not necessary to enter into any details. It is sufficient to refer to the general judgment of the book that it presents a complete picture of a legal science based on metaphysical grounds.[4] In his book *Prozess und Recht* Binder makes several assertions as to the idea of legal rights, assertions rather difficult to comprehend but which do indicate nevertheless that his view is based on legal ideology.[5] The lack of clearness of one of these assertions caused Olivecrona to make the sarcastic remark that the judge according to Binder has 'to verify a relation that does not exist if it is not verified'.[6]

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[1] Kornfeld has in view the connection between so-called legal facts and legal effects. This connection is only *relative or likely* whereas the connection between facts and effects according to the physical law is *absolute or certain.*

[2] See *Unw.* I, pp. 321–341.

[3] Cf. Nelson, pp. 205 ff.

[4] Heck, *Review,* p. 112. Erik Wolf says that in the same way as the philosophy of law after the turn of the century was renewed in adhesion to neo-Kantianism through Stammler, among other persons, so it was in adhesion to neo-Hegelianism through Julius Binder. See *Einleitung des Herausgebers* in Radbruch, *Rechtsphilosophie,* pp. 22 f.

[5] See *Unw.* I, pp. 113 ff.

[6] Olivecrona, *The Burden of Proof* (in Swedish), p. 3. As to Binder see *Jurisprudence of Interests,* p. xxiii. Binder's paper *Bemerkungen* has been translated and edited in *Jurisprudence of Interests,* pp. 279–312.

At this point it is well to recall that Kelsen and his followers quite intentionally place law in a metaphysical world isolated completely from the world in which we exist.[7]

As said above I must refrain from giving examples in more detail of legal ideology in France. Otherwise I should have been able to demonstrate for page after page that there too legal science, so called, is dominated by legal ideology. In my book *Strict Liability,* Bd I, there is a 175-page critique of the French law of liability which clearly shows the legal ideological background in France. This is not surprising in a country where legal science appears to be guided by judicature instead of guiding it. Even such a 'radical' jurist as Josserand, in spite of his reputation for seeking new methods, depends—as, in fact, we have already seen (above p. 245)—upon legal ideology. Now to give another instance, according to him legal rights have *leur source première dans un texte de loi ou bien dans la coutume,* i.e. *le droit positif* which in turn shall have its foundation *dans la volonté, plus ou moins consciente, de la collectivité.*[8] Josserand's doctrine of rights as *des produits sociaux,* suggests, although he does not say so, very much Jellinek's theory.[9] Josserand finds however partial support for his doctrine in Jhering.[1] Josserand shows influence from

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[7] About Kelsen see below pp. 400 ff. In my last Swedish book I have in more or less detail touched upon such German legal ideologists as Baur, *Entwickelung und Reform;* Esser, *Grundfragen;* Esser, *Lehrbuch;* Hedemann, *Einführung;* Lange, *Schuldrecht;* Löning, *Hauftung des Staates;* Weigert, *Ausservertragliche Haftung;* Wilburg, *Elemente des Schadenrechts;* and the following Swiss legal ideologists: Becker II; Guhl, *Obligationenrecht;* Haab, *Sachenrecht;* Oftinger I and II; Oser-Schönenberger I and II; v. Thur I and II; v. Wattenvyl, *Aussercontraktliche Haftung;* Maag, *Haftung;* Chamorel, *Responsabilité.*

[8] Josserand, *Cours* I n. 117 and n. 16. This as concerns the *general* source of *all* legal rights. Their immediate and direct sources however vary, he continues, stating that legal relationships *(rapports juridiques)* arise from: *la loi; les actes illicites (délits et quasi-délits); l'enrichissement illégitime; les actes juridiques* (= contracts, promises and other legal transactions). See ibid. n. 117 and, on the whole, the chapter: *Theorie générale des droits,* ibid. n. 102—n. 165.

[9] See Jellinek, *Allg. Staatslehre,* pp. 384, 408 ff. Cf. my criticism of Jellinek in *Unw.* I, pp. 198—213 ff. as compared with pp. 127 ff.

[1] Josserand, *Esprit,* n. 236; cf Jhering, *Zweck* I, pp. 239 ff.

Duguit too who formally denies the existence of rights believing only in legal duties as did his master, Comte.[2]

None of the other French legal writers touched upon in my book on strict liability, Bd I, seem to have broken through the barrier of legal ideology. I think it is not necessary here to show that my views on legal matter are unfamiliar to these French writers as they have also been to German authors and legal writers in others countries as well.[3] Finally, it should be mentioned that, as noted above, the eminent jurist Levy-Ullmann wrote the introduction to the French translation of Del Vecchio's work on justice as the basis of law.[4]

Detailed criticisms of Duguit and Gény are to be found on pp. 276–314, 342–351 of my *Unw.* I.

From the above my assertion that European jurisprudence is dominated by legal ideology should be firmly established. Within the past 20 years or so no more than one author has come to my notice who has tried more deeply to free himself from legal ideology. He was a German.[5] Yet I regret to have to say that he does not seem to have succeeded.[6] His work appeared the year after the publication of *Unw.* I. In his preface he notes that he had completed his manuscript before he had the opportunity to see my book.[7]

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[2] See Josserand, *Esprit,* n. 237.

[3] The more outstanding French works which I have touched upon in Bd I are cited here: Baudry-Lacantinerie, *Précis* II; Bonnecarrère, Laborde-Lacoste, Crémieux II; Colin et Capitant II; Plainol, Ripert et Esmein, VI; Demogue III and V; Marton, *Les fondements* I and II (published by Recueil Sirey; Marton was an Hungarian, and professor, first at Debrecen, afterwards in Budapest); Mazeaud I–III; Ripert, *Règle morale.* In passing, Laborde-Lacoste's *Exposé methodique* I should be noted although it was not consulted by myself in Bd I. The author points out its method and content as well. In his preface he says that he has tried *de bien nous faire comprendre. Faire comprendre, telle a été notre préoccupation constante.* Yet, in this book legal ideology is still the point of departure! I have cited it on p. 245 above merely to show its ideological character.

[4] See p. 288 n. 3 above.

[5] Jaehner, *Der Mythos vom Recht.* Of course there may be more, but I have not been able to find out about them.

[6] I have discussed him in *Strikt ansvar* II: 2, pp. 159–171.

[7] This should be evidence that Jaehner had not even read any of my Swedish

Social welfare viewpoints cannot, as has been shown above on pp. 281–285 (cf. pp. 55–76 above), be used in any really scientific way by authors whose thinking is based on legal ideology. Why, then, do so few legal writers seriously try to liberate themselves from this condemnable ideology? The answer to this question is far too complex to present here. However, I shall discuss briefly some of the issues involved in this question.

Two groups of jurists must be distinguished here. The first group feels not at all concerned with any foundation for its attitude or point of view. Here the issue—thus they think—is jurisprudence and not philosophy. They feel that the deeper substratum for the reasonings of legal science belongs to legal philosophy as distinguished from jurisprudence, and jurists are not concerned with philosophy as such. Perhaps the substratum in question might at times be discussable, they think. However such discussions are not at all important when compared to the problems which generally concern jurists: interpreting law, agreements or other legal transactions as well as judgments of the law courts. If nevertheless the discussion happened to turn to general legal principles, certain adjustments might be made if necessary from the wants of legal life. But one feels not compelled to deal in any great detail with basic issues. This is, I think, in general a real life portrait of a great part of jurisprudence. And here the majority up to now of Scandinavian jurisprudence may be classified.

The other group comprises those legal scholars who endeavor to follow the investigations into legal philosophy and utilize the results of such efforts. When these scholars deliberately have recourse to something metaphysical as the foundation of their science, i.e. to something belonging to a spiritual world as distinguished from the physical world, this usage may simply depend upon their belief in the difficulty of getting the 'whole' to fit in

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writings. However, Prof. Erik Wolf, *Literaturbericht,* pp. 163 f. describes Jaehner's book as 'a dillettantish attempt to imitate Lundstedt'. This I cite merely to show how 'unbalanced' a critic can allow himself to become. Anybody who has read Jaehner's writings and my own understands only too well that my theories were not known to Jaehner.

without including such a manner of approach. However strange such an exposition may be, one thus imagines to have an actual need of a 'higher' order, i.e. an order outside of time and space, which order authorizes legal phenomena. Then according to the nature of the thing, this order becomes normative, i.e. the objective or material law. An extraordinary incentive must be required for intentionally having recourse to 'realities' in the world of the spirit, and this incentive one apparently believes to have found in the demand for natural justice. Under the pressure of the idea of justice, there are simply no answers when such questions as the following are asked: How could the partner to an agreement be *legally forced* to fulfill the agreement or to pay damages *if* the agreement had not made it his *legal duty* to fulfill the agreement? How could a person be *legally forced* to submit to punishment *if* he had not drawn *guilt* upon himself and thus *in the name of justice deserved* to be punished?[8] How could the claim for damages, according to the rule of fault-liability and strict liability as well, carry a *legal* mark, i.e. the stamp of *justice, if* the plaintiff had not the *right* of property to the damaged thing or *if* his *legally protected* interest had not been invaded in some other way, and that under such circumstances (the *guilt* of the defendant, his *creating of a risk,* his making an *unjust profit* etc.) that a claim for legal satisfaction in the form of damages must arise?

It is true that this characterizing of the motive for the assumption of an 'objective' or 'material law' includes a *petitio principii* inasmuch as with abandoning the 'material law' even all these conceptions—of the obligating and entitling effect of an agreement, the guilt of the criminal and the right of the State to punish him, the various legal rights and duties of a person—would fall to the ground. However, exactly such conceptions—which are

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[8] Prof. Thyrén who followed 'the radical trend within modern criminal law', was anxious to 'emphasize as strongly as possible from the very beginning' the importance of the question of 'the *legal title* of the punishment: why is the society *legally authorized* to punish?' As noted above on p. 223 he therefore found my thesis of social welfare to be a shocking piece of cynicism which leads to the theory of the criminal as an innocent beast of sacrifice.

bound up with tradition and receive constant nourishment through the pressure of the general attitude of the feelings with their demand for justice—cannot, in their mind, possibly be abandoned, and in turn they maintain the idea of the necessity of adhering to the *normative* material law laid by jurisprudence as the foundation for the entire legal system.

There is no reason for me to analyze how the threads run within that psychological complex which accounts for how the most important practitioners of legal science are able to remain at the legal ideological points of departure. Upon deciding *den heutigen Stand der Rechtswissenschaft* there is a certain amount of leeway as to what are to be considered primary and secondary causal influences for maintaining legal ideology, but on the whole the explanation may lie within that frame which has just been indicated.[9]

I consider that this explanation makes it an unusually significant task for a renewed jurisprudence to show *positively,* i.e. not only by criticizing legal ideology, that *not a single presentation or development of a legal question in reality has any need of legal ideological (= metaphysical) points of departure,* but that *everything* can be completely and entirely exposed through those investigations carried out according to purely scientific principles, i.e. principles that are uncontrovertedly based on real facts, upon experience. With my positive method, i.e. the method of social welfare, it has been my intent to explain the working of legal machinery in a way that is as *natural* as explaining the working of any industrial or manufacturing enterprise.

'Science of law without law',[1] the title of a book by Leonard Nelson, caused me to think some 35 years ago that this author was pleading for the release of jurisprudence from legal ideology, but his argument proved to be quite the reverse. Against being emancipated fom metaphysics, Nelson warns:

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[9] Of course, one must not forget that there are, and have been, jurists, even jurists of great acumen, who honestly—with both their reason and feelings—believe in the fact that jurisprudence moves in two worlds, the natural world and a spiritual one.

[1] *Rechtswissenschaft ohne Recht.*

Nur durch eine aufrichtige Rückkehr zum Rechtsbegriff und damit zu einer ehrlichen Metaphysik des Rechts ... wird man hoffen können, die unsaubern Geister, die sich der Jurisprudenz unserer Tage bemächtigt haben, wieder aus der Wissenschaft zu bannen und damit die Rechtslehre in wissenschaftlich gesunde und zugleich für die höchsten praktischen Zweke des Lebens fruchtbare Bahnen zurückzulenken.[2]

Thus Nelson does not fit in with my explanation of the power of legal ideology over authors on jurisprudence. He makes direct claims for 'honest metaphysics of law'. About the same attitude has also been shown in Wieacker, a recent author. He reproaches representatives of divers tendencies within jurisprudence because they have not placed natural justice prominently enough in the law. Wieacker criticizes legal positivists because they refrained from *eine übergesetzliche* (= super-legal) *Gerechtigkeit,* i.e. from justice as superior to law, and this obviously shall apply to customary law as well as to codes and statutes. Therefore according to Wieacker the idea of law was realized only defectively in legal positivism.[3] He classes Jhering, Ehrlich and exponents of the jurisprudence of interests, headed by Müller-Erzbach and Heck, among the adherents of naturalism. Such a movement is said to be characterized by law as being determined as *blosse Wirklichkeit,* consequently by legal science as a *Wirklichkeitswissenschaft* and its method as *die kausal erklärende Methode.*[4] Quite another matter is the extraordinary superficiality of Wieacker's analyses, blatantly evident when, speaking of the authors just cited, he refers to their 'reality-science' and does not even perceive how all of them have so thoroughly confused metaphysics with reality. However, it is not this point which now needs to be emphasized. What is important to stress is that writers on jurisprudence (as Radbruch-Wolf, Coing, Wieacker and others) in the past few years, instead of trying to remove the ideas of metaphysics from legal science, have actually pleaded for them, even for a

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[2] Nelson, pp. 235 f.
[3] Wieacker, p. 348.
[4] Wieacker, pp. 332 ff.

return to 'material justice', i.e. natural justice, as the guiding light in law.[5]

Anglo-American jurisprudence, as considered from a scientific point of view, will be discussed on pp. 337 ff. below.

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[5] See Wieacker, pp. 354 ff. On p. 355 he says: *Gewiss ist das Rechtsgewissen (als Rechtsgefühl oder Rechtssinn) a u c h ein psychologischer Befund; aber hinter ihm die transzendente Bestimmung des Menschen auf das Recht hin zu verkennen, hiesse den Text als physischen Gegenstand zu analysieren, anstatt ihn zu lesen und zu verstehen. Die transzendente Herkunft des Rechtsgewissens* (= judicial or legal conscience) *ist das einzige unerlässliche Axiom, dessen die Wiederherstellung des Rechtsglaubens bedarf;* and on p. 356: *Der Befehl des Rechtsgewissens ist u n b e d i n g t, daher vor allem nicht w i r k l i c h k e i t s-bedingt, wie die naturalistische Rechtsethik glaubt.*

III

ARE DECLARATIONS OR STATEMENTS OF WRITTEN OR UNWRITTEN LAW TO BE CHARACTERIZED AS RULES OF LAW?

General remarks

Now a question which I consider to be of great juristic if not immediate practical importance will be taken up, namely, whether legal rules can be discussed as anything other than vacuous terms or empty labels. Thus I intend to complete the view of law which I have expounded above and also to point out that much of the material which has been written on this particular topic would have received quite another treatment if the writers concerned had considered the positive method which I call the method of social welfare. Above and in other writings I have asserted that as far as I can see, no other method based upon experience can be attained. Allowing for certain exceptions, nevertheless when this method is not really seriously considered I believe, as also stated previously, that this is due to the opinion that this entire subject has been treated by so many authors before me and is so obvious that there is no further need to waste words or thoughts on the matter. Yet, nowhere have I seen this question dealt with as I have done. No predecessor has criticized legal ideology and the method of justice built upon it as I have, and then, as a consequence, sought to introduce a new general method into legal science, i.e. the method of social welfare which I have developed. Considering my criticism of legal ideology and of the method of justice, and, further, observing the actual substance of my method of social welfare, there must be complete agreement, it seems to me, when I maintain that the law, so called, with all of its phenomena *is* or, at any rate, cannot better be *compared with* anything other than a machinery, being a necessary

condition for the present and continued existence of society, and that within this legal machinery there is no place for any material or objective law, nor for legal rights and duties, wrongfulness and lawfulness, nor for guilt, and—this is of particular importance just now—not for any legal rules or rules of law. With the image of the law as a legal or social machinery clearly in mind, it becomes easier to understand what follows about the implausibility of the *concept* of legal rule (even if it may be used as a convenient *term* or a handy *label*).

Let us take a simple case in which A's property, for the sake of convenience considered to be a chattel, is damaged by C in such a way that C according to the traditional rule of fault-liability upon the claim of A is adjudged to pay certain damages and expenses of the suit. A judgment which because of C's refusal to pay the stipulated sum of money results in the execution of coercive measures. Now what has taken place altogether in such a case? (I take this case to be decided according to Swedish law.) The first thing to happen is that A has beome the owner[1] of the thing through purchase, exchange, gift, inheritance, last will or other way whatever it may be.[2] The actual details included in each of these alternatives need not be discussed. We shall consider the situation only such that A bought the thing from B. What is implied when A becomes the owner through this purchase? To simplify the matter 'legal acquest in good faith' will be disregarded. We must now consider certain preceding phenomena which in turn presuppose certain facts or conditions. The purchase allows A the *same* possibilities to act free of risk with and manage the thing and utilize it for his own private interests as B had. Also as B, A may occasionally have certain powerful assistance to utilize these possibilities against the person who hinders him. To the extent that the impediment is not overcome A has certain possibilities to coerce payment in an equivalent amount of money.

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[1] There is no reason to reject the term 'owner' of something, as long as it is clear that the concept 'right of property' or 'ownership' in the legal ideological meaning, i.e. in any sense other than as merely a term or label, is untenable.

[2] It is not quite correct to say that this is the first thing to happen, but this point is further discussed below.

Before answering why or how A has taken the same position to the thing in the respect now mentioned which B had taken formerly, it is necessary to explain what B's 'power', now indicated, over the thing depended upon. This was as follows.

B himself had purchased[3] the thing from a third person. Thereby B became the owner of it. In this way B received access to those realities for an owner—the free possibilities of action concerning the thing and the other matters pertaining to it—which were discussed on pp. 93–100, and 109–114 above. He recived access to these, as was shown on pp. 135 above, because human beings are such as they are, namely, psycho-physical beings endowed with the faculties of thinking and feeling, the latter physically as well as psychically; further because they, such as they are now constituted, allow the practicing of such activities as legislation, administration of law and execution of judgments, or in brief, keep a society or legal organization which is concerned with maintaining certain written and unwritten laws or rules of law. Among them, in this very connection the following should be noted: criminal law against theft, larceny, robbery, embezzlement, blackmail, assault and battery, intentional harm-doing, etc.; civil law as concerns fault-liability and (to a certain extent) strict liability, vindication, various procedural 'rules' concerning expenses of suit and executing of judgments in divers forms. It is the maintenance of the 'legal rules' just indicated—which in turn presupposes the maintenance of a considerable part of legal machinery which it would be rather too circumstantial to introduce into this illustration[4]—for the benefit exactly of B; however, not solely this maintenance but also the influence of this maintenance on the human beings as they were just characterized and upon their lines of conduct. It is all of this in its

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[3] B can of course have 'acquired' the thing by exchange, gift or any of the other alternatives previously noted, but to avoid complicating the discussion I shall continue with purchase which is obviously no more or less mystical than the others.

[4] Besides the entire legal administration, such things belong here as religious, school and educational activities and, upon the whole, everything which promotes enlightenment and culture whether directly regulated through laws and other provisions or as indirect consequences of what has been regulated.

entirety which *in general* causes people to abstain from those manipulations with the chattel which might hinder B from the (complete or partial) exercise of his risk-free possibilities of action with his thing which have already been indicated.

In speaking of the *maintenance* of certain written or unwritten 'legal rules' I mean what is called their application or use if a case of one kind or another should appear before a court, or in other words the condition that the 'legal rules' in question are 'valid law' as expressed in legal ideological terms. Thus, through the maintenance of the laws indicated and the effect resulting from this upon persons in general, everybody steps aside and B alone 'rules the roost', i.e. nobody opposes his power over the chattel and this in turn is expressed by saying that he owns it. The purchase contract with the third person has had the significance that all the circumstances now indicated—the maintenance of the 'legal rules' mentioned and its influence on men—affect in general all people, the seller, the third person, himself included, so that they abstain from interfering for the benefit of B, while prior to this the abstention was for the benefit of the person who sold the chattel to B.

Finally, then, B sells the chattel to A. A now stands in place of B as owner with those possibilities which this implies, because the public in general refrains from interfering with the realizing of these possibilities. All of the time I have said 'in general' however. Now in B's case the exception is met in that C made the chattel unusable through a negligent action. He refuses to pay damages holding the opinion e.g. that B, not A, owned the thing thereby citing certain grounds either to the effect that no purchase contract existed or that the purchase agreement between A and B concerning the chattel was not legally binding. A summons him before the court with the suit that he shall be judged to pay damages plus court costs. A's plea is approved by the court; C refuses all the more to pay. Therefore the amount is exacted through distraint and the selling of the distrained thing. What has now taken place?

To simplify the answer to this question, to clarify the content of the concept of legal rule we may disregard everything as to the execution of the judgment. It is apparent that the possibility

of coercive execution of the judgment is necessary for the general significance of a judgment and we know that such an execution regularly takes place as it is needed. There is little interest concerning the question whether *legal rules* are applied in such instances. The important concern for our particular interest here is whether the conduct of the judge in administrating law, i.e. in judging, may imply *applications of legal rules,* and further—yet to a lesser degree—whether the actions of the people in general, thus including *also* the judges, may be considered *influenced by legal rules.*[5]

First, a reminder that I have indeed used the word 'legal rules' many times. This is a customary manner of speaking. This has been done by myself although, as previously indicated, it is my view that there can be no talk, on the whole, of any *rules* of law or legal *rules* in a characterizing meaning of the term. After being contested by C, the judge has of course established the correctness of the purchase agreement between A and B. This is merely a statement of facts and obviously does not include the application of any rule of law, as it is called. The statement may have been preceded by an examination of certain regulations in our law of agreements and certain written or unwritten regulations pertaining to evidence. In view of what follows it should not be necessary to show in particular that such regulations as these cannot be considered as legal rules in a characterizing sense. However, the judge has now concluded from the existing purchase agreement that A not B is the owner of the chattel. Perhaps this is thought to be an application of a legal rule? It is quite misleading, I believe, to call this an application of a legal rule. Indeed we can say that the judge among other things proceeded from or followed this contents of a declaration or statement in the law, that the purchaser through the agreement received the same position in relation to the chattel as the seller had previously. This declaration or statement, as well as other similarly clear (written or unwritten) statements or declarations in the law, may

[5] The actions on the part of judges which I consider in the *latter* case are particularly those the disregard of which falls under criminal law against offences committed by officials and under civil law of damages owing to the type of crimes just mentioned.

without any risk of criticism be called or denominated legal declarations or statements, the phrase then obviously being used without any other meaning than what is said in it.[6] This phrase seems to me more appropriate than legal regulations, prescriptions or provisions, already because there are *unwritten* legal declarations or statements and it may be offensive to the ear to call them regulations etc.

There can hardly be any objection against this proposed terminology.[7] The term legal declaration or statement is taken purely and simply in the meaning of a pronouncement or a formulation of written law or what can be considered as unwritten law, called for the most part customary law. The legal declaration or statement as comprising such a pronouncement or formulation is of interest to us here only to the extent that it concerns, directly or indirectly, actions of the judges or of man in society. Only such legal declarations or statements are covered by that which is considered with the concept rules of law or legal rules. Accordingly it is clear that the term legal declaration can be more widely applied than it is here used by myself. Notice consequently that by 'legal declarations or legal statements' I consider only such formulations which are customarily called legal rules.

There is of course no need to insert anything normative into the phrase legal declaration (or legal statement). And in the form I use the phrase it is actually completely free from every trace of a tendency to be a norm, that is, of the character of a legal norm (precept), i.e. command or prohibition, or of any other trait which could directly or indirectly create legal effects. However it may be added that when the judge has to the best of his ability arrived—without clear support either of written or customary law—at a decision in the case, it is of course pure fantasy even to say that he adjudged the matter in agreement with a legal declaration. Such situations will be discussed later on pp. 327 ff.

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[6] In the phrase in question 'declaration' and 'statement' are of course synonymous.

[7] By legal declaration or legal statement I mean to render the Swedish word *rättssats* (German *Rechtssatz*)—quite freed, of course, from any normative character whatsoever.

However in what immediately follows I shall confine myself essentially to examples about which it can actually be said that the judgment passed does agree with, or is opposed to a legal declaration.

From what I have repeatedly indicated previously, it is obvious that I find it groundless to consider what I have called a legal declaration to be a rule of law. This is different for those who believe in and consequently reason according to legal ideology. The legal declaration we are now concerned with would then have the following meaning: by virtue of the legal declaration in question A had through the purchase succeeded B as owner of the chattel, which in turn must signify that people in general were under the legal duty of abstaining from hindering A in the exercise of the series of possible actions concerning the thing. But the connection just mentioned between the purchase agreement and A's power over the chattel does not really exist. If we see the legal declaration in question released from everything other than what enters into it on the basis of experience, i.e. freed from the supposed characteristic of an imperative or precept with the power of creating duties and rights or from its characteristic as an expression of the will of the legislator which realizes the contents of the legal declaration in and with the occurrence of a certain fact (here the agreement); in other words, if we release the declaration from all unreal *normative* or other possible *metaphysical* characteristics; and if we thus do not insert into the declaration anything such as: after the perfect agreement you purchaser become owner of the thing sold! and you seller have the duty to comply according to the agreement!—if we see the legal declaration in question in this factual way, nothing remains but certain words which *torn off from their connection with the legal machinery* have no greater significance than the same words written by whomsoever on a scrap of paper or a slate! It appears to me probable that it is the *normative* or in any case the *metaphysical* connection between a certain fact and the legal effect, as brought about by means of a legal declaration, which has given rise to the idea of the legal declaration as a rule of law. This is however quite strongly indicated by Kelsen's perhaps acute but completely fantastic 'pure theory of law'.

He lets everything pertaining to law depend upon legal norms which as being *die Grundformen des Gesetzes* he calls *Rechtssätze.* Logically enough because of its normative character law is said to fall quite outside the world of reality. In the same way as according to the physical law cause is bound with effect, thus the law (here *Rechtsgesetz,* not *Rechtssatz*) binds the legal condition, i.e. the legal fact, with the legal effect.[8] In other words a kind of legal metaphysical causal connection should exist—by virtue of the *Rechtsgesetz*—between the fact and a legal effect.

Yet if we desire to remain in our own, i.e. in the physical world even as far as matters of law are concerned we must seek to obtain clarity upon the question of legal declarations after rejecting all conceptions of the normative character of law, written as well as unwritten law. The *entire* significance and the *true* significance of a legal declaration then occurs purely and simply by its belonging to legal machinery. This is why it is considered by the judge, and this is why the maintenance of all of these penal, civil and procedural 'regulations' previously indicated has the effect that the great majority of people abstain from interfering with the use and utilization of the chattel, now for A's benefit instead of for B's, as it was before the purchase.

Declarations in law of purchase as a legal acquest and of fault-liability (the traditional culpa-rule) are not to be characterized *as rules of law for the judge*

Now the question arises: what is the significance for the judge of the fact that our legal declaration[9] is an element in legal machinery? This means that the judge always—if he is not mentally unbalanced or committing a crime duing his term of office —judges according to the contents of the legal declaration as he understands these contents, i.e. (if he is freed from legal ideology) according to the line of thought, to the spirit, in the legal declaration as it appears from an interpretation in conformity to the purpose of his judicial activity. Does not this, then, mean that

[8] Kelsen, *Rechtslehre,* p. 22. As to some remarks on Kelsen's doctrine see pp. 400 ff. below.

[9] I have now all the while in view that declaration or statement which says that the purchase is a legal acquest.

the legal declaration is a *rule* of law? Indeed, the judge (in Sweden) has in this capacity rendered his oath conformably to the 'best of my understanding and conscience to judge according to the law of God and Sweden's laws and statutes'! That is, he has declared under oath to make *regular* use of the legal declaration concerned. In the present connection I believe that we can overlook this oral act of the judge without underestimating its importance, far from insignificant, according to my view, upon the respect for the judge's profession and the administration of law. Perhaps it signifies moreover *something* for the regularity of the application of law including our legal declaration. But there are other factors which above all else influence, or even condition, this *regularity*. The judge has been appointed by representatives of *society*[1] in order to serve it as a more or less important cog in the legal machinery through assisting in actually realizing the purpose of legal activities, i.e. legislation and administration of law. The majority of the judges—influenced as they are by the general standards of culture and by the consciousness of the significance for this of the administration of law—cannot avoid feeling themselves to be servants of society. Neither can they be unaware, or at least have a subconscious impression, of the fact that the social or legal machinery is for the benefit of *man* in society and that consequently legislation and administering of law take place in accordance with what is considered to be the needs and interests of man and with those social valuations associated therewith which make their presence felt in various ways.[2]

Accordingly the judges must realize that nothing can be more significant in their activity as the servants of society than that so-called laws in force be constantly followed and not set aside, and from this that their service to society consists in always judging according to the *contents of the laws,* i.e. those written and unwritten legal declarations or statements as they are known and understood by them.[3] To be sure a certain difference in the

[1] How legal machinery has functioned thereby is a matter apart which shall not be commented on here.

[2] Of all of this see pp. 123–200.

[3] Of course only as far as there are any legal declarations or statements to follow in the case. Cf. pp. 326 f. and 327 ff. below.

judge's comprehension of his activity in the capacity of servant of society must prevail, according as he is bound to legal ideology or freed from it. In the former case, his purpose is to realize justice. But such a purpose cannot be achieved, and actually the judge even as a legal ideologist is led in a very great degree to consider the social realities and those valuations which are based upon the conceptions of these realities. In any event it can be confidently stated that even a legal ideological judge in his capacity of a servant of society is inspired by the aim to follow constantly written and unwritten laws. All of this moreover belongs to the usual understanding of 'the demands of justice'.

The reminder just given is not always adequate to assure the regularity of judging. As observed previously there are judges who do not to any sufficiently marked extent feel themselves to be servants of society and therefore do not as something self-evident act with only an understanding of the interests or aims of society (or more immediately, with respect to legal ideology, of justice). Such other purposes than those compatible with the interests of society may occur to these judges (and perhaps occasionally to others) as: to judge upon the interests of their own, other persons, or certain groups; perhaps also to satisfy personal feelings of hate, revenge, contempt etc. A factor in this respect strongly counteracting is yet the concern by the judge for his own social esteem. No judge cares to be singled out among his colleagues as socially inferior. But that more distant background for the stability of the administration of law, which makes the judging appear practically speaking as a regular usage of written and unwritten declarations of law—that background is constituted by certain paragraphs of the criminal code as in force, paragraphs which threaten judges as well as other officials with punishment because of crimes committed in their official capacity. These criminal law prescriptions in general influence the intellectual *consciousness* of a judge only to a lesser degree. Down through the centuries they have helped to create a moral power complex within the entire population, not only among the judges as a group, from which impulses constantly stream, so to speak, to inspire a spontaneous attitude in the judging activity of proceeding without mercy from the contents of legal declara-

tions or statements such as these are interpreted or such as one considers they ought to be interpreted as guided by certain more or less varying lines during various periods. Further elucidation here of these lines is much too involved a task for the matter at hand. In the interest of completeness it should also be noted that the risk the judge, through the exercise of his office, incurs, of coercion to pay damages to the party to whose detriment he has judged, contributes to the motives just outlined for a judge to follow the contents of the legal declarations. In spite of everything, however, nothing can prevent judgments occasionally being given which disregard the substance of a legal declaration because of bias, greed for power or negligence. In all probability such judgments are infrequent and it is likely that they happen almost as rarely as such cases come to the knowledge of the public. The violent reaction which arises on such rare occasions is a further indication that judgments of this kind are very marked exceptions. This reaction is an additional guarantee against a judge neglecting to follow objectively the letter, the thought or the spirit of the respective legal declarations in the exercise of his judicial office.

In the same way as with judging according to the legal declaration concerned (i.e. of the purchase as a legal acquest) so it is with judging according to whatever legal declaration it may be. In the situation at hand, the judge next applies the traditional 'rule' of fault-liability. May this then not be a rule of law? The meaning is that a person who incurred injury negligently[4] caused to him is always, i.e. regularly, to be compensated by the doer of the damage! The declaration in question has this meaning only because it belongs to the legal machinery. Apart from this it had no other meaning than a completely arbitrary pronouncement which led nowhere. Even though it is a legal declaration, all of the so-called *normative* attributes, i.e. its characteristic of an imperative or precept and its obligating and indirectly or directly entitling effect, all of these are completely beyond the world of experience. Its significance has this legal declaration, quite as the foregoing, in that it belongs to the legal machinery and that from this its contents are regularly followed by the judge.

[4] Negligently here signifies *culpa lata* as well as *culpa levis (in abstracto).*

This is however only one side of the significance of the two legal declarations or statements in question. The other side is the influence they have upon the actions of persons *other* than judges. But let us first further discuss that significance of the two declarations which has now been mentioned. For *if* there is any meaning in describing them as *rules* of law, this must be in the first place on account of the law-courts.

What has particularly distinguished the concept of legal rule, written or unwritten, has been the supposedly legally normative or in any case metaphysical character of the same. This character has been claimed to work in two respects. The norm is considered to influence people's lines of conduct, those of the judges as well as others, so that everybody should be legally bound to act according to the norm. The metaphysical aspect is also expressed in this way that by virtue of the rule of law a certain conduct or other fact leads immediately to the origin of a legal duty and at least indirectly to the origin of a right. Indeed if we consider, for example, the legal statement of the purchase as an acquest, this has regularly been regarded to have the power of allowing a certain complex of facts to create directly a right for A and a loss of right for B, and in association with this, by means of additional legal rules, possibly to lead to certain legal duties for B as well as other persons, among them perhaps A.[5] The term

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[5] Inasmuch as from a legal declaration shall appear that a legal right or legal duty or something other of legal ideological character has come into existence, one speaks of 'legal causation' in the sense that a certain fact or facts *caused* the legal effect (positive or negative). It is that causal connection which has been treated as analogous with the causation according to physical laws (cf. what was said above on p. 307 f. concerning Kelsen). I think this conception of 'legal laws' has in some degree contributed to maintaining also in later times the belief in *legal rules*. These may quite simply have been considered to be in the world of *law* what the physical laws are in the natural world. That legal causation which I have now touched upon, of course, is quite another thing than that 'legal causation' which is spoken of when discussing the so-called condition-theory as the author of which the German v. Buri is frequently mentioned. Several Scandinavian writers on jurisprudence class John Stuart Mill as the author of the condition-theory. I think I have been able to show that this is not so. The 'legal causation' now at last in question is a very confused idea, and it depends upon legal ideology. In my

legal rule may be derived from the *regula iuris (civilis)* of Roman law, but here no *regula* was established as a direct norm for actions. *Regulae iuris* refer more likely to legal effects and have nothing to do with *iuris praecepta.* From the relevant Roman passages it appears that a *regula iuris* only stated the significance in legal respect of one or more facts which may or may not have consisted in the conduct of man.[6]

Perhaps it should be observed at this stage that outside of legal life proper we have a body of 'rules', among others the rules of sport and play. These are then rules of action analogous with the usual talk of legal rules. Why? Simply because one simulates or proceeds from the point that the fixed 'rules' have the character of norms.[7] In football or soccer one is 'penalized' for handling the ball in certain ways. The rules have produced certain duties. In tennis it is 'forbidden' to stand inside the base line when serving. The 'punishment' for such a transgression is losing the serve etc. Also comparable with 'legal rules' are the rules of propriety which certain groups of people consider should be followed. Here, too, it is the fiction of something normative that distinguished the concept of rule.

Returning now to written or unwritten legal declarations or statements fully aware of the necessity of excluding from them every kind of normative or else metaphysical meaning, there can be no reason to *characterize* them as legal rules in any possible meaning. But, the objection is heard, they are in any event rules for the conduct of the judge. What, indeed, does this mean?

Swedish works, especially *Strikt ansvar* II: 2, I have shown that the philosophical doctrines of causation are of no consequence at all for a jurisprudence freed from legal ideology. Seeing that the doctrines of causation have played no major part in Anglo-American jurisprudence I quite abstain from inserting in this work my criticism of 'legal causation' in question. Nevertheless I may refer to my brief remarks in *Unw.* II, pp. 78–82.

[6] See D. 22. 6. 9. pr.; 26. 8. 1. pr.; 30. 12. 2; 34. 7. 1. pr.; 41. 2. 16; all of these passages have been judged against the background of D. 50. 17. 1, where Paulus defines *regula,* one may say, as a brief statement of the legal significance of a factual situation. To what extent the contents of the places quoted may be the result of interpolation is indifferent in this connection.

[7] Probably there is the additional factor that the rules are accepted by the players.

Consider both of the legal declarations that have been discussed above. Indeed *these* cannot possibly contain any rules for the activity of the judge! That in the judging he in general considers them and follows the statements contained in them (either literally or through interpretation) is explained by the fact that he, in his capacity as judge, almost invariably feels it to be his duty to consider them in the instance of a certain judgment. There are several grounds for this feeling of duty.[8] A more remote basis for this feeling, as noted before, is that if he had not acted so he would have been removed from office, punished in another way, or suffered a damage coercion and perhaps, together with the latter alternatives or one of them at least, also been removed, or in any event have lost his reputation as a good judge. If it here were a question of legal rules of action for a judge, such rules must appear from the fact that he is appointed as a judge and from what this means or implicates by reason of the connection of both of the legal declarations with the entire legal organization. For, of course, it would be quite absurd to combine the two legal declarations or statements in question *only* with the maintenance of certain sections of the penal code for crimes committed by officials (or with the law of damages because of such or other, not punishable, deeds). These sections cannot either be considered isolated from their connection with legal machinery. They do not concern only judges but all types of officials in the widest possible meaning. In addition they presuppose the authorities of prosecution and execution. With this we enter into the *entire administrative organization,* which *cannot* of course be or have an *object or end in itself* but can only be motivated by the aim of maintaining the legal or social organization. However, above all we must remember all of these criminal sections (also forming legal declarations or statements) about larceny, embezzlement etc., all of those civil law and procedural declarations, the very maintenance of which—as I have so often pointed out—gives rise to a person's risk-free possibilities of action in respect to the thing he is considered to be the owner of and without the maintenance of which every kind of thought in both of the legal

[8] Cf. pp. 308 ff. above.

declarations of interest here[9] would be excluded. Also we must not forget that even all of the legal declarations lastly indicated must not be seen as isolated instances but only as belonging to the legal machinery, the legal organization in its entirety.

What would here be the appropriate terminology I cannot possibly say. It can of course be *said* that each of the two legal declarations discussed here is a rule of action for the judge, among other persons. But this can be said only as a *term,* a *label;* not in the least in any really characterizing sense, because any such a characterizing description would be entirely misleading. As I have just emphasized there is so very much more than the legal declaration concerned which must be taken into consideration in order that the talk of such a legal declaration or statement as a rule of action could be logically comprehensible. If one wishes to state in a really characteristic sense what leads to regularity in the relevant actions of a judge, a very detailed description must be made *in which the legal declaration in question is only a very little bit,* even though it may have the significance of tipping the scale one way or the other.

In other words, we are to understand that the repudiation of the combination of both of the legal declarations with only a few sections of the penal code (or the 'rule' of fault-liability) because of crimes (or civil 'negligences') committed by officials depended upon the fact that such a simple combination would overlook all the relevant conditions or prerequisites. I have in view those conditions or prerequisites the knowledge of which makes it clear that the entire frame of the question if it is to be considered real must be based upon the inescapable fact that we live in such a society as we actually live in, i.e. that we have the legal machinery formed and developed as it actually is. In other words, when one treats a legal declaration as a 'rule of law' and this term is not used merely as a term, but means rather that it constitutes a legal *rule* for the modes of conduct of man—of judges as well as of others—then one loses, so to speak, an essential part of the very presuppositions of man, namely, every-

[9] Of the purchase as a legal acquest and the traditional 'rule' of fault-liability (culpa-'rule').

thing which has brought about and all the while brings about man's living in and belonging to a civilized society.[1]

So-called rules of law for the judging activity analogous with rules for any activity whatsoever

If one absolutely must talk of rules in connection with the application of this or that (written or unwritten) legal declaration or statement, one can, of course, use the words as one pleases and thus speak of certain legal declarations or statements as legal rules of action. However, we have seen how misleading and accordingly inappropriate this way of speaking is. In every case for the judging activity there are no other rules than those which he must use to conduct his office in a satisfactory manner; rules pertaining to how this shall be done to enable him to feel himself in a position to fulfill his duty as a member of society and its servant. Should he lack such a feeling of duty, or is it not sufficiently pronounced, it is a question of rules which he follows in order not to be removed from office, suspended, punished in another way, or be forced to pay damages, great or small, or simply in order to prevent his reputation as a judge from being soiled or lost altogether.[2] But therewith one ought to understand that it is quite without meaning to speak of our two legal declarations as legal rules of action for the judge. Of course the same holds true for all legal declarations or statements. To consider these as determining the judging activity is, as already mentioned p. 315 above, only a very small part of the truth, indeed, no part of the truth at all as long as one forgets to say that *the determination in question depends upon the maintenance of a great many other declarations or statements of law,* even—that can be asserted—upon the legal machinery in operation as a whole.

In an unassailable manner one can, as suggested above, speak of rules for judging only in the same sense that one speaks of

[1] Cf. pp. 17 ff. above.

[2] With the last words I have wished to remind the reader of the fact that the judge does not in general exercise his office during any reflections on the legal risks he incurs. These commonly do not—by reasons intimated above—even turn up in his consciousness.

rules for *any* activity in which a person wants to attain a *certain end*. An engineer who wishes to construct a machine must acquire knowledge of the means and the procedure of going to work that will enable him to accomplish his purpose. The same applies to an engineer, machinist or foreman who operates a more or less complicated piece of equipment. This is true of a contractor who wants to build or repair a building or the manager of an industrial enterprise. Indeed this applies to every type of occupation from the most skilled cabinet making to the simplest unskilled labor. The way of proceeding, if one so will, the 'rules' of going to work are important for the *effectiveness* of even the last-mentioned labor: How is the axe to be held and how is the blow to be made? What is the best way to handle the spade and dig with it? It is of course immaterial how knowledge of the means (and procedure) for carrying out the work are acquired, whether through study of books, descriptions, drawings, designs, actual observations etc. After the person concerned has acquired the necessary knowledge of the means he makes use of them. Then such application can be called using the appropriate *rules* to accomplish the *intended* activity. There is as little reason to call *these* rules—for the work of the engineer, machinist, foreman, manager, contractor, cabinet maker, or unskilled laborer—*legal rules* as there is reason to call the corresponding rules for the exercise of the judge's office. For from the viewpoint of a *rule* as an expression in accordance with facts they are *completely* alike. Even a judge must place an end in front of him which he will achieve through his judicial activity. As repeatedly pointed out above, he usually feels himself to be a servant of society and therefore will work in this capacity. Whether he is dominated by or freed from legal ideology he knows that society is best served by following as impartially and consistently as possible the contents of written and unwritten legal declarations or statements. Even if he does not feel himself to be a servant of society or if he occasionally during his term of office would be tempted to disregard it and wish to look after other interests than those of society he will nevertheless in general act as if social welfare were the end of his activity. This for reasons shown above (p. 309 f.). And he knows that in a society such as ours the

valuation in general is made that the consistent obedience to the laws is a prerequisite for social welfare. Therefore in the administration of law he places in front of him the purpose to follow those lines he finds to appear from the contents of the legal declarations written or unwritten, which pertain to the matter at hand. Occasionally, perhaps more than that, the judge may be in doubt as to what these legal statements imply concerning the matter in the case before him. Then he develops his interpretative activity. Perhaps no legal declaration (written or based on precedent) may be applicable in the case.[3] Then it does not matter whether his procedure is classified as 'interpretation' or not. In any event it is quite clear from the above that there is no meaning in speaking of *legal rules* in any usable sense.

In administering law, the only rules available are those *means* necessary to attain the purpose of the judging activity. These means consist of gaining knowledge (to the extent deemed necessary) *partly* concerning the matter to be judged, *partly* concerning the written laws and statutes, precedents, legal literature, all of which to the extent it may have a bearing on the matter, *partly* also concerning the unwritten declarations which may be relevant to the proceedings before the court. The last named knowledge is at times obtained as simply as knowledge of legal statements which are both written and easily understood. The knowledge of the usable contents of these statements as well as the contents of unwritten legal declarations must however presuppose, quite often, penetrating comparative studies of declarations of law (they may be called paragraphs, sections etc.), their history, the precedents and relevant literature, and further, investigations for finding out and establishing social-economic connections, to which are to be added more or less acute reflections and careful consideration of certain social valuations as well as the own valuations of the judge (or any other investigator) elaborately made with or without relation to those made previously by others.

If so desired, the knowledge acquiring activity itself now described may belong to the means for and the method for, thus

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[3] Cf. pp. 327 ff. below.

the rules for, the judging activity. Yet perhaps the simplest is to say that through the first-mentioned activity the judge (if he had not done so previously) attains knowledge of the means and the line of procedure for achieving the purpose of his judging activity.

If one wants to work with a *rule* concept, then these means, this line of procedure, constitute, it can be said, the rules for his judging activity, for his administration of law. And these rules consist in following or at least considering the statements or the contents of thought or idea in those written or unwritten legal (declarations or) statements[4] found to be usable by him during the court proceedings or in the actual judgment. It was just noted how the judge's comprehension of the contents of legal declarations can depend upon his valuing attitude taken from certain social valuations as well as upon those made directly by himself. This procedure or means for his judging activity stands in a class by itself, insofar as it follows only indirectly from his store of knowledge. But through this the rules for the judging appear no more as legal rules than the rules for the activities of engineers, architects, builders etc. Even in these activities one must not only gain knowledge but also make valuations.

Finally, notice carefully—implied already in what has been said above—that it is *logically impossible* to speak of the legal declaration or statement itself as a means for the judging activity, thus as a 'rule'. What pertains to the means or the rules for administering law is the *following* of the express terms or the contents of thought (or idea) of the legal declarations or statements,[4] i.e. their *application*. This is important, not for the purpose of understanding—for nobody may be able to avoid doing that—but for the purpose of following the discussion in order to prevent false reasoning. *That regularity* which characterizes the judging activity depends upon factors *which are quite beyond the legal declarations* which the judge may consider in the case

[4] When speaking of the (express) *terms* or the *contents of thought* (or idea) of legal declarations or statements I have in view that the terms themselves in a legal declaration or statement often have an ideological and, thus, unrealizable content.

before the court. Expressed differently, the judge's contribution to gaining the social end of administering law—seen clearly or through the mist of legal ideology—among other things consists exactly in considering or, if one so wishes, in following the real contents of the legal statements or declarations. Therewith it is the *considering* of the legal declarations and not the legal declarations themselves which belongs to the means or rules for the judge's activity. Or, as we have seen previously, the *regularity* of the judge's activity depends on something quite other than that or those legal declarations the contents of which he considers.

It must now be understood that rules for judging activity *cannot possibly* have any more legal or, upon the whole, any other character whatsoever than *rules for any kind of activity at all* which is geared to accomplishing certain purposes. It is quite true that the administration of law can be very complicated (*inter alia* because its more detailed aims are not always clear) and thus it requires comprehensive preparations which involve thorough juridical (incl. social) studies and presuppose good judgment and scrupulousness. However, corresponding qualifications are true of a number of occupations other than the judge's profession. Considering the matter objectively and critically, the comparison just made may well apply to the making of an atom bomb, the command of a battleship or the operation of any kind of more or less complicated machinery. To maintain the machine in operation in good condition as long as possible, the operator must understand his job, know those means through which to operate his equipment, and with his intellectual and valuing capacity use these means, i.e. apply the rules to keep his machinery in running order. When thus comparing the judge with the operator of some mechanical equipment, an adjustment must of course always be made, inasmuch as legal or social machinery is enormously much more extensive and difficult to manage than any machinery whatever within society. Considering now only that part of legal machinery which is involved in administering law, the judge naturally cannot be called its chief machinist. The managing of this part requires many courts or judges of different jurisdictions and different instances. This point need not be further explained for purposes of this presentation. Suffice it to

say that every judge *contributes* to the smooth operation of the legal machinery to the best of his ability and capacity. Perhaps the 'legislator', together with the Supreme Court of Justice (and the Supreme Court of Administration), may be said to constitute the directorate of the legal machinery (in Sweden). This is however of no consequence to the matter at hand. Also, within the framework of society, there are such extensive machineries that it is a simple matter to find those executives, engineers, superintendent engineers, managers, supervisors, scientists etc. who exercise an influence on the operation of the machinery which does not suggest the activity of the head of it but in such respect reminds one more of the contributions of the law-courts to the operation of legal machinery in society.

From this the assertion should be quite clear that no more than any reasonable practitioner of any activity do the judge or the court apply any *legal rules,* unless these words are taken to mean that their activity belongs exclusively to *legal* machinery.[5] Quibbling has however no place in an objective discussion, particularly not here, inasmuch as legal rules up to this time are almost exclusively used in a normative or otherwise metaphysical sense and thus may give rise to misunderstanding. But disregarding this, such a phrase as legal rule might cause slipping from considering the *following* of the legal declaration as pertaining to the rules to so considering the legal *declaration itself.* This would result in a confusion which it is important to avoid in order to understand what we call administration of law. To elucidate my meaning it is perhaps best to emphasize again that on the whole there is no need at all to speak of any *rules.* In general, rules are not spoken of within all other types of activities (from activities by captains of industry to unskilled workers, by veteran admirals down to the greenest sailors). I have used the word only to show that in an objective discussion of administering law, 'rules' have no more or less a meaning than when the

[5] However, it may be doubtful if even such a purely formal distinction would be quite adequate. For also those 'profane' activities alluded to are conditioned by society organization, i.e. legal machinery. The rules for these activities, accordingly, presuppose the maintenance of legal machinery. From this point of view the rules in question too might be labelled 'legal rules'.

word is used in the discussion of any activity, not carried out by a lunatic but by a person whose actions are determined by motives and have not been made at random.

Are declarations or statements of law legal rules for the public?

Returning to the legal declarations of purchase as a legal acquest and of the so-called fault-liability, the question remains: Are these declarations to be considered as legal rules for persons *others* than judges? That is, for anyone who may have had occasion to hinder or disturb A in the exercise of his possibilities of action concerning the chattel he had purchased from B and which is now said to belong to A? Even a mere acquaintance with what I have written above (pp. 93–100, 109–114, 159–170: the realities behind the idea of legal rights; the legal declaration of purchase as a legal acquest; the importance to legal machinery of the senses of justice) reveals the superficiality of reasoning in discussing these legal declarations as on the whole constituting any rules, in a characterizing sense, of directing persons' actions away from encroachments on A's 'property'. First of all these legal declarations (or statements) would be absolutely nothing if the judging activity, i.e. the administration of law, did not exist, and if they along with a great number of other legal declarations were not incorporated into the legal machinery. Now if we consider that these legal declarations could not even constitute any rules for the judge's activity, how, then, could they be rules for the lines of conduct of the general public in view of the fact that without the administration of law—an activity quite beyond the sphere of ordinary people's activities—it would be *a priori* excluded to speak of the legal declarations in question as any rules of action for man? How natural then that all of these attempts to fix the concept 'legal rule' constantly fail. They *must* fail, because such a concept presupposes that one consistently omits to consider the *connections in their entirety*.

We now take up the general respect for A's 'right of property' to the chattel in question in connection with the two legal declarations or statements under consideration. In brief this respect depends primarily upon the conceptions of the common sense of justice. These comprise *partly* the 'right of property' as being

something which *ought* to be realized, which in turn leads to its actually being respected by and large in the name of *justice* by all; *partly* the general effectiveness (legal validity) of dispositions as well as other agreements, thus even of the capacity of B as the owner of a chattel, through a completed purchase agreement with A, to make A the owner of it. These conceptions of the common sense of justice could not be maintained so consistently and strongly as they are, if the courts in their judging activities had not, practically speaking, *always* partly proceeded from the indicated significance of the purchase agreement and partly, when cases of this kind were brought before them, followed the thought-contents (the spirit) of those legal declarations in criminal and civil law and the law of judicial procedure, as I indicated on pp. 303 f. above, and further if the organs of execution—for reasons too time-consuming to relate—had not felt forced, in cases of need, to carry out the decisions of the court.

It is quite possible, as I have noted previously, to use whatever name one pleases and accordingly one can call written and unwritten legal declarations rules; and inasmuch as they belong to the legal machinery, as legal rules or rules of law.[6] Of course it is then a question of a mere designation or label. One does not meet reality through maintaining that legal declarations constitute rules of action either for the judge or the general public. The concept of 'legal rule' cannot be analyzed in any other way than to first insert the function of that declaration or statement which is called a legal rule into its connection in the legal machinery and thereafter try to analyze it. To talk about legal rules in the way one does is as superficial as to try to determine the type of ground in a wide area by making a few shallow bores and letting it go at that.

But even, as someone might object, if there is no meaning in considering the legal declaration of purchase as a legal acquest a legal rule of action for man, is not the situation any different with respect to the legal declaration of fault-liability? This declaration can be stated in these terms: You, individual member of society, do not handle the property of A or another person in

[6] See however p. 321 n. 5.

such a negligent manner that it becomes damaged unless you wish to expose yourself to the legal reaction of coercion to pay damages for your harm-doing! But how can we disregard the realization that these words, abstracted from their context and function within the legal machinery, have no more significance than balderdash spoken by anybody. How can we avoid seeing that the concept of A's or another person's 'property' resolves into a number of possibilities of the owner to act with and make use of the 'owned' thing without risk of legal reactions upon such a conduct, and that these possibilities would be unthinkable without the legal machinery? It is not possible to think of an 'application' only of the 'rule' of fault-liability *isolated* because we could then not possibly understand A as being the owner of the 'property', i.e. of the thing in question. To understand this, it is necessary to visualize that the entire complex of legal declarations indicated above (pp. 303 f. and other places) acts upon man through having been applied for many centuries, and through being all the while consistently applied by the law-courts in their administration of law and through the decisions of the courts, and by having been and being all the while carried out by the executing authorities. And consideration must here be given to those particular conditions for this influence on the conduct of man which lie in his capacity as a psycho-physical being and in the way in which the feelings of justice associated therewith move and react. Abstract all of what now has been mentioned and try to think of the 'rule' of fault-liability as the only one to rely on in questions of obstructions and impediments to A's possibilities to handle and utilize the chattel in question! Quite simply, there would not be such possibilities for either A or anyone else. The idea of them could not even have come about. Accordingly the thought of the maintenance of a 'rule' of fault-liability would not be any—thought! Here again we skim the surface in speaking of or, perhaps more correctly, seeking to deal with a legal declaration or statement, e.g. the so-called culpa-rule, as a legal rule of conduct for man. There is no help in presuming the attribute 'applicability'—even though in its turn this attribute is qualified as more or less 'probable', 'foreseeable', or 'possible' —in order for the legal declaration to be a legal rule. This

'applicability' is nothing more than an empty word if in using it one means anything other than that the legal declaration belongs to the legal machinery and in doing so it fulfills a certain function impossible to understand unless one has a certain insight into this extremely complicated machinery in which threads run from and to people and authorities influencing their consciousness as well as their feelings and instincts and therewith their modes of conduct as well. It has never been my contention that I am any kind of an authority on this machinery. Nor am I acquainted with such an expert. I believe that we shall never attain completely trained specialists in this field. One positive step in this direction is the scientific investigations into what is sometimes called the 'subconscious' mind, hitherto an almost unexplored territory. While I admit quite frankly the inadequacy of my own knowledge about the legal machinery, yet from the material I have presented in my writings, anybody who seriously acquaints himself with it may understand the shallowness and inaccuracy in the conception that a legal declaration might be *characterized* as a rule for the conduct of men.

The substance of the written and unwritten legal declarations does of course influence the actions of the judge as well as those of persons in general. But the causal connection is extremely complicated. It often is a question of a great number of, always several, particular legal declarations or statements, together with the awareness of their belonging to the legal machinery, of their maintenance through the administration of law. This awareness —at times fully awake and clear, at other times dull and vague perhaps barely instinctive—does not always act in the same way. There is here a difference partly according to different types and contents of legal declarations, partly also according to the variations in the psychical constitution of people. There is scarcely any need for me to emphasize again how the very act of maintaining the criminal law directs the general 'morality', the moral 'instincts' as it were *against* punishable acts particularly the heinous ones. This applies to a lesser extent to other crimes and even to the 'rule' of fault-liability. Yet in some people the maintenance of the penal code as well as the culpa-'rule' acts as a direct deterrent or in any event as a conscious restraint from

such actions. In many a situation and concerning certain criminal code paragraphs this deterring effect is what commonly occurs. But apart from this and considering the complicated nature of the chain of causality in question, one must, upon the whole, pay especial regard to the conceptions of the common sense of justice, resting as they do upon the idea of a natural justice. Certainly these conceptions are quite irrational, and therefore they turn almost everything connected with them upside down; but they are indirectly influenced by social valuations and thereby are formed in support of the laws to the extent that, by and large, these laws agree with what can be understood as social interests. In brief the influence on the modes of conduct of man by maintenance of written and unwritten laws, i.e. legal declarations or statements, depends upon a most involved complex of psychical factors alternately influenced by and influencing the modes of conduct of the judges (and other government officials) and private persons.

What could the significance be of taking this or that legal declaration out of this complicated legal machinery in order to determine it as a legal rule applicable in a certain situation? From the above description of what actually happens at least that much must be understood that it is impossible to make any determinations in the province of law, if one in every moment omits to consider that, according to experience, legal activities have a purpose and what this purpose, also according to experience, must be when one has freed oneself from legal ideology; further, if one does not consider that this or these 'legal rules', isolated for being analyzed, are as nothing, if their function in the legal machinery is not sufficiently understood; in brief, if concerning a legal question ones does not observe what *can* be observed in that which actually takes place in what we call the law.

Here I have used the term legal declaration or statement for what is customarily referred to as a legal rule, with the reminder that this term, legal declaration or statement—including also those expressions or formulations in law which are not usually classed as legal rules—therefore can be used in a wider meaning and that I have thus used it only in a limited sense.[7] It may

[7] Cf. above p. 306.

easily be, however, that the judge does not have any legal declaration at all or in any event not a sufficient number of or sufficiently detailed legal declarations at hand when deciding a case.[8] This is an additional reason why there are no legal rules, not even in the sense of rules of action for the judge, to be applied in the administration of law and, accordingly, why it is unscientific to characterize any legal declaration or statement as a rule of law.

Before—with respect to what was just said—further elucidating the question of 'legal rules' I should like here to summarize my view on the question as the criticism now stated has revealed it:

Even if no thought of anything normative, i.e. precepts, commands, prohibitions etc., or any source of power for causal connection between fact and legal effect—in the form of rights, duties, legal relationships etc.—is implied in the concept of legal rule, it is nevertheless inescapable that the *characterization* of what I now have called a legal declaration, or a legal statement, as a *legal rule,* it is inescapable, I say, that such a characterization *presupposes abstraction from what is here the entire reality.* For this reality is the *legal machinery* and the *belonging to* and *function in it of legal declarations or statements.* Therefore, it is also inescapable that the concept 'legal rule', as it is generally used, constitutes an *unreal superstructure* upon the operating legal machinery. In fact, 'legal rule' is a concept—from the point of view of truthfulness—fully analogous with the concept of material or object law in the ideological sense.

Further elucidation of the subject matter of legal rules

Considering the damage C did to A's chattel, only two clear and distinct legal declarations have been involved. But recall momentarily such more or less difficult legal questions as: shall in a given situation master's liability for the acts of his servant be adjudged; in another situation, liability for dangerous action and in a third, liability for nuicances? Has reclamation (here = reserving certain 'claims', in case of breach of agreement, by giving notice) been completed or not, in such cases where recla-

[8] See the following pages.

mation has significance as a legal fact? Or has the question of making or omitting reclamation in the present case any bearing on the judgment? Is the actually established defect as to quality (or fitness) or quantity of purchased goods or the actually established delay in delivery of such goods to be considered of only small significance or not? Further: the judge is acquainted with all the facts pertaining to a certain case, but he must take a stand on the following points, for example. Was accepting the answer to an offer under the present circumstances to be considered as an acceptance, or a rejection, or a rejection in association with an offer? Has a legal transaction (= *Rechtshandlung, acte juridique)* been 'wrongfully' caused by the other party? In an agreement, has the defendant utilized the plaintiff's distress, imprudence, thoughtlessness etc.? Would it be contrary to 'honor and good faith' under the investigated circumstances to make a claim on the basis of a certain promise, agreement or other legal transaction? Has a presumption for a promise been lacking and, consequently, has an *error in motivis* occurred? Has such a deficiency any significance on the whole for the attitude of the judge in the present case? As to all of these questions the situation, at least according to Swedish law, can be such that the judge has no legal declaration or statement to go by! And we assume that such a situation lies before the judge.

After a more or less thorough investigation into all such questions the judge makes, however, his decision. If he is considered to have applied such and such a legal rule, the question must be asked: How can this be established? The answer: only by concluding this from the judgment. This of course turns the backside front. For, with legal rules something is meant which the judge applies, i.e. something to be already given before the judgment and thus determinative for this.

It is sophistry to say that the judge—after having gained full knowledge of the facts in the case—could certainly not too short a time thereafter find the appropriate legal rule, but that in due time through a careful investigation he could uncover the rule to apply. Everybody can see that in all cases, where such investigations are required, *another* judge after similar researches into the matter would perhaps decide to use quite *another* legal rule

in the same case. Belief in the concept legal rule has always meant belief in a maxim which applies in *all* situations of a certain type. Opposed to this is the fact that two, perhaps several diverging 'legal rules' and thus leading to quite unlike results, could nevertheless be applicable to identically alike cases.

One can try to get around the matter by saying that only in one of these cases was the really appropriate rule used or that only one (or perhaps none) of the legal rules proposed was applicable, i.e. 'right'. One then perhaps proceeds from the legal positivism with its view of law as being free of *lacunae*, i.e. complete, but this of course is a fiction.[9] Another possible attempt at an explanation is to state that a legal rule is a principle which is to be applied only *in general, usually, customarily,* etc. Such talk is not compatible with the conception of a rule of law. Neither could it be of any help towards the possibility I just indicated of several diverging judgments in one and the same case or in the identically alike cases. One would then be able to 'foresee' two or more opposing 'legal rules' as applicable to one and the same question.

Neither is it suitable to proclaim as a solution that the judge 'freely finds' the legal rule, i.e. as a law-maker in the particular case before him establishes the legal rule according to which he decides the case (cf. ZGB Art 1: 2). Such a 'legal rule' would not be available until just before the judgment, and it would be absorbed by passing the judgment. It could not possibly function as a rule of conduct for the general public, and neither for judges inasmuch as they themselves had to determine the 'legal rule' in a case of the same type to come, and such a rule would obviously not be binding in a court of higher instance, i.e. could not constitute a rule of action for that court. Further, to complete the matter, it would be irrational to suppose that the judge established a legal rule for the particular case, if he had got no knowledge of his ability as such a legislator. But how would he know such an ability outside of Swiss law, if he was not an adherent of the school of free law or any of its offshoots? But what happens even in such a situation? It may be said that

[9] Cf. p. 24 n. 4 above. See also *Unw.* I, pp. 164 ff.

previously I have shown that all of these somewhat varying doctrines of the so-called free judge movement include a blending of contradictory views which depend upon the influence of the clearly unscientific conception that the judge's 'legal rule' shall be based on natural *justice* which should appear as a result from the balancing of the reasons for the mutual interests of both parties. Following this line of justice one becomes actually incapable, *nolens volens,* of bringing in any social viewpoints. These can be considered only to the extent that the line of justice is abandoned.[1]

All of these difficulties with the conception of legal rule are avoided by not proceeding from judging according to legal rules, and by seeking to understand that the judge—quite analogously to the ship's captain, the engineer, manager, foreman, general laborer, etc.—practices his trade according to the best of his understanding, acquired knowledge, experience and ability to harmonize with the entire purpose of legal activities and in order to contribute to the operation of the legal machinery as smoothly as possible.

The unobjectivity in speaking of the application of legal rules can be quite striking, even when the judge *has* written legal declarations or paragraphs to go by. Consider, for example, certain regulations in our law of agreements, e.g. of the invalidity of certain legal actions *(= Rechtshandlungen, actes juridiques)* hinted at above, or several provisions in our sale of goods act etc. The judge here has perhaps no help whatever from the mere words of the legal provisions in question. Often he cannot even arrive at a workable result by investigating the actual contents of the words in a provision, not even if he may be supported by legal motives and other history of the legal provision in question. In addition he is among other things forced to find support in the judicature, thereby—if possible—systematizing the contents of precedents, in the hope of getting these contents as unanimous or consonant as possible. Perhaps he must search regulations not applicable in this case, in the hope of finding help in an analogy.

[1] Cf. pp. 282–285 above as compared with pp. 55–76 above. As to the school of free law and its offshoots see numerous passages to be found from p. 269 to p. 299.

Such a help may presuppose in its turn that he has carefully studied the matter of *these additional* regulations and their background, history etc. Often the judge, whether he is a legal ideologist or not, considers the common sense of justice, the conceptions of which of course are facts and thus form social realities even though their ideal contents are not true to real life. Of course the judge also lets himself be influenced, theoretically as well as through his valuation, by social-economic conditions. In seeking to reach a decision it is important for him—over and above possible analogizing—to consider the need of *continuity* in the contents of the laws and in the administration of law, a continuity necessary no less for maintaining respect for law than in view of the common transactions[2] and their condition, a general feeling of security in trade, business and other intercourse between members of society. From the said it should be apparent that all this only bears reference to the method of proceeding, the means for executing, in the best possible way, an activity determined by an end or purpose in full analogy with the method of proceeding, the means for executing any 'profane' more or less complicated activity whatever.

But even if we abstract from all that has now been said and imagine the possibility of demonstrating without so much effort that a legal declaration or paragraph had hitherto been misconstructed, and that it actually had a certain other meaning, it were nevertheless not the establishing alone of the new and correct contents of the paragraph which reasonably could lead to something. The result—the treatment of the paragraph in the new, correct interpretation as what is called 'valid law'—this result in reality depends upon an additional point, namely, that it is evaluated as important either directly or indirectly (via legal ideology) from the social aspect that a given declaration or paragraph of law is maintained according to its *true* contents as far as this can be established. This social view may be outdone by another. The 'false' interpretation of the regulation may have been applied for such a long time that the transition to the new 'correct' interpretation may upset the feeling of security and thus

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[2] Concerning this term see p. 70 n. 1 above.

be harmful to social economy. Which of these two social viewpoints is to be preferred is obviously a matter of evaluation, ultimately resting with the highest court if the law-maker does not first intercede with an elucidating regulation. From this it must be understood that a legal paragraph as *such,* i.e. in *itself,* is *legally* speaking *nothing,* unless a valuation is added, to wit, that the maintenance of the paragraph with its contents is a social interest (or, with regard to the continuing power of legal ideology, an interest based on justice) and for this reason should take place. When this is observed, one finds that a way of reasoning *de lege ferenda* and *de lege lata* is equalized and that the establishment of a previously unknown sense by the so-called legislator becomes exactly a statement *de lege ferenda.* So it must be, because the words in a paragraph of law even if their content is undoubtedly stated are as *nothing* without the leading valuation that they ought to be upheld as law whether this valuation is based *immediately* upon legal ideological conceptions or takes *directly* into consideration the motivations of social welfare. It is easy to overlook such an observation because to neglect clear and unequivocal legal declarations, even those which are unwritten, is in general evaluated as either unjust or opposed to social viewpoints. Nevertheless if the valuation now touched upon —that clear words of law written or unwritten ought to be maintained as law—did not exist, they would without a doubt sooner or later come to have been considered as nothing but dead letters, if the words themselves were not considered to originate in (justice or) social welfare.

If the judge *always* needed only to follow the content of clear legal declarations, it would perhaps be more difficult to be convinced that the declarations in question could not actually be considered legal rules. But when we in all of the situations just intimated above realize how the judge must proceed in order to arrive at his decision—at times even when explicit legal declarations have been available—then we must understand that it is quite without meaning to say this or that legal rule has been applied. Instead of this we see that it is a question of the way of proceeding, a question of the use of certain means to execute the particular instance of an activity, constituting this activity an

important part of a greater activity towards achieving a certain aim, namely, what is evaluated as the best for society and—as it is a democratic society—for the people living in it. If this is observed it may be easier to understand that there is no meaning in considering even those simple, clear and unequivocal legal declarations as rules of law.

Enough has been said to confirm my thesis that the prevalent talk of 'legal rules' moves on an unreal plane. The sole question here of interest must constantly be: what determines the modes of conduct of the people in general and the law-courts in particular? This leads in turn to the entire involved complex of legal machinery concerning which I have here tried to present a few indications. This complex is actually dominated by the interest of man to continue living in a society arranged as far as possible according to his desires and needs. In this complex written or unwritten legal declarations, as far as they are available, take a more or less important part in forming a judicial decision. But legal declarations (the so-called legal rules) as *such*—that is to say taken out of their context, i.e. the almost impenetrable complex of influencing and influenced factors—are words devoid of sense. How the *regularity* of the judging activity comes about I have tried to show above.

Finally I should like to add that judges as a group achieve their unique social importance in carrying out an absolutely indispensable means for realizing what I call social welfare, that is, those social valuations which make their presence felt with a certain strength and in a certain way. Through such an approach on the part of the law-courts, the modes of conduct of the judges viewed in general—in spite of the relatively few explicit paragraphs of law and in spite of the possibility to formally make diverging interpretations of one and the same paragraph—tend to bring about a certain consonance or agreement in the contents of the judicial decisions. It is a bit rash to object that the country (Sweden) now has too many laws. The area is far from being covered, and the necessity of interpreting those laws in effect will always exist. With such an objection one would further overlook the fact that Sweden has been a law-abiding land for many hundreds of years while our explicit laws have only covered a

very little area. E.g. our sale of goods act, our law of factorage and other agency, our law of agreements and other legal transactions (= *Rechtshandlungen* or *actes juridiques*), our law of insurance agreement were not enacted before 1905, 1914, 1915 and 1927, respectively. Moreover reference need only be made to 'common law' and 'equity law' in England.

In the long run, however, the concordance or agreement just noted in the contents of judicial decisions in legal questions of similar natures has contributed to the all-embracing belief in the existence of legal rules standing all by themselves and *over* man, consequently also over the law-courts which had to apply them. But *above all else* this belief originates in the natural inclinations of the so-called common sense of justice for the idea of legal precepts, commands and prohibitions, and of legal statements concerning legal effects being created by certain facts. These inclinations are authorized by jurisprudence which from its origins in the Western world down to the present day has been influenced by natural law and its associated conceptions of an objective or material law, which to be sure is supposed to be based on the nature of things and the nature of man but nevertheless, or perhaps more correctly because of this, to be raised above man, above all in society.

This exposé of the so-called legal rule concept began by characterizing the law as a machinery which maintains the continued existence of the community. The law-courts have to give *their* contribution to operating this machinery as smoothly as possible. This is the judging activity, the administering of law.

Now look away briefly from the use of clear and unequivocal legal declarations or statements and comparable unwritten declarations. The judging now consists in an activity for achieving the purpose placed before the judge in his capacity as one of the guardians of the legal machinery, whether he agrees with this purpose or not.[3] This activity may include all or part of the more or less arduous work summarized above on pp. 330 f. But however much or however little of it precedes every judicial decision, it is always clear that no legal rules have been applied.

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[3] Cf. above pp. 197 f. and 309 f.

As I have now stated repeatedly, if one absolutly must speak of rules for the judging activity, there can be no question of any other rules than those which must be observed by the judge to accomplish the purpose of his activity *in quite the same way* as the appropriate rules must be observed by any person at all who works with his hands or his head to fulfill a purpose determined by himself or another.

In case clear and unequivocal legal declarations or statements are available perhaps little if any of the difficult and tedious activity mentioned may be necessary on the part of the judge. But this is then another matter and does in no way interfere with characterizing—in point of the rule-question—the activities of the judicial profession like any other occupation. In the supposed case it belongs, of course, to the task of the judge to use these clear declarations of law. I mean that according to all that has been said above and with the general picture of the legal machinery in mind, one must understand that nothing is to be gained through the conception of legal rules or, upon the whole, of any rules in the specific sense in the province of law.

The above exposition of unreality in the discussion of legal rules, so called—also in the meaning of legal rules of action for the judge or people in general—is the background for a statement rather brief, and therefore perhaps for many difficult to follow made some 12 years ago and repeated a few times since. After the exposition presented above, the statement seems easy to understand and perhaps it may serve as a summary of my criticism above of the usual conception of legal rules. Yet one should maybe also bear in mind the observations I made on p. 327 above.

Finally, may I add that in spite of my criticism of the concept of legal rule or rule of law, I find it quite practical to use these *terms* in common parlance as well as in works on jurisprudence, when there is no question of insight into the pertinent actual connections. But when this insight is of importance, i.e. in the discussion itself in a province where knowledge of the realities in question must determine the reasonings, it will not do to argue according to this or that legal rule *either* as a rule of action *or* in such a way that according to the 'rule' this or that

action were a legal duty or this or that fact should be able to cause this or that legal effect.

A Swedish author has made the comment on my criticism of the concept of 'legal rule' that I have failed to distinguish between two questions: 'why do judges *in general* act as they do?' and 'why did the judge *in this present case* act as he did?' In my opinion I have made the one and single distinction possible when I say that the *term* legal rule may be used in common parlance and by and large if a clarification of the real causal connection is not needed. And, of course, such a clarification is not necessary to the judge himself when deciding the case. He can say 'I am going to apply this or that legal rule'. But nevertheless there are no legal rules. And to answer my opponent's second question with reference only to this or that 'legal rule' (= legal declaration) is an answer so incomplete that it is no answer at all. I think one must rest satisfied with the admission I have made myself, namely, that—if nothing else is necessary—one may, even within jurisprudence, *terminologically* refer to this or that legal rule. I might perhaps also put it this way: ordinary lawyers—as judges, barristers, counsels, solicitors—need not have any knowledge of the complicated nature of legal machinery, and consequently neither of the fallacy of the belief in legal rules. Things are, however, quite different with legal writers who *inquire into* the matter of law, of legal machinery.

IV

VIEWPOINTS ON ANGLO-AMERICAN JURISPRUDENCE

Within given limits I have presented my criticism of legal ideology and the method of justice associated with it, as well as my view of law as that legal machinery which is guided—in so far as ignorance does not stand in the way—entirely by what leading evaluations consider to be the demands of social welfare. Now I should like to show that, as far as I understand their views, certain modern American authors have not freed themselves from the method of justice although they may have made attempts at doing so. But before proceeding to the American literature, some observations on English jurisprudence should be made. Continental jurisprudence has been discussed above on pp. 269 ff. and 285 ff.

England

English writers on the law of torts base their work entirely on legal ideology. Since this lies within the province of common law, these authors must feel bound by precedents. But one would think that certain discussions would have revealed the absurdity of legal ideological constructions. Nothing of the sort has been detected by the present writer however. An occasional doubt is found in the literature as to whether a certain judgment is the correct expression of 'common law'. But criticism of legal ideology as constituting the basis of the common law itself has not been found by myself in a single instance, although I have read rather extensively in the literature on this particular subject. My studies have included an acquaintance with English law of contract as well, just as the law of torts belonging to the province of common law. Here too, no criticism of legal ideology seems to exist.

English textbooks on these subject-matters as well as law reports have, of course, revealed extremely interesting observations.[1] But these observations have had little significance from a purely scientific point of view. Unfortunately, the same must be said, in general, of English textbooks on general jurisprudence. For example, one finds in Salmond or Paton that legal ideology is in the background, and that the method is one of justice.[2] Finally, as concerns the more sociologically interested authors such as Ritchie *(Natural Rights),* Lindsay *(Essay in Property: Its Duties and Rights),* and Tawney *(The Acquisitive Society),* none of them seem to understand the absurdity of legal ideology. In my book *Superstition or Rationality?,* pp. 150 f. I have made a few comments on Ritchie and Tawney.

Prof. Allen in his book *Legal Duties* was friendly enough to devote quite a few pages[3] to a criticism of my *Superstition or Rationality?* Unfortunately, the warehouse of the English publisher was bombed in the last World War and the remainder of the stock of the book was destroyed. However, I hope that the major libraries have secured a copy of it. And I dare to request the reader to compare, if possible, Allen's criticism with the contents of my book. Allen has misunderstood several statements of mine. Perhaps these have sometimes been too brief. In fact Allen has a quite false conception of my attitude towards the relation

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[1] My published Swedish investigations into the law of strict liability have made use of over 200 English cases; many of them have been examined in detail with much profit and great fascination to myself.

[2] Salmond, *Jurisprudence,* needs no further comment on this point. As far as Paton is concerned see *inter alia* §§ 20 and 31. Paton sometimes wishes to abandon the method of justice, but this is for the sake of appearance only. This point may be clarified below when Pound, whom Patton obviously approves, is treated. With his handling of strict liability on p. 310 f. Paton reveals his application of the method of justice. Further, his adherence to this method is understood in such a statement as: 'In the criminal law it is necessary to take more account of the guilty mind of the wrongdoer (sc. than in the civil law), if punishment is not to be unjustly inflicted' (p. 237 f.). As we shall also see with Roscoe Pound and other Americans, Paton is a typical representative of the view which does not realize that introducing social points of view into a mass of metaphysics *cannot* be scientific but results just in a jumble of words.

[3] Allen, pp. 168–181.

between law on the one side and the sentiments or feelings of justice (including the moral standard) on the other side. Furthermore, Allen has completely misunderstood my criticism of Duguit which, unfortunately, I could only indicate in my English book while having expounded it elsewhere in greater detail.[4] And finally it should be mentioned that Allen has also got quite the wrong in assessing my positive exposition, i.e. my method of social welfare.

This may possibly be due to the fact that this exposition appearing as it did some 30 years ago was not fully developed. The most complete and clearest presentation of my views appeared some years later in Swedish. In view of what has been stated on pp. 23–336 above the reader may understand that Prof. Allen's criticism and my views do not meet in any single point. Yet I bear Prof. Allen no grudge. Many points in the English book may be difficult to follow because they have not there been fully developed. Unfamiliarity with my line of reasoning would not help matters either. This was my first publication in English and at times, though rarely I think, I used expressions not conformable to English legal style. The book was chiefly written to show that under certain circumstances the so-called Law of Nations would become dangerous and function as a death trap for the nations. The points of civil, criminal and political law were, properly speaking, treated rather in the form of preliminary remarks.[5] Nevertheless, one should have been able to understand that I gave, and meant to give, quite new signals for the whole foundation of law.

As mentioned above (p. 168 n. 5), not even my viewpoints on the law of nations seem to have met with the slightest interest in England. Not counting Allen's criticism and a great number of English reviews and journals, I have not found any English book on law—textbooks or other works—where my *Superstition or Rationality?* or my German books *Unw.* I and II have been

[4] See *Unw.* I, pp. 276–318.

[5] See Kocourek, *Legal Duties,* p. 12 f., for comments on Allen's review of *Superstition or Rationality?* Had Kocourek read the present work of mine I believe he would more decidedly have taken sides with me against Allen. About Kocourek's essay see below p. 396 f.

discussed or even mentioned. Jenks in his *New Jurisprudence* has obviously had no interest in considering my theories. There is, however, nothing in his book that could possibly make it superfluous to take up certain viewpoints of mine. Even so, I take the disregard for my doctrine in England with great calm, particularly because the interest in law as a science in that country does not seem to be too great. Morris Cohen makes the following, indeed quite amusing point:

> It was an English judge who once thanked God that the law of England was not a science. The sense of gratitude to God is often somewhat capricious; but there can be no doubt that the English bar has not only neglected the science of law but has felt a positive aversion for it. This was not overstated by one who said that the very word 'jurisprudence' was offensive to the nostrils of the English lawyer. Nor is this merely the English preference for muddling through. We must take into account the historic facts...[6]

America

General remark

I cannot of course profess to be thoroughly familiar with the American literature pertinent to this subject. However, as far as I know, there is no legal writer in America who has understood how deeply rooted legal ideology is and who at the same time has analyzed the realities cloaked in the veils of this same ideology. Accordingly, there does not seem to be in America anyone who has propounded a doctrine of law scientifically tenable.

Here it is well to take up those authors I have consulted in my studies on fault- and strict liability. 'Perhaps more than any other branch of the law, the law of torts is a battleground of social theory.'[7] However, it appears in general that such authors as Thayer (29 H.L.R. pp. 801 ff.), Jeremiah Smith (30 H.L.R. pp. 241 ff., 319 ff., 409 ff.), Isaacs (31 H.L.R. pp. 954 ff.), Burdick, Cooley-Haggard, and McCormick stay well within the frame of legal ideology—not to mention the American Law Institute's restatement of the law of agency and of the law of torts. Smith, Isaacs, Burdick and Cooley-Haggard have been touched upon in my Swedish works on strict liability. My criticism has included

[6] Cohen, *Readings*, p. 500 (extract from M. R. Cohen, *Law and the Social Order* 1933).

[7] Prosser, p. 15.

the pamphlet by Harris, *Liability without Fault*. To me Harris reveals direct or indirect influence from the doctrines of Roscoe Pound. Bohlen (39 H.L.R. pp. 307 ff.) must be classed as a follower of the method of justice as I have shown in Bd II: 1, pp. 191 f. Ehrenzweig in his paper on 'Negligence' has not given up legal ideology. This would moreover have been quite outside the purpose of his paper. This purpose is to seek to establish a certain rule in the province of the law of torts. My studies in this field have, of course, brought me into contact with the work of Dean Roscoe Pound, who is one of the most ardent workers for establishing jurisprudence on what he means to be a realistic basis. Many outstanding American authors on the law of torts, it appears to me, have taken Pound's doctrine as a pattern. For this reason it is well to look somewhat closer at Pound's view of legal matters. Let us consider, therefore, what seems to me to be his most representative work, *An Introduction to the Philosophy of Law*. Other works[8] of his that I have had the opportunity

[8] These are: *Law and Morals,* 1924, *Contemporary Juristic Theory,* 1940. His *Justice according to Law* is apparently out of print. All my efforts to obtain a copy have been unsuccessful. In a lecture delivered at Uppsala in 1953 Pound maintained the same view of law and society as is stated in his *Introduction,* which first appeared in 1922 (i.e. two years before *Law and Morals*). In his *Introduction* (here is used the 3rd printing 1925) Pound deals not only with the end of law but also with such topics as liability, property and contract.

After the following comments on Pound's legal view were written and translated, hence finished for being printed, I have received a revised edition (1954) of his *Introduction*. All of the quotations that I have made have remained essentially unaltered in the revised edition. I think the most 'important' alteration is that to the words 'the claims and demands involved' (below p. 345, *Introduction,* p. 99) have been added 'and expectations' in *Introduction,* revised, p. 47. This can however be of no consequence for my criticism. In the quotation below, p. 354 (*Introduction,* pp. 169 and 170) the words 'act affirmatively, will do so' have been changed for 'are in course of conduct will act', and 'with respect to consequences that may reasonably be anticipated' for 'so as not to impose an unreasonable risk of injury upon them' (in *Introduction,* revised, p. 86).

I have also quite recently obtained the second printing (1952) of Pound's book *Justice according to Law*. I have read it with pleasure. It is a sort of light reading, of no consequence either for my following criticism of Pound's view or, by and large, for the present work.

to examine reveal nothing else than that he consistently maintains the views expressed in his *Introduction*.

Pound's view on legal matters

It must be admitted indeed that Pound is keenly aware of the metaphysics within legal science. Frequently his propositions, if viewed isolated from the context in which they are presented, render a realistic view of the questions. He demonstrates that the existence of 'fault' must be feigned in order to maintain the dominating principle of the law of damages 'no liability without fault' (i.e. the so-called culpa-rule).[9] However, it is not here a question of the culpa-fiction in that way in which it occasionally is found in the judgments of the courts: the defendant is said not to have observed 'normal' carefulness *although* he has actually acted as a 'reasonably prudent man' (i.e. in fact in the same way as people in general) would have been considered to act. Here according to Pound the fiction is to place the equal sign between the lack of 'normal carefulness' and fault. But the absurdity in considering the judgment of fault as an expression for a conception of a real situation[1] has not occurred to him.

Diverging from the common jurisprudence Pound makes this telling observation on p. 180 that 'the negligence is established by the liability, not the liability by the negligence'. Even Pound's statements pertaining to the political basis of the rule of fault-liability seem to have a character of reality about them. Thus, on p. 177 he says 'the ultimate basis of delictual liability is the social interest in the general security'. And further on p. 178 f.: 'But what the law is really regarding is not the defendant's culpable exercise of his will but the danger to the general security if he and his fellows act affirmatively without coming up to the standard imposed to maintain that security.' In spite of such statements—that just quoted implying obviously enough the idea of the preventive function of the 'culpa-rule' or law of fault-liability—Pound has on the whole not seen through the metaphysical character of the belief in legal ideological effects even if

[9] Pound, *Introduction*, p. 178.

[1] Cf. pp. 43 ff. above.

he does repudiate an occasional point within the metaphysics of law. What he does repudiate—for example, on p. 178 f., considering setting aside 'normal carefulness' as 'fault' in the sense of being worthy of blame or, on p. 90, 'the will-philosophy of law'—hardly scratches the surface. He has not understood the legal ideological background of the conceptions of legal rights and duties, their characteristics of establishing merely a metaphysical superstructure upon the functioning of legal machinery and those realities associated herewith. In his presentation no attempt is made to analyze these realities. Pound's historical survey of legal views in various aspects during particular ages has a certain interest. But the critical observations he offers somehow fall wide off the mark. They do not really hit legal ideology, i.e. partly the objective or material law lying behind the so-called common law, customary law or statute law and partly the maintaining of this law (called positive law) by means of different sorts of adjective or remedial law. How far the belief in all of this is included in Pound's own view of law is difficult to say. He does speak of 'social engineering' and of 'law as a social institution'. However, a reasonable meaning of such phrases is not compatible with the whole of his doctrine which, as will be shown presently, is thoroughly based on metaphysics although arranged according to certain sociological points of view.

In the time that one first began to contemplate the purpose of law, according to Pound, the simplest idea was 'that law exists in order to keep the peace at all events and at any price .... It puts satisfaction of the social want of general security, stated in its lowest terms, as the purpose of the legal order.' This Pound characterizes as 'the stage of primitive law'. This and other statements seem to indicate that Pound partly understands the people of that time to have cherished this view of the law and partly means himself that the law in that time actually had the function 'to keep the peace'. Both of these opinions seem to be untenable. At this stage there was hardly any clear view of any social function whatever of law. Legal reactions against the 'breakers of the peace' were considered in the particular cases more like acts of revenge. Even if this revenge was in time regarded as exercised by society on behalf of itself, this social

revenge aimed at something quite other than to 'keep the peace', even if this effect occurred. Concerning the second opinion it is of course obvious that this 'peace' *presupposed* a society in which men—granted in varying degrees—enjoyed a certain security as regards integrity of body and property, perhaps even to a certain extent concerning fulfillment of agreements. In other words, the peace in question *implied* the maintenance of law. There is no meaning, hence, to consider that the end of the law was to keep the peace. Without being fully aware of it Pound presupposes certain positions and limitations for the conduct of man the invading and the overstepping of which would include the breaking of the peace. From where had such positions or limitations derived? Behind Pound's entire view are to be found such instances of mysticism as we shall see in the following.

The second stage in the development of the end of law Pound characterizes as 'preservation of the social status quo'. According to him this descends from the Greek philosophers and was fashioned into juristic theory according to the Roman law's three *juris praecepta: honeste vivere, alterum non laedere, suum cuique tribuere.* This maxim penetrated Germanic law and predominated during the Middle Ages.[2] Pound gives no indication that this 'juristic theory' includes an essential part of the actual foundation for all that legal ideological superstition which has encumbered jurisprudence down to the present time, a point upon which, judging from his book, Pound found no reason to meditate. (Of course, even during the Republic and before incorporation of the 'theory' in question into *ius civile* Roman law was controlled by mysticism. But this mysticism was of another kind.)

Continuing, Pound says that the geographical discoveries, colonization and activities associated therewith introduced a change in the end of law which gradually came to be characterized as the aim 'to secure the greatest possible general individual self-assertion'. This conception dominated legal theory during part of the 17th century, the 18th and 19th centuries. For this 'will-philosophy of law' the social problem was 'to reconcile conflicting

[2] Pound, pp. 74–79.

free wills of conscious individuals independently asserting their wills in the varying activities of life'.[4]

However, a new line of thought has developed from the end of the 19th century onwards. It was now no longer 'human wills' which had real significance but 'human wants and desires'. 'A new way of thinking grew up.' Jurists 'began to think of the end of law not as a maximum of self-assertion, but as a maximum satisfaction of wants'.[5]

It should be noticed perhaps that Pound appears to imagine that 'the end of law' is determined by the way of thinking of a few people during the various periods. Any insight into the conditions or presuppositions of legal machinery and its manner of operating must preclude the belief that 'the end of law' could depend upon the thinking of a little group of professionals. Moreover it is quite impossible to achieve any understanding true to real life of 'the end of law' without the most thorough and penetrating analysis possible of legal machinery and its actual way of functioning. Pound has not made any such analysis. He appears throughout to have based his analysis on nothing other than what he has found to be various scholars' understandings of the end of law during various ages. This is a very weak base when one considers about how large amount of knowledge jurists have to this very day accumulated concerning the function of law in society. Verily, this amount is very, very small!

However, Pound's conception of the juridical line of thinking at the end of the 19th century becomes now the point of departure for his own view concerning 'the end of law'. He formulates this as follows:

> For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants—the claims and demands involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satis-

[4] Pound, pp. 79–86.

[5] Pound, p. 89.

fying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering.[6]

Now, considering the background just indicated for this statement of Pound's—revealing that it was not preceded by any critical approach to the legal ideological apparatus and not even any explanation of what law actually is, to say nothing of any attempt to analyze those connections and other realities which enter into the complex of the legal machinery—the statement in question, then, may not be measured in terms of any scientific meaning. That society cannot exist without the maintenance of law and that law provides for the social interests is a reflection that must have occurred to every thoughtful layman not only during the present but in olden times as well. Such a reflection alone achieves nothing from a scientific point of view. What is also needed is an image or picture, if only in general, yet in its overall outline true to reality, of *how* the interests of the social organization and its members are provided for through the law. However, this image or picture cannot be gained before one sees why this reflexion—self-evident in the present time as well as back in the centuries—on the social necessity of law has not consciously and directly been used in jurisprudence either in the present time or formerly. The reason for this is due simply to the continuous power of legal ideology over jurisprudence. As long as legal ideology holds sway there is no side-stepping its 'effects' with their presupposition, among others: the individual as a subject of legal rights and duties and, thus, constituting an object or end in himself. Such a presupposition stands in flagrant opposition to the dominating significance of social needs and social interests.[7]

As already noted, Pound has never passed any criticism or comment upon the fact in and for itself that through Ulpian Roman law took up certain *iuris praecepta*. It is the *formulation* of their contents which he possibly—although this is by no means clear

[6] Pound, p. 98 f.

[7] Cf. above pp. 283–285.

—repudiates to a certain extent with respect to the social conditions of later ages. This matter is rather strange. Nowhere has Pound disassociated himself from the proposition of Ulpian because of its legal ideological character. On the whole he has not repudiated legal ideology as such. As it will be shown below he himself believes in an objective or material law upon which the claims or demands of the individuals should be based. Consequently it should be the *contents* of the Ulpian precepts which Pound did not approve of with regard to the social conditions of later ages. However, Pound himself believes in the 'right of property' and other rights which shall be maintained as 'claims' against the party of a legal relation as well as against 'the world at large'.[8] Among other things these 'claims' are meant also to include the demand for damages in the legal ideological sense. From this Pound seems to approve of the last two precepts of Ulpian: *alterum non laedere* and *suum cuique tribuere*. It cannot, of course, be assumed that he would like to repudiate only the first precept *honeste vivere*. Actually the matter is such that the statements of Ulpian cannot be opposed by either of the two aims which according to Pound dominate in turn the two following stages: (1) 'to secure the greatest possible general individual self-assertion', and (2) to bring about 'a maximum satisfaction of wants'. Those legal rights and prohibitions of doing harm to others which from Pound's way of looking at things must belong to these two stages must quite as much or quite as little as the Ulpian *praecepta* effect 'the preservation of the social status quo'.

Moreover Pound has not succeeded in formulating any real difference between the purposes of law of the last two stages. The significance of 'the individual self-assertion' or the 'human will' can in law only appear through the so-called declarations of will[9] being treated as legal facts. On the whole, freedom to enter into agreements is just as prevalent now as it was during the 19th century and the immediately preceding time, so one cannot say that 'the declarations of will' as legal facts nowadays have in general less importance than they had during the first half of the 19th century, for example. Perhaps it may be said that in

[8] See Pound, p. 192 and below pp. 348 f.

[9] See above pp. 245 f.

our time the individual's possibilities of utilizing *certain* commodities are more limited, but on the other hand the commodities have increased to such an enormous extent that new possibilities of disposal have been created. Assuming in this way contrasts that do not exist, Pound's historical review of 'the end of law' seems rather unclear to me.

Pound has certainly no objection against the assumption of 'precepts of law' of the tenor that 'human wants or claims or desires' should be satisfied 'through social control'. In other words he does not object to the assumption of an 'objective' or 'material law' in itself and those individual 'claims' and 'duties' which follow therefrom, as long as the contents of the 'material law' are adapted to 'human wants or desires' instead of 'human wills'. These modifications really indicate nothing other than that Pound holds—in common with jurisprudence in general of our century and part of the last one—that 'rights' for social reasons can only be relative not absolute.[1] Concerning this distinction, reference may be made to my comments above.[2] In general Pound's view of law somewhat recalls that of Demogue who stresses the difference between a former, more individualistic society and the present one more socially inclined.[3] However, we shall now consider Pound's doctrine.

According to Pound the economic life of the individual person involves four 'claims' which are: 'a claim to the control of certain corporeal things ... a claim to freedom of industry and contract as an individual asset ... a claim to promised advantages, to

[1] Cf. Pound, pp. 92 f.

[2] See pp. 283 f.

[3] Demogue in his *Rapport* 1937 writes among other things as follows: 'D'une façon plus profonde cette responsabilité de plein droit du fait des choses répond à une transformation de la société depuis un siècle et demi. Alors qu'une grande partie du XIX^e^ siècle avait été dominée par l'individualisme, les esprits voient aujourd'hui les questions sous un aspect plus social, c'est à dire qu'ils se rendent compte que l'homme n'a pas simplement des droits, mais qu'il faut pour fixer sa situation active et passive se rendre compte qu'il vit dans un milieu où l'acte de chacun doit être apprécié d'après les intérêts de tous. Cette conception devait réagir sur les problème de la responsabilité. Dans une civilisation imprégnée d'individualisme il était naturel que l'homme ne fût pas en principe responsable des dommages qu'il causait à autrui.' This is a so-called modern statement completely based on legal ideology.

promised performances of pecuniary value by others...' and finally

a claim to be secured against interference by outsiders with economically advantageous relations with others, whether contractual, social, business, official or domestic. For not only do various relations which have an economic value involve claims against the other party to the relation, which one may demand that the law secure, but they also involve claims against the world at large that these advantageous relations, which form an important part of the substance of the individual, shall not be interfered with.

After stating these four 'claims' he says:

Legal recognition of these individual claims, legal delimitation and securing of individual interests of substance are at the foundation of our economic organization of society. In civilized society men must be able to assume that they may control, for purposes beneficial to themselves, what they have discovered and appropriated to their own use, what they have created by their own labor and what they have acquired under the existing social and economic order. This is a jural postulate of civilized society as we know it.[4]

This I find to be nothing more than phrases heaped upon phrases without the possibility of finding any line of thought. What are these 'claims' based on? Or those 'relations' or 'interests' in respect to which 'claims' shall exist? According to Pound they exist independently of 'legal recognition' and 'legal delimitation and securing' respectively, because they constitute *objects* for such legal manifestations. This must actually be his view, otherwise he means that these 'claims' etc. would come about through the manifestations in question. Since this would represent word magic this cannot be assumed to be Pound's view. His meaning can really be nothing other than that these 'claims' are based upon their agreement with 'material' or 'objective' law which he calls the 'jural postulate of civilized society'. This must follow from the fact that these claims shall exist as objects for 'legal recognition' and 'legal securing' both of which conceptions obviously must bear upon law as actually maintained. Now the 'claims' in question—so Pound apparently means—must have a legal quality, i.e. be based on law. But as it has been shown *this* 'law' cannot

[4] Pound, pp. 191–193.

be the law actually maintained. Therefore this law must be that 'underlying' (by Wieacker so-called super-legal[5]) and authorizing 'law' which within legal ideology has been called 'material' or 'objective' law. That this is really and truly Pound's meaning as expressed in his book is confirmed by other statements of his as we shall soon see.

There is no meaning in Pound's statement that it were a jural postulate of civilized society that men must be able to assume that they may control what they have acquired in faith, whereby he presupposes the acquest having taken place 'under the existing social and economic order'. An order under which men can 'acquire' something must indeed imply laws of legal acquisition—i.e. laws of sale of goods, sale of land, of barter, of gift, of inheritance, of last will and testament, among others—and parts of criminal law and the law of damages. The maintenance of such rules of law enables a person, as it is expressed, to acquire a thing (chattel or real estate). This acquest must include unconditionally what Pound expresses with 'claims' and in this case 'claims to the control of certain corporeal things'. But since the legal 'acquest' has taken place here these 'claims' must have already been 'legally recognized'. Therefore it is impossible to understand that that 'jural postulate'—that men must be able to assume themselves authorized to control objects they acquire—should have any significance as concerns these 'claims'. All of the ingredients for the claim are already there when the 'jural postulate' is finally added. Thus, this addition comes too late. With good reason it is to be wondered if Pound himself understands what he means with all of these statements.

His presentation simply *cannot* contain anything founded on facts. For nowhere in his book has he dealt with the problem of the significance of the function of legal machinery for the origin of all those things which according to his own words it is to be 'at the foundation' of civilized society to 'legally recognize' and 'legally delimit and secure'. Pound's way of reasoning quite simply is to discuss the significance of law with complete abstraction from our experience of it and from law itself as not only a historical but also an actual prerequisite for our social existence.

[5] Cf. above p. 299.

But such a discussion has nothing in common with scientific research.

In other words, Pound's doctrine offers a striking example of those mistakes which are, as I have indicated above,[6] made because one loses one's own presuppositions as a civilized being in society. Pound has never made any serious attempt—in his judgment of law, i.e. of legal machinery or the organization of society —to imagine himself out of this society, and to lift it up and over himself, so to speak, in order to examine it. Therefore, he has not been able to discover the main effects of legal machinery and how it really functions. For example, keeping to Pound's first 'claim' (regarding the so-called right of property), his presentation reveals that the realities, appearing from analyses, behind the conception must have been unknown to him.

Pound's fundamental view of law turns out to be the well known legal ideology although expressed in a somewhat unusual way. The foundation for the entire view is 'a jural postulate of civilized society'. Here we find the 'objective ought' of material law. The legal recognition of 'individual claims' etc. shall apparently be based upon this. As observed previously, here 'legal' takes into view the actual maintenance of law. As this is so, Pound then must mean, that these claims arise through and also are based upon their agreement with the 'jural postulate' in question. This postulate cannot indeed lead to 'legal recognition' of any other claims than those which are in harmony with the postulate. However vague Pound's words may be there is no mistaking that he accepts the usual metaphysics pertaining to legal relationships and the associated legal claims against individual persons and—why not?—the legal claims against the state for 'protection'. This appears from a reference made above[7] and from Pound's subsequent discussion of various theories of property right. There he touches upon: '(1) Natural-law theories, (2)

[6] Cf. pp. 17 f. above.

[7] In the citation given on p. 349 above notice particularly that the various relations of economic value are to involve not only 'claims against the other party to the relation' but also 'claims against the world at large'. This is certainly a consistent legal ideological view! The author of such a statement must indeed be enraptured body and soul by legal ideological conceptions.

metaphysical theories, (3) historical theories, (4) positive theories, (5) psychological theories and (6) sociological theories.'[8] According to all of these theories the right of property comes forth as a legal ideological effect. Consequently it is throughout a question of views clearly out of touch with reality. Of this fact there is not the slightest intimation from the side of Pound himself.[9] He does not seem even to have noticed the metaphysical character of the theories he cites any more than that of his own. According to Pound 'metaphysical theories' seem to be only such theories as those of Kant and Hegel, belonging to 'the general movement that replaced seventeenth- and eighteenth-century theories of natural rights, founded on the nature of the abstract man or on an assumed compact, by metaphysical theories'.[1]

Now let us return to Pound's view of the non-contract law of damages. After he reminds us, that the 'composition for vengeance' is changed 'into reparation for injury', he continues, 'thus recovery of a sum of money by way of penalty for a delict is the historical starting point of liability'.[2] Such a point of departure, as far as it is to be used to investigate the realities within the law of (non-contract) damages, simply will not do. The conception of damages as a 'penalty for a delict' did, of course, prevail in former times. But it is important to note that such a conception is not true to reality depending as it does on the distortion of the realities by the common sense of justice. Indeed one may begin with this false conception as an historical point of departure for an exposition of the *views* through various ages of the law of damages. But one ought not to overlook that such a starting point belongs to the basis for that superstition within the entire subject which has guided and continues to guide current jurisprudence. However, Pound expresses himself to the effect that the damages in olden times *actually* constituted the 'penalty

[8] To the latter theories Pound's own doctrine is said to belong. His original prototypes seem to have been Ehrlich and, in part, Jhering (cf. *Interpretations*, pp. 7 f.). About these see above pp. 78 ff., 275 and 283 f. However much Pound has diverged from them, this divergency has not been caused by any criticism of their legal ideological attitudes.

[9] See Pound, pp. 203–235.

[1] Pound, p. 210.

[2] Pound, p. 149.

for a delict'; yet such an idea is a logical impossibility. This idea is the result of the same error of thought—as I have pointed out many a time before—namely, that in reasoning one fails to make a real effort to form one's opinion of legal phenomena as if one were an observer standing outside of the legal machinery. There could not be any delict without the legal maxim of 'penalty for a delict'.[3] And similarly with other statements by Pound. For example:

> The French civil code made the idea of Aquilian *culpa* into a general theory of delictual liability, saying, 'Every act of man which causes damage to another obliges him through whose fault it happened to make reparation'.... But along with this generalization the French code preserved a liability without fault, developed out of the noxal actions, whereby parents and teachers may be held for injuries by minors under their charge, masters for injuries by their apprentices, employers for injuries by employees and those in charge of animals for injuries by such animals. Also it provided an absolute liability for injury by a *res ruinosa,* developed out of the Roman *cautio damni infecti.*[4]

It was not, of course, 'culpa legis Aquiliae' or the noxial actions which actually were in the background here. It was the real wants and needs of society partly more or less suggestive of those which among the Romans produced, with miscellaneous scholastic subterfuges, the actions in question—it was these wants and needs which made their influence felt upon the French legislator and with the legal ideological conceptions already present determined the substance of the paragraphs of the law here in question.[5]

As was noted above Pound had made a few quite reasonable statements concerning the significance of the rule of fault-liability for satisfying 'the social interest in the general security', and also concerning its preventive influence. Yet, such statements are by no means expressions of a deeper understanding of the relevant interconnections. Pound actually means that the non-contract civil liability has its 'immediate bases' in three 'jural postulates of civilized society' (p. 177). Liability for *dolus* and *culpa* rests

[3] Cf. my comments above on pp. 281 f. about the lack of logic in the conception that rules of law have the end of solving legal controversies between the parties in the different cases. Cf. also pp. 17 f. above.

[4] Pound, pp. 161 f.

[5] C. civ., art. 1384, 1385 and 1386.

upon postulates one and two. The third shall constitute the basis for a certain strict liability. The three postulates are formulated as follows:

> 1. In civilized society men must be able to assume that others will do them no intended injury—that others will commit no intentional aggressions upon them. — 2. In civilized society men must be able to assume that their fellow men, when they act affirmatively, will do so with due care, that is with the care which the ordinary understanding and moral sense of the community exacts, with respect to consequences that may reasonably be anticipated. — 3. Men must be able to assume that others, who keep things or maintain conditions or employ agencies that are likely to get out of hand or escape and do damage, will restrain them or keep them within proper bounds.[6]

These 'jural postulates' shall be 'at the foundation of civilized society' and this in its turn shall depend upon the fact that now there is no longer a question of realizing man's free will as the end of law but instead this end is determined by 'the wants or claims involved in civilized society' (Pound p. 169 compared with p. 89). Then it is unavoidable that the liability in question shall be based on *jural demands from the side* of society having as their purport that men must act in agreement with these 'jural postulates' at the risk of being otherwise subject to legal reaction in form of coercion to pay damages. Therewith we are faced with the essential feature of legal ideology having material law as its substratum. This fact that 'men must be able to assume' against one another that their modes of conduct are done according to the 'jural postulates' is merely another formulation for their being legally *entitled* mutually to *claim* such modes of action. Again such a claim can only be a certain expression of the fact that in virtue of the legal postulates there rested an 'objective ought' upon men to act in accordance with them. With this we have, as to matter if not as to words, the usual doctrine of wrongfulness, whereby also harm-doings falling under the

[6] Pound, pp. 169, 170, 176. These three ways of threatening the social interest in general security are claimed to be 'the immediate basis of delictual liability'. The two first ways are designated 'intentional aggresion' and 'negligent action', respectively. The third way concerns obviously certain strict liabilities. See Pound, p. 177. In Pound's statements quoted above the pattern for Harper's exposition becomes quite apparent. Cf. pp. 365 ff. below.

third postulate—considering a certain category of 'strict liability' —have logically to be considered wrongful. Indeed, to Pound it is throughout a question of tort or delictual liability.[7] This seems moreover to agree well with the Anglo-American doctrine according to which even 'strict liability' belongs to the law of torts. This indeed must imply that 'strict liability' also presupposes that the action, viewed objectively, constitutes a wrong. That this must be Pound's meaning receives additional support from the fact that in the third postulate he obviously has in view, *inter alia,* the judgment in the case of Rylands v. Fletcher.[8]

It may finally be pointed out that in using these postulates Pound makes the same mistake as he did in the 'property' postulate, namely, he completely loses sight of those actual conditions for the existence of everything which must constitute the objects for those damaging actions which shall bring about a person's liability, i.e. property and all other sorts of so-called legally protected interests. These *presuppose,* among other things, the maintenance of the law of damages of a content such as is said to come above all from Pound's two first postulates, but even from the third. Moreover I need only refer to my elucidation of the so-called right of property above and the development of my thesis of social welfare following thereafter.[9] If the essential part of what I have developed in the text above now referred to is really valid, the inexorable consequence follows that Pound's doctrine of the legal postulates and his views in general on both 'property' and 'delictual liability' lack any direct contact with reality. They merely caricature it.[1]

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[7] Pound, pp. 168–177.

[8] Discussed above pp. 64 ff. Cf. Pound, p. 168.

[9] See pp. 77–114 above and pp. 123–299. Cf. also pp. 17 f. above and 370 ff. below.

[1] In 1932 at a congress arranged by l'Académie Internationale de Droit Comparé about 'Les principes généraux de la responsabilité délictuelle dans les différents systèmes juridiques' I stated that Pound appears to stand 'head and shoulders above his radical European fellows, e.g. a Duguit, a Kelsen etc.' (See *Mémoires,* p. 406.) Now it seems to me that perhaps such an estimate was somewhat exaggerated. However I do maintain that Pound's view is much less untrue to real life than the fancies of such authors as the two others just mentioned.

Finally I point out here the description in very few words of Pound's method given in the citation from Harper on p. 360 below. These few words alone show that Pound pays tribute to the method of justice.

Harper's view of law

Prof. F. V. Harper, a well-known authority on the law of torts, is apparently strongly influenced by the theories of Pound. However, he seems to have evolved his own view with a great deal of effort and in a very particular way.[2] In various terms Harper maintains that the liability presupposes an action which may be apprehended bringing injury to another. The idea that the coercion to pay damages has the social function of preventing damaging actions appeares to be just a short step from Harper's thought just mentioned. Indeed this idea seems to be implied in his way of characterizing the action that leads to liability for damage. Yet this cannot be the case, already for the reason that Harper offers no view for distinguishing between the preventive and compensating (or repairing) function of the law of damages. I am here thinking above all of the law of fault-liability. This distinction is not indicated in spite of the fact that the preventive aspect as such, i.e. alone, should never be able to lead to the coercion to pay damages but only to a coercion of payment and that primarily for the benefit of the state treasury. As his exposition now stands, Harper has actually not succeeded in presenting a reasonable explanation of the fact that a (non-contract) law of damages is maintained. For merely the fact that a harm was brought about through an action appropriate to cause such a harm is no motivation for transferring, so to speak, the damage from the injured party to the harm-doing person, the defendant. Still less can this be considered a motivation since a transfer would presuppose that the legal machinery for this purpose stood at the disposal of the plaintiff. This effort on the part of society must of course be inspired by some end for the same.[3] This assertion, of course, is to be accepted in American juris-

[2] Harper, *Treatise on the Law of Torts,* is the work I have in view.

[3] Cf. pp. 131 ff. above.

prudence, too. As concerns this question I may moreover cite Mr. Justice Holmes: 'The cumbrous and expensive machinery of the state ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be *shown* to be a good.'[4] Accordingly, the question becomes: What reasonable explanation can include the situation that the society's power of coercion can be used for 'transferring' the damage from the person injured to the doer of the injury? Harper's presentation in this respect is not scientifically tenable. Now, let us examine what Harper takes to be the theoretical substratum for his view of the law of torts.

First he formulates certain basic postulates, *Treatise* § 2. Certainly he admits that these are to be considered only as 'tentative assumptions', impossible as it is to finally adduce their correctness from a rational point of view, ibid. § 1. I shall not discuss the question of whether or not a scientific exposition of law in general can be built on such so-called postulates, i.e. pure hypotheses. Yet under such circumstances the scientific character itself must be hypothetical. However, this can be disregarded; for one thing upon which we can all agree is that these hypothetical postulates must inevitably fall to the ground if it can be shown quite simply that they are false, i.e. that they directly contradict the facts of experience. It is this character of unreality which those very postulates of Harper appear to have which otherwise would be of some significance.

The first postulate is: 'Law is relational.' If he meant by this that the law is concerned with human relations, such a statement would be only a triviality which had no bearing one way or another on a scientific investigation. But Harper means something else with this phrase. He says that law arises out of or emerges from social activity. Human beings, in their intercourse

[4] Unfortunately I am not now in a position to verify this quotation. I have not been able to find it in Holmes' *Collected Legal Papers;* possibly it comes from his *The Common Law* which however has been available to me only in the German translation of Rudolf Leonhard. Probably I have received the quotation from a report made (strangely enough) just by Harper to a congress at The Hague (1932) arranged by L'Académie Internationale de Droit Comparé.

with one another, come into certain relations from which some system of social control becomes a necessity. It is in this sense that law shall be 'based on human relations'. Here already is found that error in thinking which permeates the entire 'jurisprudence of justice' and which is reflected in both of Harper's remaining 'postulates'. It is illogical as a prerequisite for law, i.e. for the social order, to consider such human conditions that one can speak of 'social activity', or 'human relations' in the sense of Harper. These conditions presuppose themselves the existence of a certain social order. If one hesitates to call this order 'law' in the most primitive stage of development, this is only a question of terminology the negative answer of which is of no consequence to Harper's postulate in question.[5]

The second postulate states: the function of law is to protect certain needs and desires of the members of society, i.e. certain interests which have arisen from human relations. At this point the lack of logic earlier noted becomes perhaps still more obvious. One may take any of the contemporary so-called legally protected interests—to maintain one's property undamaged, not to have one's character defamed, freely to do and deal with one's own things, so called, and carry on all sorts of transactions—and one will find that it would be unthinkable to consider such an interest an object of this 'legal protection', *if* the 'protecting' law were not already maintained. Thus one has moved again in a circle losing the conditions for one's assertions, indeed the conditions for one's own existence as a civilized human being. This is quite obvious in questions of such interests as the inviolability of property, to freely undertake all kinds of economic and other transactions, etc. But this applies even as concerns bodily and moral integrity of man. Without the maintenance of certain laws, the penal code in particular, A's interest in his bodily or moral integrity would come in no other class than B's interest of providing for certain interests of his own at the expense of A's bodily or moral integrity. The absurdity of the idea that the law—i.e. social order actually maintained[6]—functions as a

[5] Concerning this matter my Swedish work *Obligationsbegreppet* II, pp. 304 ff. contains a criticism of the doctrine of Gumplowicz, pp. 354 ff.

[6] In this connection it is not completely clear to me whether by 'the law'

protection for certain interests of men should be quite apparent by now from all that I have written about so-called legal rights and duties, and about the social function of criminal law and the law of damages.[7]

Subsequently in § 3 Harper further develops his view of the function of law to protect certain interests. When he says that the law must bring about 'a reasonable compromise between conflicting interests, marking out the limits of permissible invasion of one man's interests by another to advance his own adverse interest', he states that very view which I have continually warned against and characterized as one of the most fatal mistakes of jurisprudence: staring one's eyes out at the present particular cases, these situations—so-called legal conflicts—detached from their necessary social connection; entirely oblivious to the fact that the function of the laws to a very great degree is to *prevent* these so-called legal conflicts, actually to reduce them to a minimum; forgetting in this blindness that one loses that entire connection without which it is impossible to attain anything other than a falsified picture of reality.[8] Harper's statement just cited shows unmistakably that however much he mentions 'social policy' he is still completely in the clutches of legal chimeras.

This appears literally in the following argument where he maintains that the weighing of interests must take place in such a way that 'justice' is satisfied. However, since he places an

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Harper considers the order that is actually maintained or only 'substantive' law. If the latter would be the case, of course, one did not need to waste any words on the matter.

[7] If one understands that this function consists primarily of *influencing* the *conduct* of man to bring about security for people in this or that respect, and that—concerning the law of damages—it consists moreover in increasing the security by compensation for loss or damage—then it must also be understood that these situations customarily described as legal rights or legal interests are *conditioned* by the legal machinery, i.e. the maintenance above all of criminal law and the law of damages, and therefore cannot exist independently of this maintenance. Such independence, on the other hand, would be necessary if they should be *objects* for the 'protection of law'. See my criticism of the idea of legal rights and duties, pp. 77—118 above. See also *Unw.* I, pp. 264 ff. See also pp. 17 f. above and pp. 370 ff. below.

[8] From the early 1920's this criticism has flashed as a warning beacon in my works; see however pp. 53 ff., 64 ff., 282 f. above.

equal sign between justice and 'the collectivist welfare'—which equalization in turn could be thought to be used only as an expression for the prevailing valuation, consequently without any metaphysical touch—and thus may appear to be using 'justice' only as a harmless word, we should examine his reasoning somewhat closer. It appears to be as follows. 'There must be some basic postulate or assumption of value concealed in the notion of justice.' The abstract concept of justice cannot be of any assistance in determining the individual's sphere of interests worthy of protection. The necessary standard of value is to be found implicit

> in the general notions and culture of a people. Here, we need not concern ourselves with its origin or development. Among Anglo-American peoples, it is tacitly assumed that the collectivist welfare is the norm to which all individual conflicts of interests shall be referred for adjustment. This is expressed in various ways. The judges, in the step-by-step development of the common law have been guided by and have often expressly referred to 'public policy' as the final standard of 'justice'. Dean Pound has elaborated the idea more scientifically, describing it as a process of weighing or balancing individual interests to arrive at a result which will best advance and preserve the paramount 'social interests' involved. Upon an analysis, it will be observed that general notions of policy incorporating tacitly assumed social objectives have shaped the law and have furnished the final standard by which the adjustments of the conflicting individual interests have been made.[9]

To refute all of this I need only refer to what I have written on pp. 165 ff. above concerning 'The importance to legal machinery of the feelings of justice'. 'The general notions and culture of a people' is merely another way of expressing the so-called common sense of justice. It is indeed true that the development of this 'sense of justice' is important for the development of the legal order that is actually maintained. But when the function of the so-called law in society is to be judged of, it is above all else necessary to consider that the growth and development of the 'sense of justice' itself *presupposes* the maintenance of written and unwritten law, i.e. of legal machinery. Without this, the common sense of justice or, to borrow Harper's words, 'the gen-

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[9] Harper, *Treatise*, p. 4 f.

eral notions and culture of a people' would lose its necessary base of support.

Here when Harper presents 'the collectivist welfare' as the norm for regulating the 'individual conflicts of interests' he reveals himself thereby to be a victim of the usual legal ideological blending of conceptions that mix about as well as oil and water. Justice *conforming to its idea* is bound to the conception of legal rights of the individuals. Justice demands that the entitled person shall get the benefit of his right and for this reason allots to him an ideal demand to this end. By virtue of this demand he can make a legal claim against the violator of the right. *This is the way justice expresses itself in the law of damages.* According to its own nature—i.e. that nature of justice which one imagines to oneself—it must revolve around legal rights and wrongs and thus determine solutions of so-called legal conflicts between individuals.[1] However, viewing the matter realistically —subjecting what I call the legal or social machinery to an analysis and taking into consideration how it actually functions —then one understands that there are no rights and wrongs and accordingly that those situations which are imagined as 'individual conflicts of interests' must fall quite outside the possible sphere of regulation by 'justice'. Of course, it is quite compatible with a realistic view of 'law' to maintain that its formation is influenced by considering 'collectivist welfare' or 'public policy'.[2] But with such a view it would be impossible to picture to oneself that 'public policy' or 'collectivist welfare' could constitute 'the final standard of justice' simply because a real picture of the relevant connections does not include 'justice' which has evaporated along with the other mists of legal ideology.

When Harper imagines 'the collectivist welfare' as a 'norm'

[1] Harper's 'individual conflicts of interests' are nothing other than such 'legal conflicts, whereof see pp. 282 f. above. Here it is well to stress Harper's great satisfaction (in the last quotation) at Pound's 'more scientific' elaboration of the idea—of 'public policy' as the final standard of 'justice'—in 'describing it as a process of weighing or balancing individual interests to ... advance and preserve the ... "social interests" involved'. Nothing can be more lacking in scientific character than such an attitude.

[2] From the exposition above, pp. 131 ff., of the method for a constructive jurisprudence this must be understood to be even very moderately expressed.

for justice he indicates nothing else than that the question here is of objectively valid, i.e. absolute, values.[3] But be this as it may. The conception of 'the collectivist welfare' as a 'norm' for justice does not, at any rate, change my criticism of the idea of justice in the slightest degree. In brief, the entire chimera remains, i.e. the fancy that the individual had an ideal demand, based on justice, against another person, and the entire method of justice with its disastrous attitude of considering the 'conflict of interests' between both parties isolated from the legal connection, is not in the slightest degree disturbed by the conception of 'the collectivist welfare'. As long as justice on the whole shall be determinative, it leads inevitably to the method of justice and everything that this entails—and it leads to this just as much no matter how the content of justice is considered to manifest itself. According to the nature of things it must at all times bear upon the so-called common sense of justice. When Harper states that justice is determined by the 'collectivist welfare' he bases his view on its agreement with 'the general notions and culture of the people' which—as has already been said—in Harper is only another phrase instead of the common sense of justice of the people.

What should particularly be emphasized in opposition to Harper (and his many followers as concerns this matter) is that through his dependence upon the chimera of justice he simply cannot conceive of the significance of 'collectivist welfare' or 'public policy' to the formation of law in any other way than as influencing the law *via* 'justice'. Now the situation is actually such that—because of the power of the chimera of justice over human beings—to a very great extent it is only indirectly, i.e. *through* its influence on the instrument of justice, namely, the common sense of justice, that the social valuations have really any say at all within current jurisprudence. In this round-about way 'public policy' has influenced the law since time immemorial. However, if one approves of what I have elucidated above,[4] then it is requisite, directly and frankly, without any hindrance of

[3] See above pp. 136 ff., 171 ff. against the idea of social welfare as an absolute value.

[4] See pp. 131 ff. above.

the chimerical veils, that the way be cleared so as to permit social valuations to influence the legal activities in society, i.e. legislation and the administration of law. Harper with his dependence upon legal ideology has been and *must* have been quite unaware of this distinction between the direct and only indirect influence on the law of the interests of society. The understanding of social welfare being considered as an immediate motive for law is directly contrary to the idea maintained by Harper that law has the function of protecting the interests of the individuals. According to him these 'legal protected interests' are simply other words for 'rights'. But whether they are called rights or interests, it is held to be a question of a protection for the individual as an object or end in himself, which again means that it could not be out of regard to society that 'law gave him' this protection.[5] Clarifying this distinction is not hair splitting. It is through such a false usage of the viewpoints of social welfare that one is prevented from considering the significance, e.g. of the law of damages, in large areas of social life to *influence the modes of conduct of man.* This error also causes one to overlook that the *compensating* (repairing) function of the law of damages in reality cannot either be motivated by 'equity and justice'[6] and that no other un-chimerical basis for this function ever has been discovered than the social interest of maintaining a general feeling of security against damaging actions which in turn is essential for common production and common transactions.

Harper's incorrect view of social welfare appears moreover in his idea that social welfare is 'tacitly assumed' among the Anglo-American peoples as a norm for regulating the conflicts of interests. This is pure fabrication.[7] The fact that social valuations actually are and must be included in 'law', i.e. legal machinery, does certainly not depend upon any acceptance from the people,

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[5] Cf. above pp. 283 f.

[6] Cf. above pp. 254. ff.

[7] Here may I refer to *Superstition or Rationality?*, pp. 120 ff., and to my criticism, of Jellinek's doctrine of the general recognition as also on the whole of the idea of a common or super-individual will as the bearer of the legal order, in *Unw.* I pp. 198 ff. See also Hägerström, Inquiries, *inter alia* pp. 20 ff., 213 ff., 257 ff.

either tacit or explicit. Here in the background lie all sorts of psychological factors. I mention the consciousness, more or less reflected or unreflected, of the significance of society for its members, often showing itself in feelings of justice and instincts, among the latter in all probability the instincts of self-preservation.[8] All of this—to a great extent directed and stimulated through the maintenance of certain rules of law—influences that emotional side of man's life which is called the common sense of justice. This influence occurs in such a way that, expressed in very general terms, one may say that the characterizing of an action or a claim by the common sense of justice as just or unjust is in a certain degree indirectly determined by answering the question whether the action (or claim) is considered to agree with social welfare or not. Thus we have to do with a question of human nature which in this respect should be similar in all countries of Western civilization. To distinguish in such a respect the Anglo-American peoples from other nations is of course groundless.[9]

Thus Harper in discussing 'the collectivist welfare'—even if one disregards his laboring with that conception in a meaning untrue to reality—makes the same mistake as most of the other contemporary authors. He does not perceive that the error is precisely the failure to realize that within the sphere of current jurisprudence one is not *consciously* and *directly* led by social valuations, but is hindered therefrom by the juridical fabrications, associated with the chimera of justice. In this way one is forced to stare one's eyes out at the special cases with their 'conflicts of interests'. In this manner one overlooks that social connection into which these cases must be placed if one is to be able to get one's eyes open for the realities. One has not understood the impasse between maintaining the fancy of justice, on the one side, and maintaining the view of social welfare, on the other. The

[8] Cf. above p. 128 n. 6.

[9] Here it is well to recall a struggle that has been going on in matters of law for many centuries—the struggle between unreal interests emerging out of legal ideology and its basis, the idea of justice, and *real* interests determined by considerations for the actual endeavours and aspirations of men living in society. Cf. pp. 124 ff. above.

consequence of this has been that social welfare as a leading motivation within legislation and administration of law has often been nothing more than a way of talking but saying nothing.

Harper's third and final 'basic postulate' confirms of course that his point of departure consists of legal ideological effects. He states that the interests are 'protected (by the law) against certain harmful consequences of conduct creating certain kinds of risk or threats of harm' (p. 3).[1] As this is developed later in §§ 7 ff. one understands that the word 'protected against' is not an accidental expression but rather that the postulate harmonizes with the false method of considering the situation, the so-called legal conflict, isolated from its necessary social connection, thereby spoiling the possibility of clearly and completely considering the social realities.

After his 'postulates' Harper formulates certain *'basic principles'* in § 4. These consist of a positive statement and several negative attributes connected to the positive statement which is as follows:

> Conduct threatens the interests of others in such a manner that it becomes the basis of tort liability only when the actor intends to invade such interests, is negligent toward such interests, or when the conduct is extra-hazardous with respect to such interests.

In accordance with this Harper divides his presentation of the actionable 'Invasions of interests in personality and property' into the following three parts: (I) Intended invasions. (II) Negligent invasions. (III) Unintended and non-negligent invasions. The liability in the third part is described as 'strict liability'. The many negative attributes specify—in spite of the presence of the situation given in the positive statement—that liability is not admitted, if the injured party voluntarily and with full knowledge of the risk involved exposed himself to the same, if he consented to the violation of the interest, if the actor behaved in a way that was

[1] This turns the matter upside down. Thus, according to Harper, these interests shall exist independent of the maintenance of criminal law and the law of damages, among other things. This statement can only indicate a belief in these interests as consisting of absolute values. Obviously Jhering's concept of right is the prototype of this doctrine represented by Harper among others. There is good reason at this point to refer to my criticism of Jhering on pp. 78 ff.

socially desirable, if the violation of the interest itself was socially desirable, if the damage was what we are accustomed to call inadequate, etc. In general it may be said of these negative attributes that they possibly constitute a step forward for that literature which expressly considers these attributes (disregarding the inadequancy) from the point of view that the actions have lacked the character of wrongfulness and accordingly have been lawful. To that extent Harper seeks to deal with realities. Because of his legal ideological attitude this attempt has, however, been rather clumsy. This appears more obvious in the further development of these negative attributes in later paragraphs, but it is also apparent already in the general presentation in § 4. Thus in a few of the non-actionable situations he mentions the conduct as 'however otherwise tortious in character', i.e. as in itself having the quality of a wrong. Such characterization can stem only from a legal ideological attitude. This comes forth still more clearly when he formulates one of the negative attributes thus that 'there is no liability for those consequences of a tortious conduct which are caused in such a manner that it is unjust to hold the defendant responsible therefor'. The concern here is to exclude more remote harmful consequences from the liability.[2]

Further on in the work Harper expresses himself as an out and out scholastic. Those interested in following up this point should read e.g. §§ 108–110. There Harper struggles with duties which the law is considered to impose 'upon one to avoid or refrain from conduct which subjects others to risks of certain consequences'. Setting aside such a duty, the defendant becomes liable but only for consequences which are 'legally caused'. The court shall decide whether the interest exposed or threatened is entitled to legal protection! Again the jury 'if the case is hard' decides, among other things, whether the damage occurred in such a way 'as to make it just to hold the defendant liable, i.e. whether, on the whole, the duty prohibits the risk of the particular harm complained of'. In most cases, Harper says, the problem is to determine whether the damage is not only actually but also 'legally caused'. What consequences are legal, he continues,

[2] See Harper, § 4.

'is governed', of course, by considerations of fairness, justice and social policy which are often difficult to explain and frequently have their basis in vague feelings or intuitions of what is proper and desirable.[3]

Finally, as a further confirmation that in spite of his occasionally realistic terminology, Harper in all essentials has the usual legal ideological attitude, I shall return to his positive determination of the actionable modes of conduct as being either intentional or negligent invasions or neither the one nor the other but only extra-hazardous invasions, i.e. particularly dangerous for the interests of other persons. Although Harper makes no especial issue concerning 'guilt' or 'blame', in the first two groups as opposed to the third, as a ground for liability, he cannot claim any preference over that jurisprudence which emphasizes more strongly in these cases that the ground for the liability were that the defendant has made himself deserving of it through his 'guilty mind'.[4] A scientific doctrine on non-contract law of damages must of course present motivations for those regulations which are brought forth in such a doctrine. Taking over from the work of others the entire system, as well as all of the 'rules' set forth in it, but then omitting certain arguments without any real criticism of them and without giving any reasons for doing so, can hardly be considered as a scientific way of proceeding. Even if Harper had said that he had repudiated the concept of guilt, fault, or blame, such mere repudiation would not have enhanced the quality of his work from a scientific

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[3] See Harper, *inter alia* pp. 252 f., 257 f. Discussing 'legal causation' in this way would be impossible for a person who has a real understanding of social welfare as guiding in questions of legal matters. However, this discussion of 'legal causation' does not appear in any particularly provocative manner in Harper's exposition or, on the whole, in Anglo-American jurisprudence. This is different, however, in certain sectors of Continental and Scandinavian jurisprudence. In several writings I have criticized this manifestation of legal scholasticism. See my remarks in *Festskrift til Henry Ussing*, pp. 334–347, and *Strikt ansvar* II: 2, pp. 311–337; see also my brief remarks in *Unw.* II, pp. 78–82. Cf. above pp. 307 f. and 312 n. 5, where I have touched upon 'legal causation' in another scholastic sense. In the background of the conseption in both senses lies, of course, the legal ideological attitude.

[4] Appearing from his 'intentional wrong' or his 'fault'.

point of view.[5] Disclaiming the concept of guilt without criticizing it and without introducing instead of it an explanation of the maxims falsely based upon the concept in question, maxims which are approved at the same time—all this cannot mean anything but that one does not know why one repudiates the concept of guilt, consequently that one does not know why one disclaims one of the cornerstones in the building of juristic doctrines. Such a method of proceeding has nothing to do with legal *science.*

To this must be added that it is quite without meaning for an author such as Harper to repudiate the guilt concept as a basis for legal reactions in view of the fact that the conceptions of justice and the false method associated therewith are fully incorporated in his view. Nowhere and in no way has Harper rejected the idea that a legal coercive reaction (e.g. damages) should in the name of justice hit the person who had made himself deserving of such a reaction. If Harper is to be consistent, such an idea *must* on the contrary enter into Harper's view. He has, as we have seen above, said that justice as a norm is determined by those valuations which exist 'implicit in the general notions and culture of a people'. There is no point in contesting that according to these valuations it is *just* for each and every person to receive what he deserves. But a self-evident application of such an opinion would be, in principle, that it should be

[5] However, Harper in his *Treatise* has never repudiated the concept of fault. His exposition may intimate in some measure that he wished to do so, although he was not prepared enough for it. Even if he never emphasizes the 'guilty mind' of the defendant as a justifying reason for the coercion of paying damages, he nevertheless speaks at times of *fault* in a moral as well as in a social meaning. See e.g. pp. 332 f. 'Fault' here is placed in opposition to 'innocent or accident' causation of harm. Harper obviously approves of 'the modern notion that ordinarily it is grossly unjust' to require damages for such a causation of harm. As concerns negligent invasions, he says, the fault is always 'anti-social or socially immoral' but *can* be 'unethical as well'. From the point of view of legal scholasticism there is, of course, no difference between an 'anti-social' and an 'unethical' fault. Both of them are meant to make the defendant *deserve* the legal reaction, in the name of justice. Why Harper in such §§ as 67 ff. avoids speaking of guilt and fault is difficult to understand. This avoidance cannot prevent the unscientific character of the whole foundation of his exposition.

just to compensate or repair the damage one person caused another person by his blameworthy action[6]—whether the action is characterized 'socially' or 'ethically' blameworthy (cf. p. 368 n. 5 above). This is the very content of the culpa-rule or the rule of fault-liability in the traditional as well as in the more 'modern' sense. It is without the slightest doubt that Harper believes that 'intentional and negligent invasions'—as opposed to those actions which lead to 'strict liability' ('liability without fault')—are personally deficient in some way and therefore make it just for the defendant to become liable. This is further confirmed by Harper's own statements, as we have just seen in a footnote. Indirectly he says concerning the liability for intentional and negligent invasions that the former rests 'upon the obvious moral ground that one who intentionally invades the interests of another should be required to compensate the person harmed', and the latter on 'the social ground that when one has acted unreasonably with respect to others, he should make good the loss occasioned thereby'.[7] Now notice that liability in the case of the third group —extra-hazardous conduct 'without fault'—according to Harper rests upon 'grounds that are purely socionomic',[8] so that it is quite obvious that his view implies that the liability for 'intended and negligent invasions' is based upon the conduct as being below standard, as blameworthy—whether judged according to a moral or a social measure—while strict liability had no such basis. Here the conduct is supposed to have been socially desirable although it has occasioned harm.

From this one actually finds even in Harper's view the traditional distinction between fault-liability and liability without fault. The plea of guilt or fault as the basis for liability signifies that the actor through his morally or socially deficient or blameworthy action deserves to be liable. As to matter this is exactly what Harper says in question of 'intentional' and 'negligent' invasions. It makes no difference that Harper concerning liability for negligence speaks only of the 'social' and not the 'moral'

[6] Cf. pp. 59 ff. above.

[7] Harper, p. 15.

[8] Harper, p. 15.

ground.[9] The metaphysical belief in objective values—on the one hand, moral, on the other, social—is still omnipresent in the background.[1]

The importance for legal writers not to lose sight of their own conditions as members of a civilized society

The criticism of certain of Pound's statements and perhaps more so of Harper's that has now been given may possibly recall what I mentioned on pp. 17 f. above concerning the unfortunate error made by most of the 'modern' legal writers. This mistake I have at times characterized as losing sight of, or forgetting, their own conditions (and those of other persons as well); namely, those conditions prerequisite for their existence as members of a civilized society. This becomes particularly apparent in discussions of interests as protected by law or (according to Jhering's concept of right) of legally protected interests. The importance of considering this particular error in more detail is such that I deem it appropriate to adduce the contents of the following paragraph before touching upon some other American authors.

Harper unintentionally helps to reveal that such phrases as 'legally protected interests' contain no meaning. For as far as private necessity is concerned he motivates liability thus: since the actor 'profits by the intentional invasion of what are *normally* legally protected interests of another, it is fair that he make good the loss'.[2] (The italics are mine.)

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[9] Yet we have seen on p. 368 n. 5 above that even a negligent invasion *can* be not only socially immoral but at times 'unethical as well'. This, however, is of no importance at all. Cf. pp. 383 f. below.

[1] Cf. *Unw.* II, pp. 36–41. Moreover it would be difficult to understand why only the action's ethical but not its social 'blameworthiness' should make the actor justly deserving of the coercion to pay damages. Harper does not entertain such a view either. As intimated above, he says 'the conception that legal liability should accompany moral or *social* (my italics) fault is due largely to the modern notion that ordinarily it is grossly unjust to require a person who innocently or accidently causes harm to pay for it' (Harper, *Treatise,* § 155). *E contrario* it follows from this 'modern notion'—obviously shared by Harper himself—that it *is just* that one is liable for damage which one has caused through fault, 'social' as well as 'moral'.

[2] Harper, *Treatise,* p. 141.

Indeed, according to legal ideology invading legally protected interests must be wrongful. But in the case before us the invasion is to be considered lawful. How, then, is an intentional invasion of another's legally protected interest—and thus a wrong—to be lawful! Obviously such a monstrous idea has been too much of a good thing for Harper. Therefore he has inserted the word 'normally' before 'legally protected'. His attempt at logic through this insertion has no basis. For nothing remains but the unreasonable idea that these 'legally protected interests' as such simply disappear as soon as they too brusquely obstruct a supposed necessary figure of law as now the 'lawfulness of an act under necessity', for example (or as expressed by Harper and others, that acting under necessity is a 'privilege to invade another's interest'). In that very instant the interest is to lose its legal character. The disappearance of this character of the 'invaded interest' depends upon a particularly naive conception of the content of 'law' (= material law), a content which can be presented in any way imaginable because it does not exist. However, now a difficulty arises which Harper (and his fellow-believers) overlook, an oversight making his carefulness, appearing in inserting the word 'normally', carry him on to a complete lack of meaning. For how shall it now be possible to motivate the 'liability' of the actor? This indeed shall be based upon the demand of justice which in turn shall originate in the fact that the act under necessity attacked a 'legally protected interest'. The fact that the interest has *been* 'legally protected' cannot reasonably motivate 'liability' for an attack which occurred for the first time after the interest *is no longer* 'legally protected'. According to legal ideology such a 'violation of an interest' cannot possibly contain any damage from the point of view of 'the law' and thus cannot lead to the liability of the actor. It cannot be denied that jurisprudence *throughout* bases liability on the supposed condition that an act of necessity encroaches upon the *legal rights* or *legally protected interests* of another person. Accordingly there *is* no way of avoiding, according to legal ideology, that the act of necessity must constitute this monstrosity: of a *lawful wrong*. And this can never be glossed over. One can, as is generally done, try to soft-pedal this badly compromising situation by not openly mentioning that

one is forced to work with such an abomination as lawful wrongs, lawful violations of legal rights etc. But to continue as Harper does to seek directly to efface this offensiveness—is quite hopeless. For here the legal ideological points of departure and consequences are as hard as granite and cannot be effaced. In Scandinavia efforts similar to those of Harper's to avoid the shocking consequence of legal ideology in the form of 'lawful wrongs' occurring from damage caused through acts of necessity, nuisances and many other facts which are followed by 'liability without fault', have also been made. An example of this is the discussion of something that *would* have been an invasion of a right of property (or of another legally protected interest) *if* such an invasion were not lawful.[3]

My exposition above of legal rights and duties, and of Jhering's right as a legally protected interest may be quite enough to make one understand that this notion 'legally protected interest'—so favored and used in the American doctrine of torts—is purely metaphysical, i.e. superstitious. Notions such as these are conditioned by forgetting that the interests the 'legal protection' of which is discussed are *social* phenomena and would be quite unthinkable without the attendant social organization, i.e. legal machinery. To this machinery belongs the maintenance of the variety of legal rules, among others those which give rise to what —due to a disastrous lack of knowledge or logic, or of both of them—is called legal rights, legally protected interests, *Rechtsgüter,* etc.

More striking proofs of the obliviousness of legal writers to certain presuppositions of man as a social being may be given. Such conceptions as damage, loss, harm, injury, and thus: damages, compensation, indemnity, reparation—as these conceptions are sometimes used in juristic reasonings—are also logically untenable since they depend upon *petitio principii* in discussing the foundation of certain rules of law.

Assume that there were no (non-contract) law of damages, law of recovery or those sections of criminal law which I have referred to above so often (e.g. pp. 303 f.); in such a case one could not

[3] This 'argument' I have taken up in detail in *Strikt ansvar* II: 2 pp. 54–61.

assert that a person suffered a damage or loss. For this presupposes that the person stands in such a relation to a thing or a person which is called some kind of a legal right or 'legally protected interest', *retsgode* (Danish) or *Rechtsgut,* etc. But this presupposition would not exist if the law of damages, the law of recovery and the criminal sections hinted at were lacking as being valid law. By the formulation ('is called') the readers understand that now I have not in view the non-existence in the world of reality of all kinds of objective values or legal ideological 'factors', but that I now consider exclusively those *realities* which have given rise to the false belief in such values and 'factors', e.g. the owner's risk-free possibilities of action concerning his so-called property, the creditor's possibility to influence, in case of need with the threat of legal reaction, the debtor's willingness to meet payments or other debts of his, and the debtor's general attitude of feeling duty-bound voluntarily to fulfil his promises, agreements and other engagements.[4] All of these realities for the benefit of a person (owner or creditor) are *conditioned* by the maintenance of the law of damages, the law of recovery and parts of criminal law. If these realities did not exist—how could a person suffer a damage, and, to boot, a damage which could be actionable? If the thing did not—as the phrase goes—*belong to* somebody, how could he then suffer a damage through the thing being disturbed or injured?

Indeed it is not that a thing is broken or mutilated or that its use is made impossible or more difficult or in general becomes less desirable, which is considered when 'damage' or 'loss' are discussed in jurisprudence. Here these words shall mean a decrease

[4] Cf. my whole exposition of the realities behind the idea of legal rights (above pp. 93–118) and my remarks on the importance to legal machinery of what I call the common sense of justice (above pp. 164–170). When discussing the realities behind the idea of legal rights or legally protected interests one may never forget the paramount importance to legal machinery of the fact that the feelings of justice—far from being the basis of law—are instead lead and directed by the law and its administration (legal machinery) in such grooves and furrows as are in accordance with law. As I have often stated, the feelings of justice (the common sense of justice) are taken in the service of legal machinery. Without the help of this service legal machinery would not be able to function.

of the damaged person's property or in any case (to consider also the so-called ideal damage) include an infringement of the person's 'right' or 'legally protected interest'. For example, consider the situation of turning a block of marble, granite or other suitable material into a distinguished piece of sculpture. The property, i.e. the material 'belonged' to A; the work of art was brought about through so-called *specificatio* in good faith by B, who falsely but with good reason believed that the material he worked upon was a *res derelicta*.[5] However, through his specificatio B became the owner of the work, but has to pay damages (amounting to the worth of the material) to A. Now if the material had not been considered by A for a certain more or less important purpose, from no conceivable view can it be said to have been damaged. On the contrary the material has increased in value. Nevertheless, the fact that A can be considered to have suffered a damage rests upon the idea that A—through no fault of his own, but through B's action—has lost his right of property to the material and accordingly has legally incurred a loss through B's action and acquest. This loss, it is reasoned further, must be compensated for by B. Otherwise B through his line of conduct should have made a profit at the expense of A. As no legal ground for this can be adduced, this would be unjust. Therefore, one concludes, in the name of justice A received a claim of damages against B.

But now suppose that no legal rule of damages coercion upon B for A's benefit is upheld in such situations, and that B accordingly without risking such a legal reaction could 'in good faith' work up the material! This should imply that A's property did not include the value of the material in question at the occasion of another person's *specificatio* in good faith and that consequently no loss or damage in any legal sense took place to A through B's *specificatio* in good faith. What has led astray here is the ideology of the right of property on the whole, which makes us imagine that the material had *belonged* to A. Through *specificatio* made in good faith the *material ceases to belong to him*. With this reasoning the property damage appears to be at hand and to motivate, together with the view of justice pointed

[5] I dislike using the word *specificatio*, which is apparently used infrequently in Anglo-American terminology.

out above, the application of a rule of damages. The circular reasoning is obviously not perceptible to persons with this scholastic way of looking at things.[6]

The fiction in the conceptions of loss and damages or compensation appears equally obvious if we consider the expropriation of real estate, also a *term* not frequent in Anglo-Saxon law. However, if the owner's 'right of property' were such that the estate, after the establishment of the conditions for the expropriation, were to be taken over by the other party, here called the 'expropriant', then it would mean that the estate did not 'belong to' the 'expropriated' person (i.e. the former owner) any longer. The estate would never have been a part of his fortune in any other way than that he, after the establishment of conditions for the expropriation of the estate, would stand to it in a relation no more advantageous than that of any third person. If compensation were not legally to be paid to the 'expropriated' person, the latter would no more be able to speak of his loss than a thief would who had been forced to return the stolen article to its owner. What makes this seem somewhat strange is that very deep-rooted conception of the existence of a right of property, i.e. of a right as actually being something other than a deceptive term for certain situations conditioned by the functioning of legal machinery. These consequences, as we have seen above, consist of the owner's possibilities in general to have freedom of use or

[6] The question of the coercion of indemnity is easily confused as far as the instance of *specificatio* in good faith is concerned in that one often first explains that such a *specificatio* forms a so-called legal acquest and thereafter finds a particular ground for the coercion upon the specificant (the person who performs *specificatio*) to pay 'damages'; namely, that this person otherwise would have injustifiably made an acquisition at the expense of the former owner. Actually there is no reason to view the matter in any other way than that *one* 'rule of law' is maintained namely the following: *specificatio* in good faith makes the specificant the owner, but at the same time he comes under the legal coercion of paying a sum of money to the former owner corresponding to the value of the material that has been worked up. Maintaining such a rule of law agrees very well with the viewpoints of the general security and common transactions. Such an idea that the specificant has come into the position of owner and that it thereupon were a question whether or not he had to pay compensation for the material is quite beyond the realities of the existing situation.

disposal of the property, to recover it if out of his possession, and furthermore to receive an amount of money if the property has been injured or the owner prevented in other ways from exercising those possibilities just indicated concerning the property. One must attempt to free oneself from the false conceptions of rights of property and of other 'legally protected interests', e.g. from the belief in agreements as engendering obligations, i.e. legal duties and rights. If such an attempt is successful one will understand that the ideas (in a juristic sense) of damage, loss, harm and the like are in fact conditioned by the maintenance of the pertinent rules of law: certain sections of criminal law, the law of damages, the law of legal acquisition, the law of recovery, the law of contract. Then one will also realize that, in relation to the law now intimated, such ideas as damage, loss, etc. (and therewith the associated ideas of damages, compensation, indemnity) depend upon *petitio principii* and thus are actually fictions as they are used in many a reasoning.

Let us return for a moment to the situation where property is taken over after expropriation. As we have seen, in this case it is particularly obvious that the idea of damage or loss is a *petitio principii* already in relation to the *law of damages* (strict liability). Disregarding this law and freeing ourselves from metaphysical imaginations the situation then becomes such that all the expropriated owner's possibilities in respect to the property quite simply cease to exist. In any legal sense there would neither be any loss for him. This latter fact is obscured through the habituation to his actual ability to refer to the law in order to obtain compensation. Yet if we keep to our assumption that in those situations in which the conditions for expropriation are at hand, according to law the owner had to give up his property without receiving any compensation at all, this would imply that the so-called ownership *had* such a character as to disappear in the situation of expropriation and consequently no longer existed. Neither common sense nor even the common sense of justice can assert such an absurdity as that compensation should be given to a person for the 'loss' of something which did not 'belong to him' and which he consequently *had* not lost. Or expressed in another way: compensation cannot reasonably be given to a person

for something that is completely worthless to him. The error in thinking here results from a lack of analysis. Through this lack one believes that the expropriation forms an invasion of the right of property, or of a legally protected interest.[7]

On the strength of this argumentation it will be understood that the situation is the same in the case of damage through any other conduct except a criminal act. Take the liability for damage caused by certain nuisances, called immissions on the Continent (after an expression in Roman law, D. 8. 5. 8. 5). Here the reasoning is as follows. The owner of a parcel of real estate must restrict, in favor of the owner of a neighboring estate, the use of his estate by means of refraining from certain authorizations which were otherwise implied in 'his right of property'. On the other hand it is held that an owner of a parcel of real estate has to endure certain invasions of his 'right of property' on the part of the owner of a neighboring estate. However, the truth is that the 'legal department' of each of the neighbors *is* such and *only* such as follows from the legal rules maintained. E.g. A's legal position in a certain case *is* of the kind that he may allow all sorts of nuisances—e.g., water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity and vegetation[8]—to escape from his own land into B's land. Consequently B's legal position *is* such that he has to endure the nuisances in question. Any invasion of his 'legally protected interests' has not taken place. It is in this way, released from legal ideology, that this matter must be viewed. In such a case as now suggested, no conflict of any kind between A's and B's '*legal* interests' has arisen.

In Sweden this is to a great extent a question of unwritten law. When determining this law, it is extremely important to understand that the law in question cannot in the least be concerned with 'trespassing of those boundaries or property limits which must be established for the exercise of the right of property in interneighborly relations'.[9] The legal rules that one seeks here must be such that their very maintenance gives rise to just those

[7] Cf. pp. 101, 105 f. and 107 f. above.

[8] Examples are taken from Salmond, *Torts,* p. 216.

[9] Quotation from the statement by a judge in the Swedish Supreme Court of Justice.

risk-free possibilities of action in respect to the property which, from the social-economic viewpoint—i.e. taking into consideration the common production and transactions and the condition for these, a general feeling of security in such activities—it is important that a property owner have or to which he must confine himself.

Here I shall not state in any further detail which rules of law should be maintained in this province with respect to leading social valuations. I only mention that the rules in question may result in one of the following five catagories: (a) The 'immitting' activity may continue without further notice; (b) the activity may continue if one or more measures are taken to modify the immissions; (c) the activity may be continued without observation of such measures, yet only on the condition that the opposite social interest insofar is satisfied that coercion to certain damages rests upon the performer of the activity for the benefit of the owner of the real estate injuriously influenced by the activity; (d) the activity may, yet only with certain modifying measures, be practiced under such damages coercion; (e) the activity may not at all be practiced any further.

Whether or not these alternatives are satisfactorily formulated, one can certainly understand, from what has been expounded previously, the *untenability* of the idea *that* any sort of a conflict or collision should exist between the 'property rights' of A and B, *that* for this reason sometimes A had to exercise his 'right of property' within certain limits and B to endure an encroachment on his 'right of property' for the benefit of A's exercise of his 'property right', and vice versa; and *that* e.g. a judgment against A of damages or a decision which disallows B's claim to this judgment should include an application of legal 'rules' which were based on such circumstances such as those just suggested. Here as elsewhere, the so-called legal right as well as the 'limitations' for its so-called practicing, are *conditioned* by those 'rules' which are maintained. The risk-free possibilities of action which A and B have concerning their real estates are determined from the maintenance of these very 'rules'.

In spite of these brief reasonings with respect to the liability for nuisances, it is clear that the relation of the neighbor troubled

through the 'immissions' to the estate which he 'owns' (or has on lease) cannot *determine* which rule or rules of law are to be upheld here as to indemnification. The situation is quite the opposite. A person's position as owner (or user) of a real estate is *determined* and *throughout* determined by certain legal rules as actually maintained. I believe that those general reasonings which in this province must be carried on are particularly calculated to reveal the illogicalness of such concepts as 'damages' and 'compensation for loss'. The reasonings in question play this part to such a degree because in them it must be emphasized incessantly that no trespass on the neighbor's 'rights', no encroachment of his 'right of property', no invasion of his legally protected interests (and accordingly no property loss to him) occurs through certain 'immissions' and, consequently, such occurrences cannot be referred to as grounds for liability for the 'immissions' in question.

It is quite easy to understand that the concept 'damages' in relation to the traditional culpa-rule is a *petitio principii*. If such a rule were not maintained, the so-called ownership or right of property might very well be consistent with a state of affairs where everyone could act and deal with other peoples' property as carelessly as he chose to and thereby spoil or damage it without being subjected to any legal reaction. The property could indeed be damaged in this way purely physically. But such damaging action did not imply the invasion of the 'right of property' or of any other 'legal interest'. Speaking of damage or loss of any value in a legal sense would be logically impossible.[1] And damage

[1] Perhaps I here ought to demonstrate that the traditional culpa-rule also involves a *petitio principii* of quite another type. Because the rule has this contents: coercion to pay damages on the presupposition of culpa (negligence), one has—supported by one's feelings of justice—believed that culpa as something blameworthy in the person of the harm-doer constituted an *inner ground of justice* for the coercion to pay damages. Instead of seeing in 'culpa' merely an actual condition, a (moral) valuation is inserted. In this valuation a 'legal', indeed a 'just' reason is found for the damages coercion. In this reasoning the existence of the *petitio principii* is overlooked. What is it according to the usual doctrine that constitutes the blame which makes the damages coercion *just?* The answer is of course: the negligence in the sense of the lack of normal carefulness (the caution of a man of ordinary prudence). But now imagine

or loss in another sense would have no more interest to legal science than damage to a block of stone in an unknown desert or on an unknown and uninhabited island. For the rest, if the law of damages is disregarded one could hardly imagine a society of a kind where legal science could be exercised.

All the same it is obvious from what I have said that—if one abstracts from the (non-contract) law of damages—the conception of damage in a legal sense would have no other possibility to enter the picture but via the fact that certain acts were to be punished according to criminal law, consequently as crimes. However, I think that it may be said that the conception of damage or loss from a legal point of view is a *petitio principii* already through its dependance upon the maintenance of the law of damages (at least if we therein include also contract law of damages). For if we place aside this law it is difficult to conceive of the existence of a criminal law (cf. p. 254 above). However there is no need to spin out any fine distinctions. Suffice it to establish briefly and to the point that without the law of damages and parts of criminal law all of the realities would be inconceivable —the realities behind those conceptions of legal rights and duties, legally protected interests etc. (and therewith also the conceptions of damage or property loss, damages etc.) with which conceptions one deals so generally within the sphere of jurisprudence.

What I have said may perhaps not seem compatible e.g. with the situation according to English common law after an act done of necessity.[2] Such an act is considered not wrongful but, rather, 'justified' or 'excused'. Therefore the act is meant not to be actionable.[3] Would it not in *this* case be correct to say that the

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again that no culpa-rule is maintained! In such a situation man's conduct would in general occur—to put it mildly—in what is now called a careless, negligent manner. What is now called negligent would then be 'normal', and thus not negligent. (Cf. pp. 253 ff. above.) With this, it is seen that that concept of culpa which is used *presupposes* the maintenance of the so-called culpa-rule.

[2] Only necessity acts of a private nature are meant here.

[3] See Pollock-Landon, pp. 132 ff. as compared with p. 87. There are authors who sympathize with the conception of liability following an act done of necessity, e.g. Winfield, p. 65 f., as far as the person has acted 'in protection of himself or his property'. In Anthony v. Haney (1832) there is a *dictum* by

act done of necessity and physically harmful to the thing has in a legal sense of the word inflicted damage on the owner? Strictly speaking, the answer is no! For among the owner's possibilities of deriving advantage from the thing there is (in England) precisely this one lacking: by force to obtain damages for the thing being physically harmed through an act done of necessity. As a matter of fact this implies that from a legal point of view the owner's situation as to the thing is and, from the beginning was, such that—phrased in the language of legal ideology—he had no legal authority to claim damages in case of the thing having been harmed by another's act of necessity. The owner of the thing has to endure or be content with the harm done by such an act. The act in question cannot logically be considered to involve the invasion of any 'legally protected interest'. The situation is in this respect quite the same as I have described in the fictitious case of expropriation *without* any possibility to claim compensatory damages.

One overlooks this state of affairs because, in spite of the act of necessity not being actionable, the law of torts is otherwise maintained and in addition the relevant rules of criminal law as well as the law of legal acquisition and the law of recovery. Thereby the situation arises in which a person (the owner) has all these risk-free possibilities of action as to the thing and of deriving advantage from it which cause the metaphysical idea that the thing *belongs to* him and in this meaning is included in his estate, i.e. his general property. Not only laymen but even lawyers and jurists in England, therefore, look upon the matter as if the owner has suffered a certain property loss through the act done of necessity, a loss not to be compensated since an act of necessity (as not being wrongful) is not actionable. However this view of the matter is not carefully thought out. In fact, the 'ownership' according to English law is of such a kind that it is

Chief Justice Tindal in which he states that if an occupier of premises refuses on request to deliver to its owner a chattel taken by a third person and placed upon the occupier's premises, 'at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit'. (See Bohlen, *Incomplete Privilege*, p. 309.) To Salmond-Stallybrass 'such a rule seems reasonable but we shall see that it is doubtful whether it is the law' (pp. 33 f. as compared with footnote p. 198 f.).

logically impossible for the owner from a legal point of view to make a loss through another's act of (private) necessity.

While principally damage affixed to a thing has been considered above, the situation is the same with regard to 'damage' or 'loss' caused by breach of an agreement. Without the maintenance of a law of compulsory damages in case of the breach of an agreement one would not be able in any legal sense to speak of damage in the form of either *damnum emergens* or *lucrum cessans.*

As the amount of space allotted to discuss this topic is limited, my line of reasoning as it applies immediately to this point has perhaps not been easy to follow. However, I have wished to stress the great importance to the jurist in the case of *certain* investigations of law to try to view the problem as a spectator looking at the society structure from the outside. Only in this way will he be able to avoid overlooking essential connections in the legal machinery.

It must be clearly understood that I have never sought to eradicate from jurisprudence such fictions as damage and damages. In general they are not to be treated as legal fictions. But when one directly investigates the *foundation* of certain laws, and seeks to analyze the ideas associated therewith, such as legal rights and duties, obligations as arising on the basis of agreements or of 'torts' etc., it is not logical in a legal sense to consider damage (and damages) and the like as fundamental points of departure, since they are conceptions dependent upon the maintenance of the law of damages, certain sections of criminal law, the law of recovery, the law of legal acquirement of things etc. However, there can be no question of eradicating from juristic science such expressions as damage, damages, etc. Even in investigations into law they generally can be used, properly speaking, as conceptions and not only as terms or labels. Examples of words which should always—as I have pointed out in the Introduction—be used only as terms or labels are: legal 'rights', 'duties', 'legal relationships', 'claims', 'liability', 'responsibility', 'rules of law', etc. However, such an expression as 'legally protected interest' seems to me objectionable altogether. It should never be used, not even as a term. It is more like a false *description* and therefore should not be used as a term in a scientific work.

Concluding remarks on American jurisprudence

I am acquainted with Prosser through his excellent *Handbook of the Law of Torts*. In the same way as other 'modern' authors he is a legal ideologist. He appears to represent the same school as that of Harper or a similar one. He tries not to reveal the legal ideological substratum for his statements. Prosser constantly allows 'policy'—with this he apparently means 'social' or 'public policy'—to appear as determinative for those legal principles which he proclaims. But he is occasionally forced to resort to legal ideology. On the first page of the book just cited Prosser says:

> The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.

A discussion of the distortion of realities contained in this one sentence and which Prosser has apparently not even dreamed about, could fill quite a lot of pages.

Prosser says under that very descriptive heading, borrowed from Roscoe Pound, 'Social engineering', that the 'primary purpose of the law of torts is of course to make a *fair adjustment of the conflicting claims* of the litigating parties' (my italics). However, Prosser continues to say that during the last 50 years it has become more and more clear, and during the most recent decades in quite a dominant way, that 'public policy', i.e. 'the interests of society in general' may be involved in the legal disputes between private parties. He says:

> When the interest of the public is thrown into the scale and allowed to swing the balance for or against the plaintiff, the result is a form of 'social engineering' that deliberately seeks to use the law as an instrument to promote that 'greatest happiness of the greatest number', which by common consent is the object of society. (Prosser p. 15 ff.)

This line of thought agrees so completely with Harper that my criticism need only consist of referring to pp. 356 ff. above And as has already been noted these three eminent jurists (i.e. Pound, Harper and Prosser) are of course also subject to the criticism enunciated on pp. 283 ff. above,[4] in that they do not

[4] Cf. pp. 55–76 above.

comprehend the logical impossibility of allowing 'social policy' or the like to be determinative of the legal maxim applicable in a case, before one is released from the method of justice, i.e. legal ideology and the weighing against each other of the interests of the parties associated with it. The method of justice appears undisguised in Prosser when he allows the foremost purpose of the law of torts to be to effect a 'fair adjustment' between the litigating parties of their 'conflicting claims'. The method of justice is also expressed in Prosser's statement that the interest of the public should be 'thrown into the scale and allowed to swing the balance for or against the plaintiff'. The last words mean a comparison between the interests (and the reasons for them) of the parties. As I have just recalled, such a comparison is incompatible with the point of view of 'the interest of the public'.

According to Prosser, in cases of fault-liability the concern is with '*social* fault'. Therewith Prosser appears to overlook that this must depend upon a conception just as metaphysical as the usual fault-concept, as long as one continues not to understand that *all* liability is 'strict' and that no one kind of liability is more 'strict' than any other. Thus, 'strict' liability is neither more nor less strict than fault-liability. In both types there is no non-chimerical basis for maintaining a rule of liability other than the fact that such a rule is desirable from the point of view of social welfare. Prosser's legal ideological background appears in such statements as that 'fault' in a legal sense 'has come to mean nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors' (Prosser p. 428). In the same manner 'negligence' is described as a conduct below the standard 'based upon what society demands of the individual'. Although 'an honest blunder, or a mistaken belief that no damage will result, may absolve' the defendant 'from moral blame'; nevertheless 'the harm to another is still as great, and the actor's individual standards must give way to those of the public. In other words, society may require of him not to be a fool' (pp. 220 f.). Such statements merely confirm that Prosser has not freed himself from a legally normative manner of reasoning. This appears also in that a 'socially' faulty or unreasonable conduct according to Prosser is apparently to be considered

wrongful. It is obvious that Prosser in speaking of 'social' fault, quite as if he had spoken of 'moral' fault, has in view a deficient thus blameworthy conduct.[5]

This idea of absolving a wrongdoer from moral blame and regarding his fault as social is indicative of the adaptability of legal ideology to so-called modern points of view; but it has hardly any connection with scientific, i.e. empirical reasoning. The idea in question reminds me of 'modern' German jurisprudence. Mezger, for example, writes: *Schuld* (in criminal law) *ist Schuld nicht im ethischen, sondern im juristischen Sinn.*[6] I have criticized this impossible attempt at making the conception of guilt or blame reasonable.[7]

Prosser's treatment of the conception of duty seems to me rather confused. However, the concept in question he does not directly determine as 'legal duty'. In the case of a claim based on 'negligence' he says without any reservations, 'duty is (or "may be defined as") an obligation, recognized by the law, to conform to a particular standard of conduct toward another'. Prosser regrets that that 'duty' the omission of which is a condition for 'negligence' in Anglo-American law as distinguished from 'Continental' is only 'relative', i.e. that the claim should presuppose 'the breach of a duty owed only to' the damage suffering plaintiff himself and not 'to some other person'. This conception of 'a relative duty' is characterized by Prosser as artificial. Actually he does not either approve of the concept 'duty' according to 'the continental law' even going so far as to say that the view of a merely 'relative duty' in a 'negligence action' has obvious merits in that it constitutes a limitation of liability. If the defendant's 'wrong' consists of creating a risk, then his liability should 'be bounded by that risk'. But, Prosser says shortly afterwards, 'there is much

[5] Cf. the statements on pp. 367 ff. above in my concluding remarks on Harper's view of legal matters. Concerning Prosser as well as Harper it is only a question of damages-reaction as motivated by reason of a comparison between and weighing against each other of the interests of the parties. The whole thing is considered from the viewpoint of a legal conflict between the parties. One confuses the *damages-reaction* in a particular case with the *law* of damages. Cf. above, *inter alia* pp. 281 f.

[6] Mezger, *Strafrecht,* p. 251.

[7] See *Unw.* II, pp. 35 ff.

to be said for the idea of an absolute wrong adopted by the dissent' which seems to mean that one is liable independently of even a 'relative duty', i.e. quite independently of any 'negligence' at all, if only the damage has been done by the defendant having 'admittedly departed from a social standard of conduct'. However, as Prosser says, the Restatement of torts has adopted the view that in the case of negligence there is no 'duty to the unforeseeable plaintiff', which seems to mean that liability in the case of 'negligence' presupposes a 'relative duty' although one apparently wishes to get rid of this concept and therefore in the Restatement it is expressed as follows: 'If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury does not render the actor liable to the persons so injured' (Restatement of Torts § 281). In Sweden we would say in that case which here seems particularly to lie in the background (Palsgraf v. Long Island Railroad Co.[8]) that the defendant were to be freed from liability already because the damage had not been 'adequate'.

However in § 31 on 'Duty' Prosser incessantly speaks of duty, yet finally only enclosed by quotation marks, thus as if to question whether the word itself means anything. And already at an earlier stage he says: 'But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'[9]

There is a great deal to be said about Prosser's representation of 'negligence-duty' in elucidation of this quotation. Perhaps it should be noted first that there *is* a 'duty' in the meaning of reality, namely, a more or less general, strong and spontaneous feeling of duty, which determines to a great extent the lines of conduct of the members of society, and the lack of which would make all 'social engineering' unthinkable. Every possibility of insight into the character of legal machinery is excluded without some understanding of the relationship between criminal law and

[8] On this case see Leon Green in 30. C.L.R., pp. 789 ff.

[9] Cf. Prosser pp. 178–190, for what he has to say directly about duty. On p. 185 duty is said to be 'nothing more than a word'.

the law of torts, on the one hand, and those feelings or often rather instincts of duty which usually occur in the individuals towards their actions, on the other.[1] No such understanding is to be found in the statement that 'duty' should be 'only an expression of the sum total ... etc.'.

But this we can here overlook inasmuch as Prosser has presumably only 'legal duty' in mind. Then it may be correct that duty is only a word, a label, a term with which one or more 'considerations' of legal policy are denominated. But one asks oneself: what, then, does Prosser mean—as we have just seen—with the proclamation (and this with no reservation) that 'duty' should be an 'obligation recognized by the law, to conform ... etc.'? A reasonable answer cannot, I am afraid, be given. But let us confine ourselves to the citation just quoted. The 'protection' which is discussed there and is previously said to be 'against the defendant's conduct' (Prosser p. 180), shall of course, according to Prosser, at the same time be to the benefit of the interests of the plaintiff in question to the extent that these are, as he assumes, 'legally protected'. And now it may be asked: what is this—the plaintiff's right to (notice 'entitled to') the stated 'protection'—other than empty words as equally void of sense as 'legal duty'? An understanding of my analyses of the conception of legal right reveals that here no assistance is possible through the idea that 'the law' should—by reason of certain 'considerations of policy'—'say' that the plaintiff should be entitled to protection for the interests in question. 'Legally protected interests' are as chimerical as 'legal rights' and as—'legal duties'. If the latter are rejected, it is prudent to reject the former too. The 'modern' halting legal ideologies are more confused than the older ones which were carried through with greater consequence. Prosser's exposition of 'negligence-duty' bears witness to this.

Prosser in this connection uses also such words as 'absolute wrong', 'wrongful', 'wrongdoing'—without stating directly in what sense he uses them. It is clear, however, that he wishes to consider nothing other than 'wrongfulness' in the usual meaning;

[1] Cf. my many remarks above of the importance to society of the feelings of justice being directed through legal machinery and by that means making possible its social function.

presumably he has a person's 'socially unreasonable conduct' in mind, i.e. his negligence to observe 'a social standard of conduct' (Prosser pp. 1, 184; cf. also pp. 175, 220 ff.), in a similar manner as when he allows 'fault' to signify 'social fault'. But even this, as has previously been said, does not release him from legal ideological ways of thinking. For even that social standard of conduct which has been disregarded must according to Prosser obviously be one of the standards demanded or required by society.[2] But society is unthinkable without the social order or law, i.e. legal machinery. Consequently the socially unreasonable conduct is synonymous with a legally wrongful, i.e. an unlawful conduct.

It is possible that all such refurbishings of legal ideology may be considered as practically useful advances in jurisprudence. But as long as one does not comprehend any more of the 'law', i.e. the legal machinery, there can be no question of a genuine legal *science*. In the way of epistemology Prosser appears to lack at least two qualifications, it seems to me. One is the understanding of the constructive and indispensable significance of the feelings of justice (the so-called common sense of justice) for society in that way—not that they direct the legal machinery—but on the contrary that they themselves *are directed* by legal machinery as inciting and stimulating impulses in the service of legal machinery, making possible its operation. The other qualification which Prosser lacks above all else is any insight of what I have repeated so many times (e.g. pp. 37 ff., 79 ff. and above all 370 ff.), namely, that the concept of damage in jurisprudence, i.e. 'losses suffered by private individuals in their legally protected interests' (Prosser p. 1), is a *petitio principii,* in that such an idea presupposes the maintenance of the law of damages and parts of the criminal code, and thereby, of course, the legal machinery as a whole. In other words, Prosser does not perceive that the most modern law of damages completely lacks any scientific foundation although within its sphere one discusses 'social fault' and 'social standard of conduct' and considers 'duty' as 'nothing more than a word'.

[2] See e.g. Prosser, p. 428. There we have the common idea of a superindividual will as commanding and prohibiting.

All the same Prosser's book is a highly important work. Surely not because of its scientific standard but because of the fact that the author, guided by the Restatement of Torts, a great body of other legal literature (nearly '2,000 articles, notes and comments in legal periodicals') and about 15,000 cases, has presented an unusually significant 'Handbook of the law of torts'.

Seavy is occasionally referred to by Prosser. He too is of course a legal ideologist. I need in this respect only refer to his statement that it is 'the common feeling of justice' which it is 'the primary function of the law to satisfy' (Seavy, *Respondeat superior,* p. 434). Obviously he has nothing to object against 'current legal conceptions', which he seems to find 'reasonably just to the individuals involved and to society' (ibid.). His *Principles of Torts* I have touched upon in Bd II: 2 pp. 33 n. 1 and 345. In spite of certain sound viewpoints it is obvious that Seavy also in this later writing of his stands on a legal ideological basis. (See e.g. his paper in question, pp. 87 f.)

This is more or less the situation with almost all of the American authors whose works I have been able to study. Concerning juristic radicalness references are often made to Mr. Justice Oliver Wendell Holmes although the years of his active contributions as a legal scientist had passed, for the most part, by 1900.[3] His well-known work *The Common Law* has been available to me only in the German translation by Prof. Rudolph Leonhard. Here one finds a great many statements, properly speaking intimations rather than reasonings, indicating that the author wishes to free himself from legal ideology.[4] However no traces of any analysis of the falsity of legal ideology; no criticism of the method of justice; and no real directions of how a legal science is to be exercised—are to be found in the work under consideration or in Holmes' *Collected Legal Papers* which I have also read. The

[3] In the American background, Holmes is quoted oftener than any other writer in support of the new theories of law', Kocourek, 'Libre recherche in America', p. 466.

[4] Here, it seems to me, is one of his more valuable intimations: 'Die wahren Erwägungen des Gesetzgebers ... sind die geheime Wurzel, aus der das Recht alle seine Lebenssäfte herauszieht. Ich meine natürlich die Erwägungen der Frage, was für ein bestimmtes Gemeinwesen heilsam ist', Holmes-Leonhard, p. 35.

latter work contains an essay on 'Natural Law'[5] which contains some telling observations on 'legal rights', but I have not seen Holmes make any scientific use of them. In the same volume, in an essay entitled 'The Path of the Law',[6] he says:

> The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right (pp. 168 f.).

Part of this statement is approvingly quoted among others by McCormick, who adds the old maxim: *ubi ius, ibi remedium*. To this maxim he gives the following meaning: 'where there is a right there is a remedy, or, in other words, if there is no remedy by court action, no right has been violated'.[7] (According to this it is apparent that McCormick has not regarded Holmes as refuting legal ideological rights and duties. The old maxim in question means nothing but that 'the means is given by law, for the recovery or assertion of a right';[8] consequently the right (or duty) is to be considered an object of the remedy of law, hence to exist independently of law.

One may ask if Holmes himself really had any notion of the depth of legal ideology. Certainly the answer is 'no'. Continuing, on pp. 169–179 Holmes wants to show the correctness of his statement. But this attempt is nowise made in such a way that he shows, by means of any deeper argumentation, that the talk of legal rights and duties lacks every foundation in facts and actual connections; nor does he seek to summarize, more or less briefly, the realities given behind the conceptions in question. He rather wishes to show 'the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal

[5] First published in 32 H.L.R., pp. 40–44.

[6] This essay was first published in 10 H.L.R., pp. 457–478.

[7] McCormick, pp. 85 f.

[8] Broom-Kersley, *Legal Maxims*, p. 118.

language lays for us on that side of our way' (ibid. p. 179). It is correct that confusion exists here. But Holmes has quite overlooked that this is connected with the fact that morality in the shape of feelings of justice has a decisive significance for the law, i.e. the legal machinery. It is true that this occurs in quite another manner than is understood by both laymen and jurists. It is 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.[9] This, Holmes has not thought about at all, it seems. Therefore his 'showing' here in question does not seem to have any genuinely scientific character.

Among Holmes' pages referred to above are to be found these words: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law' (p. 173). These words are often cited with approval in American literature concerning the concept of law.[1] They are preceded by the following passage:

> The confusion with which I am dealing [sc. between moral and legal ideas] besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man[2] we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind.

The statement that law is 'nothing more pretentious' than 'the prophecies of what the courts will do in fact' may probably be considered as a sententious utterance. But it has no bearing on legal science, even if it may be calculated to stimulate a legal ideologist to reflection. The aphorism in question first appeared in 1897. At about the same time it was surely observed by legal

[9] See several places above, e.g. pp. 95 f., 164 ff., 228–235.

[1] As a matter of fact they formed a kind of basis for 'legal realism'; cf. Cahill, p. 97.

[2] On p. 171 Holmes speaks of a bad man who cares only for certain material consequences which the knowledge of law enables him to predict.

ideologists in Europe who at that time probably did not know about this particular paper of Holmes.[3] Very likely it was noticed and commented upon by many a jurist a long time ago.[4] I think the meaning of 'law' is impossible to arrive at without such an exposition of legal machinery as I have made and without an analysis of the kind carried out by me to show that the concept 'legal rule' forms an unreal superstructure upon the operating legal machinery (see above pp. 123–336).

Holmes takes up the question of the forces which determine the content and the growth of the law on pp. 179 ff. Here he makes several keen and realistic observations but these do not bear witness to any markedly developed scientific method. His view of criminal law appears rather abortive, it seems to me, from the question he asks on p. 188: 'What have we better than a blind guess to show that the criminal law in its present form does more good than harm?' Regardless of whatever objections may be raised against criminal law and prison organization in America at that time, such a question does not reveal any real understanding of the problems involved. Eliminate at any time the maintenance of criminal law in the U.S.A. and you will eliminate the U.S.A. as well—of course not its territory but its people as a civilized nation.

Under the heading 'Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist' Jerome Frank characterizes Holmes as '... one wise leader pointing the way we have had with us many years'. Among other things Frank adds,

> the judicial opinions and other writings of Mr. Justice Holmes—practitioner, teacher, historian, philosopher, judge—are a treasury of adult counsels, of balanced judgments as to the relation of the law to other social relations. ... Whatever clear vision of legal realities we have attained in this century in the past twenty-five years is in large measure due to him. No American thinker working his way forward, against his own and others' prejudices, to sane and honest recognition of how the law works and how its working can be bettered, but Holmes's adult illusionless surveys are an indispensable aid and an inspiration.[5]

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[3] Cf. Kocourek, 'Libre recherche in America', pp. 466 f.

[4] As to the ambiguity of the phrase 'what courts do' see Felix Cohen, *Transcendental Nonsense,* p. 836.

[5] Frank, *Law and the Modern Mind,* p. 253.

Of course, I do not dispute the correctness of such a eulogy of Mr. Justice Holmes. And I willingly admit that his many inspiring sententious statements often seem to have been 'strokes of genius'. But nevertheless I do assert that he as well as Frank himself has not succeeded in surmounting the *fundamental* prejudices concerning law as they have been shown above in this book.

During the past few or more decades there have been in America and continue to be, of course, a great many authors who have been very anxious to free themselves from all prejudices of legal ideology, to elucidate what is and what actually happens in the various aspects of what we associate with the term 'law'. I am thinking particularly of the authors whose views I have studied or become acquainted with through articles which have appeared in such journals as H.L.R., C.L.R. and M.L.R., and such works as Hall, *Readings, My Philosophy of Law* (Credos of Sixteen American Scholars), *Interpretations of Modern Legal Philosophies,* and Cohen (M. R. and F. C.), *Readings.* Through Stone's *Province and Function of Law,* and Cahill's *Judicial Legislation* I have become acquainted with the views of some other American authors. In view of the purpose of my present work it would not be appropriate to burden it with any criticism of the authors just referred to. For in all fairness I would have been obliged to limit my criticism to showing that they were not familiar with the main points of my view on legal matters and to suggesting that there might be some interest in America for my work. After what I have expounded in the foregoing I may perhaps achieve the same result by merely making the following statement: In the American authors referred to in general I have found

(1) no criticism of legal ideology including the method of justice;

(2) no analysis of the realities behind fundamental conceptions of legal ideology;

(3) no attempt of unfolding the fallacy of the belief in legal rules;

(4) no attempt of elucidating the relation between epistemological problems and social valuations in legal science as a constructive jurisprudence;

(5) no account of the functioning in the legal machinery of

the feelings (or instincts) of justice, i.e. the common sense of justice;

(6) no positive method, based on social welfare, to apply to legal science;

—I say I have found nothing in America of what I have mentioned in these six points, hence nothing which I might consider *akin to or allied with my own investigations and my own view on legal matters.*

However, I shall nevertheless briefly touch upon a few of those American authors I have in mind. Jerome Frank's views on legal matters I have studied also from his monograph *Law and the Modern Mind.* The sixth printing of this work was published in 1949 with a preface which contains a revision of and comments upon the first printing. Frank classifies himself among the so-called legal realists whom he wishes to call legal skeptics. These he divides into 'rule skeptics' and 'fact skeptics'. He places himself among the 'fact skeptics'.[6] To me his book seems somewhat more amusing than indicative of fruitful thought.

Frank is anxious to point out that by 'law' he means 'merely to talk of actual past decisions, or guesses about future decisions, of specific lawsuits'.[7] If I have understood him correctly, Frank characterizes as 'the basic myth', 'the current demand for exactness and predictability in law',[8] in spite of the fact that 'only a limited degree of legal certainty can be attained'. This demand for a 'greater legal certainty' than that which is possible, or as Frank expresses it, after Wurzel, *Juristisches Denken,* this 'social want for a body of law which shall appear to be what it never can be, an exhaustive list of commands, issued by the State, sufficient to settle every conceivable controversy which may arise'—this social want Frank finds curious, and he asks for the source of it, the source of 'this desire to be fooled'. 'If it be true', Frank says, 'that greater legal certainty is sought than is practically required or attainable, then the demand for excessive legal stability does not arise from practical needs. It must have its roots not in reality

[6] Frank, *Law and the Modern Mind,* pp. VII–X.

[7] Frank, *Modern Mind,* p. VI; cf. pp. 46 f.

[8] Here the reader has to observe what was just said of Frank's meaning of the word 'law'.

but in a yearning for something unreal.' Therefore Frank asks: What is the source of this basic legal myth?[9]

The repudiation of the search for legal certainty is in itself well grounded. Nevertheless Frank's way of framing the question is superficial. The search for legal certainty is no *basic myth*. If one does not go deeper into the myth of law one will not be able to free oneself from it. Of course *legal ideology* with all that is associated therewith is the *basic* legal myth. As a matter of fact it is the *belief in natural justice* that lies behind what Frank calls the search for legal certainty. To show this I need merely to refer to my presentation on pp. 269–299 above. May I also remind the reader of Kantorowicz' assertion that *der als ungerecht empfundene Entscheid de lege lata gar nicht notwendig sei, sondern auf schlechter Auslegungsmethode beruhe.*[1] In addition one need only recall that legal ideology has dominated the continent of Europe from time immemorial and continues to do so, and this of course includes England and America too![2] As we have seen, legal ideology is based on the idea of natural justice. With this idea, as we have also seen, the belief in an objective 'ought' and other absolute values, especially legal rights and duties, is connected. I call particular attention to the fact that even the ideological belief in *relative* rights and in legally protected interests implies belief in absolute values.

If one considers what I pointed out of the domination of legal ideology and of its being based on the belief in absolute values, and if one considers further that legal ideology exercises its power over people in general as well as over writers on jurisprudence in particular, one must understand that we have here the *real* 'basic legal myth' with no need to look elsewhere. The belief in and search for legal certainty—which has to such a degree irritated Frank—is only a relatively unimportant consequence of this myth. Anybody who cannot see such a clear and unequivocal fact cannot really be said to have a scientific view of or about legal matters. Frank's book contains a number of

[9] Frank, pp. 11 f.

[1] See above p. 281.

[2] See above—besides pp. 269–299—what I have written of Anglo-American jurisprudence.

correct observations as to what he sometimes calls 'the certainty illusion in law' (e.g. p. 229) and a great many attachments negative as well as positive to other authors. In spite of Frank's intention his book does not yield very much profit to legal science. Penetrating investigations into the conception of the rules of law and analyses of 'rights' and other ideas of legal ideology are conspicuous by their absence. Certainly such a book would not have been written if Frank had had any understanding of the functioning of legal machinery as I have sought to present it in the present work. For with this understanding it would be too superficial and too meaningless—even from the viewpoint of common parlance—to designate law as merely a 'talk of actual past decisions, or guesses about future decisions'.

As concerns the fact that my views on legal matters have essentially nothing in common with those of Sorokin and Timasheff I need only refer to Olivecrona's excellent criticism, *Sociological Explanation of Law?*, notably pp. 173–181, 192–199, and 201 ff. It is evident that none of these two authors has an opinion compatible with my presentation of legal machinery, with my view of the feelings of justice as checked and directed by legal machinery, and with my criticism of the concept of 'legal rules'. It is also evident that their opinion cannot be made to agree with my positive method.[3]

Probably Kocourek of whose thinking I have learned through his *Introduction*, his articles 'Libre recherche in America' and 'Legal Duties', and his 'Credo' in *My Philosophy of Law* would have welcomed the publication of this present work for the English-reading public. The report he read at the Second Congress of the International Academy of Comparative Law at The Hague

[3] Of Sorokin's other writings, Olivecrona has considered *The Organized Group, etc.* As concerns Timasheff, Olivecrona has quoted this author's paper on *Petrazhitsky's Philosophy of Law* and, above all, he has treated Timasheff's *Introduction to the Sociology of Law* (1939). This book has not been available to me. Sorokin's 'Characteristics of Law-Norms' in *The Organized Group, etc.*, pp. 668 ff., where he follows a book in Russian by Petrazhitsky (1909) is very naïve indeed. How the 'inner motivation' against e.g. heinous crimes arises is quite unfamiliar to him. The way in which the maintenance of criminal law works, and the paramount importance to social welfare of this working, is, of course, equally unknown to Sorokin.

in August 1937 has been published with the title 'Legal Duties'. In this report Kocourek discusses the following authors: Austin, Jhering, Schlossmann, Duguit, Puntschart and myself. In some points Kocourek has misunderstood my view. So when he says

> it is probably not historically accurate to say, as Lundstedt proposes, that moral ideas have not had an important place in the development of liability, but it can be little doubted that for modern law the idea of social security has been prominent in legal policy.[4]

In making this statement Kocourek obviously had only my *Superstition or Rationality?* in mind and had overlooked my remarks as to the position and import to legal machinery of the feelings of justice, the common sense of justice. These remarks I had made in my German book, *Unw.* I, pp. 231 ff. However, referring to this work of mine Kocourek says the following:

> In his later and larger work, Lundstedt enters on a detailed discussion of the same ideas with many interesting and valuable references to, and criticisms of, other jurists. As might be expected, most of them fare badly. Even Duguit does not escape. In this later work, Lundstedt expounds the further important proposition that *'Das positive Recht im Sinne der Jurisprudenz existiert nicht'*. Behind written or unwritten prescriptions stands the reality consisting of a complex of psychic factors which influence the conduct of the organs of the State and of the subjects. This revolutionary doctrine is a logical sequel to Lundstedt's views on rights and duties. — While Lundstedt's views stand in sharp opposition to many centuries of traditional belief and doctrine, yet we believe, if Lundstedt insists that only objective realities are to be taken into account in theory of law, his position on that basis is unassailable. In any event, his criticisms of existing theories have, we believe, shown that many definitions and formulations widely accepted need re-examination.[5]

My only comment on this is that a great portion of what I have expounded above, as a description of legal machinery and as an exposure of the fallacy of speaking of rules of law, was unfortunately not known to Kocourek. However, discussing 'legal realism' Kocourek goes on to say that

> Lundstedt's views, although available since 1925, in English, do not seem to have been as well known in America as they deserved. If they

[4] Kocourek, 'Legal Duties', p. 11.

[5] Kocourek, 'Legal Duties', pp. 11 f.

had been as familiar as the views of Duguit, and various other continental authors writing on *freie Rechtsfindung* or *libre recherche,* it is not improbable that the realist movement in America would have had a more vigorous life in the few years that it occupied the center of the stage.

However, Kocourek continues:

> It may be noted here that one of the founders of legal realism in America (Bingham) had long anticipated Lundstedt's objectivism, at least in its fundamental aspect. Lundstedt's merit lay in his direct attack on traditional definitions, formulas, and doctrines. These points of attack were highly vulnerable....[6] [Whereby Kocourek refers to my 'attack' on Austin in *Unw.* I., pp. 191–198.]

To be sure Kocourek is mistaken when he believes that my view of legal matters is in any way related to the so-called legal realism in America. He would not have made that mistake had he known the whole of my view of legal machinery and had he not overlooked my remarks on the relation to legal machinery of the feelings of justice, a matter just as important as it was unknown to the representatives of so-called legal realism. However, as to Bingham's writings I am familiar with his 'Credo' in *My Philosophy of Law.* The article in 11 Mich. L.R. pp. 1 ff., referred to by Kocourek, I have read only in the abridgment to be found in Hall, *Readings,* pp. 786–789. Of his article 'The Nature and Importance of Legal Possession' (13 M.L.R., pp. 535 ff.) I have likewise read no more than an abridgment in Hall's *Readings* (pp. 438–440).[7] Yet on the basis of this rather incomplete body of Bingham's writings I have found a number of quite correct observations.[8] But even on this basis I can assert that my statement made above on p. 393 f. holds for Bingham also. Indeed, this statement seems to be confirmed through the description of Bingham's 'legal realism' given by Cahill.[9] Moreover Bingham's position as 'explicitly based on a dualistic metaphysics'

[6] Kocourek, ibid. p. 13.

[7] Unfortunately vols. 11 and 13 of the *Michigan Law Review* are not available at Uppsala University Library.

[8] In his *Law and the Modern Mind,* pp. 274 f., 340, Frank mentions some of Binghams' views that seem to me to be correct.

[9] Cahill, *Judicial Legislation,* pp. 102–111; cf. Llewellyn, *Some Realism,* pp. 1233 ff.

has been criticized by the discerning philosopher M. R. Cohen. Cohen's argumentation appears conclusive to me.[1] However, Cohen —in spite of all his acuteness and sagacity—is not at all freed from legal ideology, as appears from such a statement as the following:

> Legal science is normative, in the first place, in the sense that it deals with norms. Legal rules, whether embodied in statutes, accepted legal doctrines, or judicial decisions, are normative, in that they contain imperatives or orders regulating what men should do. This is so rudimentary and obvious that it seems impossible that any one should dispute it.[2]

I have already mentioned another 'legal realist', Frank. A quotation from his works shows why 'law' according to legal realism may be characterized as 'predictions'. The opposition to this 'school' began in the late 1920's and continued through the 1930's. However, in 1941 Garlan's book *Legal Realism and Justice* was published. It has been characterized as 'perhaps the most elaborate attempt to restate legal realism'.[3] Garlan says, *inter alia:*

> The concern of realism with laws as predictions ... leads to a concern for both the general theory and the particular problems of justice ... in the sense that these problems are the contexts which make prediction itself a moral concern. It leads to a reconsideration of the general theory of justice. ... One who reads the literature of American legal realism will discover many indications of the presence of an altered conception of the character of the quest for justice. The literature exhibits a more empirical, pragmatic emphasis in approach to normative problems than has hitherto been generally found in practice or given due recognition in theory. ...[4]

Other legal 'realists' to be noted are Llewellyn, just mentioned, and W. W. Cook.[5]

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[1] Cohen, *Readings,* pp. 692–696 (an abstract from *'Law and the Social Order'* by M. R. Cohen, 1933). The article has been given the sub-heading *Nominalism and the Reality of Rules.* (Bingham's doctrine is often called 'nominalism'.) Cohen makes some keen remarks upon the conception of legal rules. However, as far as I know, he has not made any attempt at really analysing this concept.

[2] See *Law and the Social Order,* p. 340 (Hall, *Readings,* p. 804).

[3] Cahill, p. 146.

[4] See Garlan, *Legal Realism,* pp. 13 f. (Cohen, *Readings,* p. 655.) Several interesting quotations from Garlan's work in question can be read in Stone, *Province and Function of Law.*

[5] As concerns Llewellyn see *A Realistic Jurisprudence,* pp. 431 ff. and *Some Realism,* pp. 1233 ff. As to Cook I have only read some abridgements in Hall, *Readings,* pp. 363–365; 484–501; 784–786.

There are of course other prominent opponents to the realist movement than M. R. Cohen. In addition to Roscoe Pound mention may be made of John Dickinson. Pound's view of legal matters shall not be discussed here once more. Dickinson's way of looking at matters of law seems to me both acute and enlightened. But what I have in mind here are merely certain statements which I have read in his papers *The Law behind Law, Legal Rules* and *The Problem of the Unprovided Case,*[6] as well as his *Credo.* On pp. 98–100 of this paper Dickinson makes some fitting remarks as to 'realistic jurisprudence'. I do not imply by this that Dickinson in his discussion of law and rules of law has gone deeply enough under the surface. In stating this, I am not making critical remarks of the kind Frank has made (see last note). I am thinking of Dickinson's as well as other authors' lacking knowledge of such viewpoints as I have applied in support of the fact that there are no 'legal rules' and that one cannot speak of rules for the judge and his activity in any other sense than for every type of non-juridical activity. And I believe, to the extent that I have been able to learn about Dickinson's view of legal matters, that my statement expressed in the six points on p. 393 f. holds true for him as well.

Finally it seems appropriate to say a few words concerning the doctrine of Kelsen who is nowadays considered to be an American author. Kelsen has never understood that jurisprudence *can* be exercised empirically, i.e. as a science. According to him 'the legal order determines what the conduct of men ought to be. It is a system of norms, a normative order. The behavior of the individuals as it actually is, is determined by laws of nature according to the principle of causality. This is natural reality', i.e. reality in an empirical sense. Opposed to this Kelsen predicates 'legal reality', i.e. the legal or normative order, a system of norms which is also called by Kelsen 'positive or real law', and said to be the particular subject of legal science.[7] Consequently the sub-

[6] See the comments on his *The Law behind Law* in Frank's *Law and the Modern Mind,* pp. 264–271, 274, 282.

[7] Kelsen 1945, p. xiv. As a rule I shall cite his German work, *Reine Rechtslehre,* 1933. It seems to me that this work presents a clearer picture of his view. To be sure, in his American book he says in the 'Preface' that he aims

ject of legal science *shall* according to Kelsen lie completely outside the natural reality, i.e. the world in which we live.[8]

With this absurd point of departure Kelsen has sought in the name of logic to completely free law and its metaphysical world from mixing with the natural world, to purge away all realities from the world of law and accordingly to propound, if I may say so, a purely cultivated ideology of law, also called by Kelsen the *pure* theory of law.

However, Kelsen says this pure theory of law tries to delimit its object of knowledge (which shall be 'the positive law') to both of those directions in which its independence is threatened by the dominating *Methodensynkretismus*. First and foremost the law is to be delimited against nature, i.e. reality. Law is said to be a phenomenon of Society but 'society is an object completely distinguished from nature because it constitutes quite another connection between the elements'. Kelsen holds that if law is not distinguished 'in the most obvious way' from nature, then 'legal science should be merged in natural science'. It can be questioned, of course, whether this would really be so terrible. My own criticism of legal ideology in connection with my positive theory of social welfare sets out to show simply that legal science *is* an empirical science, i.e. a natural science, although I have not in general used the latter expression in my expositions.

Kelsen is of course forced to admit that what one at times calls legal events, happenings or occurrences as 'external facts' are determined in space and time, pieces of nature and as such de-

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at giving to the 'pure theory of law such a formulation as to enable it to embrace the problems and institutions of English and American law as well as those of the Civil Law countries, for which it was formulated originally. It is hoped that this reformulation may have resulted in an improvement.' However, as regards the contents of this book of mine as a whole I think that Kelsen's writings in German present a clearer picture of his view than his American work.

[8] Certainly Kelsen's 'positive or real *law*' shall be no ideal law in the sense of common legal ideology. It is indifferent, according to his doctrine, whether 'positive or real law' corresponds to an ideal law, called justice, or to natural law in a legal ideological sense. Of course, this gives no character of reality to Kelsen's law. For this has been placed by him, once and for all, outside of the real world, the world in which we live.

termined by laws of causality. As elements in the system of nature they are thus not at all 'legal'. It shall be in the 'objective meaning, which is bound' to the occurrence, the external fact, which makes this a 'legal (or wrongful) act'. This external fact receives the specific juristic sense, i.e. its characteristic legal significance, through a norm which by its very contents alludes to the fact in question and invests it with a legal meaning. These norms constitute the law and are accordingly the sole object of legal knowledge.[9] And with this we pass on to those norms or 'ought'-judgments which in order to be valid require other norms, these in their turn presuming additional norms, and so on, all of which forces Kelsen to resort finally to a basic norm as the 'hypothetical basis' for the entire structure.[1] One can disregard the 'hypothetical' character of the basic norm, inasmuch as the 'pure theory of law' quite simply *presupposes* the basic norm's validity.[2]

The other direction in which the 'pure theory of law' attempts to delimit its 'object of knowledge' is 'other spiritual phenomena' (i.e. other than law), but in particular 'norms' of another type than the legal ones. Primarily the concern here is to release law from the connection in which from time immemorial it has been brought together with morality.[3] The consequence becomes that the 'ought-judgment' in Kelsen's legal norms is not valid as a moral norm because of its moral contents. On the contrary the 'pure theory of law' is concerned with releasing law from the 'ought' as a transcendental category, i.e. the legal norm, made a *Rechtssatz,* is valid as an 'ought' completely independent of every valuation. The 'ought' according to Kelsen signifies, as far as I can see, that the legal norm as a *Rechtssatz* possesses unconditional validity. Why?, one asks. Kelsen does not give any tenable answer. The Rechtssatz *is* valid because it is valid. He has hardly even tried to present any genuine argumentation. As such one cannot consider his statement that the norms are valid *(gelten)*—i.e. the

[9] See Kelsen 1934, pp. 1 ff.

[1] Kelsen 1934, pp. 62 ff. (on *Die Rechtsordnung und ihr Stufenbau*); 1945, pp. 123 ff.

[2] Cf. Kelsen 1934, pp. 66 f., and 1945, pp. 110 f., 115 ff.

[3] Kelsen 1934, pp. 12 ff.

conduct of man in accordance with the norm is to be regarded as *gesollt* (falling under an 'ought')—by virtue of their substance *(Gehalt): weil ihr Inhalt eine unmittelbar evidente Qualität hat, die ihm Geltung verleiht.* In his view, the norms receive this quality through the fact that they are reducible to a basic norm.[4] But according to Kelsen, as we just have seen, this norm shall be only hypothetical! Quite as gratuitous is Kelsen's following view of the matter:

As the natural law binds a certain fact as cause with another as its effect, so does the *Rechtssatz* bind the legal condition with the legal effect (which of course can be the effect of a wrong). If the form for the connections between the facts in the one case is the causality, it is in the other the imputation, which latter is recognized by the pure theory of law as the particular legality *(Gesetzlichkeit)* of the law. Its expression—and no other—is the 'ought' *(Sollen)* in which the pure theory of law presents the positive law, just as the expression for the causal connection is a 'must' *(Müssen).* Natural law states: If *A* is, then *B* must be, thus legal law says: If *A* is, then *B* ought to *(soll)* be, without having stated thereby anything about the value, i.e. about the moral or political value of the connection in question. Although the latter connection would be completely distinguished from causality, it would be just as steadfast as it.[5]

To this there is the immediate objection that even if no other argument is raised against the 'pure theory of law', this theory

[4] Kelsen 1934, pp. 62 f.

[5] The source of this is Kelsen's paper *Den rena rättsläran* (in Swedish) in a Swedish review, Kelsen 1933, pp. 202 f. Cf. Kelsen 1934, pp. 22 f. See also Kelsen 1945, p. 45 f. He says there: 'The principle according to which natural science describes its object is causality; the principle according to which the science of law describes its object is normativity', p. 46.

It is important to note that the particular legality of the law is in German *die besondere Gesetzlichkeit des Rechts,* and that this is meant to constitute an equivalent to the *Gesetzlichkeit* of the physical or natural law. In this meaning legality *(Gesetzlichkeit)* is here taken by Kelsen. Concerning Kelsen's concept imputation *(Zurechnung)* he is anxious to emphasize that it has nothing to do with the legal-political principle of imputation, especially designed for criminal law. Imputation does not imply anything but that a certain fact, e.g. a crime, is the condition for a certain legal effect, e.g. a certain compulsory reaction. See Kelsen, *Allg. Staatslehre,* pp. 49 f. Cf. Kelsen 1934, pp. 22, 57, 119 ff.

breaks down at once through the introduction of this 'ought' which is indeed nothing else than a purely arbitrary construction with no other support than its necessity and this simply in order that the 'pure theory of law' may be presented in writing.

A striking expression of the absurdity in this 'pure theory of law' appears to me to be its attitude towards (legal) sociology, however consistent it may be in itself. Knowledge of legal norms as identical with legal science demarcates itself, Kelsen says,

> against all other sciences which have in mind the causal explanation of the natural course of events. Also more particularly against a science which establishes as its object to explore the causes and effects of those natural occurrences which, interpreted from legal norms, appear as legal acts. If one will designate such an exploration as sociology, particularly as legal sociology, no objection can be raised to such a designation.[6]

Actually the situation is such that writers on (legal) sociology quite independent of Kelsen's doctrine seem to lack sufficient understanding of the necessity for scrutinizing the social phenomena and problems in the *consciousness,* if I may say so, of their own presuppositions or conditions, namely, those which make them live in society. The basis and nature of this society demand the most penetrating explanation that it is possible to give. That explanation, which I have sought to present, consists of everything which I have indicated above and referred to what I call the legal machinery. If one does not have the necessary knowledge of the construction and function of this machinery—how can a person, other than as a dilettante, enter into any thorough and comprehensive discussions of social or sociological questions? Kelsen and his followers or successors of various shadowings have here encouraged evil ways. Legal sociology shall indeed be permitted to invesigate the causes and effects of the natural occurrences in society. But such research may concern itself only with these occurrences without respect to their relation to any norms which are understood or presumed to be valid, i.e. without respect to what Kelsen considers as law.[7] Since writers on sociology cannot be expected to penetrate the queer

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[6] Kelsen 1933, p. 197; Kelsen 1934, pp. 9 f.

[7] Kelsen 1933, p. 197. Cf. Kelsen 1934, p. 10.

character of 'the pure theory of law' but understand this 'theory' as legal science, the consequence can be—to the extent that authority is attached to Kelsen—that writers on sociology also alienate themselves from the discussions within the sphere of a *true* legal science, however significant such discussions may be for the sociological science itself.

Now, to state this point more parenthetically, I have discussed Kelsen's doctrine in some detail, in order to propound the following question: Would it indeed be possible for a person of average intelligence—after consideration of what I have presented with regard to the factual legal activities and the equally factual, although indirect, influence of the maintenance of law on the consciousness, feelings and actions of men—to regard law and legal science in this *abstract and completely unreal way*? Even if one is acquainted with the legal machinery only to the extent that appears from this book—would it then be possible for those ideas which characterize the 'pure theory of law', ideas which are completely absurd with respect to the actual state of matters in our societies, to come into one's head? Kelsen has never made such a criticism of legal ideology which the realities of the legal machinery have developed in him. On the contrary he has continued in the belief that legal ideology with its metaphysical world —its *geistige Welt*—would be inescapable for *law,* of which one could otherwise not gain the mastery. But Kelsen has been plagued by the confusion of the usual legal ideology. He says that jurisprudence has been completely uncritically mixed with psychology and biology, with ethics and theology.[8] He forgets to point out that it confuses its legal ideology with social aims (*sozialer Zweck,* 'social policy' etc.) and allows legal ideology to veil and obscure the viewpoints of social welfare. With his lack of understanding for the realities of law, i.e. for the legal machinery, nothing has remained for him other than to create the 'pure theory of law' by means of 'purgation'.

The criticism of Kelsen is that he believes that one can judge law and legal concepts without taking any more penetrating consideration of all of the actual circumstances which I call the legal

[8] Kelsen 1934, p. 1 f.

machinery. The criticism of the 'pure theory of law' is that its *entire point of departure*—that which is called positive or valid law, as different from nature, i.e. the world of reality—is pure fantasy. This has been shown, concerning Kelsen's basic works, briefly and irrefutably by Hägerström.[9] There has been no need for me to present Kelsen's doctrines in greater detail. But I believe that I can rightly say that the irrationality of the entire so-called pure theory of law becomes quite clear from my criticism of the conceptions of wrongfulness, legal rights and duties, legal rules etc., from my efforts to clarify, in connection with this criticism, certain realities obscured by the veils of legal ideology, and moreover from my analyses of the legal machinery, however incomplete the latter of these analyses may be.

[9] Hägerström, *Inquiries,* pp. 257 ff.

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