Ancestors: Early Empirical Approaches to the Analysis of Legal Concepts in Modern Legal Theory

FRANCESCA **POGGI**
University of Milan

FRANCESCO **FERRARO**
University of Milan

ABSTRACT
This chapter provides an introduction to thinkers who, starting in the 18th century, have advocated an empirical approach to jurisprudence. With regard to the 20th century, the focus will be on Scandinavian Legal Realism and American Legal Realism. These thinkers' approaches can be labelled as "empirical" in one or more of the following senses: 1) they undertake to explain legal concepts by relating or reducing them to empirical facts; 2) they seek to explain the directive function of law in empirical terms; 3) they develop an empirical methodology for the study of legal reasoning in general, and judicial reasoning in particular, and assume that the methods of legal theory must be continuous with those of the natural sciences.
The three previous senses of "empirical approach" are interconnected: their common trait lies in the translation of legal concepts into empirical facts in order to make their functions amenable to empirical enquiry, both in directing conduct and in legal reasoning. However, those three senses need to be distinguished, since not all of them are expressly adopted by the thinkers under discussion.

KEYWORDS
early modern jurisprudence, Scandinavian legal realism, American legal realism, naturalization, empirical approaches to jurisprudence

CITATION
Poggi F., Ferraro F. 2023. *Ancestors: Early Empirical Approaches to the Analysis of Legal Concepts in Modern Legal Theory*, in Brigaglia M., Roversi C. (eds.), *Legal Reasoning and Cognitive Science: Topics and Perspectives*, «Diritto & Questioni pubbliche», Special Publication, August 2023, forthcoming. (Preview published online on 07.08.2023)

DIRITTO & QUESTIONI PUBBLICHE / RECOGNISE
Legal Reasoning and Cognitive Science: Topics and Perspectives
Special Publication / August, 2023 (preview) pp. 1-17

ISSN 1825-0173

Ancestors: Early Empirical Approaches to the Analysis of Legal Concepts in Modern Legal Theory

FRANCESCA POGGI, FRANCESCO FERRARO

1. *Introduction*

This chapter provides an introduction to some thinkers who, starting in the 18th century, have advocated an empirical approach to jurisprudence. With regard to the 20th century, the focus will mostly be on Scandinavian Legal Realism and American Legal Realism[1]. The approaches in question can be labelled as "empirical" in one or more of the following senses.

Firstly, they undertake to explain legal concepts—like rights, duties, powers, or obligations—by relating or reducing them to empirical facts. The analysis of legal concepts has always been hotly debated. What does it mean that somebody has a right or that somebody else is under a certain obligation? One of the main problems is that legal concepts are not empirical facts: nobody has ever seen or touched a right or a duty. The existence of rights and duties is usually explained by referring to the legal norms which create them. However, on the one hand, the concept of "legal norm" is troublesome as well, and, on the other, this still does not explain what kinds of entities rights and duties are, or what kind of existence they have.

Secondly, the approaches in question seek to explain the directive function of law in empirical terms. The law has many functions, but especially important among them is that of directing behaviours. And yet, from an empirical point of view, law *prima facie* appears as a set of texts. How is it possible for a set of texts to successfully direct conduct?

Finally, the approaches here examined develop an empirical methodology for the study of legal reasoning in general, and judicial reasoning in particular. They assume that the methods of legal theory must be continuous with those of the natural sciences.

The three previous senses of "empirical approach" are surely interconnected. As we will see, their common trait lies in the translation of legal concepts into empirical facts in order to make their functions amenable to empirical enquiry, both in directing conduct and in legal reasoning. However, those three senses need to be distinguished, since not all of them are expressly adopted by the thinkers under discussion.

2. Early modern empirical approaches to legal reasoning: Hume, Smith, and Bentham.

The first modern attempts to apply an empirical and "scientific" approach to legal reasoning can

[1] We must warn that these are certainly not the only authors in whom it is possible to find traces of an empirical approach to law. Worth mentioning among the authors we have not been able to take into account is at least Petrażycki, the founder of Polish-Russian legal realism. For an accurate comparison between Polish-Russian legal realism and Scandinavian legal realism see FITTIPALDI 2016.

probably be traced back to the 18th century and to the work of David Hume. In the third book of his *Treatise*, Hume propounds his famous theory of justice as an "artificial virtue", namely, a disposition «based on social practices and institutions that arise from conventions» (MORRIS & BROWN 2022). As is well known, Hume followed the Newtonian model, in that he tried to offer an entirely empiricist and naturalistic account of the mind's working and contents. In turn, Hume's explanation of how the very concept of justice arises, and why humans feel moral approbation of justice as a virtue, is based on his theory of the mind. Although it could be objected that Hume's concern with justice is with morality, not law, his account of justice traces morality back to conventional social rules, having «features which jurists often associate with law and not with "pre-legal" social rules or custom» (POSTEMA 2019, 81). That is, justice, for Hume, is an inherently juridical concept, and «law is as much involved in defining of the basic institutions of justice as it is in their interpretation and enforcement by formal governmental institutions» (POSTEMA 2019, 82). So, on the one hand, the *origin* of justice is tied to the development of legal rules, broadly understood as the result of social interaction and the development of conventions; and once these rules are fixed, terms like "obligation" and "right" start to make sense. On the other hand, Hume also provides a theory of obligation which could be seen as applying not only to moral but also to legal obligation. For him, an obligation to perform an action *x* only applies when some *motives* pertaining to the natural and common range of human motivation can prompt us to perform that action. In other words, *ought* implies *can* in the sense that we cannot be under any obligation if no corresponding motive can be found. Moreover, an obligation to do *x* entails that if we fail to do *x*, this is a sign that we lack a quality of character (the aforementioned "natural" motive) and that is a defect or imperfection. The defect or imperfection is such because it provokes a certain kind of displeasure in the observers, as distinguished from the peculiar pleasure we feel when we behold a virtuous action or trait of character. This latter kind of pleasure is generated by the passion of moral approbation. Moreover, when someone lacks the quality of character, ie. the motive needed to do *x*, they usually know it themselves, and they can come to feel shame for this lack and comply with the obligation out of a sense of duty, rather than prompted by a natural motive (HAAKONSSEN 1981, 30-34). This squares with Hume's widespread characterization as a *moral internalist*, namely, as someone who holds that motivation is conceptually connected with the acceptance of, or belief in, some moral standard (see DARWALL 1983, 55).

However, Hume's account does not really enable us to distinguish between purely moral and full-fledged legal obligations. This distinction is one that can instead be found in Adam Smith's jurisprudence. Smith likewise builds on the foundation of justice as a virtue. On his interpretation, however, justice is a purely «negative virtue», one that «only hinders us from hurting our neighbour. [...] We may often fulfil all the rules of justice by sitting still and doing nothing» (SMITH 2002, 95 f.). In contrast to other virtues, the rules of justice are clear and precise and leave room for no unforeseen exceptions—as we would say, they are indefeasible. This, in Smith's view, is due to the fact that justice or, better yet, injustice always elicits the same kind of emotional response by the «impartial spectator». A lack of justice, with the «positive hurt» or *injury* it inflicts, causes resentment in those affected, who will then seek punishment; due to the force of sympathy, the impartial spectator approves of the reaction (punishment) and may even be prompted to cooperate in supporting such a reaction (SMITH 2002, 86–88). The link between Smith's theory of moral sentiments and his «natural jurisprudence» is the concept of rights (HAAKONSSEN 1981, 99). Like "justice", "right" can be defined by appealing to injury; by establishing what actions constitute an injury to us, we can also lay down what our rights are (in the sense of the right *not to be subjected* to such actions). Smith even provides a classification of all subjects of law based on the division of rights, which in turn is determined by a division of the different kinds of injury that someone can suffer.

Smith's empiricist account of rights is based on the impartial spectator's sympathy with those whose rights are violated, that is, who suffer an injury. When it comes to «real rights», that is, rights to *things*, and hence rights held against any other subject—paradigmatically, property rights—the impartial spectator will sympathize with those who are disturbed in their possession by anybody else, and will approve of their reaction in protecting their possession and punishing the trespasser. But why does possession give rise to rights and elicit the spectator's sympathy? Smith's answer lies in the «reasonable expectation» that one can use and dispose of one's own possession: this is what activates the sympathetic mechanism, in that the spectator will sympathize with the expectation in question. However, such "reasonableness" will vary according to the specific circumstances in which the impartial spectator observes the injury being inflicted; hence, different historical and geographical contexts could allow for very different answers in regard to the kinds of things that could be deemed property (HAAKONSSEN 1981, 104-106)—and, one could add, in regard as well to the sheer amount of property that one can rightfully possess. Essentially the same explanation also accounts for «personal rights», i.e., rights to some service from another person. They derive from promises, i.e., statements that can give rise to reasonable expectations. *Obligations*, in turn, are explained in terms of the «expectation and dependance of the promittee that he shall obtain what was promised» (SMITH 1978, 87).

Interestingly, Smith's natural jurisprudence is meant as a *science*, but a *normative* one: it devises a model to be followed by an ideal statesman; hence, it is «the science of a legislator» (SMITH 1976, 39). The idea of a science of legislation was almost commonplace both in British and Continental Enlightenment (BURNS 1984, 7); from Smith himself and from Claude-Adrien Helvétius, this idea was enthusiastically received by Jeremy Bentham (BENTHAM 1968, 99; also HOESCH 2018). In Bentham, we probably find for the first time all three of the senses which we have distinguished with regard to an "empirical approach" to jurisprudence.

However, Bentham's jurisprudence pursues the naturalization of legal concepts as part of a «science of legislation» that is very different from Smith's, in that, as we will see, it draws a sharp distinction between the task of *describing* the law and that of *prescribing* how the law ought to be, as well as between moral and legal concepts.

"Universal expository jurisprudence" (i.e., the descriptive science of law) was, in his view, concerned with defining the basic concepts in law, such as "power", "obligation", "duty", "right", and "liberty", along with many others, among which we find "law" itself (in the sense of *a* law) (BENTHAM 1970, 295). Bentham's empiricist account of legal concepts lies in his theory of fictitious entities. He considered all nouns as being either «names of real entities» or «names of fictitious entities». Names of real entities stood for ideas derived from the perceptions of actually existing objects. By contrast, names of fictitious entities referred to entities to which no real, perceptible existence was ascribed; their existence was only feigned for the sake of discourse (BENTHAM 1997, 84). Conspicuous examples of such names of fictitious entities were nouns like "obligation", "right", and other legal terms: we cannot actually experience, in the sense of perceiving, an obligation or a right. However, the terms in question refer to complex states of affairs, which in turn are reducible to real entities. Hence, we can semantically analyse them by means of the «paraphrastic method», through which whole propositions having as their subject the name of a fictitious entity are translated into equivalent propositions having as their subject a name of a real entity (BENTHAM 1843a, 246 f.). For instance, if we wanted to analyse the term "obligation" (or its synonym "duty"), we would translate the sentence "An obligation to do x is incumbent upon y" into "If y abstains from doing x, she is likely to experience a certain pain (or loss of pleasure)". Obligation and duty are explained in terms of the likely punishment for failing to act accordingly, the punishment deriving from any of three "sanctions", that is, from any of three "causes of pain and pleasure": the religious sanction, in the form of punishments expected at the hand of some divinity; the popular or moral sanction, i.e., punishments deriving from the attitudes of fellow citizens; or the political or legal sanction, i.e. punishments administered by

judges and other legal officials (BENTHAM 1970, 35-37; BENTHAM 1977). Accordingly, we have religious, moral, and legal duties. "Right", in turn, was the name of a fictitious entity of "the second remove", in the sense that propositions about rights had to be translated into propositions about duties (i.e., duties of others towards the right-bearer). Hence, their relation to names of real entities was mediated by other names of fictitious entities (BENTHAM 1997, 164-166).

Thus we see that, for Bentham, the meaning of legal terms must be understood with reference to empirical concepts, like pain and its probability. Also closely tied to this empirically based semantic analysis is his account of the directive function of law. For Bentham, there are no norms understood as mysterious abstract entities. While "duty", "right", and the like are names of fictitious entities, when we speak of "a law" we are referring to a real entity (BENTHAM 2010, 316), namely,

> «an assemblage of signs *declarative* of a *volition* conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons [...] subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question» (BENTHAM 2010, 25 f.).

Hence, it seems that Bentham conceived of normativity as simply the result of a prediction on the law-subjects' part: the anticipation of a certain pain or loss of pleasure, which is sufficient to prompt action or abstention from action[2]. The directive function of law basically consists in its capacity to interfere with the individuals' "motivational set" so as to provide them with new, "artificial" motives to direct their conduct.

Lastly, Bentham endorsed method continuity between jurisprudence and the natural sciences. Despite Bentham's references to the Newtonian conception of science (HALÉVY 1901, 289 f.), a much deeper influence on his expository jurisprudence was probably that of Francis Bacon's and Carl Linnaeus's systems (JACOBS 1990; MIXON 2020). Be that as it may, Bentham conceived of morality as a science mainly based on «sensation and experience» derived from observation, «but partly [...] upon experiment, as much as medicine» (BENTHAM 1988, 26). He saw the science of legislation as one sub-branch of "Deontology", or the science of morality. In his all-comprehensive scheme of all the sciences (an idea he had drawn from Bacon and d'Alembert) (MACK 1962, 97, 105-112), each science was coupled with its respective *art*: on this approach, which has been labelled as «proto-pragmatist», the sciences had value insofar as they could be turned into techniques capable of acting on and changing reality (MACK 1962, 136 f.). Hence, the science of legislation was inextricably connected with the art of legislation, i.e., a technique meant to improve legislation. Another name for this art was "censorial jurisprudence", while "expository jurisprudence" corresponded to the science of legislation (BENTHAM 1970, 293 f.). However, the descriptive and prescriptive aspects of jurisprudence were never to be conflated: studying law *as it is* was different from prescribing how it *ought to be* (BENTHAM 1977, 397 f.). The former task belonged to the "Expositor", who dealt in *facts*; the latter, to the "Censor", who was concerned with *reasons* (BENTHAM 1977, 397 f.). In all cases, even statements about what ought to be were deconstructed by Bentham in purely naturalistic and empirical terms, since they simply expressed a sentiment of approbation on the part of those who uttered them (BENTHAM 1983, 206 f.) — thereby anticipating 20th-century metaethical emotivism.

[2] For simplicity's sake, we are leaving out the possibility (admitted by Bentham) of «praemiary or invitative laws», i.e., laws relying on the anticipation of pleasure (in the form of a reward) rather than pain (in the form of punishment). See BENTHAM 2010, 146.

3. *Scandinavian legal realism*

Scandinavian Legal Realism owes its name to Axel Hägerström's thesis of reality[3]. Against idealistic epistemological subjectivism, Hägerström affirms a subject-object dualism: he claims that, in the cognitive process, the subject comes into contact with a reality independent of her perception. According to Hägerström, in order to identify this reality we must refer to the law of contradiction[4]. This law states that two judgements, one of which denies what the other asserts, cannot both be true. This means that we cannot regard as real a situation in which two contradictory worlds exist. Therefore, according to Hägerström, we can regard as real only objects that are self-identical, that is, determined and, therefore, internally coherent. But in order to conceive of different wholes of objects as unified objects, we need to think of a unifying principle: «a whole in addition to which none other is thinkable» (HÄGERSTRÖM 1964, 53), a *continuum* which is determined, and which therefore enables us to identify other objects as self-identical, determined, and coherent (see HÄGERSTRÖM 1964, 53 f.). This unifying principle, according to Hägerström, cannot be but the world of the senses, that is, the world to which the knowing subject pertains[5]. In other words, in order to explain the possibility of an objective knowledge, Hägerström embraces the thesis which is nowadays labelled "ontological naturalism"[6], according to which there is one (and only one) spatiotemporal framework, and everything that exists is to be found in this framework[7]. Ontological naturalism claims that reality is exhausted by nature, by physical entities, and denies the existence of ideal, "supernatural", or other "spooky" kinds of entities.

Hägerström can be considered the founder of Scandinavian Legal Realism, and his ontological naturalism exerted a strong influence on all exponents of the movement: Anders V. Lundstedt, Karl Olivecrona, and Alf Ross all claim that nothing exists but "mere facts" (See, e.g., LUNDSTEDT 1932, 328 f.; OLIVECRONA 1939, 15, 25 ff.; ROSS 1958, 67). However, law is not a set of physical entities. To be sure, law is a set of texts (statutes, judicial decisions, etc.), but we usually think that such a set creates rights and duties, that it expresses norms directing people's conduct. What sort of entities are duties, rights, and legal norms? Scandinavian legal realists try to explain legal concepts (such duties and rights) as well as the directive function of law in empirical terms.

3.1. *Legal concepts in Scandinavian legal realism*

From Hägerström's thesis of reality it follows that moral and axiological facts do not exist. In fact, Hägerström maintains that moral and normative judgements express just feelings, emotions:

> «If one says, "It is good to possess a barrel of potatoes", this is the same, in so far as "good" actually has a valuational significance, as "How good it is, indeed, to be in possession of a barrel of potatoes"

[3] See HÄGERSTRÖM 1908. However, Hägerström explicitly distances himself from what he calls "realism", that is, the theory according to which objects are "out there" and the subject does not play any role in the cognitive process: see HÄGERSTRÖM 1908, 54 ff.; HÄGERSTRÖM 1964, 74; on this topic see also MINDUS 2009, 48 and 52 ff.

[4] See HÄGERSTRÖM 1964, 42: «The law of contradiction declares, in fact, what reality in itself is».

[5] HÄGERSTRÖM's argument is much more complicated than that just set out. For a more detailed analysis see FRIES 1944; SANDIN 1959; SANDIN 1966; MARC-WOGAU'S 1972; PATTARO 1974, 40 ff.; FARALLI 1982; CASTIGNONE 1995; LYLES 2006; MINDUS 2009, 48 ff.

[6] See BJARUP 2005; SPAAK 2009; FERRARO & POGGI 2014; PAPINEAU 2021. Hägerström himself calls his approach «rational naturalism», so as to stress «the completely logical character of sensible reality» (HÄGERSTRÖM 1964, 37). On this point see BJARUP 2005.

[7] Note that Hägerström does not demonstrate and does not intend to demonstrate that sensible reality truly exists: he argues only that every attempt to demonstrate anything, every judgement, postulates the reality of the world of experience, as proven by the fact that denying that reality gives rise to an inconsistency (see MINDUS 2009, 52).

> or "Oh, if one only had something like that!" Thus it is manifestly an expression of feeling» (HÄGERSTRÖM 1964, 70)[8].

In particular, some normative judgements, like duty-sentences, express «a simultaneous association of a feeling of conative impulse with the idea of an action» (HÄGERSTRÖM 1964, 114). Thus, for example, if the law states, "All citizens ought to pay taxes", what it expresses, and what it aims to create in the citizens, is a «state of consciousness of duty»[9], that is, an association between an unconditional feeling of volition and an idea of action ("paying taxes"). In particular, the "ought to" is perceived and presented as something which belongs objectively to the action of paying taxes, as if there were an «oughtness to be» (HÄGERSTRÖM 1964, 136) as an objective property of the action. Hägerström maintains that this objectification of duties, this feeling of a conative impulse associated with actions, is mainly caused by a process of sociopsychological conditioning, to which a variety of factors contribute (such as education, tradition, habits, the effectiveness of sanctions, and the convergence of different authorities in prohibiting and sanctioning the same conduct). All these factors in combination give rise to «the idea of a system of ways of acting, having the expression of command as an objective property, which carries with it a feeling of conative impulse and leads to a judgement on each particular action» (HÄGERSTRÖM 1964, 131).

In the same manner, Hägerström claims that the concept of a (legal) right conveys the idea of a supernatural power, a mysterious force, which in reality does not exist[10]. The idea of a right can only be explained psychologically, through an account that lays emphasis on the feelings of strength and power associated with the conviction of possessing a right.

It is worth noting that, according to Hägerström, feelings, emotions, and ideas of action are all natural entities: they pertain to the spatiotemporal reality, even if only indirectly, insofar as they belong to a person's mind, through which they therefore exist[11].

Thus legal norms are expressions of commands, i.e., expressions of a conative impulse combined with the idea of another person's action. They do not create duties and rights, but they create the *ideas* of duties and rights as objective properties, and they do so through complex sociopsychological mechanisms, in which an important role is played by the effectiveness of norms themselves and of sanctions[12]. Hägerström also notes that «the expression of a command leads one's thoughts inevitably to a commanding will» (HÄGERSTRÖM 1964, 133). However, according to Hägerström, legal norms are not imperatives: they are not expressions of the will of the State or of other collective entities. This sort of «singularly mystical will» does not exist: it is a fiction[13]. Law is just a system of rules which is actually applied and followed.

[8] As BJARUP (2005, 4) notes, Hägerström's view of morality «is a version of nominalism that holds that there are no moral concepts but only moral words that are used to express various feelings or sensations».

[9] For a more detailed analysis of this idea see PATTARO 2005, 135.

[10] See, e.g., HÄGERSTRÖM 1953, 4 ff. Hägerström also investigates the historical roots of the idea of a right, arguing that the Roman *ius civile* was conceived as a system of rules for acquiring and exercising supernal natural power through magical acts: see HÄGERSTRÖM 1927.

[11] See HÄGERSTRÖM 1908, 76; on this point see also PATTARO 2005, 138; LYLES 2006, 74; MINDUS 2009, 57; FITTIPALDI 2016.

[12] See HÄGERSTRÖM 1964, 167: «It is necessary [...] that fictitious or real commanding authorities should assert themselves effectively and unanimously in a society, in order that the expression of command shall be transformed into a supposed real property of a system of conduct and that the idea of duty shall enter».

[13] According to Hägerström, even if it were plausible to configure the law as an expression of will, in any case, the courts do not ever apply this will. Judges apply a law which does not correspond to the will of all the members of parliament, because historical research into the will of legislators is possible only within certain limits, nor can they be thought to have had a clear appreciation of the full implications of the law they enacted, not even in the case of a single legislator. In fact, a law will sometimes have to be applied to cases which could not have been foreseen at the time of its enactment. See HÄGERSTRÖM 1953, 34. On this point see also MINDUS 2009, 125.

> «When one talks of the "sovereign organs" of a society which is a state, nothing else is meant than that certain rules for the exercise of supreme power come to be applied by persons [...] appointed for that end, in consequence of forces operative within the society» (HÄGERSTRÖM 1953, 37).

Therefore, «[t]he legal order throughout is nothing but a social machine, in which the cogs are men» (HÄGERSTRÖM 1953, 354).

In sum, according to Hägerström, legal vocabulary is «only a matter of using empty words [...] to cause appropriate behaviour» (BJARUP 2005, 7). Hägerström shows how this is possible: he explains how empty legal concepts (or, better yet, sentences containing legal concepts) are connected to "real" psychological events—to false ideas about objective properties which actually do not exist in our world—and how such a connection arises. Moreover, Hägerström enquires into the role of these ideas of objective duties and rights in directing human behaviours[14].

Hägerström's theses strongly influenced other Scandinavian legal realists: Lundstedt and Olivecrona only deepened Hägerström's analysis of legal concepts. The only one to have departed from it to some extent was Alf Ross.

Ross likewise maintains that legal concepts express indefinite ideas about supernatural powers, which in reality do not exist. But Ross thinks that statements about rights can be interpreted in a meaningful way. According to Ross, the word "right" is used as a technical tool of presentation in order to connect a number of conditioning facts with directives for judges[15]. So, for example, to say that "Alf has a property right to the thing T" means that certain facts occurred (e.g., Alf has entered into a valid contract for the purchase of T, or has found T which was *res nullius*) and that, therefore, judges must use coercion is a certain way (e.g., if Karl has stolen T, judges must convict Karl of theft, or, if Alex has damaged T, they must order Axel to pay damages).

Thus Ross develops a logical analysis of legal rights which is very far from Hägerström's orthodoxy[16]. We will return to this point in § 3.3, but before that let us (in the next section) turn to how Olivecrona and Ross developed Hägerström's legacy in explaining the directive function of law.

3.2. *The machinery of law: Scandinavian legal realists and the directive function of law*

As we have seen, Hägerström argues that our false ideas of objective duties and rights play a decisive role in directing human behaviours. The analysis of the role of these false ideas within legal systems was especially deepened by Olivecrona.

Olivecrona maintains that, even if rights are not facts, «[t]he subjective ideas of rights are facts. They cannot be "excised" from the law in the sense of law as fact»[17]. According to Olivecrona, the idea of rights plays a directive function insofar as it exerts a psychological compulsion: it acts as a sign that indicates which actions are permitted and which are not. This psychological effect depends only partly on the threat of sanctions:

> «[the law] would become inefficient if people paid regard to the supposed rights of others only out of the fear of punishment, and if they implemented their legal obligations only under the immediate threat of

[14] Actually, according to Hägerström, the idea of law as a system of objective duties and the idea of law as the product of a superior and compelling force coexist and are both (incorrect and) effective in driving conduct: see HÄGERSTRÖM 1953, 251 ff.

[15] ROSS 1951. For some criticisms see OLIVECRONA 1971, 180 ff.

[16] On this point see BIX 2009.

[17] OLIVECRONA 1971, 185. By contrast, Lundstedt proposes to delete the traditional legal concepts or to use them only in inverted comma. See LUNDSTEDT 1956, 17. Indeed Lundstedt continues to use such traditional concepts in inverted comma.

> sanctions. [...] The directive function of the ideas of rights and duties on the one hand and the working of the machinery of justice on the other are mutually interdependent» (OLIVECRONA 1971, 191 f.).

In this regard, Olivecrona stresses that «[t]o be effective among the general public, legislation on rights presupposes that people [...] attach consequential ideas concerning their own behaviour to the supposed existence of rights» (OLIVECRONA 1971, 198). Also, new rights are always founded on pre-existing ideas of rights, on the «inveterate habit of taking one's own rights as a green light and that of others as a red light» (OLIVECRONA 1971, 199).

In sum, Olivecrona follows Hägerström in claiming that rights and duties are nothing but false ideas generated through a process of sociopsychological conditioning to which the machinery of justice and the fear of sanctions also contribute. However, Olivecrona emphasises, even more strongly than Hägerström, that such false ideas are fundamental cogs in the machinery of law, as well as in the process of psychological conditioning that creates them. It is because people *think* of rights and duties as something real that they act accordingly. It is because everyone *behaves* in this way that we are conditioned to continue to do so. Rights and duties do not exist, but the idea of rights and duties is crucial to explaining the directive function of law.

Alongside and behind the ideas of rights and duties, other factors explain the directive function of law, its ability to direct behaviour. This emerges above all in Olivecrona's analysis of legal rules. According to Olivecrona, legal rules are not commands: they are independent imperatives, that is, imperatives independent of personal relationships. Olivecrona distinguishes two elements of legal rules: an imagined pattern of conduct (which he labels *ideatum*) and «the particular form in which expression is given to it» (OLIVECRONA 1971, 115. See also OLIVECRONA 1939, 29 ff.) Olivecrona labels this second element *imperatum* and claims that it does not consist in «an expression of a wish on the part of the lawgiving authorities»[18]. Instead, it consists in an imperative—an unconditional "shall"—that makes no appeal to any values on the part of the addresses (see OLIVECRONA 1971, 120). In particular, the *imperatum* of legal rules consists in

> «the whole setting in which the enactment takes place: the working constitution, the organization functioning according to its rules, familiar designation of parliamentary bodies and state officials, etc. Once the constitution has been firmly established, the people respond automatically by accepting as binding the texts proclaimed as law through the act of promulgation. Thanks to this attitude among the addressees the *imperatum* becomes effective» (OLIVECRONA 1971, 130).

So, according to Olivecrona as well, there is not an *imperator* behind a legal rule: there is only a set of other rules, a machine functioning according to the rule, and a general, psychological, attitude of obedience.

> «[T]here is no homogeneous source of the rules reckoned as legal. [...] There is no single driving force to the system; the regular application of the rules and their efficacy in governing the life of society depends on a network of psychological and material factors (ideas of rights and duties, habit, belief in authority, fear of sanctions, and so on)» (OLIVECRONA 1971, 77).

What emerges, according to Olivecrona and Hägerström, is that law is a fact, but a very complex one: a network, an interaction, between psychological facts, material facts, ideas, habits, feelings, behaviours that support one another.

[18] OLIVECRONA 1971, 118. While Hägerström claims that legal norms are expressions of commands and not imperatives, Olivecrona claims that they are (impersonal) imperatives and not commands. However, the difference seems merely terminological. For, according to both authors, norms are made up of an idea of action coupled with a normative element that does not express any will.

A partly different analysis of law and legal norms is advanced by Ross. In *On Law and Justice*, Ross claims that the "real content" of a legal rule is always a directive for the judge concerning the use of force: «A national law system is an integrated body of rules, determining the conditions under which physical force shall be exercised against a person» (ROSS 1958, 34). According to Ross, this body of rules is valid if, and only if, judges apply it, and they do so because they feel bound by it. Legal norms are valid if, and only if, they are «effectively followed, and followed because they are experienced and felt to be socially binding» (ROSS 1958, 18). Therefore, to know which legal norms are valid means to know by what norms the courts feel bound: the task of a realistic legal science is to develop descriptions of how judges actually behave, in such a way that predictions can be made about their future conduct.

In the later *Directives and Norms* (1968) this conceptual apparatus becomes more sophisticated but remains essentially unchanged. Here Ross claims that a directive is a linguistic phenomenon, an action-idea conceived as a pattern of behaviour. As far as legal rules are concerned, Ross argues that they are impersonal and heteronomous directives that stand in a relation of correspondence to social facts, meaning that by and large they are followed by the members of a given society. According to Ross, «it is necessary for the establishment of a norm that it be followed not only with external regularity [...], but also with the consciousness of following a rule and being bound to do so» (ROSS 1968, 83). Ross repeats that, from a logical point of view, all legal norms are directed at judges (ROSS 1968, 90 ff., 113 ff.). However, he now admits that the rules addressed to citizens are felt to be independent and therefore «must be recognized as actually existing norms, in so far as they are followed with regularity and experienced as being binding» (ROSS 1968, 92).

In sum, according to Ross, the law is a set of linguistic meanings, but ones that exist in a very peculiar way: legal norms exist if, and only if, they are effective and felt as binding. Their binding force—the "experience of validity", as ROSS (1958, 62) calls it—is a psychological phenomenon, one that is owed to many factors (the same ones analysed by Olivecrona) and which must be accounted for as a fact. So the concepts of (valid) law are reduced to a mix of linguistic, sociological, and psychological facts.

3.3. *Scandinavian methodological naturalism*

Scandinavian Legal Realism contends that law is a set of facts, albeit a very complex one. Conceiving of law as a set of facts is the first step to developing an empirical approach to it. By "empirical approach" we mean the attempt to analyse law and/or legal reasoning in empirical terms. Nowadays, we call *methodological naturalism* the view that the methods of jurisprudence must be continuous with those in science. The continuity can be strictly *methodological* (i.e., philosophical theories must emulate the method of inquiry and styles of explanation employed in the sciences) or it can be *results-based* (i.e., philosophical theories must be supported by scientific results), or both. Whether the Scandinavians can be said to have adopted a methodological naturalism, however, is up for debate.

In this regard, Torben Spaak claims that Olivecrona's analysis of the function of legal rules could—in principle—be empirically tested. However, Spaak concedes that Olivecrona never emphasized the "testability aspect" of his analysis, nor did he devote himself to any sort of empirical analysis (see SPAAK 2009). The issue mainly depends on how we frame empirical analysis, on how we fashion scientific methods and results. Surely, the Scandinavian legal realists never collected statistical data, never expressly formulated predictions, nor did they try to falsify their theses or predictions by comparing them against empirical findings[19]. Even so, the inquiries conducted by

[19] In fact, the thesis that rights and duties are false ideas cannot be tested in this way, since psychological facts are not directly observable. On this point, however, see FITTIPALDI 2016, 309, who underscores how, following Karl Popper and Hans Albert's critical rationalism, entities not amenable to direct observation can be hypothesized in a way that is consistent with the Scandinavian legal realists' analysis.

Olivecrona, Lundstedt, and Hägerström recall scientific investigations in at least four respects.

First, their ontological naturalism places them in the same domain as science: they do not admit the existence of supernatural entities, or of any entities that are not scientifically ascertainable. Second, within that domain, they want to offer a descriptive explanation of legal phenomena. Third, they infer their explanation from empirical data: legal texts, ways of talking, and close historical analysis[20]. And, finally, such an explanation is focused on causal, and hence empirically testable, connections[21].

As far as Ross is concerned, a separate issue needs to be addressed. Ross adheres to logical positivism—which Hägerström instead rejected—and holds that the task of jurisprudence is to develop a logical analysis of the fundamental legal concept of general scope (see ROSS 1958, 25 f.), so as to ensure that the predictions made about law can be empirically verifiable (or falsifiable). But in fact Ross, throughout his career, confined himself to the first part of this task, namely, linguistic analysis. Moreover, his analysis is not merely a description of the current uses (of the various meaning) of these concepts, but rather consists in redefining these concepts, conceiving them anew by defining them in new terms[22]. This is certainly a very different enterprise from Hägerström's. Hägerström and Olivecrona do not want to redefine legal concepts so as to make them meaningful—or to do so according to logical positivism, by relating these concepts to facts—nor does Lundstedt embark on such an enterprise. What they want to do, rather, is to explain how these concepts work and direct behaviours, even if they do not refer to anything. In this respect, their analysis is also far removed from that of the American legal realists[23].

4. *The legacy of early American legal realism: legal concepts and facts*

It is usually accepted that, unlike the Scandinavian legal realists, the early American realists were not concerned with ontological issues. However, they *are* usually regarded as tacitly presupposing some version of ontological naturalism, this in order to make sense of their *semantic* naturalism, namely, the view that meaningful concepts must be directly or indirectly amenable to empirical analysis[24]. This does not necessarily entail subscribing to the view that all existing objects have a factual existence and are thus amenable to empirical proof. For instance, the ontology of Felix S. Cohen explicitly included nonfactual objects, such as relations and processes (COHEN 1960, 62 fn.).

An empirical approach to the analysis of legal concepts is typical of Oliver Wendell Holmes, usually deemed to be the founding father of American Legal Realism. A prominent example of an approach that reduces legal concepts to empirical facts is offered by Holmes's famous reduction of legal science to the point of view of the "bad man", that is, to the prediction of the

[20] See HÄGERSTRÖM 1953, 299: legal science «has become one of the special sciences. Like physics and chemistry, for example, its function is merely to establish the facts within a certain region, to reach general principles by induction, and to make deductive inferences from the inductively established results».

[21] See OLIVECRONA 1971, 84: «the law is a link in the chain of cause and effect». LUNDSTEDT 1956, 126: legal science must be concerned with «social evaluation and other psychological causal connections». On this topic see also BJARUP 2005; FERRARO & POGGI 2014; FITTIPALDI 2016.

[22] This is particularly evident in his analysis of the concept of a legal right (§ 3.1.). Olivecrona criticizes Ross's argument about legal rights, claiming that there is no historical foundation for the assumption that the rules of private law are primarily conceived as rules on the use of the State's force, which rules are then expressed in a more simple and practical way by inserting the word «right». On the contrary, Olivecrona stresses that the rules of private law are generally conceived as rules regulating people's rights and duties: «we cannot take a single step in describing private law without making use of the words "right" and "duty"» (OLIVECRONA 1971, 180).

[23] On this point see, e.g., PATTARO 2005; BIX 2009; FERRARO & POGGI 2012; FITTIPALDI 2016.

[24] LEITER 2007, 35 fn. (Leiter considers this as one of two forms of «substantive» naturalism, the other being an ontological view); SPAAK 2009.

consequences the courts could attach to certain behaviours[25]. For Holmes, a legal duty 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» (HOLMES 1952, 169). Much like Bentham—and unlike Hume and Smith—Holmes's empirical approach allows for (and indeed requires) a clear-cut distinction between moral and legal concepts: the bad man's interest in the law is merely instrumental to avoiding clearly identifiable disagreeable consequences[26]. Legal norms do not seem to belong to Holmes's conceptual toolbox. Moreover, his insistence on the need for a purely predictive approach to legal science explains away the law's directive function as a by-product of its being a set of predictions regarding the disagreeable consequences which the "bad man" would seek to avoid. Of course, this leaves a central question unanswered—namely, how judges (and government agencies) are supposed to be guided by existing law in their decision-making[27]. They would probably also have to think of the undesirable consequences they themselves would incur if they should misapply the law or improperly enforce it.

Almost four decades later, this same empirical approach to the analysis of legal concepts is endorsed by Felix S. Cohen, who develops a "functional approach" meant to analyse the mysterious, "supernatural" concepts of legal language in purely factual terms. Any such concept that would eventually come out as unable to «pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it» (COHEN 1960, 48). Like Holmes's approach, Cohen's is an inquiry into factual, empirically assessable consequences, understood as the real meaning of legal concepts, which are thence brought back to earth from the «ghost-world of supernatural legal entities» (COHEN 1960, 54). Not too distant from Cohen's functional approach is Jerome Frank's, who considers legal concepts as artificial devices with an "operational character"[28]. Frank considers legal concepts to be fictions, understood as ideas used as «means to aid thinking» but with no pretence of real existence[29]. Therefore, both Frank and Cohen hold that legal concepts are not directly amenable to empirical enquiry, but in order to be meaningful they must hold at least an indirect relationship with empirically ascertainable facts. Hence, these concepts are to be seen as shorthand or abbreviations, useful for the sake of discourse and possibly of thought (FRANK 1932, 91).

It is more difficult to find some uniformity in the American realists' treatment of the concept of a legal rule. As noted, Holmes saw legal rules as mere predictions of the courts' decisions. According to Frank, some realists were "rule-sceptics", in the sense that they thought that "paper rules"—rules which could be derived from law books by means of interpretation—concealed the "real rules" that describe judicial behaviour and are useful for predicting future judicial decisions. Other realists, in his view, were "fact-sceptics", in that they thought that the «elusiveness of the facts on which decisions turn» made it impossible, in most (though not all) cases, to predict the outcome, no matter how precise the applicable rules (FRANK 1949, 10 s.). Despite the fact that «Frank's description of the fact-sceptic is basically a description of himself» (DUXBURY 1991, 178), he also acknowledges that «the so-called legal rules have *some* effect» in determining the judge's final decision (FRANK 1931, 43). Frank seems to ascribe to rules a capacity to causally influence judicial decision: they can do so as one of the very many possible factors that lead the judge to

[25] Holmes's "prediction theory", however, was anticipated and probably inspired by Nicholas St. John Green: see HORWITZ 1992, 53 f.

[26] HOLMES 1952, 170-173. However, this by no means makes of Holmes a moral relativist, nor a non-cognitivist, as he thought that ethics could be made the object of a science: see TARELLO 1962, 42 f.

[27] GOLDING 1986, 444. The first to make this point was probably John Dickinson: see DICKINSON 1931, 843.

[28] FRANK 1949, 167, 319 fn. However, Frank himself was dismissive of both Cohen's functionalism and Holmes's predictivism: see DUXBURY 1997, 133.

[29] FRANK 1949, 317. Frank refers to Hans Vaihinger's *Philosophy of As If* and adopts Vaihinger's distinction between dogmas, hypotheses, and fictions properly so called, as well as Pierre de Tourtoulon's distinction among fictions, lies, and myths.

form a "hunch" as to the correct solution to the case at hand[30]. Still, this does not say anything about what rules are and how they can be reduced to empirically ascertainable facts. This also relates to the question of the law's directive function, namely, its capacity to guide conduct and the possibility of explaining that capacity in empirical terms: Frank seems to take it for granted that a knowledge of legal rules can contribute to a sudden intuitive understanding capable of guiding judicial decision-making—as well as it can be helpful to lawyers in persuading courts to decide cases in their clients' favour (FRANK 1932, 761). However, for him, «the rules set forth in a judge's opinion may often be no more the cause of his decision than the cigar he was smoking when he made up his mind» (FRANK 1931, 44); and he provides no account of how rules—or, for that matter, cigars—can be a causal determinant of decision-making.

As much as Karl Llewellyn was reckoned by Frank among the rule-sceptics, his position was probably more nuanced. Llewellyn advocated a jurisprudential approach geared toward the study of dispute settlement and official behaviour. In his view, such an approach would translate traditional legal notions, such as that of legal rule, into purely factual terms. He sought to ascertain how far the "paper rules" of traditional jurisprudence were purely on paper (like "dead-letter" statutes) and how far they were instead "real" (LLEWELLYN 2008, 24). By "real" he famously meant "law in action" and (as reported by Frank) he held that real rules were predictions proper. They belong to the realm of "isness" rather than "oughtness": they purport to describe what *is going to* happen, rather than to prescribe what *should* (or *ought to*) happen. This is the use made of the term "rule" by legal scientists. But Llewellyn finds a place for paper rules as well, because in his view legal rules are in the first place «rules of authoritative ought, addressed *to* officials, telling *officials* what the *officials* ought to do» (LLEWELLYN 2008, 23). The officials may not comply with such authoritative directives, or they may comply only partly. Nonetheless, these directives imply a «tacit statement» that officials are already complying with them and a prediction that they will do so in the future. Llewellyn holds that it is a shared tradition that such implicit statements and predictions are solemn truths, and to a certain extent this belief is self-fulfilling. In any case, this tradition entails that «a good paper justification, in terms of officially accepted paper rules» is necessary for any decision to «be regarded as likely of acceptance» (LLEWELLYN 2008, 24). The "verbal formulation" of rules provides a "stimulus" to which officials react in certain ways (LLEWELLYN 2008, 25). Hence, although he does not explain *how*, Llewellyn holds that some complexes of signs causally and factually determine official behaviour. The "official formulae" of the law are there to be used by lawyers to influence court behaviour (LLEWELLYN 2008, 25).

For Llewellyn, rights are the counterparts to rules; «the right is the shorthand symbol for the rule». When a rule favours someone, that person is considered to have a right. When rights are «ascribed to particular individuals in specific circumstances», they «are deductions which presuppose the rule; the major premise is the general rule on rights; the minor is the proposition hooking up this individual and these circumstances with that general rule». As a legal concept, they help gather all the possible remedies which can be allowed for the violation of certain rules; concrete remedies can be seen, while rights cannot, but they have a «scope independent of the accidents of remedies» and of the concrete multifarious behaviours of the courts. In this sense, they afford a «scientific advance», because they enable us to think more clearly among feigned «ultimate realities» supposedly underlying the endless variety of specific cases (LLEWELLYN 2008, 10).

More generally, Llewellyn acknowledges the role that all legal concepts play in organizing thought by means of classification. The data received through the senses need to be arranged into categories; otherwise, they are useless. Categories and concepts, however, «tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience»

[30] FRANK 1949, 112. Frank borrowed the notion of the judicial hunch from HUTCHESON 1929.

(LLEWELLYN 2008, 28). They are useful organizing tools, but they can also deceive, since they tend to suggest the existence of facts corresponding to their classifications, even when such facts are lacking; moreover, they can distort observation when new data are forced into old categories. Nonetheless, other realists also recognize the undeniable usefulness that «conceptual formulation and a logical arrangement» have for «economy of thought and harmony of structure», as well as for economy and harmony in human minds. That, for example, is the view of Max Radin, who acknowledges the role that legal conceptualism plays in making it possible to handle the whole body of legal material: legal institutions, judicial precedents, and statutes (RADIN 1931, 827).

4.1. *Methodological naturalism in American realist jurisprudence*

American legal realists consistently advocate that the same methods applied in the natural sciences should also be used in jurisprudence and legal science. Walter W. Cook, for instance, propounded «a scientific study of law», by which he meant the application of the 20th-century logical and epistemological developments to jurisprudence. It is time, he said, to discard «[t]he nineteenth century notion of science as the ascertainment of all-embracing laws of nature, holding for all cognizable occasions, which we have seen disappearing from physical science in the twentieth century». He instead argued for the view that

> «[u]nderlying any scientific study of the law [...] will lie one fundamental postulate, viz., that human laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable. If so, it follows that the worth or value of a given rule of law can be determined only by finding out how it works, that is, by ascertaining, so far as that can be done, whether it promotes or retards the attainment of desired ends» (COOK 1927, 308).

What does this involve, in Cook's view? For him, once the common lawyer's traditional reasoning, based on presumptively fixed principles and rules, is shown to be «as grotesquely inadequate for legal purposes as the childish mechanical notions of the nineteenth century have shown themselves to be in the field of physics»,

> «we discover that the practicing lawyer, as much as, let us say, an engineer or a doctor, is engaged in trying to forecast future events. What he wishes to know is, not how electrons, atoms, or bricks will behave in a given situation, but what a number of more or less elderly men who compose some court of last resort will do when confronted with the facts of his client's case" (COOK 1927, 308).

While Cook also endorsed the view that knowledge of the law is basically about predictions, his theory is not vulnerable to the objection which, as discussed, could be levied against Holmes's application of the bad man's point of view, namely, that it cannot account for the judge's point of view.

> «If we shift our point of view from that of the practicing lawyer to that of the judge who has to decide a new case, the same type of logical problem presents itself. The case is by hypothesis new. This means that there is no compelling reason of pure logic which forces the judge to apply any one of the competing rules urged on him by opposing counsel. His task is not to find the prexisting [*sic*] but previously hidden meaning of the terms in these rules; it is to give them a meaning» (COOK 1927, 308).

In Cook's view, this implies acknowledging that the courts must, in fact, legislate (COOK 1927, 308). A similar approach to method continuity between 20th-century natural sciences and legal science is endorsed by Felix S. Cohen, who claimed that the functional approach he advocated

had already been applied in contemporary mathematics, physics, anthropology, and economics as a «functional attack upon unverifiable concepts» (COHEN 1960, 53).

A looser interpretation of scientific method and its application to legal science is offered by Frank and Llewellyn. Both insisted on an empirical approach to jurisprudence and somehow followed in the footsteps of Roscoe Pound's sociological jurisprudence, who saw the law as a social institution that could be reformed in order to pursue a number of general «social interests» (see, for instance, POUND 1943). However, their endorsement of empirical methods is much more consistent than Pound's.

Frank suggests that realist jurisprudence be renamed "experimental jurisprudence", an approach that, as he describes it, characterizes recent developments in both legal science and economics. Experimentalism is, for him, a complex of attitudes: experimentalists studied existing institutions critically and with an eye to possibilities of reform. «[T]hey repudiate fixed beliefs as to the eternal validity of any particular means for the accomplishment of desired ends» and «are keenly alive to the shifting nature of many of the so-called "facts" upon which all human action is based» (FRANK 1934, 2). Though admittedly vague, Frank's description of such an experimental attitude focuses on the rejection of established principles whose application has led to undesirable consequences. Experimentalists, in economics as in law, «tend to look upon human activities with the eyes of anthropologists» (FRANK 1934, 2). They hold that judges commence their reasonings not with premises, but rather with the conclusions they find desirable, «and work backward to the available premises»; similarly, lawyers seek to justify, if possible, what their client desires (FRANK 1934, 3 f.). It seems, then, that Frank's experimental jurisprudence—which he sought to put to the service of the Roosevelt administration's New Deal—is basically a trial-and-error method for achieving some desirable social and political results by means of legal argumentation.

Llewellyn instead focuses on «behavior analysis» as an alternative to the abstract, deductive thinking of the «devotee of formal logic in the law», who is «concerned with words, with propositions» and symbols. The study of the formal logic of judicial decisions could be very useful, provided it is accompanied by «an equally careful study of the instrumentalism, the pragmatic and socio-psychological decision elements in the same cases» (LLEWELLYN 2008, 20 fn.). Llewellyn seeks to bring jurisprudence closer to the other social sciences, like economics and sociology, and criticizes the kind of analytical approach that sees law as a closed system with its own principles and logic, separated from the other fields of human reality and knowledge. He endorses Roscoe Pound's sociological approach to jurisprudence, but criticizes «Pound's preference for the study of theory, verbalized theory, writer's theory, over study of results, or of how it gets done» (LLEWELLYN 2008, 501). In contrast, Llewellyn favours the consistent application of sociology, anthropology, and ethnography to the study of the actual behaviour of those involved in the "craft" of law: as is well known, he gave an example of this approach himself by studying the law and customs of the Cheyenne together with anthropologist Edward Adamson Hoebel (see LLEWELLYN & ADAMSON HOEBEL 1941).

References

BENTHAM J. 1970. *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns, H.L.A. Hart , The Athlone Press, 1 ff.

BENTHAM J. 1977. *A Comment on the Commentaries and A Fragment on Government*, ed. by J.H. Burns, H.L.A. Hart , The Athlone Press, 576 ff.

BENTHAM J. 1983. *Deontology together with a Table of the Springs of Actions and Article on Utilitarianism*, ed. by A. Goldsworth, Clarendon Press, 394 ff.

BENTHAM J. 1988. *The Correspondence of Jeremy Bentham. Volume 7: January 1802–December 1808*, ed. by J.R. Dinwiddy, Clarendon Press, 394 ff.

BENTHAM J. 1997. *De l'ontologie et autres textes sur les fictions*, Seuil.

BENTHAM J. 2010. *Of the Limits of the Penal Branch of Jurisprudence*, ed. by P. Schofield, Oxford University Press.

BIX B.H. 2009. *The American and Scandinavian Legal Realists on the Nature of Norms*, in DAHLBERG M. (ed.), *De Lege: Uppsala-Minnesota Colloquium: Law, Culture and Values*, Iustus Förlag, 85 ff.

BJARUP J. 2005. *The Philosophy of Scandinavian Legal Realism*, in «Ratio Juris», 18, 1, 1 ff.

CASTIGNONE S. 1995. *Diritto, linguaggio e realtà*, Giappichelli.

COHEN F.S. 1960. *The Legal Conscience: Selected Papers of F.S. Cohen*, in KRAMER COHEN L. (ed.), Yale University Press, 505 ff.

COOK W.W. 1927. *Scientific Method and the Law*, in « American Bar Association Journal», 13, 6, 303 ff.

DARWALL S.L. 1983. *Impartial Reason*, Cornell University Press.

DUXBURY N. 1991. *Jerome Frank and the Legacy of Legal Realism*, «Journal of Law and Society», 18, 175 ff.

DUXBURY N. 1997. *Patterns of American Jurisprudence*, Oxford University Press.

FARALLI C. 1982. *Diritto e magia*, in PATTARO E. (ed.), *Contributi al realismo giuridico*, Giuffrè, 11 ff.

FERRARO F., POGGI F. 2014. *A Commitment to Naturalism: Bentham and the Legal Realists,* in TUSSEAU G. (ed.), *The Legal Philosophy and Influence of Jeremy Bentham*, Routledge, 224 ff.

FITTIPALDI E. 2016. *Introduction: Continental Legal Realism*, in PATTARO E., ROVERSI C. (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, 297 ff.

FRANK J. 1931. *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, in «University of Pennsylvania Law Review», 80, 1, 17 ff.

FRANK J. 1932. *What Courts Do in Fact*, in «Illinois Law Review», 26, 761 ff.

FRANK J. 1934. *Experimental Jurisprudence and the New Deal*, Congressional Record (Bound), 78 . 12, 12412 ff .

FRANK J. 1949. *Law and the Modern Mind*, Stevens & Sons.

FRIES M. 1944. *Verklighetsbegreppet enligt Hägerström*, Harrassowitz.

GOLDING M.P. 1986. *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, in «Journal of Legal Education», 36, 1986, 441 ff.

HAAKONSSEN K. 1981. *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith,* Cambridge University Press.

HÄGERSTRÖM A. 1908. *Das Prinzip der Wissenschaft. Eine logisch-erkenntnistheorische Untersuchung*, SKHVSU Almqvist & Wiksell.

HÄGERSTRÖM A. 1927. *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung. Volume 1*, SKHVSU Almqvist & Wiksell.

HÄGERSTRÖM A. 1953. *Inquiries into the Nature of Law and Morals*, Almqvist & Wiksells boktr.

HÄGERSTRÖM A. 1964. *Philosophy and Religion*, George Allen and Unwin.

HALÉVY E. 1901. *La formation du radicalisme philosophique*, Alcan.

HOESCH M. 2018. *From Theory to Practice: Bentham's Reception of Helvétius*, in «Utilitas», 30, 294 ff.

HOLMES O.W. 1952. *Collected Legal Papers*, Peter Smith.

HORWITZ M.J. 1992. *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*, Oxford University Press.

HUTCHESON J.C., Jr. 1929. *The Judgement Intuitive: The Function of the 'Hunch' in Judicial Decision,* in «Cornell Law Review», 14, 3, 274 ff.

JACOBS S. 1990. *Bentham, Science and the Construction of Jurisprudence*, in «History of European Ideas», 12, 5, 583 ff.

LEITER B. 2007. *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford University Press.

LLEWELLYN K., ADAMSON HOEBEL E. 1941. *The Cheyenne Way*, University of Oklahoma Press.

LLEWELLYN K. 2008. *Jurisprudence: Realism in Theory and Practice*, with a new introduction by James J. Chriss, Transaction Publishers.

LUNDSTEDT A.V. 1932. *The Responsibility of Legal Science for the Fate of Man and Nations*, in «New York University Law Quarterly Review», 10, 326ff.

LUNDSTEDT A.V. 1956. *Legal Thinking Revised. My Views on Law*, Almqvist & Wiksell.

LYLES M. 2006. A *Call for Scientific Purity: Axel Hägerström's Critique of Legal Science*, Rönnells.

MARC-WOGAU, K. 1972. *Axel Hägerström's Ontology*, in OLSON R.E., PAREL A.M. (eds.), *Contemporary Philosophy in Scandinavia*, Johns Hopkins Press, 479 ff.

MINDUS P. 2009. *A Real Mind*, Springer.

MIXON R.W. JR. 2020. *Bentham, Science and Utility*, in «Revue d'études benthamiennes», 18. Available on: https://journals.openedition.org/etudes-benthamiennes/8127#toc01112.

MORRIS W.E., BROWN C.R. 2022. *David Hume*, in ZALTA E.N. (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition). Available on: https://plato.stanford.edu/archives/sum2022/entries/hume/.

OLIVECRONA K. 1939. *Law as Fact* (1st Ed.), Einar Munksgaard, Humphrey Milford.

OLIVECRONA K. 1971. *Law as Fact* (2nd Ed.), Stevens & Sons.

PAPINEAU D. 2021. *Naturalism*, in ZALTA E.N. (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition). Available on: https://plato.stanford.edu/archives/sum2021/entries/naturalism.

PATTARO E. 1974. *Il realismo giuridico scandinavo I, Axel Hägerström*, Cooperativa libraria universitaria editrice.

PATTARO E. 2005. *The Law and the Right: A Treatise of Legal Philosophy and General Jurisprudence. Volume 1*, Springer.

POSTEMA G.J. 2019. *Bentham and the Common Law Tradition* (2nd Ed.), Oxford University Press.

POUND R. 1943. *A Survey of Social Interests*, «Harvard Law Review», 57, 1 ff.

RADIN M. 1931. *Legal Realism*, «Columbia Law Review», 31, 824 ff.

ROSS A. 1951. *Tû-tû*, in BLOM USSING H. (ed.), *Festskrift till professor, dr. Juris, Henry Ussing*, København, 468 ff.

ROSS A. 1958. *On Law and Justice*, Stevens.

ROSS A. 1968. *Directives and Norms*, Routledge & Kegan Paul.

SANDIN R.T. 1959. *Axel Hägerström's Philosophy of Religion with Special Reference to His Theory of Knowledge*, University of Minnesota.

SANDIN R.T. 1966. *The Concept of Reality and the Elimination of Metaphysics*, in «The Monist», 50, 87 ff.

SMITH A. 1978. *Lectures on Jurisprudence*, ed. by R.L. Meek, D.D. Raphael, P.G. Stein, Oxford University Press.

SMITH A. 2002. *The Theory of Moral Sentiments*, ed. by K. Haakonssen, Cambridge University Press.

SPAAK T. 2009. *Naturalism in Scandinavian and American Realism: Similarities and Differences*, in DAHLBERG M. (ed.), *De Lege: Uppsala-Minnesota Colloquium: Law, Culture and Values*, Iustus Förlag, 33 ff.

TARELLO G. 1962. *Il realismo giuridico americano*, Giuffrè.