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Comparing the Two Legal Realisms—American and Scandinavian

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"We are all Realists now," as the saying goes. The American legal theorists who repeat this mantra seldom recognize, however, that the statement is ambiguous. Historically, there were two self-styled "Legal Realist" jurisprudential movement, American and Scandinavian. Because they are largely unaware of the second of these two movements, American legal scholars have not compared them.[1] The purpose of this article is to begin to fill that gap.

Like comparative law, comparing jurisprudential schools is risky business. One way of keeping matters focused is to select a particular substantive legal subject and examine how scholars in the two movements treated that subject. This article adopts that approach. I will critically evaluate how scholars in American and Scandinavian Legal Realists treated property, both as a concept and as a legal institution.

Property turns out to be an especially revealing lens through to compare Scandinavian and American Legal Realism. On the surface American and Scandinavian Realist discussions of property reveal substantial differences between the two movements. While property issues were widely and thoroughly discussed by American Realists, their Scandinavian counterparts paid little attention to the whole subject. When they did discuss property, they focused almost exclusively on conceptual or strictly analytical questions rather than, as the Americans did, discussing how property, both a social and a legal

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This paper is dedicated to the memory of Betsy Clark. *Veni ut Deus.*

1. There is one exception to this statement, Michael Martin, *Scandinavian and American Legal Realism* (1997).

institution, affects political, economic, and social relationships in liberal societies. The difference between their two treatments of property seemingly reflect the more basic difference between the two schools of thought. Scandinavian Legal Realism was a version of legal positivism, seeking a strict separation between law and politics and law and morality. American Legal Realism, on the other hand, was an extension of political Progressivism, insisting that law is deeply infused with questions of power. From this perspective, then, Scandinavian and American Legal Realism seem to have been nearly opposite jurisprudential movements.

Viewed not simply as jurisprudential movements but as parts of their broader political cultures, however, Scandinavian and American Realism have more in common than first meets the eye. Both were critical movements that sought to assert their respective legal systems' independence from the past. American Legal Realism was an overtly critical movement that reacted against the politically conservative orthodoxy of nineteenth-century Langdellian "legal science." Similarly, Scandinavian Realism was as a critical movement, reacting against an entrenched jurisprudential tradition that had profoundly undemocratic effects. In this deeper sense, then, Scandinavian and American Realism can be understood as parts of a trans-Atlantic critical legal movement that sought to widen democracy.

If this interpretation of Scandinavian Realism is correct, then the question becomes why did Scandinavian Realism's treatment of property appear apolitical? Before turning to this question, I need first briefly to describe the two Realist movements, specifically focusing on their treatment of property. The succeeding sections address the question that I just posed. I argue that differences between the background political and legal traditions of Scandinavia and the United States required the two groups of Realists to adopt different strategies for pursuing a common goal – widening the scope of democratic order. The Scandinavians sought to create more room for democratic politics by making jurisprudence more scientific. By "demystifying" law, the Scandinavian Realists sought to purge it from all remaining traces of the old Order, especially the two pillars of that Order, aristocracy and religion. Doing so required a sustained and withering critique of the "metaphysical" character of what conservative apologists of the old Order perversely called "legal science." The American Realists, on the other hand, sought to demonstrate the inevitably political character of law. Both Realist groups, however, shared a common conception of democracy, and both sought to realize their democratic ideal by adopting strategies that suited their respective legal and political cultures. American Realists were trying to open issues involving property, its use, distribution, and other matters, to democratic politics by freeing it from the grip of *Lochner*-era

judicial activism that removed those issues from the realm of politics. The Scandinavians, on the other hand, faced a different legal-political culture, but one whose effect was, like the American legal culture of the late nineteenth century, to limit the realm of democratic politics. This was the legal culture that was heavily influenced by the German schools of *Begriffsjurisprudenz*, on the one hand, and *Interessenjurisprudenz*, on the other hand. While these two schools of jurisprudential thought were rivals, both claimed to have made law more scientific. It was precisely that claim that the Scandinavian Realists attacked. What I am suggesting, then, is that between the late nineteenth and early twentieth centuries there occurred a trans-Atlantic critical legal movement whose central objective was eliminate law as an obstacle to democratic reform.

I. American Legal Realism and Its Critique of Property

A. *Realism as the Descendant of the Progressive Movement*

Beginning around the turn of the twentieth century American legal scholars increasingly criticized the classical Blackstonian conception of property. That conception described ownership as a "sole and despotic relationship" between a person and a thing. The Blackstonian conception, American scholars argued, was both inaccurate and disingenuous: inaccurate because it wrongly suggested that it was possible for one person to have absolute freedom in the use and control of his things; disingenuous because it hid from view the political function of property. These legal intellectuals set out to demolish the Blackstonian conception and to develop an alternative conception that emphasized the social and political dimensions of private property. The primary catalyst for this project was the political ideology of Progressivism.

Historians commonly define the Progressive era as ending with World War I. That definition implies that there was a sharp disjuncture between the Progressive political movement and the reformist New Deal program that Franklin D. Roosevelt initiated with his first election as President in 1932. It is as though the impulse for reform was completely moribund between 1917 and 1932 and that the New Deal reformers started on a clean slate. Neither of these implications is accurate. Many intellectual leaders of that period viewed the prewar reforms as incomplete, and after the war they argued that social and economic changes had made reform even more imperative. The Great Depression seemed to prove their arguments correct, and it created the necessary sense of emergency to renew the project of reform. The New Deal continued the agenda of Progressivism, and in this sense can be called "Progressive" as well.

The same experience of continuity was present in legal thought. Most accounts of Legal Realism sharply distinguish that intellectual

movement, which historians conventionally date in the 1920s and 1930s,[2] from sociological jurisprudence, which was closely related to early twentieth-century Progressivism. Morton Horwitz recently—and correctly—has criticized this depiction of the relationship between Progressivism and Legal Realism. He has convincingly argued that "[f]or many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism."[3] According to Horwitz, the most important common denominator between the two political-intellectual movements was their attack on legal orthodoxy, the crucial characteristic of which was an understanding of law as politically neutral.[4]

Agreeing with Horwitz's basic point that there was more in common between legal Progressivism and Legal Realism than what separated them, I want to suggest that in both movements legal scholars, joined by scholars from other disciplines who were interested in law, engaged in a common enterprise of critiquing the Blackstonian conception of property. What that conception hid, they repeatedly argued, was the role that private property played in structuring social relationships. Property was best understood not from the perspective of the non-social relationship between persons and things but from the vantage point of how ownership affects relationships among individuals. More trenchantly, these progressive critics pressed the theme that property is power. Owners hold legally-sanctioned power over non-owners in ways that limit the non-owners' individual autonomy and even their personal security. The task of property law, progressives concluded, is to determine when and why that power is legitimate.

The writers who pursued this project of critique and reconstruction included, in rough chronological order, the following: Richard T. Ely, Wesley Newcomb Hohfeld, Robert Hale, John R. Commons, Morris R. Cohen, Thurman Arnold, A.A. Berle, Gardiner C. Means, Myres McDougal, and David Haber. These writers did not constitute a coherent group. Indeed, they did not constitute a "group" at all, in the sense that the Bloomsbury group did, for example. Some did not even

2. The following is a much truncated list of accounts of the Legal Realist movement: John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995); Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986); Wilfred Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (1968); William Twining, *Karl Llewellyn and the Realist Movement* (2nd ed. 1985); Hull, "Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931," 1987 *Wis. L. Rev.* 921; Purcell, "American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory," 75 *Am. Hist. Rev.* 424 (1969); White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," 58 *Va. L. Rev.* 999 (1972).

3. Morton J. Horwitz, *The Transformation of American Law, 1870-1960* 169 (1992)

4. Id., at 170-71.

know each other; some were not contemporaries of the others. Not all of them were lawyers, and some never taught in law schools. To a considerable extent, however, they were aware of each others' work and regarded their work as building upon that of those among them who came earlier. In this sense they constituted a (non-exclusive) conversational network of scholars.

Though they did not share all of the same political values, they did share the conviction that adjustments in the relationship between government and the private sphere were necessary to adapt American law and politics to changing economic and social conditions and would be adequate to achieve social and economic justice. Some, like Hohfeld, did not understand their work primarily as politically motivated, yet even the seemingly least political texts had profound implications for opening up the strongly political character of property, both as a legal concept and as an institution. All of these writers' works, in one way or another, contributed to a powerful critique of the classical liberal conception of property, which depicted the sole function of private property as securing freedom and autonomy for individuals. All of them were influential participants in an ongoing scholarly conversation about the meaning and functions of property in American law and society that continued roughly from 1913 to 1950. That conversation shaped the dominant legal understanding of property by the middle of the twentieth century. It clearly framed in American legal discourse the dialectic between two understandings of the role of property in society, one economic and private, the other political and social.

B. The Context of the Progressive Critique: Turmoil and Reform

The period between 1890 and 1913 was a time of tremendous economic, political, and social upheaval and conflict in the United States.[5] As one historian recently observed, without exaggeration, these years "were among the most tumultuous in American history."[6] Industrial capitalism introduced unprecedented economic change, as the country experienced successive depressions and industrial corporations grew dramatically in size through combinations and consolidations. Immigration reached tidal wave levels, stimulating expressions of anti-"alien" sentiment in a rising crescendo. The increasing concentration of wealth and power widened the gap between the haves and have-nots and deepened feelings of resentment between opposite social-economic groups. In some instances, class con-

5. For a useful succinct overview of recent historiography of this period, see McCormick, "Public Life in Industrial America, 1877-1917," in *The New American History* 93 (Eric Foner ed. 1990).

6. Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* 1 (1991).

flict escalated into full-blown riots, and while these occasions were the exception rather than the rule, the fact that they occurred at all produced deep anxiety in many quarters.

For political and economic elites, the reasons for anxiety were especially acute. Recurrent waves of economic depression, labor unrest, and social conflict throughout the last quarter of the nineteenth century fueled the growing sense among many Americans that the old liberal political and economic order was both outmoded and unjust. For the first time in American history the unimaginable seemed possible: by the early twentieth century the Left seemed to be on the verge of becoming a serious force in American politics. As Dorothy Ross has acutely noted, "The failure of socialism to secure a permanent and substantial presence in America has made it easy to forget that its fate was still an open question in this period."[7] Leftist political groups, ranging from the Industrial Workers of the World (the "Wobblies"), which espoused a version of anarcho-syndicalism, to the much more accommodationist Populist party, gained unprecedented political clout as working people, including unprecedented numbers of immigrants, came to regard the existing distribution of wealth and power as fundamentally unjust. In retrospect, of course, there was little danger that America would be the locus of the proletarian revolution that Marx had predicted for Western Europe. None of the foundational elements of the extant order, including social and legal respect for private property, was ever seriously in jeopardy.[8] But appalling working conditions, growing concentration of economic power, and exclusion of large segments of the adult population (particularly White women and African-Americans of both sexes) from the political process did produce serious social and political unrest, including labor strikes, riots, and other acts of civil disturbance on an unprecedented scale.

These social and economic conditions prompted a wide variety of reform efforts beginning in the final decade of the nineteenth century and continuing through the first several decades of the twentieth century. Historians have debated the origins and meaning of Progressive era reforms in recent years. One view is that progressivism was a conservative force initiated by business leaders to maintain the extant political and social order in the context of profound social change.[9] It is certainly true that Progressives were reformers, not revolutionaries, and that the basic thrust of their programs was to keep the political and economic order in the United States a liberal order. It is also indisputable that progressive economic reforms left

7. Dorothy Ross, *The Origins of American Social Science* 98 (1991).

8. See Dawley, at 98.

9. The main exponent of this view is Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (1963).

the basic structure of legal relations within the economy largely intact, and in this sense progressivism was conservative.

Nevertheless, the "triumph of conservatism" thesis seems overstated. As Alan Dawley has recently shown, Progressivism "challenge[d] elites to remake the liberal state in accord with the emergent forms of social life."[10] In particular, Progressive-era reforms effected a substantial revision of economic liberalism. Government, both state and federal, increasingly occupied a far more visible role in regulating the nation's economy, altering the relationship between government and business in ways that were unimaginable just a few decades earlier. From labor relations,[11] to tax policy,[12] to competitive market conditions,[13] federal and state government became increasingly active in adjusting the legal rules of the market to the very different conditions that prevailed by the early twentieth century. To be sure, governments, especially state governments, had in fact regulated many aspects of economic activity well before the Progressive era, but the presuppositions of Progressive governance differed significantly from those that prevailed through most of the Gilded Age. Progressive governance made no pretense of co-existing with the joint ideologies of laissez-faire and anti-paternalism. Its ideology was frankly paternalistic and interventionist, particularly on social issues. Such measures as the "mothers' pension," workers' compensation, prohibition of child labor, regulation of women workers' hours and work condition were all pet Progressive projects, and all were promoted on the argument that government had an obligation to protect society's weaker members from its stronger members.[14]

C. The Critique of Classical Economics

The dramatic swings in the nation's economic fortunes during the Gilded Age, together with the sudden rise to prominence of large industrial corporations, led a new generation of economists to rethink how the market functioned and what role government should play in the market's domain. The Progressive critique of classical economics provided a model for legal scholars who initiated a critique of legal

10. Dawley, supra n.6, at 138.

11. Progressive-era labor reform had its greatest success in the context of child labor. See Wiebe, *The Search for Order,* at 169-73.

12. Both the federal income and estate taxes were the products of Progressive reform efforts. The first income tax was enacted in 1913, following passage of the 16th Amendment. The first federal death tax was introduced in 1898, but was abolished in 1902 with the close of the Spanish-American War. After sustained pressure from a variety of quarters, including President Roosevelt and Andrew Carnegie (whose "Gospel of Wealth" argued that the evils of inherited wealth far outweighed its benefits), Congress enacted an estate tax as part of the Revenue Act of 1916.

13. On the antitrust debates of the Progressive era, see generally Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916* (1988).

14. Dawley, supra n.6, at 98-105.

orthodoxy a decade or so after the first generation of Progressive economic scholarship appeared. Both in method and substance, the new thinking about the operation of the market and the relationship between government and business directly influenced legal thought in general and property theory in particular. Some of the legal critics had studied under Progressive political economists. Others had at least read and in some cases taught the new economists' work.[15] The economists whose work most directly influenced lawyers were Richard T. Ely, Edwin R.A. Seligman, John R. Commons, and Robert Hale.

The central insight of the Progressive critique of classical economics was that the classical model of the market no longer fit the new conditions of corporate capitalism. The classical model had posited that economic equilibrium depended solely on maintaining competition among producers. So long as a substantial number of firms competed with each other in an industry, prices would remain stable, and the firms would produce efficiently. This model anticipated that the competitive market itself would maintain firms relatively small in size and that large consolidated firms were unnatural. Only minimal government interference was needed to maintain this stable state of affairs. The appearance and dramatic expansion of huge industrial firms in the American economy after 1870 increasingly placed these assumptions in doubt.

While the Sherman Anti-Trust Act (1890) reflected the persistent influence of laissez-faire assumptions that industrial concentration was unnatural and that the laws of the market would ultimately prevail,[16] younger economists in the late nineteenth century began to question the classical economic model of the competitive market. Examining the causes of the economic downturns that had occurred with bewildering frequency in many western industrialized countries, including the United States, Britain, and Germany, these economists developed a revised theory of economic behavior. Viewing

15. The *Encyclopedia of the Social Sciences,* published between 1930 and 1935, was only the most conspicuous (and among the last), signs of intellectual interactions between the Progressive (institutional) economists and Legal Progressives and Realists. Edwin R.A. Seligman, an influential political economist at Columbia, was the editor-in-chief, while Roscoe Pound served as its legal editor. Earlier, Karl Llewellyn identified John R. Commons' book *Legal Foundations of Capitalism* as an exemplary form of interdisciplinary scholarship on law and economics. See Llewellyn, "The Effect of Legal Institutions upon Economics," 15 *Am. Econ. Rev.* 665 (1925). Earlier still, Richard T. Ely's book *Property and Contract in Their Relation to the Distribution of Wealth* (1914) was taught at several law schools, including Harvard, where Roscoe Pound required it in his jurisprudence seminar. "There is nothing else on the subject worth talking about," he declared. See Benjamin G. Rader, *The Academic Mind and Reform: The Influence of Richard T. Ely in American Life* 199 (1966).

16. See Horwitz, supra n.3, at 80-81; Hovenkamp, "The Sherman Act and the Classical Theory of Competition," 74 *Iowa L. Rev.* 1019 (1989); Hovenkamp, "The Antitrust Movement and the Rise of Industrial Organization," 68 *Texas L. Rev.* 105 (1989).

classical political economy as anachronistic and unable to explain the historically unprecedented conditions of large industrial capitalism, the revisionists denied that competition was always socially beneficial or economically efficient. Increased competition among producers itself had led to overproduction and declining profit margins, thereby triggering economic downturns.[17] According to the new theory of the market, the trend toward corporate consolidation and concentration was both economically logical and socially beneficial. Large industrial corporations, the theory went, would stabilize the economy and make economic cataclysms less likely to occur.

The substantive implications of this new theory of industrial concentration for government-business relations were ambiguous, at least formally. On the one hand, as the leaders of the large corporations recognized, the theory could be used to a defend a continued government policy of deference toward corporations. One could plausibly argue (and corporate leaders did argue[18]) that attacking trusts for the purpose of maintaining competition was not only futile but counterproductive since competition was the root cause of persistent economic turbulence.

Progressives drew a different conclusion, however. They pointed out that the new theory demonstrated that the market was not always self-correcting, and that liberty of contract, the keystone in the foundation of laissez-faire, did not always increase wealth. Visible hands could and increasingly did take over the controls of the market under industrial capitalism, driving out competition in order to maintain high profit levels. How the market behaved and whether its social consequences would be positive or harmful was, at bottom, a matter of power, not of the laws of nature. The new type of industrial corporation increasingly controlled the market because its size created advantages that the old nineteenth-century corporation simply lacked. On balance, Progressives believed, the new corporations regulated the economy in socially and economically beneficial ways, but opportunities for abuse of that power clearly existed. Progressives looked to government to regulate in those areas of potential abuse. Specifically, they tended to favor regulation of oligopolistic industries, antitrust enforcement, and labor union organization. Government's function in the new marketplace, then, was as a kind of second-order regulator, regulating the large industrial corporations that were the primary regulatory institutions.[19]

Progressive political economy's methodological implications for legal theory were as important, if not more so, as its substantive im-

17. Sklar, supra n.13, at 55.

18. See Horwitz, supra n.3, at 83 (quoting the president of the American Cotton Oil Trust as asserting that the development of trusts was part of "a steady, wise, and logical evolution, or improvement in the method of conducting industrial affairs.").

19. See generally Sklar, supra n.13, at 57-68; Ross, supra n.7, at 145-51, 174-75.

plications. Methodologically, Progressive economics differed from classical economics in three main respects. First, it was committed to an empirical, or behavioral approach to the study of economics. For those who were educated in Germany and influenced by the German historical school of social science, a historical evolutionary approach was a crucial part of their empiricism. Historical evolutionism rejected the deductive approach of classicists, who posited that the market followed certain universal laws. As Richard T. Ely put it in his autobiography, Progressive political economists of his generation accepted "the idea of [historical] relativity as opposed to absolutism and the insistence upon exact and positive knowledge . . . ."[20] Economics was, above all, a *social* science. Its domain was not an abstract or metaphysical entity known as the market, but human behavior, and there were no a priori laws of human behavior. One could meaningfully study human behavior only at particular times and in particular places.

Unlike their classical predecessors, the new generation of economists emphasized the central and irreducible role of human agency in the operation of the market. They rejected theories that minimized the role of individual volition in economic development, whether the theory came from the political Right—the invisible hand—or the Left—Marxian historical materialism. Nothing about the operation of the market, or any other aspect of social life for that matter, was inevitable or necessary. Necessitarian theories were not only wrong, they were also insidious, for they bred a sense of passivity and lack of responsibility among citizens. Historical circumstances bounded the range of social and economic change that was possible, but change was both possible and, the Progressives, believed desirable.

Second, Progressive economists deliberately set out to revise their discipline and other social sciences to bring them in line with the reality of the present. They had all been profoundly affected by the late nineteenth-century changes in character of capitalism and the social problems that those changes had engendered, including what they considered the very real threat of class conflict. The social, economic, and political upheaval of the Gilded Age made them keenly aware of the fact that the rate of historical change was rapidly increasing.[21] Their age, their culture constituted a sharp break with the past, and there was no reason to expect that the pace of change would abate. Prompted by their empiricism and historical outlook, the new generation of economists, and social scientists generally, set out to refocus attention on the actual operation of existing institutions and social practices, rather than abstract models. They sought to make their disciplines genuinely *social* sciences.

20. Richard T. Ely, *Ground Under Our Feet* 146 (1938).
21. See Ross, supra n.7, at 148-51.

The final methodological change that Progressive social scientists made was the turn to objectivity. Increasingly after 1900, political economists and other social scientists wanted to separate the ethical from "what is" and declared that social facts, not ethical values, were the proper subject of their scientific studies. Their increasing reliance on the fact-value distinction posed a dilemma for early twentieth-century social scientists, however. Despite their professionalization, they remained keenly interested in policy matters and the political implications of their work. How could they reconcile the ideological conflicts within their ranks with their claim to value-neutrality?[22] Dorothy Ross has shown how they responded to this problem with various tactics: begging off on controversial questions on the ground of "scientific modesty"; allowing provocative reformist papers to be presented at public meetings while leaving more "professional" individuals to point out the scientific flaws; and, most commonly, maintaining ideological balance, or at least the appearance of balance, in journals, professional meetings, and public discussions.[23] A politically "left" paper or presentation was always balanced by a spokesperson from the "right." In this way, although the ideological dimension of their work was acknowledged, the profession as a whole remained neutral on particular issues.

Every one of these methodological changes affected legal scholarship and legal theory. Early twentieth-century law school teachers' own aspirations to be scientific and professional led them closely to monitor developments in the social sciences.[24] While most of them continued to regard law as an autonomous discipline (it was not until the 1920s and 30s that Realists began explicitly to treat law itself as a social science), many leading legal scholars in the first two decades of the twentieth century regarded growing professionalization and methodological changes in the social sciences as a model that legal study could and should emulate. The influences of the new social scientific method was evident in legal scholarship in many areas, but especially so in property law.

22. See Ross, supra n.7, at 159.

23. Id., at 159-61.

24. The close interaction, based on shared aspirations for professionalization and scientism, between legal scholars and social scientists in the late nineteenth century is indicated by the fact that several leading law school teachers involved in the revision of legal education actively participated in the newly-founded American Social Science Association. Yale law school professor Simeon Baldwin served as its president from 1897 to 1899, while Christopher Columbus Langdell and James Bradley Thayer of Harvard, and T.W. Dwight of Columbia were early and active members. See Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* 219-222 (1977).

D. From Progressivism to Realism

No great change in legal thought marked the transition from Legal Progressivism to Legal Realism in general. Indeed, in some respects the only substantial difference between the two is the generational difference between their academic exponents. Perhaps the best way of looking at the relationship between Progressive legal thought and Realist thought is to view Realism as largely an extension of the project of Progressives like Ely and Commons. As we have discussed, that project itself is best understood as a reformist effort to adjust the private property/free contract legal regime to the social and economic changes associated with the rise of large-scale industrial enterprise. The project's main objective was accommodationist—to adjust the relationship between individual and social power in order to preserve the basic elements of the private property/free market regime.

In large measure the same was true of Legal Realism. The Realists were hardly political or legal radicals, however much their worst critics may have viewed them as such. Their recurrent substantive themes were that law and public policy were inseparable and that the public and private spheres were deeply intertwined. Those themes were not intended to lay the foundation for any fundamental transformation but rather to explain and justify the need for governmental regulation of a variety of economic activities. The Progressives, however, had already made much of the case for a regulatory state, and in this sense Legal Realism was little more than a clean up operation, extending the critiques of economists like Ely and Commons to legal issues that Progressive economists had not addressed.

There were some differences between the two movements, of course. The most important of these was not about the substance of public policy, but about public policy's philosophical foundations. Progressivism generally lacked Legal Realism's skepticism about the rational foundations of legal, moral, and political values.[25] Progressives like Commons and Ely never questioned, as many (though not all) Realists did, the existence of rational bases for ethical and political values.[26] While Commons, Ely, and other Progressive critics rejected mid-nineteenth century idealist and naturalist theories of rationality, they firmly believed that moral and political values could be rationally justified.[27] By contrast, one of the defining characteristics of post-1920 legal thought was the overt skepticism of any ra-

25. Horwitz, supra n.3, at 170.

26. An unusually clear expression of the belief in legal and moral rationality by two influential figures from the Progressive generation is Wigmore & Kocourek, "Editorial Preface," in *Rational Basis of Legal Institutions* (1923).

27. The best treatment of the pre-1920 intellectual project to construct alternative theories of rationality is James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (1986).

tional basis for legal, political, or moral values that Legal Realists like Jerome Frank (to cite the most obvious example) expressed. Much of the most controversial writing in the Legal Realist spirit was concerned with the problem of value.[28]

Realist writing about property, however, was not taken up with questions of rationality. Rather, Realist critiques of property reiterated the same concern that Progressives had earlier expressed regarding property and power. Their discussions of the relationship between property and power added little to what Richard T. Ely and John R. Commons had said a generation earlier. Like the Progressives, the Realists of the 1920s and 1930s perceived that underlying specific legal issues like the meaning of "reasonable value" was the more fundamental question of what property means in the modern regulatory environment. Moreover, they built on the Progressives' insight that property relations were a matter of power, really only elaborating and making more explicit their predecessors' observations about the publicness of private property.

E. Property as Coercive Power: Robert L. Hale

The relation between property and power was most fully developed by the lawyer-economist Robert L. Hale (1884-1969).[29] Hale was one of the first legal economists in American legal education. Having spent several years in corporate legal practice after graduating from Harvard Law School, he returned to his original interest in economics and took a Ph.D. from Columbia in 1918. He taught in the Columbia economics department at first and later received a joint appointment in the law school in 1922. His interests gradually shifted to legal aspects of economics, and within a few years he moved full-time to the law school where he remained until he retired from teaching in the mid-1950s.

Hale's influence was greater in legal circles than among academic economists, although his work on public utility economics was respected and cited by leading economists like James C. Bonbright.[30] His work was widely cited not only by legal scholars but also by several of the most distinguished judges of the time, including Hugo Black, William O. Douglas, and Jerome Frank.[31] While the bulk of his writing concerned public utility regulation, the work for which he

28. See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973).

29. The best full-length treatment of Hale is Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998).

30. See, e.g., James C. Bonbright, *Principles of Public Utility Rates* (1961), at. 33, 164, 183.

31. See FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) (Black and Douglas, JJ., concurring); M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949 (2d Cir. 1949) (Frank, J., dissenting).

is best known today in legal scholarship is his 1923 article, "Coercion and Distribution in a Supposedly Non-Coercive State"[32] and, later, his article "Bargaining, Duress, and Economic Liberty."[33] That brace of articles outlined his general theory of the relationship among law, property, and power in market transactions and laid the foundation for his culminating work, *Freedom Through Law*, published in 1952.[34]

Hale wanted to establish two basic points. The first was that the free market economy, like all economies, in fact was a system of coercive power. The second was that the legal system and the market, far from being separate realms, were interdependent. Taken together, these two points, Hale contended, indicated that effective policy decisions concerning resource allocation and income distribution require analysis of how the legal system itself distributes coercive power.

Hale considered the law of property to be a fundamental source of coercive economic power. He conceived the basic function of legal property rights not to be defensive—a means to protect oneself from unwanted interferences from others or the state—but offensive: the basis for coercing others to do something that the owner wishes. In his 1923 article on coercion and distribution Hale drew on Hohfeldian analysis explained the coercive role of ownership:

> The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He may remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences—consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided. Such avoidance may take the trivial form of paying five cents for legal permission to eat a particular bag of peanuts, or it may take the more significant form of working for the owner at disagreeable toil for a slight wage. In either case, the conduct is motivated, not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative.[35]

Many of Hale's relationships with judges, including Douglas, began as collegial relationships at Columbia Law School, particularly during the 1920s when Columbia was the center of Legal Realism. On Columbia's role in the development of American Legal Realism, see Kalman, supra n.2, at 68-97.

32. 38 *Pol. Sci. Q.* 470 (1923).

33. Hale, "Bargaining, Duress, and Economic Liberty," 43 *Colum. L. Rev.* 603 (1943).

34. Robert L. Hale, *Freedom Through Law* (1952).

35. Hale, "Coercion and Distribution," p. 472. Hale's attraction to Hohfeldian analysis was especially apparent in his articles on ratemaking, where he cited

Initially, what seems odd about Hale's analysis is its conception of coercion. Why is it coercion for a person to work at at an unpleasant job in order to earn enough money to buy food from another acting under coercion from the owner of the food, rather than a constrained choice? Hale's answer was that coercion *is* just the effect of one person's behavior that constrains another person's range of options. From one perspective, this sense of the term trivializes the concept of coercion, for it makes coercion ubiquitous. All choices are constrained choices simply by virtue of the fact of being made in the context of society. Every person's choices are constrained to some extent by the behavior of others, individually or collectively. Everyone is coerced, by everyone else.

But that was precisely Hale's point. He wished to establish that one could not maintain a categorical, mutually exclusive distinction between freedom and coercion. The crucial question is not, freedom or coercion, but "the *structure* of coercion (i.e., of mutually coercive capacity) and, therefore, of the *structure* of volitional freedom."[36] The crucial point for Hale was that there was nothing necessary or inevitable about the outcomes of either the market or legal processes. All legal-economic outcomes were the results of choices. The important matter on which to focus, Hale argued, is, who gets to choose?[37]

Hale was not the first to point out that allocative and distributive outcomes were the products of choices rather than the inexorable working of the invisible hand. John R. Commons had made the same point earlier, although less lucidly and forcefully.[38] What Hale added to this point was the further insight that one could not privilege certain social practices and institutions over others by characterizing them as "free" and others as "coercive." More concretely, it was pointless to try to establish market practices as being presumptively more legitimate than government regulation on the ground that government regulation coerces while market transactions do not. *Both* regulate, and *both* coerce. Hale continually emphasized that "to call an act coercive is not by any means to condemn it."[39] Clearly, some forms of coercion are illegitimate, but since coercion is ubiquitous, it can hardly be the case that all forms are illegal or improper. Arguments based on a categorical distinction between private freedom and public coercion begged the two important questions, what forms of coercion should be permitted and who gets to decide. Those questions

Hohfeld extensively. See, e.g., Hale, "Labor Law. Anglo-American," in *Encyclopedia of the Social Sciences* (1932), vol. 8, p. 669; "Rate Making and Property," p. 214-15.

36. Samuels, "The Legal Economics of Robert Lee Hale," p. 279. By "volitional freedom," Hale meant choices constrained by others. Id., at 277.

37. Id., at 279.

38. See id., at 280.

39. Hale, supra n.35, at 471.

were fundamentally issues of power, and issues of power had to be discussed and resolved openly and forthrightly.

F. Property as Sovereignty: Morris R. Cohen

Following Hale's "Coercion and Distribution" article by just a few years and closely paralleling it was perhaps the most straightforward critique of the idea that the state plays no role in the creation or distribution of property interests. Perhaps more successfully than any other article of the period, Morris R. Cohen's famous article, "Property and Sovereignty,"[40] demolished the notion that private right and public power were categorically distinct from each other.

It is more accurate to label Cohen a Progressive than a Legal Realist. He matured intellectually under the influence of leading Progressive figures like Herbert Croly and Walter Lippmann, who, as David Hollinger has observed, "sought to turn liberals toward the conscious, cooperative use of government power for reform."[41] He vigorously criticized aspects of Legal Realism, especially its behaviorism and its claims that moral and legal values lack rational foundations.[42] Still there was important common ground between Cohen and the Realists. Most importantly, Cohen shared the Realists' conviction that law and politics were interconnected. He believed that laissez-faire ideology, with its insistent radical separation of the private and public spheres, was not only intellectually indefensible but morally and politically repugnant. In this respect, Cohen stood shoulder to shoulder with Legal Realists like Hale, Walter Wheeler Cook,[43] and Jerome Frank,[44] as well as Progressive economists like Commons and Ely.

Responding to the Supreme Court's decision in *Adkins v. Childrens Hospital*[45] that a federal statute setting a minimum wage for women in the District of Columbia was an unconstitutional deprivation of property without due process, Cohen set out to demolish the classical liberal assumption that private property is wholly distinct from and prior to governmental power. Classical liberalism defined freedom, or liberty, negatively: individual freedom from interference from the state. That definition presupposed a social ideal in which individuals act independently of each other. Within this scheme, the role of property is to protect the individual's liberty by creating for

40. Cohen, "Property and Sovereignty," 13 *Cornell L.Q.* 8 (1927).
41. David A. Hollinger, *Morris R. Cohen and the Scientific Ideal* 203 (1975).
42. See Morris R. Cohen, *Law and the Social Order* 198-218 (1933); Cohen, "Justice Holmes and the Nature of the Law," 31 *Colum. L. Rev.* 352 (1931).
43. See Cook, "Privileges of Labor Unions in the Struggle for Life," 27 *Yale L.J.* 779 (1918).
44. See M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949 (2d Cir. 1942) (Frank, J., dissenting).
45. 261 U.S. 525 (1923).

each owner a zone of autonomy. Within that zone each person was free to act as she wishes, free from non-permissive encroachments by others, particularly the state. The state's sole legitimate role is to protect that zone by preventing others from unauthorized invasions.

Cohen argued that a "dispassionate scientific study" of "the nature of property, its justification, and the ultimate meaning of the policies based on it"[46] reveals "the actual fact that dominion over things is also *imperium* over our fellow human beings."[47] By the time Cohen wrote his article, this observation was well-worn. Hale had written extensively on it, and before him, so had Commons and Ely. The important question was what consequences follow from the insight that property is power, or sovereignty, delegated to individuals by the state?

Cohen's initial response was hardly bold or startling. He cautioned that "the recognition that private property as a form of sovereignty is not itself an argument against it."[48] Cohen was no radical and no socialist. He was a progressive liberal who never doubted that private ownership of property was fundamentally correct. He conceded that individual labor plays a legitimate, albeit limited, role in justifying private ownership, and he acknowledged that private property has an important economic function, stating that "there is a strong *prima facie* case for the contention that more intensive cultivation of the soil and greater productiveness of industry prevail under individual ownership."[49]

Taking the familiar liberal arguments for private property for granted, Cohen argued that the question of property had to be understood dialectically. "We can only say dialectically," he emphasized, "that all other things being equal, property should be distributed with due regard to the productive needs of the community."[50] The dialectic did not apply just to the matter of distribution. It applied to all aspects of property ownership, including power to transfer, possess, and use. Private ownership confers certain negative rights to individuals owners, Cohen argued, it is also subject to "positive duties in the public interest."[51] Cohen did not develop in detail the parameters of these positive duties and the public's correlative positive rights in privately-owned property, but some legal issues that had provoked considerable debate seemed to him to fall within the core meaning of this social obligation of obligation. Rate regulation was among these. Cohen saw no need to resort to the affectation doctrine to justify this sort of public interference with private ownership:

46. Cohen, supra n.40, at 11.
47. Id., at 13.
48. Id., at 14.
49. Id., at 19.
50. Id., at 17.
51. Id., at 26.

> Though the interests of free exchange of goods and services have never been as powerful as in the last century, governments have not abandoned the right to . . . fix the price of certain . . . services of general public importance, e.g., railway rates, grain elevators and warehouse charges, etc. The excuse that this applies only to businesses affected with a public interest, is a very thin one. What large business is there in which the public has not a real interest?[52]

More generally, Cohen's point was this:

> A government which limits the right of large land-holders limits the rights of property and yet may promote real freedom. Property owners, like individuals, are members of a community and must subordinate their ambition to the larger whole of which they are a part.[53]

In effect, Cohen was trying to sketch the outline of a political and moral theory of ownership that would bracket the scope of the commodified conception of property. His real contribution was to synthesize various strands of arguments that had appeared before and explicitly to articulate that synthesis in the form of a dialectic of sociality.

II. The Scandinavian Conceptual Critique of Ownership

It is easier to agree on the timing of Scandinavian Legal Realism's beginnings than those of its American namesake. While American legal historians disagree about the extent to which the American Realist writings of the 1920s and 30s, the Realism of Llewellyn and his contemporaries, were intellectually indebted to those of their Progressive fathers, the generation of Hohfeld, there is little disagreement–and little reason to doubt – that the beginnings of the Scandinavian movement are properly dated in the 1920s. To be sure, the Norwegian scholar Fredrik Stang produced a kind of Realist version of law around the turn of the century, but Stang's work is better interpreted as a Nordic expression of the *Freirechtsschule* and the *Interessenjurisprudenz* whose origins trace directly to von Jhering (d. 1892).[54] Indeed, Stang's views owe much to the early 19th century work of A.S. Ørsted (1778-1860). But neither Stang's work nor Ørsted's were pieces of a more widely-shared paradigm of Scandinavian legal thought. If there was a paradigm shift of Nordic legal scholarship, as I believe there was, it dates to the time of the so-called

52. Id., at 23.
53. Id., at 19.
54. See Dalberg-Larsen, "Four Phases in the Development of Modern Legal Science," in 23 *Scandinavian Studies in Law* 77, 86 (1979). On von Jhering's ideas and influence, see the very interesting recent *Festschrift, Rudolf von Jhering* (Okko Behrends ed., 1992).

Uppsala School, whose two earliest and most influential exponents were Vilhelm Lundstedt (1882-1955) and Axel Hägerström (1868-1939). As the great Realist scholar, Karl Olivecrona, himself stated, "In the nineteen-twenties, under the influence of the philosopher Axel Hägerström . . . And his friend and follower Vilhelm Lundstedt . . ., legal theory in Sweden took a new turn."[55] Olivecrona need not have so modestly confined the turning to Sweden, for Hägerström's and, to a lesser extent, Lundstedt's work profoundly influenced Scandinavian legal theory generally.[56] Adding the later figures, Olivecrona and Alf Ross, one can safely say that these four individuals constitute the core of Scandinavian Legal Realism. It is these individuals on whom I shall primarily concentrate.

As one shifts from American Legal Realist texts to Scandinavian Realist writing, perhaps the most striking difference that one notices is the virtual absence in the Scandinavian legal literature of any sustained discussion of the public, or political, dimension of private property. Fredrik Stang and Ragnar Knoph had written extensively on the private law dimension of property, and Hägerström and Lundstedt had frequently used the legal concept of ownership to illustrate their critiques of legal language. None of them, however, focused any attention whatsoever on questions such as the relationship between property and power, property and coercion, the distribution of property in society, the effect of property on social relations (and vice versa), and related questions that so preoccupied the American Realists. With the exception of Ross, all of the Scandinavian Realists appeared to have concentrated almost exclusively on a project of conceptual analysis, as their treatment of property illustrates.

A. Axel Hägerström and the Conceptual Critique of Ownership

On the surface, Scandinavian Realist writings seem far more concerned with philosophical questions, notably epistemological issues, than with economic or political problems. Indeed, H.L.A. Hart went so far as to say that the distinctive characteristic of Scandinavian Realism is that "though professedly skeptical in aim and empirical in method, [Scandinavian Realism] is much more like a kind of philosophy."[57] Whether or not that can accurately be said about the other main proponents of the Uppsala School, it certainly is the case

55. Olivecrona, "The Legal Theories of Axel Hägerström and Vilhelm Lundstedt," 3 *Scandinavian Studies in Law* 125, 127 (1959).

56. Olivecrona asserted that "[i]n Finland and Norway, Hägerström has been little studied." Id. at 142. That statement is contradicted, however, by Rune Slagstad, who contends: "Norwegian legal realism may be viewed as part of Scandinavian legal realism. It gathers within it themes taken partly from what is called the 'Uppsala School' (Axel Hägerström, Ingemar Hedenius, Vilhelm Lundstedt, Karl Olivecrona in Sweden, Alf Ross in Denmark) . . . ." Slagstad, "Norwegian Legal Realism Since 1945," in 35 *Scandinavian Studies in Law* 215, 217 (1991).

57. Hart, "Scandinavian Realism," 1959 *Cambridge L.J.* 233.

with respect to its seminal figure, Axel Hägerström. Virtually the entire corpus of Hägerström's work is, again to borrow Hart's words, "a sustained effort to show that notions commonly accepted as essential parts of the structure of law such as rights, duties, transfers of rights and validity, are in part composed of superstitious beliefs, 'myths,' 'fictions,' 'magic' or rank confusion."[58] Hägerström's overt discussion of property was limited to this goal, and it illustrates the most apparent difference between American and American Realism.

Hägerström's analysis of property appears strictly conceptual in character. The limited discussion of property and ownership in his most famous work, *Inquiries into the Nature of Law and Morals*,[59] is illustrative. Although his style was dense and prolix, three themes repeatedly emerged from his prodigious writings: (1) Modern jurisprudence (properly) aspires to be *scientific* in character. As such, it seeks to identify the *facts* which correspond to legal ideas and statements. (I'll call this the general epistemological thesis.) (2) There are *no* facts which correspond to that which we call a right of property. Therefore, the legal ideas associated with property and ownership "have nothing to do with reality."[60] (3) Fundamental legal concepts like ownership are based on and "maintained by magic, which can be utilized and made to work in the world of facts if the appropriate acts are performed."[61] It is no exaggeration to say that Hägerström's ambition was to purge legal analysis of its, in his view, metaphysical premises and to create a jurisprudence that is strictly scientific and grounded in observable and testable reality (scientific because it is so grounded).

Hägerström's discussion of ownership nicely illustrates both his goal and his method. In the introductory chapter of his book *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (The Roman Concept of Obligation in Light of the General Roman Legal View),[62] Hägerström immediately asserts that modern jurisprudence, unlike its Roman counterpart, "seeks to use only such notions as correspond to facts."[63] But, he contends, as soon as we try to determine what those corresponding facts are we run into serious difficulties.

> Suppose I have the right to property to a certain house. The only actual fact seems to be that the state guarantees to me

58. Id.

59. Hägerström, *Inquiries into the Nature of Law and Morals* (Karl Olivecrona ed., C.D. Broad trans., 1953). The book is actually a compilation of essays written between 1916 and 1939.

60. Id. at 4.

61. Bjarup, "Epistemology and Law According to Axel Hägerström," 29 *Scandinavian Studies in Law* 11, 13 (1985).

62. Axel Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung*, vols. I and II (1927, 1941).

63. Reprinted in Hägerström, supra n.59, at 1.

> a certain protection in my possession, provided that I or my predecessors have not taken certain actions by which I have lost that protection.[64]

This conception of ownership closely resembles that held by both Morris Cohen and Robert Hale, who emphasized that private property rights are nothing more or less than state-sanctioned coercion. Had Hägerström endorsed the conception he outlined, an interesting intersection between his views and those of Hale and Cohen might have emerged. But Hägerström foreclosed any such possibility when he rejected the conception as irremediably flawed. "[T]he state does not step in as protector," he argued, "unless I have actually lost possession of the thing . . . ."

> But the right of property would seem to be a right to the thing itself, *i.e.*, a right to retain possession valid against every other person. Can the state guarantee this? Of course not. All that it can do is to enable me to regain the house if it should already be in the possession of another person.[65]

One might quibble with this argument, pointing out, first, that the state's protective power can be activated even before I am dispossessed of the house (e.g., through the court's injunction power) and, second and more fundamentally, it is the constantly looming threat of the state's power that deters others from attempting to take it from me. This is the point at which Hale especially hammered away, and it is difficult to understand why that threat of power is not itself a "real fact" sufficient to ground the right of property. Had Hägerström accepted this point, it might have led him explicitly to discuss the political aspect of private property and thereby establish an apparent symmetry between Scandinavian and American Realism.

Rejecting this first possible meaning Hägerström moved on to consider a second.

> It is now said that a person's property means the fact commands all others, who are not entitled to the possession of this thing through special legal acts, to respect this person's possession; and that, in the event of disobedience to this command, it threatens to take coercive measures for the benefit of this person if he should so desire.[66]

That argument is equally flawed, Hägerström argued. In the typical lawsuit over possession both sides believe they are lawfully entitled to possession; hence no one is being disobedient. "[D]isobedience implies that one was aware of the command."[67] Hägerström provided no explanation for this statement, and it is hardly an incontestable

64. Id. at 1-2.
65. Id. at 2.
66. Id.
67. Id. at 3.

conception of disobedience. The important point, however, is not whether he was right or wrong, but that he found some flaw in every possible correspondence between property right and real fact that he could imagine. "It is plain," he contended, "that there are insuperable difficulties in determining the fact which corresponds to that which we call a right of property."[68] So what, one might interject? For Hägerström, the implications were nothing less that revolutionary: it meant that the legal idea of a property right has no basis in reality and therefore can only have a metaphysical basis.

> This insuperable difficulty in finding the facts which correspond to our ideas of such rights forces us to suppose that there are no such facts and that we are here concerned with ideas which have nothing to do with reality. . . .
>
> It seems, then, that we mean, both by rights of property and rightful claims, actual forces, which exist quite apart from our natural powers; forces which belong to another world than that of nature, and which legislation or other forms of law-giving merely liberate.[69]

There was, of course, another possibility open to Hägerström, one that was being developed by philosophers elsewhere. That possibility was simply to reject the correspondence theory of knowledge altogether and to replace it with a pragmatic understanding of truth and meaning rather than a referential understanding. That was precisely the move that American pragmatists, notably John Dewey, had already made by the time Hägerström wrote this essay. It was also the move that Wittgenstein had made by the time he repudiated the logical positivism that he had previously adopted under the influence of the *Wiener Kreis* and later under the tutelage of Russell and Moore at Cambridge.[70]

The difference between Hägerström's critique of legal concepts like ownership and that of the American Realists seems marked, then. The contrast becomes apparent by juxtaposing Hägerström's discussion with that of Hohfeld. While Hägerström was intent on demonstrating that law's conceptual apparatus was epistemologically empty, Hohfeld was anxious to show that it was normatively contradictory. As Joseph Singer has pointed out, what was important to Hohfeld was unmasking the illusion that "legal liberties could . . . be justified by the fiction that they concerned self-regarding acts" rather than by policy choices.[71] Hohfeld's elaborate tables of "jural oppo-

68. Id.

69. Id. at 4-5. Later, he refers to these non-natural forces as a "mystical basis." Id. at 8.

70. On Wittgenstein's development during the pre-World War I period, see Allan Janik & Stephen Toulmin, *Wittgenstein's Vienna* (1973).

71. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," 1982 *Wis. L. Rev.* 975, 1057.

sites" and "jural correlatives" was, to borrow Duncan Kennedy's and Frank Michelman's words, "not undertaken merely for the sake of clarifying discourse by supplying a precise vocabulary that people could use to avoid getting some distinct notions mixed up."[72] His goal was instead to refute the then-conventional wisdom that there is an inevitable, deductible symmetry between a *right* over some act and a *privilege* over the same act in any private legal order. "[T]here is," Kennedy and Michelman, paraphrasing Hohfeld, state, "no logically necessary bond between a right over some act or class of acts and a privilege over that same act or class, no logical reason why having the right must go with having the privilege, or vice versa."[73] The point was not simply a logical clarification; its real cash value was political. "To have a [Hohfeldian] privilege means . . . that one is the beneficiary of a state practice or rule of nonintervention."[74] Legal privileges are nothing less (or more) than state authorizations to choose between doing some act or not doing, without regard to the welfare of others. Put differently, the upshot of Hohfeld's analysis was to underscore the extent to which the state is responsible for structuring social relations, even in nominally non-interventionist legal orders. That is a point that Hägerström simply never addressed.

B. Vilhelm Lundstedt

Lundstedt was basically a more extreme version of Hägerström. He was a devoted student of Hägerström's and considered his chief mission to be the propagation of Hägerström's ideas. Folke Schmidt has stated that "[t]here existed between Hägerström and Lundstedt what can only be described as a God-to-Prophet relationship."[75]

In *Legal Thinking Revised*,[76] published posthumously in 1956, he summarized his scholarly goals in one sentence: "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."[77] By that, he meant "to cope empirically with questions of law."[78] His empiricism was entirely different from that of the American Realists who sought to make law more empirically grounded.[79] Rather, it meant "to show that all the conceptions of legal ideology are meta-

72. Kennedy & Michelman, "Are Property and Contract Efficient?," 8 *Hofstra L. Rev.* 711, 752 (1980).

73. Id. at 752-53.

74. Id. at 753.

75. Schmidt, "The Uppsala School of Legal Thinking," 22 *Scandinavian Studies in Law* 148, 160 (1978).

76. A. Vilhelm Lundstedt, *Legal Thinking Revised* (1956).

77. Id. at 5 (emphasis in the original text).

78. Id. at 6.

79. On the empiricist wing of American Legal Realism, see John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).

physical."[80] One of those conception was ownership, and like Hägerström, Lundstedt repeatedly asserted its "metaphysical" character.

Lundstedt argued that the conventional notion of a "right" to property or, in von Jhering's terms, an "interest" that is legally protected is pure metaphysics. There is no reality to concepts like "rights" and "interests." Such concepts are simply superstitions. In attacking von Jhering's conception of a legal right as an "interest" that is legally protected, for example, Lundstedt argued that the holder of a right is not able legally to protect his interest through a "processual [sic] claim" filed against the infringer of the right.

> The interest [involved in a property right] 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*.[81]

What seems to be driving Lundstedt to establish the "metaphysical" character of the idea of property rights is a point that bears some resemblance with that made by the Americans Hale and Cohen. He wanted to emphasize the role of legal machinery as the reality behind the metaphysics. In a striking passage, Lundstedt states:

> In opposition to such a metaphysical view, it is of importance to understand that [an owner'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. 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 a need no such a condition.[82]

What Lundstedt is trying to express here is that it is the power of the state as the constantly looming presence in the background of all private legal relations. The state's power is the indispensable precondition for those relations. This is why he says that "jurisprudence has literally come to confuse result and cause, for . . . experience reveals that [the owner's] possibilities of action with regard to the thing –let us say his actual power over it–solely constitute a collective conse-

80. Lundstedt, supra n.76, at 16.
81. Id. at 85.
82. Id. at 98 (footnote omitted).

quence of the maintenance of the rules of law in question, and the influence of this maintenance on people."[83] Lundstedt's point is not the just the familiar positivist theory of property, i.e., the Benthamite theme that property rights depend on state action. Rather his point is that everything that we take for granted as part and parcel of the legal property regime–individual property rights, others' respect for those rights, punishment of those who do not respect those rights, indeed social order and harmony themselves–all presuppose and depend on state power, or what Lundstedt calls "legal machinery." That is the only reality in the law of property. All else is "a product of pure fantasy."[84]

This way of looking at property rights is, as I have indicated, quite similar that the view of Robert Hale and Morris Cohen, but they differ in one very important way. For Hale and Cohen, the whole point of emphasizing individual property rights as state-delegated power to harm others was to unmask the illusion of the non-interventionist, i.e., laissez-faire legal order. Hale and Cohen wanted to establish that the dangerous, indeed insidious, fantasy is the idea that in so-called private legal orders the state has withdrawn in order to allow the invisible hand to work its magic. Lundstedt never made the connection between conceptual critique and political critique.

If Lundstedt overlooked property's political dimension, he did not overlook its social dimension. He repeatedly stressed that "legal activities . . . as well as jurisprudence have always been strongly influenced by social viewpoints."[85] Here again, however, Lundstedt's concerns departed from those of the American Realists. The Americans were concerned with the ways in which property, by conferring on the owner the power to coerce others, structured social relations and shaped entrenched hierarchies. By contrast, Lundstedt viewed the social aspect of property more neutrally, one may even say benignly. This is evident in his "method of social welfare," which he sought to establish as the scientifically correct alternative to the traditional "method of justice."[86]

In an earlier work (1920), Lundstedt had declared that one of the legal scholar's tasks is "to define legal rules and legal institutions by having regard to those purposes that from the point of view of *social welfare* should be attached to them."[87] Lundstedt was to repeat this thesis throughout his life, but it is not entirely clear what he meant by it. The source of the difficulty is the ambiguity in his notion of "social welfare." In *Legal Thinking Revised*, Lundstedt was at pains to distinguish the idea of social welfare from Benthamite and Millean

83. Id. at 99 (footnote omitted).
84. Id.
85. Id. at 124.
86. Id. at 6.
87. A. Vilhelm Lundstedt, *Principinledning* 6 (1920).

utility. The difference, he stated, is that the method of social welfare does "not consider any ethical or absolute principle . . . ."[88] He referred to the social-welfare idea as "no principle but merely a practical guide."[89] Guide to what, though? Folke Schmidt pointed out that the social-welfare idea is not very useful because Lundstedt attached different meanings to it at different times. In general, however, Schmidt suggested, the idea is best understood as indicating some sort of "common weal" idea.[90] When Lundstedt discussed the idea in connection with property, his meaning emerged more clearly.

In a discussion of compensation for expropriations of property, Lundstedt could not have been more direct about the way in which legal protection of property serves what he calls "social welfare":

> *[C]ompensation 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.*[91]

This, of course, is the familiar argument for private property rights based on the hypothesis that rational agents require incentives to be productive. The argument has a very long pedigree as one can glean by comparing the following two statements, whose authors were separated by a hundred years and an ocean:

> 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 of the industrious man through whose energy and hardships all this was brought about?[92]

> But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "*sub jove frigido,*" or a vertical sun, pursue the windings of this wily quadruped [i.e., a fox], if, just as night came on, and his stratagems and strengths were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permit-

88. Lundstedt, supra n.76, at 139-40 (footnote omitted).
89. Id. at 171.
90. Schmidt, supra n.75, at 161.
91. Lundstedt, supra n.76, at 106 (emphasis in the original).
92. Id. at 102.

> ted to come in at the death, and bear away in triumph the object of pursuit?[93]

Neither Bentham nor Locke would have found anything objectionable in either statement. Nor would modern law-and-economics scholars find anything objectionable in Lundstedt's views regarding the priority of wealth-creation over fairness in wealth distribution. "[I]n the provinces of the law of torts and the law of contracts there must, in the nature of things, be extremely little room for any consideration of the points of view of equity and justice."

> 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. . . . A distribution of wealth on equitable principles is worth nothing if there *exists no wealth to be distributed.*[94]

This statement creates a considerable space between Lundstedt and those American Realists who were influenced by political progressivism and institutional economics, such as John R. Commons and Richard T. Ely. True, not all American Realists addressed the question of wealth redistribution, and none favored complete equality in the distribution of wealth or income through society. But it is difficult to imagine any of them stating, as Lundstedt did, that there must be "there must, in the nature of things, be extremely little room for any consideration of the points of view of equity and justice" in private legal ordering. True, Robert Lee Hale stated that "[t]here may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights,"[95] but his point was that no version of laissez-faire economics could so justify vast economic inequality. True, as Barbara Fried has pointed out, Robert Hale's "affirmative proposals to reconstitute property as the servant of a true, functional liberty rarely got beyond the progressive commonplace that (all other things being equal) the government ought to redistribute property rights so as to maximize the aggregate, positive freedom in society,"[96] but there is little room to doubt Hale's basic sympathy with legal efforts to minimize economic inequality. Lundstedt's understanding of "social welfare," on the other hand, appears to have little to do with distributive justice and everything to do with security of ownership and wealth-maximization.

93. Pierson v. Post, 3 Cai. R. 175, 2 Amer. Dec. 264 (1805) (Livingston, J., dissenting).

94. Lundstedt, supra n.76, at 139 (emphasis in the original).

95. Hale, supra n.33, at 603, 628.

96. Fried, supra n.29, at 23.

C. *Karl Olivecrona*

Olivecrona is best-known for his two books–for they are two quite works-*Law as Fact* and its second edition, published in 1971. Of the two, Olivecrona had much more to say about property in the first edition, so I will concentrate primarily on that work.

Many of the themes that Hägerström and Lundstedt developed are also evident in Karl Olivecrona's work. The insistence on looking behind legal concepts for observable social realities, the critique of traditional legal concepts as "metaphysical", the rejection of the Austinian command theory of law–all of these themes characterize Olivecrona's work as much as they do that of Hägerström and Lundstedt. More specifically concerning property, Olivecrona shared with his Realist predecessors a rejection of the idea that the term "property right" refers to any social reality. Similarly, Olivecrona agreed with Hägerström and particularly Lundstedt that the reality behind notions of rights and ownership is psychological and sociological in character.

Olivecrona's views about property were not, however, simply a rehash of Hägerström and Lundstedt. Besides writing much more clearly than either Hägerström or Lundstedt, Olivecrona made two important contributions to the Scandinavian Realist critique of the conventional (i.e., classical) legal concept of property: (1) a behavioral theory of the role of legal concepts; and (2) an emphasis on the role of force and its relationship to the distribution of property. These contributions places his views on property closer to that of the American Progressives, but the core of his work remained heavily influenced by Hägerström's critique of traditional legal concepts as metaphysical or superstitious.

Like Hägerström and Lundstedt, Olivecrona dismissed the concept of property rights, indeed, rights generally as nothing that exists "among the facts of social life."[97] Sharing their cognitive relativism, Olivecrona stated that "[t]he whole question of truth is, indeed, inapplicable to sentences about rights and duties."[98] The relevant question is how words like "right" are used, how they function. "[W]e seem to be unable to get on without using the word [i.e., "right"]," Olivecrona stated. "But how can this be explained if it does not connote anything at all?"[99]

Olivecrona's answer to the question was behavioral and pragmatic. Like Lundstedt, he recognized that "[t]he essence of the notion of a rights is that of *power*,"[100] and regarded this power as

97. Karl Olivecrona, *Law as Fact* 88 (1932).
98. Olivecrona, supra n.55, at 125, 149.
99. Id. at 143.
100. Supra n.97, at 89 (emphasis in original).

something that "does not exist in the real world."[101] Still, the concept of a right does have an important consequence: it engenders "a *feeling* of power" which "helps to maintain the illusion that there is a real power present."[102] What is important, Olivecrona argued, is to study and understand the psychological background of this feeling and the behavioral function that the notion of a right plays in society.

Property illustrates this behavioral function:

> When I have the idea of possessing the right of ownership of my house, and of other people being owners of the neighbouring houses, this influences my behaviour in a distinct way. I feel free to do what I like with the house and the garden, provided that I keep within the bounds prescribed by the law: I must not cause a nuisance to my neighbours, and so on. At the same time, the idea of others being owners of the surrounding houses causes me to refrain from interfering in any way with their use of them. Other people's conduct with regard to my house is influenced in a corresponding way: they habitually refrain from interfering with my own use of it.[103]

Olivecrona then asks whether it is necessary, in order for the concept of ownership to perform this function, that the right of ownership is represented "as *being* something." His answer is no. "I need only have these words ringing in my ears: This is my property, that is not my property, you must not infringe on other people's rights, on so on." What causes those words to ring in his ears, Olivecrona states, is "a *psychological connection* between the statement 'this is the property of another' and the idea that certain consequences regarding right behaviour follow from the thing's being the property of somebody else." "This," Olivecrona concludes, "we might call the *behaviouralist* function of the word 'right.'"[104]

Olivecrona's behavioralist views led him to take a rather bleak view about claims based on justice, including distributive justice. To Olivecrona, an appeal to "justice" is simply an appeal based on what he called "expediency." By that, he meant self-interest. Morality does not affect the content of law or lead to legal change. Indeed, the causal relationship between law and morality is just the opposite: law influences our ideas about morality. What influences the content of law is nothing more or less than self-interest. Olivecrona's views on the role of self-interest were strikingly similar to those of modern rational-choice theorists. "Self-interest," he wrote, "has always ben dominant. When have, e.g., the rich and powerful prompted by moral

101. Id. at 90.
102. Id.
103. Olivecrona, supra n.98, at 143-44.
104. Id. at 144.

reasons introduced laws aiming at a more equal distribution of property? Never."[105] Law, Olivecrona thought, is a necessary force that checks people's natural instincts toward avarice and self-enrichment. "[T]he struggle for gain between individuals and groups is kept within bounds only and with great difficulty through law. . . . The existing division of property is determined by the law."[106]

Olivecrona's views regarding the role of law in the distribution of resources bears some resemblance to Robert Hale's views. Hale treated the law of contract, property, and tort as "rules of the game of economic struggle." Like Olivecrona, he viewed law as instrumental in the distribution of wealth, and his theory of private law in capitalist societies as coercive echoes Olivecrona's emphasis on the relationship between law and force. Hale's theory of law as coercive was more subtle and nuanced than Olivecrona's, however. While Olivecrona treated law directly as the force that directly maintains social order, Hale focused on the ways in which so-called facilitative law in fact structures the game of bargaining over joint products.[107]

D. Alf Ross and the Possibility of a "Legal Politics"

Alf Ross was yet another of Hägerström's students, and the influence of teacher on student was apparent. In the Preface to his early book, *Toward a Realistic Jurisprudence*, Ross stated that he "rel[ied] on fundamental ideas in the Swedish enquirer *Axel Hägerström*'s philosophy."[108] While the signs of Hägerström's ideas are evident in Ross's work, there was more originality to Ross than either of Hägerström's other two former students, Lundstedt and Olivecrona. Particularly in his later book, *On Law and Justice* (1959), Ross developed ideas that echoed many of the themes of the American Realists. Even after forty years, *On Law and Justice* strikes the modern American reader as a remarkably fresh and insightful work.

Like that of his Realist predecessors, there was no sustained discussion of property in any of Ross's work. Ross was primarily preoccupied with questions such as the meaning and bases of legal validity rather than issues concerning the relationship between the public and private spheres. Still, *On Law and Justice* includes such remarks about property that resonate with the themes of American Realists like Hale and Cohen. This is especially true in connection with Ross's discussion of what he called "legal politics."

A clear and direct writer, Ross unambiguously stated his core premise regarding legal politics: "I reject the idea of an *a priori* prin-

105. Supra n.97, at 167.
106. Id. at 159-60.
107. See Kennedy, "The Stakes of Law, or Hale and Foucault!," in *Sexy Dressing Etc.* 83 (1993).
108. Alf Ross, *Toward a Realistic Jurisprudence* 10 (Annie Fausbøll trans., 1946).

ciple of justice as a guide for legal politics (legislation), and discuss the problems of legal politics in a relativistic spirit, that is, in relation to hypothetical values accepted by influential groups in the society . . . ."[109] Ross's relativism was a necessary predicate for the very idea of legal politics. An idealist conception of law would clearly distinguish legal politics from politics generally on the basis of its objective: the objective of legal politics would be "to perfect the idea of justice inherent in the law."[110] From a relativist perspective, however, legal politics must be defined as "applied legal sociology, or legal technique."[111] That is, it is the province of attempts to influence human behavior through legal tools. So defined, legal politics cuts a wide swath, as Ross well understood. "[E]very problem of legislation," he asserted, "has a legal-political aspect."[112] Ross also recognized that matters conventionally understood as confined to the private sphere, including property, have a significant legal-political dimension:

> [E]ven the most central institutions are not raised above all political development and re-evaluation. Along with the dynamic evolution of a community comes also a change in its ideological basis. The law of property and contract has undergone far-reaching changes in the period between the zenith of liberalism and the present-day social-welfare legislation. This evolution has brought its own problems and conflicts extending far beyond the legal-technical field and well into the long-term social effects of the legislation judged in relation to the conflicting interests of different groups in the community.[113]

Ross shared with the American Realists an unconditional belief in the possibility of and need for a progressive state. That is what "legal-politics" is all about. Like the American Progressives, he viewed the laissez-faire state as something that once served a useful purpose but had now become an anachronistic impediment:

> In the face of the powerful economic forces unleashed by the industrial revolution and the break-up of feudalism the *laissez-faire* policy was a necessity rather than a virtue, or made a virtue by necessity. The experiences of the past few generations in the direction of purposeful legislative intervention have signally demonstrated the falsity of the assertion of the impotence of legislation and politics.[114]

109. Alf Ross, *On Law and Justice* ix-x (1959).
110. Id. at 327.
111. Id. at 328.
112. Id. at 329.
113. Id. at 330.
114. Id. at 351-52.

Ross clearly understood that the image of the market and politics as categorically separate spheres was a chimera. Not only were they integrally related, but the priority between them was clear. *Pace* Marx, Ross declared, "In the final instance political power conditions economic power and not vice versa."[115]

Ross never developed this insight into a anything like a general theory of private property. His statements regarding property were entirely consistent with the American Realists' conception of private ownership as state-delegated authority, but they were cursory at best, lacking any sustained explication of the implications of that conception. More specifically, he had nothing to say concerning issues of distributive justice. His moral non-cognitivism did not necessarily preclude him from holding views regarding wealth distribution. He might have objected to a gross maldistribution of wealth on prudential grounds, for example. Nevertheless, the fact of the matter is that, like those of his Scandinavian predecessors, Ross' version of Legal Realism did not include a political critique of wealth distribution in a system of private property.

III. Common Ground of the Two Legal Realisms

On the surface of things, it appears that property was simply not an important topic for the Scandinavian Legal Realists. By contrast, it was one of the primary concerns of American Realists. Indeed, for Realists like Hale and Morris Cohen it was the epicenter of their critiques. How can one account for this apparent difference? It is tempting to answer this question by looking only at the ways in which the two Legal Realist projects differed more generally. There certainly were apparent differences between them. As we have seen, American Realism was an openly political project. The Realists of the 1920s and 30s were continuing a critique that had begun around the turn of the century by the so-called Progressives. The central concern of both the Progressives and the Realists was to delegitimate the legal ideology that supported laissez-faire politics and legal policies, especially the idea that the private and public spheres are categorically distinct from each other. The Scandinavian Realists, on the other hand, were uninterested in the relationship between law and politics–at least so it seems from the surface of their writings. Their self-professed goal was philosophical rather than political. Specifically, their articulated aim was to expose the epistemological foundations of traditional legal concepts and ideas as being "metaphysical," by which they meant non-cognitivist. If Progressivism, the critique of laissez-faire policies, was the intellectual stimulant for American Legal Realists, then logical positivism, the critique of all non-cognitivist

115. Id. at 352.

epistemologies, combined with Kantian epistemology, were the dual energy sources of Scandinavian Realism.

This account of the difference between the two movements is not entirely satisfying. For one thing, it only pushes the question back one step: *Why*, one wants to ask, was American Realism largely political in its concerns and objectives, while Scandinavian Realism appears to have been almost exclusive philosophical in character? Moreover, and more trenchantly, does this apparent difference tell the whole story, or was there more to Scandinavian Realism than meets the eye?

A. The Different Agendas of Scandinavian and American Realism

There is certainly some truth to the account provided thus far, one that emphasizes American Realism's overtly political aims and Scandinavian Realism's epistemological concerns. Indeed, given the sociological and biographical backgrounds of the two movements' central figures, it would be most surprising were it otherwise. Scandinavian Realism was largely the outgrowth of the work of one man, Axel Hägerström. Every major figure associated with Scandinavian Legal Realism openly acknowledged their deep intellectual debt to this man. Hägerström was a philosopher by training, not a lawyer, political theorist or an economist. The philosophical tradition that philosophers of his generation had inherited was epistemological idealism, which was based on the anti-empiricist view that "knowledge is a relation to propositions rather than to objects . . . ."[116]

Philosophical idealism was strong throughout the Continent during the nineteenth century, and it was the dominant philosophy at the University of Uppsala at the time Hägerström joined the faculty there.[117] His reaction against it was that of a thorough-going positivist, one who "thought it time for man to leave behind the primitive theological mode and to bring to maturity the positive mode of thought, action, and emotion: Science."[118]

Hägerström was hardly alone in pursuing this project. Two decades before the emergence of the *Wiener Kreis* of the 1920s, Ernst Mach and others had mounted a withering positivist assault on metaphysics, and their influence, especially Mach's, on others was profound and diverse.[119] Robert Musil, Albert Einstein, and Hans Kelsen, to name only three prominent intellectuals of the period, all acknowledged a deep debt to Mach. Mach's influence was pervasive not only in Austria and Germany but throughout continental Europe, especially those countries, including Sweden, where intellectuals

116. Richard Rorty, *Philosophy and the Mirror of Nature* 148 (1979).
117. Michael Martin, *Legal Realism: American and Scandinavian* 126 (1997).
118. Kloppenberg, supra n.22, at 21-22.
119. See Janik & Toulmin, supra n.70, at 133-45.

commonly were fluent in German. I have encountered no indication that Hägerström read or was aware of Mach's work, but it does not strain credulity to suppose that Mach's strenuous and well-known epistemological positivism influenced Hägerström, even if only indirectly. Mach's work predated Hägerström's most productive years (1916-1939) by a sufficient number of years to have permitted his ideas to have filtered through to Hägerström. At any rate, the general point is that Hägerström was, above all else, a philosopher, and at the milieu in which he worked, philosophers were primarily occupied with epistemological questions, specifically with the credibility of philosophical idealism. While it would be too strong to say that the agenda of issues that might attract the attention of a Swedish philosopher in Hägerström's position was predetermined, it is no exaggeration to say that Hägerström set the agenda for his colleagues at Uppsala and elsewhere in Scandinavia.

The background economic and political conditions prevailing in Sweden and the United States during the height of Realism also tends to support an interpretation that stresses difference rather than similarity. Like Germany, Sweden industrialized late, much later than Britain and the United States. When it did finally industrialize, toward the very end of the nineteenth century, Sweden did not undergo social, economic, and political upheaval on the same scale as the United States did.[120] Moreover, while trade unionism came late to Sweden and came against considerable opposition, the reasons for and character of that opposition were quite different from the forces that fought the union movement in the United States. Swedish industry traditionally was small in scale, highly patriarchal in character, and geographically diffused. The combined effect of these characteristics was to discourage labor organization.[121]

What was *not* involved in the opposition to unionism in Sweden was a widely-shared commitment to the principle of "liberty of contract." Sweden in the decades before and after the turn of the century was not a society fundamentally based on the ideology of laissez faire. That ideology was certainly not enshrined as a constitutional principle in the way that it was in the United States during the same period, the notorious era of *Lochner v. New York*. Indeed, the entire spectrum of Swedish political thought at the time was well to the left of what it was in the United States. Social Democracy, both as an ideology and as a political party, was well-established and well within the mainstream of Swedish politics.[122] Indeed, progressives

120. The great Swedish Eli Heckscher, explicitly acknowledged this point. See Eli F. Heckscher, *An Economic History of Sweden* 215-16 (Göran Ohlin trans. 1954).

121. See Franklin D. Scott, *Sweden: The Nation's History* 415 (1988).

122. See Daniel T. Rodgers, *Atlantic Crossing: Social Politics in a Progressive Age* 413 (1998). See generally Tim Tilton, *The Political Theory of Swedish Social Democracy: Through the Welfare State to Socialism* 1-14 (1990).

in the United States keenly followed social democratic initiatives, such as the cooperative movement, in Sweden and later, during the New Deal, were to use those initiatives as models for their own experiments in social engineering.[123]

This is hardly to say that economic liberalism was unknown to Sweden in the late nineteenth and early twentieth centuries. Swedish economists, most notably Knut Wicksell, were among the forerunners of marginalist economic theory, which provided the basis for neo-classicism in economics. But marginalism did not sweep over Swedish economic thought and policy in the way that it did in the United States during this period.[124] As late as 1918, Gustav Cassel, for example, rejected marginal analysis as useless metaphysics,[125] echoing the terms of Hägerström's critique of traditional epistemology and legal analysis. By contrast, in the United States, the marginalist revolution, as Barbara Fried has recently pointed out, "left in shambles the labor theory of value,"[126] and prompted progressive economists like Robert Hale to shift their attention to the character of exchange as a form of coercion and the nature of individual preferences as socially constructed, not given. As Fried succinctly states, "[T]he central question for Hale, like most other [American] progressives, was the light shed by the marginalist revolution on the distributive justice of the market."[127]

Given the political-legal milieu within which they worked, it is completely understandable that Hale and other American legal and economic progressives would focus on the problem of distributive justice. While recent legal historiography has revised somewhat our understanding of what was going on during the era of "laissez-faire constitutionalism,"[128] as it is commonly called, the facts remain that government regulation *was prima facie* suspect and that the vision of the market as situated strictly within the sphere of private volition and thus categorically distinct from all forms of collective intervention was deeply entrenched in American legal thought and doctrine. American progressive had no choice but to focus the brunt of their attention on the legal, particularly the constitutional factors that were responsible for the sanctification of private property and freedom of contract. Legal regulation of property was the crucible of progressivism in the United States between 1870 and 1933. By

123. Id., at 421.

124. On the influence of marginalism in the United States, see Fried, supra n.29, at 23-24, 125-27; Herbert Hovenkamp, *Enterprise and American Economic Law, 1836-1937* (1991), pp. 71-73, 191-92.

125. See Gustav Cassel, *Theoretische Sozialöknonomie* (1918).

126. Fried, supra n.29, at 23.

127. Id., at 130.

128. See, e.g., Alexander, "The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism," in *The Fall and Rise of Freedom of Contract* 103 (F.H. Buckley ed., 1999).

contrast, Sweden's social, economic, and political future did not rest so clearly or directly on the legal status of property. Property, that is, did not pose the kind of deeply serious social or political dilemma that would preoccupy the attention of intellectuals, legal and otherwise. This fact, above all else, is what separates American from Scandinavian Legal Realism.

B. Common Ground: Expanding Popular Sovereignty

Beyond the differences just described, the two Realisms shared a more fundamental objective. Both movements sought to open up the space for a greater degree of democracy in their respective societies. They pursued different, and to some extent contradictory paths to achieving the same end, but both strategies fit their respective legal cultures.

The basic thrust of the property critiques of American Realists like Hale was to deny the scientific character of law. Hale and his contemporaries wanted to demonstrate that the private property/free contract regime was hardly politically neutral. Quite to the contrary, both the regime generally and particular doctrines of that regime represented political choices that conventional legal analysis attempted to hide under the cloak of legal objectivity and science. The grip of legal science's pretense, especially with respect to matters concerning the distribution and use of property, had been made tighter in the late nineteenth century by the constitutionalization of the twin principles of liberty of contract and freedom of owners to do with their property as they wished. Lochnerian judicial activism, acting under the pretense of law as science, had, Hale and his contemporaries thought, effectively insulated political questions about property from democratic deliberation. As Edward Purcell trenchantly observes, "[Scientific] abstraction . . . in the law, [the Realists] believed, had been one of the biggest obstacles to the attainment of a truly democratic society."[129] The only effective way to open questions about the use and distribution of property to democratic debate, they thought, was to expose legal science *as* a pretense.

The same basic goal – expanding the realm of democracy by demystifying law – animated the Scandinavian Realists. Paradoxically, however, the strategy that they adopted in pursuit of that goal was exactly the opposite of the path that American Realists like Hale took. The Scandinavians sought to cleanse jurisprudence of its unscientific aspects. They did so by embracing an extreme version of legal positivism, what the late Franz Wieacker aptly termed "legal-scientific formalism."[130] In the American context, formalism represented reactionary politics. For the Scandinavian Realists, legal for-

129. Purcell, Jr., supra n.28, at 93.
130. Wieacker, *A History of Private Law in Europe* (Tony Weir trans., 1995) at 342.

malism offered the prospect of politically progressive implications. The Scandinavians viewed legal formalism as a means to discredit the two jurisprudential schools that dominated Scandinavian legal thought in the nineteenth century, the Historical School and the Idealist, or Conceptualist School. In the milieu of Scandinavia during the late nineteenth and early twentieth centuries, these self-styled "scientific" theories of law had deeply reactionary and undemocratic effects. By dethroning these jurisprudential Schools, the Scandinavian Realists hoped to create more room for the expression of popular sovereignty through legislative law.

1. The Political Context of Scandinavian Realism

Fin-de-siècle Scandinavia was a place largely dominated by a past that was anything but liberal or modern. Sweden[131] in particular had long possessed, to borrow James Kloppenberg's characterization of the similar situation in Germany, "an anemic liberal tradition and an autocratic state."[132] Throughout the eighteenth and most of the nineteenth centuries Sweden had been an extremely conservative and hierarchical society. During the so-called Age of Liberty in the eighteenth century, for example, "both the aim and the reality of parliamentarianism . . . was reflected not in democratic government, but rather in the rule of aristocracy . . . ."[133] Three institutions dominated Swedish society and politics — the state-established Church, the nobility, and the Crown.[134] The Age of Liberty, far from being a time when political and legal reform diluted these institutions' influence, was a period in which they solidified their hegemony. Even the reform of the *Riksdag* (parliament) in 1866, which replaced the old Estates with an elected parliament, turned out to give the reactionary forces greater power.[135] The King, Charles XV, assured both the anxious clergy and the restive nobility that abolishing the old Estates created no risk of real reform, let alone revolution.[136] Much as France at the time was undergoing a return to old Bourbon regime, Sweden after 1866 was suffused with conservative tendencies which persisted for a long time.[137] A Romantic movement sought to replace ideas based on Enlightenment Reason with those based on sentiment

131. It is important to bear in mind that Sweden historically was the dominant force in Scandinavia. Not until Sweden lost the 1808-09 war with Russia did Finland separate from Sweden. Likewise, Norway long remained under Sweden's thumb. Indeed Sweden and Norway remained politically united until 1905. See Kurt Samuelsson, *From Great Power to Welfare State: 300 Years of Swedish Social Development* 186 (1968).

132. Kloppenberg, supra n.22, at 177.

133. Id., at 114.

134. See id., at 55-62, 67-69, 113-26, 141-43.

135. Id., at 138.

136. Id., at 141.

137. Id., at 167.

and tradition. A nascent Gothicism generated a reactionary pan-Scandinavian movement, and various Revivalist religious movement only stiffened the Old Order's will to resist change.

Overriding all other issues was the question of reforming the political franchise. Although the *Riksdag* Act of 1866 had introduced a measure of parliamentary democracy to Sweden, it was extremely limited. The vast majority of the Swedish population did not possess the political franchise, and the Parliament was dominated by the civil service and the landowning class.[138] The Swedish reformer and poet Esaias Tegnér, otherwise a strong spokesman for the poor, in 1842 opposed a compulsory education bill on the ground that a general population that was literate might end up as revolutionaries.[139] Literacy, religion, and politics were all viewed as intertwined. Conservatives anxiously reasoned that "[i]f a man could read his Bible, believe in *his* God, and serve him as his own conscience, and not authority, dictated, might he not also hold a contrary opinion on mundane matters and dare to express it? If bishops and priests were no longer held in respect, then what respect should be owed to the agents of secular power, the local authorities and crown bailiffs, and all other authority . . . ."[140] The joint forces of the Crown, the landowning nobility, and the State Church all resisted extending the franchise and certainly opposed universal suffrage. Parliamentary democracy existed in nineteenth-century Sweden, then, but only in a much diluted form. Politics was primarily the province of the Crown, the nobility, and the Church, not a popularly-elected legislature.

It was against this political background that the Scandinavian Legal Realists developed their critiques of the then-dominant schools of jurisprudence, the Historical School and the Idealist School. They viewed, with considerable reason, those schools of thought as ideologies that legitimated an undemocratic status quo.

2. "Demystifying" Law: The Critique of the Historical School[141]

In general terms, the basis of the historical approach to jurisprudence, as Morton Horwitz has explained in his analysis of English jurisprudence, is based on the assumption "that change and flux are permanent, and . . . that the meaning of an idea or concept–right,

138. Id., at 166.
139. Id., at 167.
140. Id., at168-69.
141. There is a vast literature on both the German Historical and Idealist Schools. The purpose of my discussion of them here is not to add anything new to what is already known about them but instead to summarize them in order to understand the intellectual background against which the Scandinavian Realists were reacting. The single best discussion of the two Schools in German legal history remains Wieacker, supra n.130.

liberty, sovereignty, positivism–may change depending upon its historical context."[142] In the context of German-influenced jurisprudence (which included Scandinavia), however, historical jurisprudence took on a somewhat different coloration. First developed by the famous legal theorist Friedrich von Savigny, German historical jurisprudence sought to extract from the historical record those rules and principles that reflected the true genius of the nation's people (*Volksgeist*).[143] As the great legal historian Franz Wieacker pointed out, "'People' for Savigny is not any actual nation or society, but an ideal cultural concept, the intellectual and cultural community bound together by a common education . . . ."[144] The potential for such a concept to play a politically apologetic role is obvious, and this was precisely Savigny's intent. Savigny was an intensely political man, and his politics, together with his religion, were deeply conservative, if not reactionary. He strongly favored maintaining the existing order based on the Crown, the established church, and the privileged classes.[145] The French Revolution and the German revolt of 1813 profoundly dismayed him. Both events overtly signaled a rejection of tradition, and the preservation of existing traditions and customs was the entire purpose of the historical approach. History was not to be studied for its own sake but for the sake of keeping the past alive in the present. "History," Savigny wrote, "in an age such as ours has another and *holier* role. Only through history can the link with the *original* condition of the *Volk* be maintained, and if this link is lost the *Volk* would [be] deprived of the best part of its spiritual life."[146]

Savigny's celebration of tradition and custom had direct implications for the ongoing debate over legislative law. He regarded all legislation as "unscientific," even demagogic, and his project of renewing "legal science" through the historical method was aimed at defeating the various efforts to create a common civil code for all of Germany. For both Savigny and his pro-codification opponents, legislation represented not just national unity but, much more importantly, the triumph of the politics of democracy over the politics of aristocratic culture. As Wieacker pointed out, when Savigny argued that law had to be the product of the spirit of the people, he did not have in mind a "'commonwealth of adult citizens'" exercising popular sovereignty,

142. Horwitz, "Why is Anglo-American Jurisprudence Unhistorical?," 17 *Oxford J. of Leg. Studies* 551, 552-53 (1997).

143. See Reimann, "Nineteenth-Century German Legal Science," 31 *B.C. L. Rev.* 837 (1990).

144. Wieacker, supra n.130, at 311.

145. Id., at 306.

146. Quoted in id., at 313.

but an elitist concept of a cultural tradition created by the old aristocracy and the established Church.[147]

Against the background of this reactionary mode of jurisprudence the Scandinavian Realists' critique of extant jurisprudence can be seen as political as well as philosophical. In particular, Axel Hägerström's withering assault on the accepted approaches to legal science as being "mystifying" emerges as an expression of progressive, democratic politics. In the context in which he wrote, an historical approach had a sharply conservative purpose and effect, while a formalist approach of the sort that Hägerström recommended was reformist. A jurisprudence that celebrated established traditions would have not only impeded the spread of popular sovereignty through legislative lawmaking. It would also have permitted, indeed encouraged, the content of law to be deeply influenced by the precepts of the established Church. This would have been an anathema to someone like Hägerström. Hägerström was raised in a deeply religious environment. His father was a Lutheran minister, and his mother was devout in her Christianity.[148] Set on a path by his parents to study theology, Hägerström rebelled and turned against religion. Reason, not religion, was the key to creating the proper legal order. As Jes Bjarup explains, "Reason is for Hägerström what Grace is to the Christian." In Hägerström's world view, "The proper function of man's reason has been corrupted by Christian theologians who elevate faith and feeling above reason."[149]

It was not only Christian theologians who elevated faith and feeling above reason. Jurists who adhered to Savigny's view that law is made more scientific by preserving its cultural traditions likewise had a perverse and dangerously wrong understanding of what "legal science" is. A positivist, or formalist approach to jurisprudence would demystify the character of law and purge it of its religious and irrational content.[150] The historical approach, on the other hand, only further mystified law and strengthened law's dependency on irrational religion. The project of "demystification," then, was essentially one of demonstrating how the Historical School had undermined the rule of law by privileging religion. In this respect, as in others, the early Scandinavian Realists like Hägerström and Lundstedt anticipated the path taken by later legal positivists like

147. Id., at 311.

148. See Bjarup, 14.

149. Id., at 15.

150. In viewing positivism as the antidote to religious irrationality, Hägerström was hardly alone. John Stuart Mill defined positivism as "the substitution of the scientific for the religious point of view." See Roger Soltau, *French Political Thought in the Nineteenth Century* 205 (1959).

Hans Kelsen and H.L.A. Hart, to pursue a formalist agenda as a means to making law more progressive.[151]

3. Law's "Metaphysics": The Critique of the Idealist School

Scandinavian Realism's second theme was its characterization of most existing legal norms and concepts as "metaphysical." This theme was part of early Scandinavian Realism's critique of the other jurisprudential theory reigning on the Continent at the time, idealism. Like the historical approach, the idealist approach claimed that it was making jurisprudence more scientific (a "positive science"as much as mathematics or physics), but its scientific method focused solely on abstract legal concepts, analyzing them for the purpose of discovering their pure meaning, completely removed from the contexts of time and place. It was an approach that John Stuart Mill derisively referred to as the "German, or *a priori* view of human knowledge," animated by "[t]he notion that truths . . . may be known . . . independently of knowledge and experience."[152] German and German-influenced legal idealists sought to build a universal system of jurisprudence, completely pure of what Clifford Geertz calls "local knowledge."[153] As Franz Wieacker explains, the German legal idealists were "able to construct [a] rigorous pyramid of concepts, that is, the hierarchy of concepts seamlessly derived from axioms, with individual rules of law and decisions being deduced from them."[154]

Ironically, the German idealist approach was developed by Savigny's successors, the Pandectist theorists Georg Friedrich Puchta (1798-1846) and Bernhard Windscheid (1817-92). They transformed Savigny's historical jurisprudence into a jurisprudence that was totally unhistorical. In Germany, it took the form of "*Begriffsjurisprudenz.*" That theory conceived of the task of law as specifying the conceptual expressions in which Roman legal sources were expressed after the Civil Law's adaptation of Roman Law. Those expressions were then used to deduce concepts from existing legal phenomena "through abstractions which in their turn were traced back to abstractions at a higher level and to a single or a few general principles."[155]

While it would be too much to say that German idealism dominated mainstream Scandinavian jurisprudence, it certainly did make an important mark on Scandinavian legal thought. The most influential idealist was the nineteenth-century Danish scholar F.C. Bornemann (1810-1861). Bornemann reacted against the realism of

151. See Horwitz, supra n.142, at 551, 577-76, 581-83.
152. John Stuart Mill, *Autobiography* 144-45 (1957).
153. See Clifford Geertz, *Local Knowledge* (1983).
154. Wieacker, supra n.130, at 317.
155. Jørgensen, "Idealism and Realism in Jurisprudence," 21 *Scan. Studies in Law* 93, 105 (1977).

his famous countryman A.S. Ørsted (1778-1860), arguing that the purpose of legal science is to identity general legal concepts from which the legal scientist would deduce particular propositions.[156] He regarded these concepts as "the inmost and unchangeable essence of legal institutions."[157] The ultimate goal of this form of jurisprudence, in his estimation, was to elevate human life to, as one scholar put it, "the eternal life of the spirit."[158]

Political conservatives drew on the idealist school of jurisprudence to provide arguments against any significant political reform, especially expanding the franchise. Idealist legal scholars like Puchta, Windscheid, and Bornemann argued that the existing conceptions of legal rights and legal situations were, quite literally, real things, as much subject to the laws of physical nature as chairs and planets.[159] In a world still dominated by Newtonian laws of physics this meant that legal rights, obligations, indeed all legal phenomena were immutable. Consequently, the aim of the "science" of jurisprudence, these scholars contended, was strictly to derive general principles from which deductions would be made. It was not to develop a jurisprudence that responded to existing social or political needs. This conception effectively legitimated the existing legal order by depicting that order as the realization of actual entities rather than as a body of norms chosen by humans and subject to change by humans.

In this respect, Swedish legal scholars influenced by German legal idealist jurisprudence played much the same legitimating role in Scandinavia as the well-known nineteenth-century English legal theorist John Austin played in Britain.[160] As Morton Horwitz has recently argued, Austin's important legacy was effectively to transform Jeremy Bentham's politically progressive version of analytical jurisprudence into "a tool for promoting conservative politics."[161] The precise political questions for conservatives in England and Scandinavia, particularly Sweden, were somewhat different, but both involved the challenge of popular sovereignty to the traditional rule of the aristocracy. In late nineteenth-century England, the immediate issue was the role of the House of Lords after the Reform Acts of 1832 and 1867 expanded the power of the House of Commons.[162] In Sweden, the issue was the control of the Lower Chamber of the *Riksdag*, which, after the Organic Law of 1866, was the only organ of government whose members were chosen on the basis of popular election. The 1866 Act, however, made a mockery of the notion of popular sover-

156. Id., at 106.
157. Id.
158. Id.
159. Wieacker, supra n.130, at 343-45.
160. See Dalberg-Larsen, supra n.54, at 77, 83.
161. Horwitz, supra n.147, at 568.
162. Id., at 568-73.

eignty. The franchise was strictly gender- and property based, so that the entire industrial working class was entirely shut out of any voice in politics.[163] Within this political environment any school of legal thought that depicted the extant legal and political order as a set of immutable principles derived a study of either the historical "spirit" of the people or the "essence" of legal institutions inevitably had politically reactionary consequences.

From this perspective the Scandinavian Realists' characterization of much of what was called "legal science"as "metaphysical" can be interpreted as nonpejorative. "Metaphysical" simply meant that a particular concept or proposition was not objectively true, not that it was nonsense. The realm of truly scientific jurisprudence was in fact vastly smaller than the reigning schools of legal thought claimed. By treating the unscientific, or "metaphysical," phenomena as truly scientific, the dominant legal theories gave law a conservative tilt. They had created the fiction that existing legal norms were not only correct but were unchangeable because they were subject to the immutable laws of physics, not the very mutable will of groups of people. In fact, the Scandinavian Realists thought, most legal concepts and norms were subject to human control to create and change as people wanted.

The ultimate effect of this methodological cleansing was to open the realm of political discourse. By shrinking legal science, the Uppsala School moved the locus of debate about political questions to the legislature, rather than to courts and legal scholars. This effort added support to the program of the recently-formed Swedish Social Democratic Party,[164] which sought to democratize Swedish society. Uppsala School figures like Lundstedt placed great weight on democratic legislatures as the protectors of social welfare. Lundstedt himself aggressively proposed legislative programs aimed at achieving social welfare.[165] Real democracy, he and his contemporaries believed, required that the realm of politics be explicitly and thoroughly removed from the realm of jurisprudence and that jurisprudence, *true* legal science, be limited in its scope. The conception of the role of the judge that they held was as the "'junior partner'" of the legislator.[166] The legal scholar as well as the judge were to play secondary roles compared with the legislator, who determined "legal politics," a much smaller province than "legal science."

It is no coincidence that this shift toward legislation occurred at a time when the was a growing tendency in Scandinavia, indeed all of

163. Samuelsson, supra n.131, at 138-39.

164. The Party's founding Congress occurred in 1889. Tilton, supra n.122, at 16. It is no coincidence that the most rabid of Hägerström's followers, Vilhelm Lundstedt, was an active member of the Swedish Social Democratic Party.

165. See Dalberg-Larsen, supra n.54, at 77, 95-96 (1979).

166. The phrase is borrowed from id., at 89.

Europe,[167] toward a line of thought that looked to the activist state to avert social crises stemming from the dominance of the few by the many.[168] Bismarck's social welfare program of 1881 became a model for other countries, including Scandinavian countries. In Scandinavia, the primary institution to which progressives looked for social welfare initiatives was the legislature.[169] Within such an environment, a program of legal formalism that shifted legal decision making from elite "legal scientists" to a popularly elected legislature was a strategic attempt to overcome a long history in which "legal science" had largely had anti-democratic and reactionary effects.

CONCLUSION

Comparative law, including comparative legal history, too often stresses the differences between the legal phenomena of the systems under study. This paper has tried to moderate that tendency by balancing the underlying commonalities of Scandinavian and American Legal Realism with their obvious differences. While the two schools pursued quite different strategies, they shared a common core objective–advancing the cause of democracy in societies undergoing the enormous strains produced by large-scale industrialization. Both were part of a trans-Atlantic effort to create politically progressive societies in the context of industrial market economies.

167. See generally Rodgers, supra n.122.
168. See Dalberg-Larsen, supra n.54, at 90.
169. See generally Samuelsson, supra n.131, at 206-10.