LEGAL PHILOSOPHY IN THE ANALYSIS OF TORT PROBLEMS

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THE PHILOSOPHICAL analysis of law has to a large extent been concentrated on very general questions and subjects, such as the concept of law, the validity of law or of special legal rules, the claims of natural law and the concepts of right and duty. In this essay I shall consider legal philosophy from another approach, namely its impact on reasoning in a special field of law, the law of torts.

Before entering on this subject, we might pause a moment to ponder a question. This question is simply whether philosophy of this kind is of any interest to lawyers, including judges, legislators and writers. Is it not the best policy for a lawyer to stick to common sense and leave the philosophers to their own business without attempting to put the philosophical analysis to a use for which it is not, or at least not primarily, intended?

The answer to this question is that to some extent it is necessary to make a choice between philosophies. The lawyer must have some method for his work, especially for establishing its aim and for choosing his arguments. Most people would hold that he must also have some underlying principle for the evaluations which enter into his work. Every choice between such aims, methods and principles involves a philosophy of some kind. For instance, to defend the death penalty on grounds of morality as well as to reject it for reasons of public policy, or vice versa, are both courses which are impossible without accepting some kind of reasoning as valid, and this acceptance implies the choice of a philosophy. To stick to common sense means that one leaves one's philosophy implicit, without making clear what it actually is. It also means accepting not only the evaluations but also the logic and ways of thought that are involved in the language, speech, literature and education prevalent in Western civilization. This logic and these ways of thought have been increasingly criticized during this century by philosophers who have largely approached the philosophical problems by studying scientific method and the use of language. If we do not even attempt to analyse the arguments commonly used in legal reasoning, we can have no assurance of

the validity of our arguments and no real understanding of the reasoning. To disregard philosophy is therefore a form of conservatism for which it is difficult to find any sufficient justification.

The greatest value of modern philosophy seems to be that it provides a basis for a careful examination of the use of linguistic expressions and of the validity of arguments. Such an examination can undoubtedly be made with the help of common sense, without any special technical knowledge. If the examination is carried out by a lawyer who is not himself a philosopher he might profitably put his practical knowledge of the law to use, but it would probably be foolish of him to attempt the precision of the professional philosopher. The best way seems therefore to be for him to adopt the method of the philosophers in their attention to the use of language and the validity of arguments but to leave the niceties to the experts. These considerations may help to explain the approach of the following study.

I shall be particularly concerned here with Swedish legal philosophy, and my aim is to examine critically some Swedish contributions to the analysis of the law of torts in order to demonstrate how far the philosophical views enter into this analysis and to discuss the validity of these views. There is a special reason for this procedure since the most influential Swedish legal philosopher of recent times, A. V. Lundstedt, was also a specialist in the law of torts and devoted much of his work to this field. He has analysed and criticized earlier works and now his own contributions are due for examination. In addition to legal philosophy it will also be necessary to touch upon certain questions of substantive law, especially in the domain of strict liability, as the impact of legal philosophy appears particularly in the results which are reached there.

I shall begin by analysing some Swedish works which can be regarded as typical of certain thought current on the European Continent at the end of the 19th century. They will serve as a background for the subsequent development.

The oldest of these works is E. V. Nordling's *Svensk civilrätt. Allmänna delen* (Swedish Private Law. General Section).[1] This

[1] *Anteckningar efter prof. E. V. Nordlings föreläsningar i svensk civilrätt, allmänna delen*, Uppsala 1882. The following references are to the 3rd ed., Uppsala 1913, which except for certain additions and exclusions closely follows the first edition.

volume is based on lectures given during 1877–79 but was used as a textbook as late as the nineteen-twenties. It is an exposition of the leading principles and concepts of private law, and the treatment of the law of torts is characterized by its connection with the general analysis. From the abstractions of the system the attempt at solving concrete problems emerges.

Nordling's starting point is that of natural law. According to him law is founded in the reasonable nature of man. Therefore, it should be possible by reflecting on man and his nature to arrive at a basic principle which expresses the idea of law and from which one can deduce particular legal rules. Nordling's primary aim is accordingly to explain the various legal rules by showing that they can be deduced from this general principle of law.[2]

For this purpose, he makes extensive use of the concept of private right, which he analyses at the beginning of his treatment of the special principles of law. In his view a private right is the authority inherent in some reasonable interest in relation to some external state of affairs. This authority is vested in the interest as a consequence of the conformity of the interest with the law. Thus a private right presupposes a reasonable interest, and where there are conflicting interests the authority is conferred on the interest which is more reasonable than the others.[3]

Such an analysis of the concept of right is obviously not aimed at describing what the word "right" means according to the general or the legal use of the word. It has for Nordling another and more important purpose. He tries by his analysis to give the foundation of the whole system which appears as a system of rights from the point of view of those on whom rights are conferred. This is also brought out by the place of this analysis in the general exposition and by the use which Nordling makes of his results. When discussing special problems, such as the rules regarding possession and the effects of mistake in contract law, Nordling tries to prove that to reach a correct result one must ascertain which party has the more reasonable interest.[4]

In Nordling's discussion of the law of torts we find the same type of argument. Nordling has here to consider the view, which was current at the time when he was writing, that the wrongful will of the tortfeasor creates the obligation to pay damages for a tort. Nordling finds this view inconsistent with the existence of rules

[2] See the introduction to the work and pp. 20 f., 27, 29, 43 f.
[3] *Op. cit.*, pp. 51, 113 f.
[4] *Op. cit.*, pp. 155 f., 181 f.

of liability in tort which do not involve negligence on the part of the person liable, for instance rules regarding liability for animals, rules of vicarious liability in maritime law, rules of compensation to persons unlawfully arrested and rules which impose strict liability on railways. His result is that the foundation of liability in torts lies in the fact that the damage has been caused by the wrongful act of another or by independent forces belonging to another and working to his advantage. In both cases the interest of the person suffering damage is superior to that of the person liable.[5]

In this way Nordling constructs a system which, at least superficially, appears consistent and orderly. The right to damages accruing to a person who has suffered an injury is made a result of the general weighing of interests which, according to Nordling, characterizes legal institutions and explains the existing rules. This view must be seen in its historical context to be understood. A main difficulty for Nordling was to introduce into his system the rules of strict liability, which were gaining importance on the Continent at that time as a supplement to the prevailing rules of negligence liability. Nordling skilfully turns strict liability into an argument for his main thesis, that *interest,* not *will,* is the true foundation of law. Thus, the law of torts as well as the rules regarding possession and contract are used by Nordling to support this thesis.

The deficiencies of this system are now obvious, however. The consistency and the uniformity are reached only by using a general principle so vague that its power of explanation is small. As so often in law, what is professed as a general principle—here the weighing of interests—is hardly more than a method for legal reasoning, a way by which to seek the solution of different problems. Nordling's method, although vague and adaptable to various rules and arguments, can on the whole be characterized as utilitarian and rationalistic.

In 1894 W. Sjögren presented as a thesis for the doctorate of law his work entitled *Om rättsstridighetens former med särskild hänsyn till skadeståndsproblemet* (The forms of wrongfulness, with special regard to the problem of damages).[6] This work has acquired the reputation of being cleverly reasoned and difficult

[5] *Op. cit.,* pp. 245 ff.

[6] Uppsala 1894. A revised version appeared in German under the title "Zur Lehre von den Formen des Unrechts und den Thatbeständen der Schadenstiftung", *Jherings Jahrbücher,* Vol. 35, 1896, pp. 343 ff.

to read. It has a peculiar interest since it makes explicit certain premisses which are generally not analysed even by those who use the same form of argument in their legal reasoning.

Sjögren analyses and makes use of *causal* explanations of legal rules, and his analysis is of interest for the understanding of all arguments where a right, a duty, an obligation or a liability is said to be caused by or to arise from a certain fact, as, for example, when obligations are said to be founded on contract, tort or unjust enrichment. According to Sjögren, this means that the fact is connected with the consequence by the "rule of life", and this connection is recognized and confirmed by the particular legal rule. The delict is e.g. connected to the punishment by the rule of life and this connection is pre-existent in relation to the corresponding legal rules.[7]

This seems to presuppose that at least some rules are valid without regard to legislation, merely by virtue of being appropriate. Sjögren's view is, however, empiricist rather than rationalistic. He rejects natural law because it tries to deduce a great number of rules out of a few general principles and to establish valid rules on the basis of reason without support in experience.[8]

Sjögren recognizes as a general characteristic feature of causal explanations that among several relevant circumstances one is singled out as the cause in the strict sense. The same feature is found in causal explanations of legal relations. For example, many circumstances are relevant and necessary for liability for negligence, including the circumstances that a damage has occurred, that it was caused by the tortfeasor, that he acted negligently, etc. From these circumstances one is selected as the foundation of the liability.[9] Sjögren also points out that if a human act is one of the relevant facts, this act is often considered to be the cause.[1] But from the human act also a certain element is selected as being the cause *stricto sensu,* and this element is the "will". The act appears to be a symptom of an inner will and this will is the real cause of the obligation, both in contract, where the will to be bound is effective, and in tort, where the wrongful will is the binding element.[2]

[7] *Rättsstridighetens former,* pp. 11, 16, 19, 27.
[8] *Op. cit.,* pp. 1, 12 f.
[9] *Op. cit.,* p. 42.
[1] Sjögren maintains that this idea is a development of John Stuart Mill's analysis of the popular conception of causation, *op. cit.* p. 46. Cf. H. L. A. Hart and A. M. Honoré, *Law Quarterly Review,* Vol. 72, 1956, pp. 58 ff., at p. 76.
[2] *Rättsstridighetens former,* pp. 43 ff., 48 ff.

Sjögren applies this general conception of the foundation of obligations when he discusses the foundation of liability in tort. The loss itself cannot be the cause of liability because the liability only means that the loss is transferred from the person suffering the loss to the person liable, and the cause must be a fact which can explain that only certain losses are transferred. Sjögren then arrives at the result, which conforms to his general view, that the human will is the element which causes the liability. Only in this way can we explain the sense of justice that requires that the tortfeasor should be liable for the damage.[3]

The way in which Sjögren develops this idea is rather complicated, and for our purpose we can disregard the details. His conclusion is that in liability for negligence the negligence is the symptom of the wrongful will and the cause of the liability. In strict liability the activity for whose purpose the damage is caused is the symptom of the will to achieve the results of the activity, and this activity is the cause of the liability.[4]

Granting the validity of this causal type of explanation, Sjögren's conclusion seems rather plausible. If we are to single out one circumstance which explains the liability for negligence, the fact that the tortfeasor could, and according to general opinion should, avoid his action seems significant and indeed rather obvious. As previously mentioned, this view was quite common at the end of the 19th century.

As regards strict liability, if we grant the causal explanation it seems also quite possible to consider the activity from which the damage arises as the element that causes the liability. If a person acts in his own interest and by this action causes damage to others, it might seem proper that he and not they should carry the burden of the damage. This explanation, however, seems to extend too far. Is not all activity undertaken in the interest of the actor, and should he not then be liable for all damage that he causes? To this objection Sjögren gives no acceptable answer. It is interesting, however, to note that in his opinion damage which is caused by large-scale industrial activity is so closely connected with the interests of the enterprise operating it that there is a strong argument in favour of compensation by the enterprise.[5] By this argument Sjögren anticipates a line of thought which has played an important part in later Scandinavian discussion.[6]

[3] *Op. cit.*, p. 188.
[4] *Op. cit.*, pp. 188 ff.
[5] *Op. cit.*, pp. 239 ff.
[6] See *infra*, p. 172.

The particular interest of Sjögren's investigation lies in the attempt to explain the rules of liability in tort by a causal technique.[7] This analysis does not attempt to explain why we have rules of liability but rather why we have those special rules which actually exist. On the other hand, the explanation is not applicable to the details of the rules. Sjögren explains by his method why there is liability for negligence, but his explanation is of little value for choosing between different forms of this liability. His view of the foundation of strict liability also provides reasons for imposing such liability but not for the choice between its various forms.

There are more serious limitations to the use of the causal method of explanation. The existence of the rules is assumed and the determination of the cause is primarily a justification for this existence. However, if new elements are found which are capable of being causes of obligations or of rules the system can perhaps be developed. But it may be impossible for us to find a cause for an existing or a suggested rule, and in such a case it is not clear whether the rule should therefore be discarded. The causal explanations rely on a way of thought which might be common, but the validity of the arguments based upon it is left open. Even if it is psychologically and linguistically admissible to regard liability for negligence as being caused by the negligence, there remains the question of what validity this fact can confer on the rule in question. Such objections seem to hold not only against Sjögren but also against others who use causal explanations of legal rules without analysing the underlying assumptions.

A third work which should be considered here is J. C. W. Thyrén's *Culpa legis Aquiliae*.[8] This work is primarily an analysis of the concept of negligence based on material from Roman law but it also takes into account modern law. In the course of his investigation Thyrén discusses the development of the law of torts in its connection with penal law. He finds several stages in the historical development, characterized by increasing separation between punishment and damages. This development has already gone so far that liability to pay damages in tort is imposed even where there is no real fault but only the fiction of it; on the other hand the fault remains a necessary condition for criminal liability. As a future stage Thyrén envisages the possibility that liability in tort may be imposed even without the semblance of fault. He

[7] Cf. Hellner, *Om obehörig vinst*, Uppsala 1950, pp. 188 ff.
[8] Lund 1893.

finds such a development justified; if some tortfeasors are liable irrespective of negligence, all ought to be liable on the same condition.[9]

In this way Thyrén justifies strict liability by establishing it as a stage in an evolution. How far he considers this justification valid is uncertain; this part of his work is only a minor excursion.

The works which have just been analysed are interesting especially because they exemplify the ways in which theoretical constructions are used for practical purposes. We find as an important element in these works the desire to clear the path for strict liability in tort. The authors accept the prevailing ideas of law and justice in principle and seek to reconcile strict liability with them. The methods differ, however. In the expositions of Nordling and Sjögren the element justifying this acceptance is the conformity or similarity between strict liability and other, generally accepted legal institutions and the consequent possibility of introducing such liability into a consistent system. Nordling's system is rationalistic since he derives the validity of the fundamental principles from their conformity with reason, whereas Sjögren by making the "rule of life" the foundation points to the force of experience and consequently takes an empiricist view. Thyrén, on the other hand, may be regarded as an exponent of the evolutionary method; he stresses that strict liability can be considered, and to some extent justified, as the result of a continuous evolution.

It is against the background of such works that we must consider the achievement of A. V. Lundstedt. Lundstedt sets out to reform the conception of law and legal method, and he thinks his own approach wholly unique among lawyers. His views are, on the other hand, intimately connected with the philosophical impulses which he received from the Swedish philosopher A. Hägerström, and Lundstedt continuously acknowledges and stresses his indebtedness to Hägerström. It is not easy, however, to discover to what extent Lundstedt's work in the field of law is due directly to Hägerström's influence, so it seems preferable to examine it on its own merits.[10]

[9] See pp. 137 ff.

[10] Lundstedt has given a fairly comprehensive account of his main ideas in a work in English published posthumously under the title *Legal Thinking Revised,* Stockholm 1956. References in the following are when possible given to this work. An earlier work in English was *Superstition or Rationality in Action for Peace,* London 1925. Lundstedt's principal work in German is *Die Unwissenschaftlichkeit der Rechtswissenschaft,* Vol. 1, 2: 1, Berlin 1932–36.

Lundstedt has taken over from Hägerström an intensely anti-metaphysical conviction.[1] In common with Hägerström he finds overwhelming proof that many concepts used in modern speech and thought are metaphysical and even imbued with the remnants of superstition and magic. This is also true of ideas of law and justice. In violent opposition to this he engages in a quest for reality. He seeks the realities underlying the legal concepts, and he seeks the realities of social life that can explain our ideas of law and our legal principles. Such a view of law may to some extent be characterized as sociological, and Lundstedt himself goes so far as to equate legal science with the natural sciences.[2] However, it is clear that his general method for selecting and treating material differs widely from those common in present-day sociology and even more so from those of the natural sciences. Lundstedt is a lawyer, and his constant aim is to further the investigation of legal problems, including questions of legislation and of social organization.

Lundstedt's realistic approach appears in the way in which he looks for the foundations of special legal rules. He puts the question thus: What would be the result for society if these rules were not in force? The explanation of legal rules found by this method is obviously of a sociological type. It is based on a hypothesis, which Lundstedt finds confirmed by experience, that legal rules are created by their suitability for society and that judges and legislators are determined in their actions by such factors as decide the suitability of the rules for society, even if they do not realize this fact themselves and act from other, conscious motives. According to Lundstedt there has been a constant battle between the claim for justice raised by legal ideology and the pressure of social forces on lawyers to produce rules suitable for the welfare of society.[3] The conclusion drawn by Lundstedt is that legislators, judges and also legal writers must adapt their activities to this fact. When one becomes aware of the foundation of the legal rules one must decide whether to follow the path of justice or the path of social welfare. Since the path of social welfare is indicated by experience, it alone has the support of science. In this manner, Lundstedt maintains that his method is the only tenable one.[4]

[1] Hägerström's main works in moral and legal philosophy have been translated into English under the title *Inquiries into the Nature of Law and Morals*, ed. by K. Olivecrona, trans. by C. D. Broad, Uppsala 1953.

[2] *Legal Thinking Revised*, pp. 129 f.

[3] *Op. cit.*, pp. 60 f., 131 f., 149 ff., 197 ff.

[4] *Op. cit.*, pp. 131 ff., 195 ff.

The method which Lundstedt propagates is called by him "the method of social welfare" in contrast to "the method of justice". By the former method, legal rules are judged by the effects which their application has on society, not by the justice of the particular case.

The rule concerning liability for negligence in tort provides one of Lundstedt's main arguments for his thesis. The importance of this rule is not only to be found in the fact that in a number of cases where negligence has occurred the courts order the defendants to pay damages and the persons who have suffered damage thus receive compensation. It is of much greater importance that with strict regularity a damage which has been caused negligently leads to the compulsion to pay an indemnity. The indirect effects on society of enforcing the rule are thus more important than the direct effects of applying the rule in the particular case. In other words, the main feature of Lundstedt's view is that he transfers the attention from the particular cases brought before the courts to the indirect effects of enforcing the rule.

Among these indirect effects Lundstedt stresses the prevention against causing damage. He puts the question thus: What would be the result for society if people could negligently cause damage to the person or property of others without being obliged to pay damages? By way of answer he paints in vivid colours a state of society where all safety to person and property has disappeared. But the operation of the rule of negligence forces everyone to take care not to damage others and it creates protection against the preponderance of negligence. In addition the certainty that a negligent act when it occurs will give rise to an action for damages creates further safety; however, according to Lundstedt this reparative function of the law of damages is of much smaller importance.[5]

Even strict liability in tort can according to Lundstedt have its foundation in prevention. If the liability is increased to such an extent that even a person who has acted without negligence is forced to compensate the damage which he causes, the person who is threatened by such liability must be even more cautious in avoiding damage to others. However, Lundstedt acknowledges the existence of strict liability without a preventive function, where the reparative function alone explains the liability. Such is e.g. the liability for actions caused by necessity.[6]

[5] *Op. cit.*, pp. 57 ff., 253 ff.
[6] *Op. cit.*, pp. 69 f., 100, 267 f.

This explanation differs widely, as can be seen, from those discussed earlier. Lundstedt considers the utility of the rules as demonstrated by experience the foundation of these rules. This is surely a progressive development in the discussion of tort liability. Instead of an explanation which relies on a habit of thinking which in itself needs a justification, as the method of Sjögren does, Lundstedt makes it possible to examine critically an idea which is generally accepted both by lawyers and laymen.

At this point there are certain questions to be raised. How does Lundstedt verify his statements regarding the effects of the rules? How far can the knowledge of such effects give guidance for practical problems, and in what way is such knowledge supplemented when approaching a problem? Can the method be used not only for finding general principles but also for developing the details of the rules? What is the relation of this method to more special methods for the interpretation of statutes, for the use of precedents and so on?

Concerning these questions Lundstedt gives no completely satisfactory answers. He is not very careful regarding the verification of his statements about the effects of the rules. He seldom refers to any empirical investigations but confines himself to general speculations or to analogies. In this regard we can extend our objections to Lundstedt still further. Is it possible to test the truth of the statement that safety would disappear if the rules of tort did not exist? Since the comparison is not confined to any special alternative or any special form of society, his thesis appears to be a tautology devoid of empirical significance. It is even difficult to say what facts could confirm or falsify the statement that the preventive effect of the rules of tort is more important than the reparative one.

Certain statements of Lundstedt seem to indicate that in his opinion knowledge of the effects would be sufficient for the choice between possible rules and therefore if there were absolute certainty regarding these effects everybody with sufficient theoretical understanding to accept the method would come to the same result.[7] From other parts of his work it appears, however, that this cannot be his true opinion. He stresses that one must take into account the evaluations prevalent in society, particularly concerning various effects of the possible rules. Having taken into account the effects of the rules and the evaluations prevalent in

[7] Cf. the criticism by Alf Ross, *Sv.J.T.* 1932, pp. 336 ff.

society, one still must, according to Lundstedt, make a decision regarding the best solution. This last decision is not a rational procedure, but insofar as it is based on knowledge of the effects of the rules and of the prevailing evaluations, it is as rational as possible.[8] By this last admission Lundstedt seems to avoid the objection which otherwise might be raised that he deduces what ought to be from what is.

There still remain some points to be explained. What should one do when there are several groups of citizens with conflicting interests and conflicting evaluations? Is it possible to give any rational argument for the remaining decision when the effects and the evaluations have been ascertained? Are all decisions which are reached then equally good? Although Lundstedt hardly discusses this last point openly, it seems to follow from his whole approach and to agree with his treatment of special problems that in his opinion no such further rational element enters into the procedure. It is apparently part of his realism that only facts, such as the effects and the prevailing evaluation, can be taken into account. Trying to find some reason or some argument which would make one decision more rational or more correct or in any way better than another would be to pursue a phantom when the facts were clear. In his opinion, what remains lies within the domain of the feelings. We shall return to this point later.

Another of the questions just raised concerns the applicability of arguments with regard to general principles and to special rules. It seems clear that Lundstedt's explanation of the rules of tort is primarily intended for general principles. It explains why we have rules of liability in tort and why negligence is so important, since liability for negligence can be regarded in ordinary circumstances as an appropriate means for maintaining the general standard of care on a desirable level. As long as we remain on this level of discussion the preventive and the reparative effects are valid arguments.

Apparently Lundstedt intends that the method should be used as an explanation of the rules and as a guide for legislators, judges and other lawyers, even for very special rules and decisions. As an example of this application of his method, his treatment of the well-known English case of *Rylands* v. *Fletcher* is interesting.[9] As will be remembered, in this case water had escaped from a reservoir and caused damage on adjoining land in rather peculiar circum-

[8] *Legal Thinking Revised,* pp. 136 ff., 171 ff.
[9] *Op. cit.,* pp. 64 ff.

stances. The person suffering the loss was awarded compensation for his loss from the owner, although there was no evidence that the owner was negligent. According to Lundstedt, when deciding such a case one should take into account on the one hand the need for protection against damage of this kind and the desire for safety in other respects by those who are likely to suffer damage; on the other hand, one must consider the need for freedom of action for those who risk being liable to pay damages. Against this view, several objections can be made. Whatever decision is reached by the court, it is too uncertain to determine what effect it will have on the actions and feelings of people in general and how it will be used by the courts as a precedent. It seems quite possible that the judge might say that his concrete decision will have no appreciable effects of a general kind. As has already been indicated, it also seems relevant to ask whether there are any other rational arguments for such a decision, even assuming that we can predict its effects, in addition to those admitted by Lundstedt. The relation to methods for using precedents and statutes is also not clear. It may be that in the case of *Rylands* v. *Fletcher* the courts were not bound by any precedent and could establish whichever rule they thought best. But this is then an exception. Lundstedt's opinion seems to be that in the interpretation of statutes his method should be used only within the framework provided by the words of the statute.[1] Concerning the use of precedents (which in Sweden are not considered binding but nevertheless have a strong persuasive effect) Lundstedt argues that where there is a long series of cases concerning a particular question, it is generally consistent with the public welfare to follow these decisions as precedents.[2] As a guide to the many intricate problems with which judges and other lawyers are faced concerning the use of precedents, this is hardly satisfactory.

From all these objections it follows that Lundstedt's method is not very clear and that its scope is rather limited. The prevention against negligent acts may be important for understanding the general principles of the law of torts or when discussing for instance the relation between the law of torts on the one hand and the law of insurance on the other side. But when considering the details of liability in tort or when deciding specific litigation in tort, other reasons must as a rule be given. Speaking more abstractly and more generally, we must recognize that there are

[1] *Op. cit.*, pp. 158 f.
[2] *Op. cit.*, pp. 187 f.

different logics for different levels of generality. The arguments which hold good for the discussion of general principles cannot always be used for questions of detail, and vice versa.[3]

The merits of Lundstedt's analysis should not be overlooked, however, and they appear clearly if we regard his argument as a warning against attaching too much importance to the special cases which appear before the courts. The obvious and undoubted importance of the courts for the working of a legal system easily leads to the view that the whole function of this system can be reduced to the decisions of the courts. Lundstedt's analysis makes clear the dangers of such an oversimplification.[4]

In contrast to his own method Lundstedt refers to the common method of lawyers as "the method of justice". By this term he refers to several ideas and methods which have little in common. According to Lundstedt, the method of justice is characterized by trying to find the solutions which agree with the general sense of justice, and it consequently devotes its main attention to the circumstances in the particular cases which come before the courts. Nordling's general principle can serve as an example of this method. The weighing of the interests of the parties in each separate case of conflict is in Lundstedt's view only another way of looking for the justice of the case.[5] He also denounces Sjögren's quest for legal causes for obligations and liabilities as being based on the method of justice, which is apparent particularly in the reliance on the general sense of justice.[6]

In order to prove the fallacy of the method of justice Lundstedt refers not only to its deeper lack of support in fact, but also to the existence of rules which are unjust in the sense that they do not agree with the general sense of justice although they are suitable for the welfare of society. The examples given are, however, not always convincing. One example which constantly appears in Lundstedt's writings is that of a poor man who negligently damages

[3] Cf. *infra*, p. 175.

[4] It is interesting to compare Lundstedt's idea with those of the earlier English utilitarians (Bentham, Austin, John Stuart Mill). Lundstedt himself disclaims all similarity, see e.g. *Superstition or Rationality*, pp. 142 ff. Lundstedt stresses *inter alia* that he is not concerned with the utility of a singular action or decision but only with the effects of the maintenance of a rule (see e.g. *Legal Thinking Revised*, pp. 141 ff.). This has a certain affinity with the idea that the utility of a line of action as a whole should be taken into account rather than the utility of the single actions separately (cf. Austin, *The Province of Jurisprudence Determined*, Lecture II), but there might still be a difference insofar as Lundstedt stresses the *indirect* effects of enforcing a rule.

[5] Cf. *Legal Thinking Revised*, pp. 51 ff.

[6] For further criticism of prevailing methods see e.g. *op. cit.*, pp. 285 ff.

the property of a millionaire. Under most Western systems of law the poor man is liable to pay damages to the millionaire. According to Lundstedt this result is in conflict with the sense of justice but the rule agrees with the welfare of society.[7] Many persons would no doubt object to this opinion on the ground that the rule brings no special welfare to society but is just, and others might consider it both unjust and contrary to the general welfare.

It is impossible to discuss here the respective merits of evaluations based on the long-range effects of the rules and those based on the effects of immediate application in cases of conflict. For the purpose of this study it is important, however, that Lundstedt's analysis shows the similarity in function between liability for negligence and strict liability in the law of torts. One should not separate them as being based on different causes of obligation, as Sjögren does, for instance; one should rather regard them as similar because they have the same kind of function. This similarity becomes important when discussing, for instance, the relations between tort and insurance. There is a tendency still evident in Scandinavian discussion to make a clearcut distinction between liability for negligence and strict liability, which in the opinion of the present writer is unfortunate.

It appears from what has been said that Lundstedt's analysis disposes of the entire way of thinking which appears in the quest for justifications of legal principles, whether these justifications depend on general principles based on reason, or on relevant facts in a rule which serve as the causes for consequences imposed by these rules. The laborious quest for justification has in the law of torts largely been aimed at eliminating the obstacles against the introduction of strict liability. The conviction that no such justification is necessary may seem an insignificant gain particularly for one who from the beginning is not disposed to look for it, and certainly there are others than Lundstedt who have discarded this kind of argumentation. But Lundstedt's achievement makes it easier also to look through arguments where the connection with the older way of thinking is more obscure, as when, without any explicit theory, the most dissimilar rules are explained as the consequence of a few general principles or are said to arise from a few special facts, such as contract, negligence or unjust enrichment.[8]

Another side of Lundstedt's search for realities appears in his

[7] *Op. cit.*, p. 59.
[8] Cf. Hellner, *Om obehörig vinst*, pp. 139 ff.

analysis of legal concepts such as private right, duty etc. Of particular interest for the law of torts is his analysis of the concept of "duty" or "obligation", where he looks for the reality underlying the concept. According to Lundstedt, the reality covered by the statement that someone is subject to an obligation because he has entered into a contract etc., is the fact that he is subject to the coercion to pay a certain sum of money, provided that a suit is brought against him, that the claim against him is proved in this suit, that he has some money with which to pay, etc.[9]

With certain limitations this analysis seems to be valid if the statement analysed is taken as a description of a state of affairs. Its value is apparent in comparison with another theory, according to which such a statement is also descriptive, but refers to a "reality" transcending sense-experience, a "reality" specific to the world of law. However, if we consider such an analysis the only admissible analysis of the term "obligation", as Lundstedt seems to do, or even as the principal analysis, then we overlook the various functions which statements containing the word "obligation" can perform. This appears particularly if we see how this word is used in statutes, or even if we confine ourselves to its use in descriptive contexts, such as legal treatises.

Lundstedt uses his analysis of the concept of obligation for several purposes. One objective is to deny the correctness of the view that a contract gives rise to an obligation.[10] He tries to prove that the same coercion as he found to be the reality underlying the idea of an obligation operates even on people who have not entered into contracts and are therefore not considered to be subject to obligations. From this he concludes that there is no real difference between the stage before entering into the contract and the stage after. This result is of some importance for the law of torts, since it rejects the distinction between liability in tort and liability in contract.[1] On this point Lundstedt's views cannot be accepted, but rather because of defects in the analysis than because of the method.[2]

Without any doubt the features of Lundstedt's analysis which have been mentioned are due to a specific philosophy, but this connection is less apparent in other criticisms which he has directed against prevailing legal ideas.

[9] *Legal Thinking Revised*, pp. 114 ff.
[10] *Op. cit.*, pp. 118 ff.
[1] *Loc. cit.*
[2] Cf. Alf Ross, *Virkelighed og Gyldighed i Retslæren*, Copenhagen 1934, pp. 235 ff.

This criticism is aimed *inter alia* against the use of the concept of wrongfulness (*rättsstridighet*), and it forms an important part of his battle against prevailing ideas of law.[3] His preoccupation with this concept is due to its predominance in earlier German and Scandinavian discussion. His main objection seems to be that this concept is in itself "metaphysical", because it implies the idea that some actions are prohibited by the will of the legislator or by society, an idea which, as Hägerström has proved, is untenable. This criticism seems less important, since it is no doubt possible to apply the word "wrongful" to certain acts without committing oneself to any such idea.[4] The main interest of Lundstedt's criticism applies to his analysis of arguments where the idea of wrongfulness plays a considerable part, particularly where the liability in tort is explained or justified by the wrongfulness of the act causing it.

Lundstedt's criticism is in substance the following. A condition for an act giving rise to liability in tort is, according to the doctrine criticized, that the act is wrongful (or "a wrong"). But if this act did not give rise to liability in tort, it would be incorrect to label it wrongful; it would on the contrary be lawful. To this analysis it might be objected by some that the act can be wrongful in the sense that it is punishable. But this view also presupposes that the act is wrongful, and in this way there is no escape from the criticism. In addition there are acts which are wrongful from the point of view of the law of torts without being so from the point of view of penal law. To explain (or justify) liability in tort by the wrongfulness of the act causing the damage is thus a *petitio principii;* it presupposes the validity of the rule which it should explain.[5]

This criticism of Lundstedt's seems valid insofar as it is aimed at arguments where the wrongfulness is invoked as an explanation of the liability. Lundstedt sometimes stresses this view explicitly.[6] He points out that by referring to the wrongfulness of the conduct no solution is given to the problems concerning the validity of the rule imposing liability. The problems are merely set aside and one only believes that they are solved. This is an important limitation. His criticism is not effective when liability is explained in some other way, after which the corresponding action is labelled wrongful. Neither does his criticism apply to the prac-

[3] See *Legal Thinking Revised,* pp. 32 ff.
[4] Cf. H. Ussing, *Retstridighet,* Copenhagen 1949, pp. 40 f.
[5] *Legal Thinking Revised,* pp. 37 f.
[6] E.g. in one of his first discussions of the problem, *T.f.R.* 1923, p. 62.

tice of separating certain questions regarding liability in tort which are said to concern the wrongfulness of the action, although this procedure may itself need an explanation.

A considerable part of Lundstedt's criticism of the prevailing law of torts concerns the concept of negligence (fault),[7] which in his opinion is built on a fiction. The main ground for his criticism is that negligence is the same as guilt and thus is the justification for the liability imposed; this idea is untenable for the same reasons as apply to other attempts to give justifications for legal rules. This criticism may be valid against those who in fact conceive negligence as guilt justifying the rule but not against others. Lundstedt has, however, yet another line of criticism, which goes further. If liability was not imposed on those who damaged the property of others negligently there would be no reason to consider such actions negligent. Such actions would be normal and even quite common. Since thus the possibility of calling an action negligent depends on the enforcement of the rules of tort imposing liability, it is, according to Lundstedt, a fiction to use the concept of negligence at all. He goes so far as to say that if in a certain situation there is no liability for negligence, but only for intentionally caused harm, it would not be correct to call any acts negligent that are not intentional.[8] All liability in tort is strict, as Lundstedt repeatedly says.

This view is surely exaggerated as a general criticism of the concept of negligence. Even if the activity of the courts in branding some acts as negligent is one of the factors that determine the general standard of care, it is a mistake to deny that this standard can be used as a guide for the courts when deciding whether certain conduct is negligent. For instance, even if we might assume that the standard of care which bailees maintain when handling the goods of the bailors is to a considerable extent determined by their knowledge of previous cases where bailees have been held liable for negligence as well as by their expectation of what conduct will be considered negligent by the courts in the future, this standard of care is an independent fact which can be used by the courts when deciding what conduct of bailees should be considered negligent. But Lundstedt's criticism may be valid in certain cases. If the reason given for imposing liability on a person is that he has acted negligently and at the same time the only reason given for calling this action negligent is that this liability

[7] Cf. *Legal Thinking Revised*, pp. 252 ff.
[8] *Grundlinjer i skadeståndsrätten. Culparegeln*, Uppsala 1935, pp. 115 f.

is imposed, a fiction (or rather a *petitio principii*) is involved. It may happen for instance that a statute imposes liability for cases where a person has acted otherwise than he ought to do, without giving any further description of the conduct giving rise to liability. Such a rule gives in itself no indication as to which actions should not be undertaken, and if it is invoked as the ground for calling any given action negligent, a circle ensues.

Lundstedt's own idea of the way the courts should apply rules regarding negligence has a teleological character, i.e. the decision should take into account the standard which is desirable according to the court.[9] Such an idea apparently assumes that it is possible to influence the general standard of care by decisions in law suits concerning liability for negligence, and this idea indeed agrees with Lundstedt's entire approach to law. It seems reasonable to adopt here a more sceptical and cautious attitude than Lundstedt does for reasons similar to those that were advanced when speaking of *Rylands* v. *Fletcher*. Thus, it is not certain, or even likely, that the general standard of care will be adapted to a single decision of a court in the way which Lundstedt's method assumes.

Another example of Lundstedt's criticism of special arguments in the field of law is his objection to the use of implied warranties as foundations for liabilities.[1] The liability of a vendor of goods for defects in those goods or of an employer for injuries suffered by his employees was explained by the fact that the vendor or employer has assumed an implied warranty to indemnify the purchaser or the employee in such cases. The lack of content in such explanations has been demonstrated by Lundstedt in a convincing way. As long as the warranty is implied, i.e. does not appear in any words or overt acts, it can be given whatever character the interpreter chooses. The warranty is only another way of describing the rule, and it can be useful for such a purpose, but it is without value as an explanation or a ground for a decision.

Such examples of Lundstedt's criticism can easily be multiplied. He has demonstrated the futility of explaining strict liability in tort by an analogy with the rules of compensation for seizure under the doctrine of eminent domain, and he has also analysed the French doctrines of *responsabilité du fait des choses* and *risque créé* in the same manner.[2]

[9] *Legal Thinking Revised*, pp. 264 ff.

[1] See *Sv.J.T.* 1921, pp. 337 ff., *Grundlinjer i skadeståndsrätten, Strikt ansvar*, Vol. 2: 1, Uppsala 1948, pp. 560 ff.

[2] As for the analogy to eminent domain, see *Grundlinjer i skadeståndsrätten, Strikt ansvar*, Vol. 2: 1, pp. 418 ff., cf. *Legal Thinking Revised*, pp. 101 ff.,

It hardly seems justifiable to characterize the efforts of Lundstedt in criticizing special doctrines in the law of torts and elsewhere as the outcome of a special philosophy. Apparently a strong intention to eliminate question-begging, false analogy, the use of general principles which do not cover the special rules summarized by them, and other fallacious arguments is the main motive of his criticism. However, insofar as his analysis implies the aim of examining the arguments in legal reasoning, it can be called philosophical. The underlying assumptions for such criticism and the general questions concerning the validity of arguments in legal reasoning are not analysed by Lundstedt. This lack of sufficient analysis does not of course detract from the value of his achievement, although it may be responsible for some exaggerations which mar the work considered as a whole.

From the preceding pages it has appeared that Lundstedt's analysis of the foundations of the law of torts and its concepts is connected to a varying degree with a special, philosophically motivated method. The main feature of this method is a quest for realities which is occasionally driven to such extremes that the only arguments admitted are those that can be described as taking into account the facts. This general view is supported by a criticism of purely verbal arguments, which is important in itself.

It is fairly certain that to accept the main view would involve a considerable change in the general method of arguing in law, even if some exaggerations are pruned away. There cannot be any doubt that in practice many other kinds of arguments are used. If we were to admit that once the facts are certain all arguments which do not involve verbal fallacies are equally good or bad from the point of view of correct reasoning and that the only appreciable difference between them lies in their emotive aspects, the change would indeed be important. This does not mean that there are no philosophers or philosophically inspired thinkers except Hägerström and Lundstedt and their companions who have expressed similar views; it only means that such views differ from the general practice of legal argumentation.[3]

375 ff. The French and Anglo-American doctrines of tort are the subject of a special volume, *Grundlinjer i skadeståndsrätten, Strikt ansvar*, Vol. 1, Uppsala 1944, where Lundstedt analyses *la théorie du responsabilité du fait des choses* at pp. 80 ff., and *la théorie du risque créé* at pp. 162 ff. Cf. *Legal Thinking Revised*, pp. 73 ff.

[3] There are for example certain affinities between the views of Hägerström and his school and those proposed by C. L. Stevenson in his well-known work *Ethics and Language*, New Haven 1945.

Even if we are prepared to accept part of Lundstedt's analysis, as the present writer is, we must raise some questions regarding those arguments which Lundstedt rejects. Provided the anti-metaphysical starting-point is accepted, is no other approach possible than that of Lundstedt? Can we get no further, and more specifically, can we find no rational arguments except those admitted by Lundstedt? Even if we do not accept such "justifications" as those offered by Nordling and Sjögren, is there no core in their arguments which is worth preserving?

The obvious alternative to the approach of Lundstedt is that of the philosophy which now prevails in England and America. This philosophy is anti-methaphysical and analytical like that of Hägerström and Lundstedt, but it differs from theirs in being primarily based on an analysis of language. This approach appears at least safer and less exposed to fallacies than that of Lundstedt, whose quest for realities produces a limitation in his analysis.

As we have seen, in Lundstedt's analysis of the term "obligation" the basic element is the determination of a state of affairs which is denoted by this term when it is used in a descriptive statement. The alternative method seems preferable. By analysing the use of such a word in different kinds of sentences we have a chance of getting a more thorough understanding of its functions without running the risk of transgressing into metaphysics.

Another characteristic trait in Lundstedt's work is the concentration on isolated words and concepts. If he should find fault with certain uses of a word, this very word is tainted for him and he condemns the corresponding concept as "metaphysical". This appears, for example, in his analysis of the concept of "wrong". As has been indicated earlier here, it would be a better approach to examine the entire argument rather than the words separately or even the sentences in which the words occur. The analysis will then concern the validity of the reasoning as a whole and it will be of little interest whether the word "wrong" is actually used or not. An argument containing the word "wrong" may be carried out in such a way that it is unobjectionable, whereas arguments in which this word is carefully avoided may be untenable for the reasons advanced by Lundstedt in his criticism of the concept.

In the same way an analysis of such concepts as "negligence" (fault) and "causation" should not only concern the facts which may be denoted by these words but also their use and the validity of different arguments in which they occur. Since both negligence and causation may enter as conditions of liability in tort it will be

profitable to examine these concepts together, as the same facts and considerations may arise under either heading. The determination of the concepts will thus be part of a wider analysis comprising the rules and principles in which these concepts are used.

An important problem, which has appeared several times before in this study, concerns the validity of arguments proposed for introducing some sort of strict liability in tort. We may admit that prevention and reparation of losses are important factors in determining the rules of liability in tort and that knowledge of such effects can induce us to impose stricter liability on some kinds of activity which are particularly dangerous than on others. Also there are other similar effects of the rules that must be considered together with the popular evaluations. The problem remaining is whether there are any further reasons to be advanced for imposing a more severe liability on some of those who cause losses than on others, and I shall here make some brief remarks on this subject.

It seems reasonable at this point to make a distinction in our judgement concerning those arguments presented by Nordling and Sjögren which were criticized by Lundstedt. As mentioned earlier, these arguments were intended to justify certain rules concerning strict liability in tort in a rather formal and apparently precise manner. We may admit that these justifications fail both from their particular shortcomings and from the very fact that complete and binding justifications are untenable. But this does not mean that there can be no rational arguments of the kind just mentioned, although the reasons must then be rather tentative and may be different for general principles than for the detailed development. It is also quite possible that with some alteration and reformulation the very attempts at justification of the principles can yield acceptable reasons. This would not be the only case where an idea which is untenable in the form in which it was proposed fares better when it is modified in some minor respects.

Consider for example the idea that the large-scale industrial enterprise should compensate damages which it causes even if there is no negligence on the part of the entrepreneur. We find traces of such an idea in Sjögren's work[4] and it has been more fully developed by other authors. Some maintain that anybody who in pursuit of a substantial economic profit causes damage to another should compensate the party suffering damage.[5] Others

[4] Cf. *supra*, p. 156.

[5] The classical expression of this idea occurs in the Austrian jurist J. Unger's words: "*eigenes Interesse, eigene Gefahr*". See *Jherings Jahrbücher*, Vol. 30, 1891, p. 363 ff.

claim that any enterprise—whether working for a profit or not—whose size and type of activity makes losses to others practically certain in the long run should pay compensation for these losses.[6]

Another opinion differs from the above views by stressing the importance of the danger associated with certain activities. This opinion was developed by the Danish jurist H. Ussing into a principle according to which an extraordinary activity which brings a peculiar risk should be subject to liability wholly independent of negligence.[7]

In face of such suggested principles which are offered as solutions to the problem of imposing strict liability, the primary question will be what facts should induce us to put a heavier burden on certain activities than on others. This increased burden may take the form of having to pay damages out of one's own pocket, or of paying a comparatively high premium for liability insurance or of acquiring some other type of insurance which in fact operates in favour of the person suffering damage.

The following is suggested as a common reason which might be advanced in favour of either of the principles mentioned, although it is mainly negative, in that it consists in the absence of factors which in other cases prevent the imposition of more burdensome kinds of liability. Although such normal activities as walking in the street, using things in one's home and performing unqualified work are not and should not be burdened with liability except in the case of considerable carelessness, the more qualified the occupation or the more businesslike the enterprise the better are the reasons for imposing a comparatively severe kind of liability on the person or enterprise. This argument should accordingly be admitted not only within the law of negligence but also for extending liability beyond negligence. Its main strength depends on the freedom of choice left to a person to decide whether he wants to engage in a certain activity or not. This freedom is small in everyday life but increases in qualified occupations and in businesslike enterprises.

An argument of this kind is not conclusive in itself. We must also decide whether, in spite of the fact that there is freedom to

[6] This idea has lately had a considerable success with certain Scandinavian writers, among whom the Norwegian Kristen Andersen may be mentioned. See *T.f.R.* 1948, pp. 106 ff. and *Norsk erstatningsrett,* Oslo 1952, pp. 106 ff.

[7] This idea formed the main theme for Ussing's dissertation *Skyld og Skade,* Copenhagen 1914, see particularly pp. 118 f., 127 ff. Ussing supported the same principle with new arguments (largely derived from Lundstedt) in a later work *Erstatningsret,* Copenhagen 1937, see pp. 115 ff.

engage in an activity, this activity should be encouraged by being subject only to some mild kind of liability rather than being hindered in its growth by severe liability. To some extent this decision would depend on the value to the community which we place on this activity. As already mentioned, we should also consider the preventive and reparative effects of the rule and for this consideration the amount of risk is the most important factor.

Such considerations, although vague and incomplete, may contain the gist not only of the principles previously mentioned but also of others. Arguments of this kind are not concerned with the particular cases of conflict but with the rules. On the other hand they have little to do with the effects of maintaining the rules, since it is not likely that the rules would have any appreciable effect on the actual decisions of the people concerned. These arguments have also no bearing on the popular evaluations because it would be possible to advance them in conscious defiance of public opinion. Finally, the arguments need not be considered to be emotive since they refer to matters which may not be wholly clear from the beginning but whose clarification is supposed to have a bearing on the issue.

The idea now suggested has also some affinity with a trait found in the liability for negligence. Negligence in the common meaning presupposes that it is logically and physically possible to act in another way than was done, i.e. "ought implies can". When we consider the possibility of imposing a heavier liability than that for negligence we should also take into account the opportunity to avoid the damage by avoiding the whole activity, not only the separate act which gave rise to the damage.

This leads us a step further. The heavier liability imposed on some forms of activity thus proves to be in conformity with a more general principle of evaluation. It exemplifies a standard of evaluation which we also use in liability for negligence, i.e. that we must take account of the opportunity to avoid causing the damage. This likeness seems to give an additional force to each separate rule.

As we have seen, the work of Nordling illustrates how the construction of a consistent system was thought to justify the special rules that were included in the system. Even if we decline the attempt to give a complete justification and reject the particular analogies on which Nordling built his system, we may still admit that an analogy may be an important element in the motivation of a special rule. It shows a consistency among the legal rules

that satisfies one of the demands that we put on a legal system, although the nature of this consistency and the force which it carries may need further explanation.

The argument now suggested for increasing liability also differs from the principle proposed by Ussing in being much less definite concerning the details of the rules. Ussing considered that the liability for such activity which falls within the principle he propagated should be completely strict, i.e. liability should be enforced irrespective of negligence on the part of either the person liable or any of his subordinates. The reasons given here, on the contrary, do not permit such definite conclusions. Instead of a clearcut principle which yields definite results and which is apparently applicable regardless of special circumstances, we have a tentative idea stated in a comparative form, i.e. "the more—the more". Although for several reasons the clearcut principle would appear more desirable, the tentative idea has a better chance of being acceptable. We have taken only one step towards fully developed rules, but this step cannot be opposed in the way in which the fully-fledged principle such as that of Ussing could be.

When we find sufficient reasons for imposing some heavier kind of liability on certain activities than on others, the next question will be of what kind this liability should be. Here we have the choice of different types of liability in tort and of insurance and combinations between these, all of which may serve to transfer in varying degrees and manners the losses to the enterprise which has caused them. Without going into the various possibilities we can state that the reasons advanced for deciding the questions discussed earlier will have little bearing on such issues.

Finally, there are the wholly technical questions without any political implications. One important consideration here is that rules should be easy to apply and not give rise to unnecessary litigation. On the level of court decisions the rules regarding precedents etc. must be taken into account.

The details of the view now outlined are not of much concern for the main purpose of this discussion. It is sufficient that reasons of this kind do not refer to the effects of the rule but may still be credited with relevance. If we accept Lundstedt's view we should deny them all relevance, except as being facts that might be subject to popular evaluations.

There is, however, yet another objection which is much more serious and which concerns not only these reasons but also the

effects of the rule, deductions from general principles, purely verbal arguments and, generally, all arguments which can appear in legal discussion. Whether an argument in law is good or bad from the point of view of truth or logic may be said to be without real relevance; if it is accepted by a sufficient number of judges, legislators, other lawyers and laymen, it can be considered valid in a pragmatic sense. Even decisions which are based on entirely mistaken ideas about reality can lead to workable legal rules. If the mistake is very serious, the resulting social misadjustments will perhaps be sufficient to reveal the mistake. But it will be rare that mistaken logic can have such serious implications. At every stage of legal argument, before a court, by the court, before parliament, before the general public arguing for a proposed reform or in writing a legal treatise, it might be said that the main thing is to use such arguments as will convince those who make the decision or who will in the future pass judgement on the immediate decision. If this opinion is accepted we must necessarily conform to the generally accepted arguments regardless of our opinion of their logical validity.

In the face of such considerations, some person may ask if it is of any use to bother with the question whether some generally accepted arguments are good or bad, when we have no immediate objection to the rules which are supported by these arguments. It should have appeared from this paper that the present writer does not share such a view. Nor does he think it necessary to defend his position. The question just raised does not concern the validity of any special legal argument or any special method of analysis but concerns legal argument generally. As such, it is a philosophical problem of the kind best left to the philosophers.