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# Naturalism in Scandinavian and American Realism: Similarities and Differences

## 1 Introduction

Ever since W. V. Quine published an essay entitled “Epistemology Naturalized” (Quine 1969), naturalism has again become an important topic in core areas of philosophy, such as epistemology (Kornblith 2002), the philosophy of language (Devitt and Sterelny 1999), and the philosophy of mind (Churchland 1988), and it has now reached jurisprudence (or legal philosophy). Accordingly, the task of gaining an understanding of the implications of a naturalist approach to the problems of jurisprudence, such as the place (in the jurisprudential landscape) and shape of empirical theories of legal reasoning, the nature of law’s normativity, and the nature and viability of conceptual analysis as a central philosophical tool, is on the agenda of contemporary jurisprudence.

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We should, however, note that some legal scholars advocated a naturalist approach to jurisprudence, and, more generally, to the study of law, already in the 1920's, 1930's, and the 1940's.<sup>1</sup> I have in mind here American Realists such as Oliver Wendell Holmes (1896–97), Felix Cohen (1935; 1937), and Walter Wheeler Cook (1924), and Scandinavian Realists such as Axel Hägerström (1953; 1964), Vilhelm Lundstedt (1925; 1942; 1956), Karl Olivecrona (1939; 1971), and Alf Ross (1946; 1959), among others.<sup>2</sup> These jurisprudential realists – the Scandinavians as well as the Americans – are sometimes taken to make up a third school of jurisprudence, in addition to natural law theorists and legal positivists (see, e.g., McCoubrey & White 1999; Wacks 2005). But this is misleading, for even though both the Americans and the Scandinavians thought of themselves as giving in some sense a realistic picture of law and legal phenomena, they differed in their choice of primary study-object, but also to some extent in philosophical ambition and ability. Whereas the Americans focused primarily on the study of adjudication (see Leiter 2007), the Scandinavians were mainly interested in the analysis of fundamental legal concepts, such as the concept of law, the concept of a legal rule, or the concept of a legal right; and whereas the Americans, except Felix Cohen, were lawyers rather than philosophers, the Scandinavians Ross and Olivecrona were fairly accomplished philosophers of law.<sup>3</sup> The difference regarding the choice of study-object is particularly important, because it means that on the whole the Scandinavians, but not the Americans, operated on the same level as natural law theorists and legal positivists, such as Gustav Radbruch (1956), Hans Kelsen (1934; 1945; 1960), and H. L. A. Hart (1961). Indeed, the Scandinavians were legal positivists themselves.<sup>4</sup>

Nevertheless, it is tempting to think that the Americans and the Scandinavians shared a certain philosophical outlook. Alf Ross, for example, maintains in the preface to his book *Towards a Realistic Jurisprudence* (1946) that Scandinavian and Anglo-American jurisprudents share the

<sup>1</sup> Naturalism was an issue in the German-speaking legal world even earlier, when Hans Kelsen defended normativism against naturalism. Kelsen (1934, ch.3).

<sup>2</sup> See, e.g., Ekelöf (1945); Hedenius (1963); Strömberg (1980; 1988).

<sup>3</sup> Whereas Alf Ross was both a legal scholar and a philosopher, Karl Olivecrona and Vilhelm Lundstedt were legal scholars with a strong interest in philosophy. Hägerström was, of course, a first-rate philosopher.

<sup>4</sup> To be sure, Olivecrona said on more than one occasion that legal positivism was a flawed theory of law. But in saying that he understood by 'legal positivism' the theory that the law is the content of a sovereign will. Olivecrona (1971, chs 1–3).

view that we must understand law and legal phenomena in terms of social facts and conceive of the study of law as a branch of social psychology:

There should, I think, be good possibilities for a contact between Scandinavian and Anglo-American views in legal philosophy. In both these cultural circles a decisive tendency towards a realistic conception of the legal phenomena is traceable; by this I mean a conception which in principle and consistently considers the law as a set of social facts – a certain human behaviour and ideas and attitudes connected with it – and the study of law as a ramification of social psychology. (*Ibid.*, 9. See also Ross 1959, ix.)<sup>5</sup>

In this article, I argue (i) that the realism espoused by the Americans and the Scandinavians alike is to be understood as a commitment to *naturalism*, conceived of as the ontological claim that everything is composed of natural entities whose properties determine all the properties of whatever it is that exists, or as the methodological (or epistemological) claim that the methods of justification and explanation in philosophy must, as they say, be continuous with those in the sciences, or as the semantic claim that an analysis of a concept is philosophically acceptable only if the concept is analyzable in terms of natural entities.<sup>6</sup> I also argue (ii) that the Scandinavians and the Americans were more alike, philosophically and legally speaking, than one might have thought. For, as we shall see, even though the Scandinavians were primarily semantic and ontological naturalists, and the Americans were mainly methodological naturalists, two of the Scandinavians (Lundstedt and Ross) also embraced methodological naturalism and some of the Americans (Holmes, Cook, and Cohen) also accepted semantic (and, it seems, ontological) naturalism; and even though the Scandinavians were primarily interested in the analysis of fundamental legal concepts, and the Americans were mainly interested in the study of adjudication, some of the Americans were also interested in the analysis of fundamental legal concepts. Furthermore, I suggest (iii) that the commitments to different types of naturalism on the part of these thinkers – both individually and collectively – may explain their respective choice of primary study-object, *viz.* fundamental legal concepts and adjudication, respectively. Finally, I argue (iv) that the

<sup>5</sup> It is worth noting that Hart (1983b, 161) observed in a review of Ross (1959) that “English and Scandinavian legal theory have long shared many points of view.”

<sup>6</sup> As we shall see in Section 6, Leiter (2007) has recently argued that the American realists were methodological naturalists who were concerned solely with the study of adjudication.

modest version of conceptual analysis practiced by the Scandinavians and some of the Americans does not contradict their naturalism.

I begin by introducing naturalism (Section 2). I proceed to consider the sense in which the Scandinavians and the Americans were naturalists (Sections 3–6), and point to some important similarities and differences in their understanding of naturalism and in their choice of primary study-object (Section 7). The article concludes with some thoughts about the alleged incompatibility between naturalism and conceptual analysis (Section 8).

## 2 Naturalism

Although the term ‘naturalism’ appears to lack a definite meaning in contemporary philosophy (Papineau 2007, 1; Bedau 1993), writers on naturalism make a fundamental distinction between (i) ontological (or metaphysical) and (ii) methodological (or epistemological) naturalism. Post (1999, 596–7), for example, explains that metaphysical naturalism is the view that “everything is composed of natural entities … whose properties determine all the properties” of whatever it is that exists, and that methodological naturalism is the view that “acceptable methods of justification and explanation are continuous, in some sense, with those in science.” (See also Wagner & Warner 1993, 12)

*Ontological* naturalism is thus a thesis about the nature of what exists: there are only natural entities. But what is a natural entity? I shall assume that it is an entity of the type that is studied by the social or the natural sciences,<sup>7</sup> though I recognize that it is difficult to find a fully acceptable characterization of natural entities.<sup>8</sup> On a more fundamental level, we might perhaps say that a natural entity is an entity that can be found in (what I shall refer to as) the *all-encompassing spatio-temporal framework*.<sup>9</sup> On this analysis, if a contemplated entity, such as God, a natural number, a scientific theory, or a legal norm, cannot find a place in this framework, it isn’t a natural entity.<sup>10</sup>

<sup>7</sup> This seems to be the view taken in Brink (1989, 22–3) and in Lenman (2008).

<sup>8</sup> Discussing moral non-naturalism, Ridge (2008) calls the attempt to make a choice between the various available characterizations “a fool’s errand.”

<sup>9</sup> Armstrong (1978, 261) takes (ontological) naturalism to be “the doctrine that reality consists of nothing but a single all-embracing spatio-temporal system.”

<sup>10</sup> For a spirited rejection of ontological (and methodological) naturalism, see Popper (1978).

*Methodological* naturalism, on the other hand, requires that philosophical theorizing be continuous with the sciences. But what, exactly, does “continuity with the sciences” mean? Brian Leiter makes a distinction between methodological naturalism that requires “results continuity” with the sciences and methodological naturalism that requires “methods continuity,” and explains that whereas the former requires that philosophical theories be supported by scientific results, the latter requires that philosophical theories emulate the methods of inquiry and styles of explanation employed in the sciences. He states the following about “methods continuity”:

Historically, this has been the most important type of naturalism in philosophy, evidenced in writers from Hume to Nietzsche. Hume and Nietzsche, for example, both construct “speculative” theories of human nature—modelled on the most influential scientific paradigms of the day (Newtonian mechanics, in the case of Hume; 19<sup>th</sup> century physiology, in the case of Nietzsche—in order to “solve” various philosophical problems. Their speculative theories are “modelled” on the sciences most importantly in that they take over from science the idea that we can understand all phenomena in terms of deterministic causes. Just as we understand the inanimate world by identifying the natural causes that determine them, so too we understand human beliefs, values, and actions by locating their causal determinants in various features of human nature. (2007, 34–5. Footnotes omitted)

But one may well wonder whether talk about “continuity with the sciences” is not too abstract a formulation to be helpful. The question, of course, is: Which sciences do the naturalists advocating such continuity have in mind? Although Leiter does not go into this, it is clear that the Americans as well as the Scandinavians had in mind the *social* sciences, such as sociology and behaviorist psychology (the Americans) and psychology (the Scandinavians).<sup>11</sup>

One may also wonder about the logical relation between ontological and methodological naturalism. It is tempting to assume that methodological naturalism implies ontological naturalism.<sup>12</sup> For one might argue that it wouldn’t make sense to aim at emulating the methods of

<sup>11</sup> Neither the Scandinavians nor the Americans address the question of whether there might be kinds of psychological or sociological research that are *not* acceptable from the standpoint of naturalism.

<sup>12</sup> This appears to be the view of Wagner & Warner (1993, 12). I shall leave it an open question whether ontological naturalism implies methodological naturalism.

inquiry and styles of explanation employed in the sciences, unless one also believed that the world is such that this approach is likely to be successful, that is, that everything that exists is composed of natural entities, and that these entities determine all the properties of that which exists. Nevertheless, I am inclined to think that a believer in methodological naturalism may be *agnostic* about the ontological question, in the sense that he may allow that there may or may not be non-natural entities, such as a God, provided that these entities are unable to causally interact with the natural world – if there were a God, who could causally interact with the natural world, we couldn't really *know* that metal expands when heated, say, since the God might then choose to stop a heated piece of metal from expanding.<sup>13</sup>

At any rate, Leiter also distinguishes a third main type of naturalism, which I shall refer to as *semantic* naturalism, according to which a concept must be analyzable “in terms that admit of empirical inquiry,” if the analysis is to be philosophically suitable. Leiter calls it semantic S-naturalism, because he conceives of it as a special kind of substantive naturalism. Here is Leiter:

S-naturalism in philosophy is either the (ontological) view that the only things that exist are *natural* or *physical* things; or the (semantic) view that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry. [...] In the semantic sense, S-naturalism is just the view that predicates must be analyzable in terms that admit of empirical inquiry: so, e.g., a semantic S-naturalist might claim that “morally good” can be analyzed in terms of characteristics like “maximizing human well-being” that admit of empirical inquiry by psychology and physiology (assuming that well-being is a complex psycho-physical state). (2002, 3).

I believe, however, that we should make a distinction between a narrow and a broad conception of semantic naturalism.<sup>14</sup> On the narrow conception (NCSN), which Leiter appears to accept, a philosophically acceptable analysis of a concept entails that the concept – strictly speaking, the *term* that expresses the concept – refers to natural entities. On the

<sup>13</sup> This is also Leiter's view (Leiter 2007, 35, n 96). I want to thank Folke Tersman as well as Brian Bix and Michael Green for having emphasized in conversation and in email correspondence the possibility of a believer in methodological naturalism who is agnostic about the ontological question.

<sup>14</sup> Jan Österberg suggested to me that this (or a similar) distinction might be useful here.

broad conception (BCSN), on the other hand, a philosophically acceptable analysis of a concept entails that it does *not* refer to non-natural entities. This distinction is of some interest in this context, because the non-cognitivist analysis embraced by Ross and Olivecrona – according to which moral terms like ‘right,’ ‘good,’ or ‘duty’ have no cognitive (or descriptive) meaning, and *do not refer at all*<sup>15</sup> – is in keeping with the broad, but not the narrow, conception. For, on this type of analysis, while such terms do not refer to non-natural entities, they do not refer to natural entities either.

However, the broad conception of semantic naturalism is difficult to square with what we might call the *classical conception of philosophical analysis*, according to which such analysis aims to establish an analytically true equivalence between the *analysandum* (what is analyzed) and the *analysans* (what does the analyzing).<sup>16</sup> Since on the non-cognitivist analysis, moral terms have no cognitive meaning and do not refer at all, one cannot specify the *analysans* by saying “*A* has a right to *X* if, and only if, ...” or “*A* ought to do *X* if, and only if, ...” Accordingly, a naturalist who embraces the classical conception of philosophical analysis will almost certainly prefer the narrow conception of semantic naturalism.

Although Leiter does not touch on this issue either, it seems to me that semantic naturalism does *not* imply ontological naturalism.<sup>17</sup> Like the methodological naturalist, the semantic naturalist may allow that there may or may not be non-natural entities, provided that these entities are unable to causally interact with the natural world. For the belief that a philosophically acceptable analysis of a concept will be in terms of natural entities (NCSN), or at least not in terms of non-natural entities (BCSN), is clearly compatible with the belief that there may be non-natural entities that cannot influence the natural entities.

Let us note, finally, that Leiter makes a further distinction between two types of naturalism, which turns on one’s view of the *goal* of the philosophical enterprise, viz. between *replacement* naturalism and *normative* naturalism: Whereas replacement naturalists aim to substitute a descriptive/explanatory account of some legal phenomena for existing

<sup>15</sup> Instead of cognitive meaning, they may have *emotive* meaning. On this, see Stevenson (1937).

<sup>16</sup> On the classical conception of philosophical analysis, see, e.g., Langford (1942); Urmson (1956, 116–8); Sosa (1983); Strawson (1992, ch. 2); Anderson (1993).

<sup>17</sup> I shall leave it an open question whether ontological naturalism implies semantic naturalism.

normative theories of such phenomena, normative naturalist aim instead to regulate practice by laying down norms and standards (2002, 35). Replacement naturalism is of interest in this context, because both the Americans and the Scandinavians Lundstedt and Ross aimed precisely to substitute a descriptive/explanatory account of some legal phenomena for existing normative theories of such phenomena.

### 3 Naturalism in the Legal Philosophy of Alf Ross

#### 3.1 Introduction

Ross conceives of philosophy as “the logic of science” and its subject as “the language of science,” and he thinks, in keeping with this, of jurisprudence as the logic of legal science (*Rechtswissenschaft*) and its subject as the language of legal science. The focus on the language of legal science involves in turn a large dose of conceptual analysis aimed at general and fundamental legal concepts, such as the concept of valid law, the concept of a legal rule, or the concept of a legal right. Ross puts it as follows:

The relation of jurisprudence to the study of law is reflex, turning towards its logical apparatus, in particular the apparatus of concepts, with a view to making it the object of a more detailed logical analysis than is given to it in the various specialized studies of law themselves. [...] His subject is pre-eminently the fundamental concepts of general scope such as, for example, the concept of valid law, which for that reason is not assigned to any of the many specialists within the wide realm of the law. (1959, 25–6. Footnote omitted.)

In fact, Ross espoused semantic naturalism already in Ross (1946), whose aim was to refute (what Ross referred to as) *dualism* in jurisprudence:

The starting point of the exposition in the present book is the view that the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied prescientific concept of law which more or less consciously forms the basis of the theories developed. It is the dualism of reality and validity in law, which again works itself out in a series of antinomies in legal theory. What is meant by this dualism will appear from the sequel. As a preliminary explanation it may be said that law is conceived at the same time as an observable

phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and a priori, as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition. (Ibid., 11)

The reason why Ross could not accept dualism was that he could not square it with the ontological naturalism that he espoused. That is to say, he could not find a place for the ideal component of dualism – the bindingness, the a priori, the ideal, the validity – in the all-encompassing spatio-temporal framework, mentioned above.

Ross returned to the distinction between jurisprudential idealism and jurisprudential realism in *On Law and Justice*, where he made it clear that he espoused ontological, semantic, and methodological naturalism. He explained that jurisprudential *idealism* rests on the assumption that there are two distinct worlds with two corresponding modes of cognition, viz. (i) the world of time and space, which comprises the usual physical and psychological entities that we apprehend with the help of our senses, and (ii) the “world of ideas or validity”, which comprises “various sets of absolutely valid normative ideas” and is apprehended by our reason (1959, 65); and that jurisprudential *realism* is concerned with the world of time and space, and aims to attain knowledge of the law using the methods of modern empiricist science. As he put it, “[t]here is only one world and one cognition. All science is ultimately concerned with the same body of facts, and all scientific statements about reality—that is, those which are not purely logical-mathematical—are subject to experimental test.” (Ibid., 67)

He also made a distinction between *psychological* and *behaviorist* versions of jurisprudential realism, explaining that while all versions of realism interpret legal validity in terms of the *social efficacy* of legal norms, psychological realism and behaviorist realism differ on their understanding of the idea of social efficacy of norms. According to the former, a norm is valid “if it is accepted by popular legal consciousness”; according to the latter, it is valid “if there are sufficient grounds to assume that it will be accepted by the courts as a basis for their decisions.” (Ibid., 71–3).

Ross’s naturalism is at work, *inter alia*, in the analyses of the concepts of valid law and legal right, and in the analysis of the methods and techniques of legal reasoning. But, as we shall see, whereas it is the *narrow*, not the broad, conception of semantic naturalism that is at work in these analyses, it is the *broad*, not the narrow, conception of semantic natural-

ism that can be squared with Ross's non-cognitivism. Let us therefore take a look at Ross's meta-ethics before we turn to a consideration of these topics.

### 3.2 Ross's Meta-Ethics

Naturalists may be moral realists as well as moral anti-realists, though if they are moral realists they must of course embrace a naturalist version of moral realism. Ross was a moral anti-realist, specifically, a non-cognitivist of the emotivist type, who held that moral judgments do not state that something is the case, but express the speaker's attitudes or feelings. Since non-cognitivism does not assert or presuppose the existence of any moral facts whatsoever, it is clearly in keeping with the broad, but not with the narrow, conception of semantic naturalism.

Ross's non-cognitivism was explicitly stated in a couple of early articles. For example, in a 1936 article celebrating the 25<sup>th</sup> anniversary of the Pure Theory of Law, he maintains that we cannot conceive of the law as a system of norms in the sense contemplated by Kelsen and others, because norms do not express propositions, do not concern (or refer to) states of affairs, but simply express the speaker's (subjective) attitudes or feelings:

Thus a normative claim does not have any meaning that can be expressed in abstraction from the reality of experience. It is not a "thought" the truth or falseness of which can be tested as something that is absolutely independent of its psychological experience. No, a normative claim can only be considered in its actual occurrence itself as a psychophysical phenomenon that brings certain other psychophysical phenomena (emotions, attitudes) to expression. But this "bringing to expression" has nothing to do with meaning, but only means that a normative claim is considered a fact in a real causal relationship to other, not immediately observable psychophysical phenomena, the existence of which we can infer in this way. (1936, 13)<sup>18</sup>

<sup>18</sup> Translated into English by Robert Carroll. The Danish original reads as follows. "Det normative Udsagn besidder altsaa netop ingen Mening, der lader sig fremstille i Abstraktion fra den psykologiske Oplevelsevirkelighed. Det er ingen "Tanke," hvis Sandhed eller Falskhed kan prøves som noget, der er absolut uafhengigt af dens psykologiske Oplevelse. Nej, det normative Udsagn kan alene betragtes i sin faktiske Forekomst selv som et psykofysisk Faenomen, der bringer visse andre psykofysiske Faenomener (Følelser, Indstiller) til Udtryk. Men denne "Bringen til Udtryk" har intet med Mening at göre, men betyder blot, at det normative Udsagn betragtes som et faktum, der staar i faktisk Aar-

Ross does not have much to say about meta-ethical questions in *On Law and Justice*, but his distinction between assertions, which can be true or false, and directives, which lack truth-value (1959, 6–11), together with his comments on the idea of justice, suggest that he still adheres to the emotivist version of non-cognitivism. Having argued that whereas it makes sense to maintain that a decision by a court on the basis of a general rule is just or unjust, it does not make any sense at all to say that the rule itself is just or unjust, he states the following:

To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate. That is no proper way to mutual understanding. It is impossible to have a rational discussion with a man who mobilises "justice," because he says nothing that can be argued for or against. His words are persuasion, not argument ... The ideology of justice is a militant attitude of a biological-emotional kind, to which one incites oneself from the implacable and blind defence of certain interests. (Ibid., 274–5)

And a few pages later, discussing the relation between law and justice, he states the following: "To assert that a law is unjust is ... nothing but an emotional expression of an unfavourable reaction to the law. To declare a law unjust contains no real characteristic, no reference to any criterion, no argumentation." (Ibid., 280)

Ross returns briefly to the question of the nature of moral judgments in his last monograph, *Directives and Norms*, where he makes it clear that he still accepts non-cognitivism of the emotivist type (1968, 64–8). Pointing out that cognitivism and non-cognitivism are the two main positions in moral philosophy, he explains that according to non-cognitivism, (i) acceptance of a directive constitutes its validity, (ii) there exists no specific moral cognition, and (iii) that the personal attitude involved need not be a matter of an arbitrary whim. He adds (iv) that non-cognitivism does not eliminate the need for moral reasoning by requiring that

sagssammenhang med andre, ikke umiddelbart iakttagelige psyko-fysiske Faenomener, til hvil Eksistens man ad denne Vej kan slutte sig."

Ross reiterates the claim that moral judgments do not state that something is the case, but simply express the speaker's attitudes or feelings, in an article that deals with the possibility of a logic of norms (1941, 55), and again in an article on the logical nature of value judgments (1945, 202–3).

every moral judgment be based on a separate attitude, and (v) that non-cognitivism does not have any connection with moral nihilism or moral indifferentism (relativism).

### 3.3 The Concept of Valid Law<sup>19</sup>

Ross observes in the beginning of *On Law and Justice* that the problem about the nature of law is at the heart of jurisprudence, and proceeds to ask why this is so. His answer to this reasonable question is that we need to be clear about the import of the concept of valid law, because we presuppose this concept every time we make a statement about the law of the land, such as “[Directive] D is valid (Illinois, California, common) law.” (1959, 11) He adds that the interest of jurisprudents in the *nature* of their study-object is unique to the study of law and has no counterpart among, say, physicists or chemists, and explains why the problem about the nature of law is the main problem of jurisprudence. (Ibid., 11)

Turning to a preliminary analysis of the concept of valid law, Ross takes his starting point in an analysis of the game of *chess*. Pointing out that chess players move the chess pieces in accordance with a set of rules, he explains that one must adopt an *introspective* method if one wishes to ascertain which set of rules actually governs the game of chess – if one were content to observe behavioral regularities and nothing more, one would never be able to distinguish chess rules from regularities in behavior that depend on custom or the theory of the game (Ibid., 15). The problem, he explains, is to determine which rules are *felt to be binding*: “The first criterion is that they are in fact *effective* in the game and are outwardly visible as such. But in order to decide whether rules that are observed are more than just customary usage or motivated by technical reasons, it is necessary to ask the players by what rules they *feel themselves bound*.” (Ibid., 15. Emphasis added) He maintains, in keeping with this, that a rule of chess is *valid* if, and only if, the chess players (i) follow the rule (ii) because they feel bound by it. (Ibid., 16)

He then points out that we must apply a similar method to the study of *law* and advances the following hypothesis:

<sup>19</sup> Like other Scandinavian and German authors, Ross speaks of ‘valid law,’ not just ‘law,’ in order to indicate that the law (in the sense of a legal system) is in force or exists. Roman law, for example, was, but is no longer, ‘valid’ law. I owe this point to Åke Frändberg.

The concept “valid (Illinois, California, common) law” can be explained and defined in the same manner as the concept “valid (for any two persons) norm of chess.” That is to say, “valid law” means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding.” (Ibid., 17–8)<sup>20</sup>

He is, however, careful to point out that this analysis is not as banal as one might think if one approached the problem with no preconceived notions. The novelty of the analysis is precisely its naturalist, anti-metaphysical quality, which rules out the traditional view that the validity of law is “... a pure concept of reason of divine origin existing *a priori* ... in the rational nature of man”. (Ibid., 18)

Turning to a full analysis of the concept of valid law, Ross points out that in regard to its *content*, a national legal system is a system of norms “for the establishment and functioning of the State machinery of force.” (Ibid., 34) To say that such a system is *valid*, he explains, is to say that judges (i) apply the norms (ii) because they feel bound by them. (Ibid., 35) This analysis, he adds, is a synthesis of the psychological and the behaviorist versions of realism, distinguished above. (Ibid., 73–4)

The concept of valid law is thus analyzed in naturalistically acceptable terms, viz. in sociological and psychological terms. For not only does Ross take into account natural entities and nothing else (ontological naturalism), he also analyzes the concept in question in terms of such entities (the narrow conception of semantic naturalism), employing methods of inquiry and styles of explanation – claims about social facts that can be empirically verified or falsified – that are “continuous with” the sciences (methodological naturalism of the type that requires “methods continuity”). So, on this analysis, there is no non-naturalistic (idealistic) residue that could embarrass the naturalist.

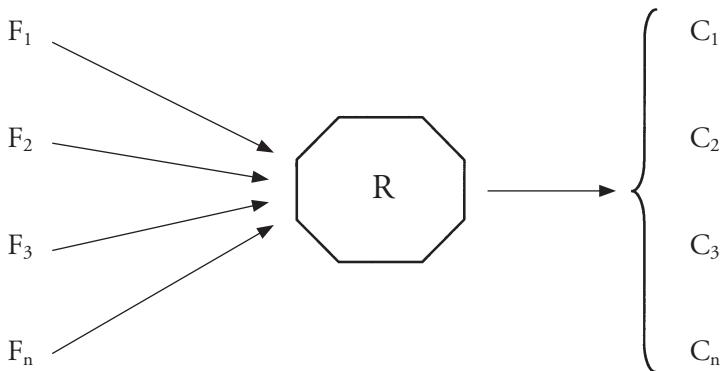
But, as we have seen, a non-cognitivist meta-ethics, according to which moral and legal terms have no cognitive meaning and do not refer, cannot be squared with the narrow conception of semantic naturalism, which requires that an acceptable analysis of a moral or legal concept

<sup>20</sup> But, one wonders, if we can't conceive of the law as a set of norms, on the ground that norms have no “meaning that can be expressed in abstraction from the reality of experience,” as Ross contends, how can we conceive of valid law as a set of abstract normative ideas?

entails that the concept refers to natural entities. Does this mean that Ross *contradicts* himself when he clearly accepts the narrow conception of semantic naturalism and applies it to the analysis of legal concepts, such as the concept of valid law? I do not think so, and I will explain why below in my discussion of Ross's analysis of the concept of a legal right.

### 3.4 The Concept of a Legal Right

Ross's starting point is that the term 'legal right' does not refer – it lacks, as Ross puts it, semantic reference – and must therefore function in some other way (Ibid., 172–5. See also Ross (1957, 820). Against this background, Ross (1959, 74) claims that the concept of a legal right is a *technical tool of presentation*, or, as I shall say, a *connective concept*, which ties together a disjunction of operative facts and a conjunction of legal consequences in the following way (*F* stands for operative facts, *R* stands for right, and *C* stands for legal consequences):



We might say with Karl Olivecrona (1962, 190) that the concept of a legal right thus conceived fulfils the same function as a *junction*: a large number of lines (the operative facts) converge into the junction (the legal right), from which a large number of lines branch out (the legal consequences). On this analysis, to assert that a person has a legal right is to render the content of a number of legal norms in a convenient manner. What we have here, Ross explains, is "a simple example of reduction by reason to systematic order." (1959, 172)

Ross points out that his understanding of the concept of a legal right differs markedly from the common sense understanding of that concept, because lawyers as well as laymen often speak of legal rights as if they were some type of *entity* that follows from certain operative facts and then yields certain legal consequences (Ibid., 179). The problem with such a metaphysical conception of legal rights, he points out, is that it assumes that a legal right is “a single and undivided entity that must exist in a specific subject ...” (Ibid., 179) For, he explains, it is often the case that the various functions (or aspects) of a legal right – such as the advantage of having a right, the power to take legal action, and the power to transfer the right – are to be found in different persons. (Ibid., 179–83)

Ross is aware that this kind of analysis, which emphasizes the connective function of the concept, fits other legal concepts as well, and he therefore proceeds to say something about the circumstances in which we can properly say that a person has a legal right (Ibid., 175). He is, however, careful to point out that doing this does not involve “deciding when a right ‘actually exists.’” For, as he keeps reminding us, the term ‘legal right’ does not refer to “any phenomenon that exists under certain specific conditions.” (Ibid., 175)

Nevertheless, Ross argues that typically the right-holder (i) is on the advantageous side of a legal relation, (ii) has the legal right as a result of a legal regulation, and (iii) is the person who can enforce the right by taking legal action. He adds that it is usually the case that the right-holder (iv) has the legal power to transfer the right to another person. The concept of a legal right, he concludes, “is typically used to indicate a situation in which the legal order has desired to assure to a person liberty and power to behave – within a specified sphere – as he chooses with a view to protecting his own interests.” (Ibid., 177) He adds that this means that we do not speak of legal rights in a situation where a person has certain liberties and powers that are intended for the protection of social interests. (Ibid., 177) In such a case, he explains, we speak instead of a person’s *authority* or *power*. The concept of a legal right, in other words, “indicates the autonomous self-assertion of the individual.” (Ibid., 177)

Ross’s attempt to distinguish the concept of a legal right from other concepts that might also be conceived of as connective concepts – by rather loosely characterizing the situations in which we typically say that a person has a legal right – is of interest in this context, because it doesn’t indicate what is necessarily the case, but only what happens to be the case, and because the absence of conceptual necessity appears to be a

result of Ross's naturalist approach to conceptual analysis – in nature there is no conceptual necessity. (On this, see Bealer 1987)

Ross thus rejects the concept of a legal right as traditionally understood on the ground that the term 'legal right' does not refer to anything at all. Since he believes that the concept thus conceived is unacceptable, Ross proposes that we re-conceive it as a connective concept along the lines indicated above. Thus re-conceived, the concept has been analyzed in terms of natural entities, viz. in terms of the content of valid, that is, existing legal norms, and this means that the analysis could be accepted by an adherent to the narrow conception of semantic naturalism. As Ross puts it, "the assertion that *A* possesses the ownership of a thing, when taken in its entirety, has semantic reference to the complex situation that there exists one of those facts which are said to establish ownership, and that *A* can obtain recovery, claim damages, etc." (1957, 822) Alternatively, one might say that the *content* of positive legal norms can be said to be an empirical matter, if and insofar as the *determination* of the content of such norms is essentially an empirical matter.<sup>21</sup>

One may, however, wonder whether this analysis can really be squared with Ross's non-cognitivism. If, on the non-cognitivist analysis, the term 'right' has no cognitive meaning and does not refer, how can 'right,' on Ross's analysis, refer to natural entities in the shape of the complex situation, mentioned in the previous paragraph? I believe Ross could answer this question by invoking a distinction between norms and first-order value judgments (the legal object-language), on the one hand, and statements *about* norms and second-order value judgments (the legal meta-language), on the other hand. Specifically, he might argue that the non-cognitivist theory applies *only* to the legal object-language, and that, while 'right,' as it occurs in the legal object-language, does not refer, his analysis concerns 'right' as it occurs in the legal meta-language. On this interpretation, Ross's analysis of the concept of a legal right simply does not come within the scope of the non-cognitivist theory. But this means, of course, that the scope of Ross's analysis turns out to be rather narrow, and this takes value away from the analysis.

<sup>21</sup> Of course, the extent to which this is so is a controversial question, which divides so-called exclusive and inclusive legal positivists. On this, see Coleman (2001, 103–19); Raz (1985); Waluchow (1994).

### 3.5 Methods and Techniques of Legal Reasoning

Ross's discussion of the methods and techniques of legal reasoning falls into two parts, viz. (i) the doctrine of the sources of law, which identifies the recognized sources of law, such as legislation, precedent, and custom, and (ii) the judicial method, which concerns the interpretation and application of the legal raw material found in the sources of law (Ross 1946, ch. 6; 1959, chs 3–4). Beginning with the former, Ross explains that if prediction of judicial decisions is to be possible, judges must embrace an ideology – a set of normative ideas – concerning how to decide cases,<sup>22</sup> and follow this ideology faithfully. And this ideology, he explains, is the subject-matter of the doctrine of the sources of law.

Ross is careful to point out that the doctrine of the sources of law concerns the way judges actually behave, and that any *normative* doctrine of the sources of law that deviates from the actual behavior of the judges will be of little or no value:

The *ideology* of the sources of law is the ideology which in fact animates the courts, and the *doctrine* of the sources of law is the doctrine concerning the way in which the judges in fact behave. Starting from certain presuppositions it would be possible to evolve directives concerning how the judges *ought* to proceed in making their choice of the norms of conduct on which they base their decisions. But it is clear that unless they are identical with those which are in fact followed by the courts, such directives are valueless as bases for *predictions* as to the future behaviour of the judges, and thus for the determination of what constitutes valid law. Any such normative doctrine of the sources of law, which does not square with facts, is nonsensical if it pretends to be anything else than a project for a different and better state of law. The doctrine of the sources of law, like any other doctrine concerning valid law, is norm-descriptive, not norm-expressive—a doctrine concerning norms, not of norms. (1959, 76. Emphasis added)

Ross's treatment of the *judicial method* follows similar lines. Pointing out that we may regard statements about the interpretation of legal rules as statements about “valid interpretation” analogously to statements about valid law, Ross explains that this means that we must conceive of them as *predictions* of judicial behavior: “Just like the doctrine of the sources of law, a doctrine of method which is intended to serve as a guide to

<sup>22</sup> But note that such an ideology would have to include components that rightly belong in the theory of the judicial method, which Ross conceives of as a separate field of study.

interpretation must be a doctrine concerning the manner in which the courts in fact behave in the application of valid law in specific situations.” (Ibid., 110) But he points out that we cannot expect as much precision in our claims about the judicial method as in the case of our claims about the doctrine of the sources of law.

Ross concludes his analysis by emphasizing that he has offered an *analytical-descriptive*, not a normative, theory of interpretation:

Like the traditional doctrine of the sources of law, the traditional theory of method is constructed not as an analytical-descriptive theory expounding how law *is* administered (particularly: interpreted), but as a dogmatic-normative doctrine stating how the law ought to be administered (interpreted). These dogmatic postulates are developed by deduction from preconceived ideas of “the concept of law,” “the nature of law,” and “the task of the administration of justice”, and are formulated in the guise of assertions as to the “aim” or “purpose” of interpretation. From these postulates are deduced, in turn, a series of general principles of interpretation or more concrete rules of interpretation. In general, these constructions have no value for the understanding of valid law or for the prediction of future legal decisions, unless they reflect, more or less by accident, the method which is actually practiced in the courts; their relative truth-value is limited because they attempt to lump the various considerations that affect interpretation into one single “purpose.” (Ibid., 155)

I believe Ross’s discussion of the doctrine of the sources of law and the judicial method is based on a commitment to both methodological and semantic naturalism, because in both cases the idea is to analyze a concept in terms of natural entities, and to make statements about the law that can be tested empirically; and the latter enterprise is precisely to emulate the methods of inquiry and styles of explanation employed in the sciences. Moreover, Ross’s (implicit) claim that in both cases this type of analysis should be substituted for the traditional, normative approach to the doctrine of the sources of law suggests that Ross was also committed to replacement naturalism.

Finally, it is worth noting that in his analysis of the doctrine of the sources of law and the judicial method, Ross clearly assumes that judges decide cases in accordance with the *law* and not on the basis of party affiliation, bribes, racist preferences, etc. But this is not the case everywhere and at all times.<sup>23</sup> Consider, for example, the courts of law in the Third

<sup>23</sup> I owe this point to Thomas Mautner.

Reich. I believe this seemingly banal point is worth making, because one could argue that someone who aims for an empirical investigation into the causes of judicial decisions should not disregard “external” or “non-legal” influences on judges, since in some cases they – and not the law – may be the causes of the decision.

### 3.6 Conclusion

We have seen that Ross was a dyed-in-the-wool naturalist, who accepted semantic and ontological naturalism as well as methodological naturalism of the type that requires “methods continuity”, and that his commitment to these types of naturalism played an important role in his legal philosophy. We have also seen that Ross’s non-cognitivism is compatible with a commitment to the broad conception, but not with a commitment to the narrow conception, of semantic naturalism, which Ross appears to accept, though we have also seen that Ross might be able to solve the problem by invoking a distinction between the legal object language and the legal meta-language and saying that his analysis concerns legal concepts as they occur in the legal meta-language. Moreover, we have seen that Ross’s analysis of fundamental legal concepts, such as the concept of valid law and the concept of a legal right, depends on a commitment to the narrow conception of semantic naturalism, and in the former case, also on a commitment to methodological naturalism; and that Ross’s analysis of the methods and techniques of legal reasoning depends on a commitment to the narrow conception of semantic naturalism and to methodological naturalism of the type mentioned. Moreover, his analysis of the methods and techniques of legal reasoning may perhaps be seen as reflecting a commitment to replacement naturalism.

## 4 Naturalism in the Legal Philosophy of Karl Olivecrona

### 4.1 Introduction

I believe that Olivecrona was committed to ontological, but not to semantic, naturalism. Moreover, he does not seem to have accepted methodological naturalism.

Olivecrona’s adherence to ontological naturalism is clear from the claim in the First Edition of *Law as Fact* that any adequate theory of law

must eschew metaphysics and treat the law as a matter of *social facts*. The aim, Olivecrona explained, was to *reduce* our picture of the law in order to make it correspond with *objective reality*:

I want to go straight to this question [of law as fact] and treat directly the facts of social life. If in this way we get a coherent explanation, without contradictions, of those facts which are covered by the expression “law”, our task is fulfilled. Anyone who asserts that there is something more in the law, something of another order of things than “mere” facts, will have to take on himself the burden of proof. [...] The facts which will be treated here are plain to everybody’s eyes. What I want to do is chiefly to treat the facts as facts. My purpose is to reduce our picture of the law in order to make it tally with existing objective reality, rather than to introduce new material about the law. It is of the first importance to place the most elementary and well-known facts about the law in their proper context without letting the metaphysical conceptions creep in time and again. (1939, 25–7)

That Olivecrona’s commitment to and understanding of naturalism remained the same in all essentials throughout his long career is clear from his treatment of the various legal-philosophical problems that he engaged with, but also from what he said on the few occasions when he explicitly considered his methodological stance. For example, he explained in the preface to the Second Edition of *Law as Fact*, that even though it is not a second edition in the usual sense, but rather a new book, the fundamental ideas are the same, viz. “to fit the complex phenomena covered by the word law into the spatio-temporal world.” (1971, vii. See also 1951.)

Olivecrona’s naturalism comes to the fore, *inter alia*, in the critique of the view that the law has binding force, and in the analysis of the concept of a legal rule. Let us, however, begin with a look at Olivecrona’s meta-ethics before we proceed to consider what Olivecrona has to say on these topics.

## 4.2 Olivecrona’s Meta-Ethics

Olivecrona never spoke of *moral* values or moral rights or obligations, as distinguished from other types of value, right, or obligation, but preferred to speak more generally of values, rights, or obligations, etc. Nevertheless, it is clear from the context that he usually had in mind precisely moral values, rights or obligations. He rarely went further than to assert that there are no objective values and no objective ought, however. But

this claim, or these claims, could be accepted not only by non-cognitivists, but by meta-ethical relativists (Harman 1996) and error-theorists (Mackie 1977; Joyce 2001). As a result, the precise nature of Olivecrona's meta-ethical position is somewhat unclear. I suggest, however, that in his early writings Olivecrona vacillated between an error-theory and a non-cognitivist theory in regard to rights statements, while accepting non-cognitivism in regard to judgments about duty and value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board.<sup>24</sup> Of course, what is important here are not the details of Olivecrona's meta-ethical position, but that it is consistent with the types of naturalism espoused by Olivecrona.

Olivecrona's analysis of the *concept of a legal rule* in the First Edition of *Law as Fact* suggests a non-cognitivist stance. Olivecrona, who conceives of legal rules as a species of imperatives, viz. so-called independent imperatives, maintains that an independent imperative can sometimes be expressed by a sentence in the indicative mood, such as "It is the case that you shall not steal." And, he points out, this is the reason why we believe in objective values and an objective ought. But, he explains,

[w]e do not impart knowledge by such utterances, we create suggestion in order to influence the mentality and the actions of other people. There is no real judgment behind the sentences. The objective nature of an action is not determined by saying that it should, or should not, be undertaken. What lies behind the sentences is something other than a judgment. It is that, in our mind, an imperative expression is coupled to the idea of an action. This is a psychological connection only, though of the utmost importance in social life. But for certain reasons the connexion appears to us as existing objectively. Thus we get an illusion of a reality outside the natural world, a reality expressed by this "shall". That is the basis of the idea of the binding force of the law. (1939, 46.)

<sup>24</sup> Konrad Marc-Wogau argued already in 1940 that Olivecrona vacillates between two different ways of understanding the existence of rights, duties, and the binding force of law. On the first interpretation, these entities exist only as ideas or conceptions in human minds. As Marc-Wogau puts it, on this interpretation they have *subjective*, but not objective, existence. On the second interpretation, the entities exist neither in reality nor as ideas or conceptions in human minds. On this interpretation, they have neither objective nor subjective existence. Marc-Wogau suggests that Olivecrona really wanted to defend the second interpretation, although he frequently spoke as if he were concerned with the first. Marc-Wogau (1940).

Olivecrona's analysis of the *concept of a right* in the First Edition of *Law as Fact*, on the other hand, suggests an error-theoretical analysis. Olivecrona argues that since we have seen that the idea of the binding force of the law is an illusion, we must conclude that the idea of duties is subjective. Duty, he explains, "has no place in the actual world, but only in the imagination of men." (Ibid., 75.) He then maintains that the situation is essentially the same with regard to the concept of a right:

It is generally supposed that the so-called rights are objective entities. We talk about them almost as if they were objects in the outer world. On reflection we do not, of course, maintain that this is the case. But we firmly believe that the rights exist outside our imagination as objective realities, though they are necessarily something intangible. We certainly do not confine their existence to the world of imagination. Suggestions to that effect are commonly rejected with scorn and indignation. Yet on close examination it is revealed that the rights just as well as their counterpart the duties exist only as *conceptions in the human mind*. (Ibid., 76–7)

I take Olivecrona to be saying that while statements about rights or duties are genuine statements that assert, or perhaps imply, that rights and duties exist "outside our imagination as objective realities," the truth of the matter is that they exist only as *conceptions in the human mind*, and that therefore all statements about rights or duties are false.<sup>25</sup>

Olivecrona returns to the topic of legal rules and judgments about duty in an article on realism and idealism in legal philosophy published 1951. Having reiterated a claim made in the First Edition of *Law as Fact*, viz. that the grammatical form of value judgments, which here appears to include rights statements as well as judgments about duty, but *not* value judgments proper, deceives us into believing in objective values and an objective ought, he proceeds to clarify the real nature of value judgments:

These statements have the *verbal form* of judgments; that is to say, they are verbal propositions concerning reality. When we, for instance, qualify actions as good or bad, we apparently ascribe the property of goodness or badness to them. Yet, it is obvious that no such property can be detected in the actions among their natural properties. The qualification represents our

<sup>25</sup> Strictly speaking, only statements that assert that there *are* rights or duties would be false on this interpretation, whereas statements that there are no rights or duties or statements that a certain, contemplated right or duty does not exist, would be true.

own emotional attitude; it would be senseless to describe an action as either good or bad if it were to leave us completely unmoved. The statements on goodness or badness are supplied with meaning by the corresponding feelings. But our feelings are entirely subjective; it is senseless to ask whether they are true or not. They exist, or do not exist: that is all. (1951, 129–30. Footnote omitted.)

The reference to what “we apparently ascribe” to actions and to “our emotional attitude,” and the claim that it is senseless to ask whether our feelings are true or not, suggest that Olivecrona now embraces non-cognitivism of the emotivist type.

Olivecrona returns to the concept of a *right* in the Second Edition of *Law as Fact*, where he makes a distinction between two different ways of rejecting the reality of rights. He explains that we may say that there is no *facultas moralis* of natural law theory or no *Willensmacht* of the imperative theory of law, or we may instead say that the noun ‘right’ as commonly used “does not signify anything at all,” not even something that exists in imagination only. (1971, 183) He is explicit that he now prefers the second, non-cognitivist analysis, though he does not comment on the fact that he used to prefer the first, error-theoretical analysis.

Details about Olivecrona’s meta-ethical position aside, it is clear that Olivecrona’s non-cognitivism is in keeping with a commitment to ontological naturalism: Since there are no such entities in the natural world as moral values or standards, one’s meta-ethical theory must do without them. And since non-cognitivism does not assert or imply the existence of any moral facts whatsoever, it is also in keeping with the broad conception of semantic naturalism, which, as we have seen, has it that a philosophically acceptable analysis of a concept entails that it does *not* refer to non-natural entities.

#### 4.3 The Binding Force of the Law

Olivecrona begins the First Edition of *Law as Fact* with a consideration and rejection of the view that the law has binding force. He introduces the topic to be discussed in the following way:

The most general definition of law seems to be that law is a body of rules, *binding* on the members of the community. Vague as it is, we may take this as our starting point for our investigation into the true nature of the law. It contains at least one element which, beyond doubt, is common to practically all those who have treated the subject. This is the assumption that the

law is *binding*. Leaving aside for the time being the question how a rule is to be defined, we will first ask what is meant by the binding force of the law and try to decide whether the binding force is a reality or not. (1939, 9).

Having rejected several attempts to explain the nature of the binding force by reference to social facts, such as feelings of being bound, or inability to break the law with impunity, Olivecrona concludes that the binding force has no place in the world of time and space, but must be located in some sort of supernatural realm: “The absolute binding force of the law eludes every attempt to give it a place in the social context. [...] This means in the last instance that the law does not belong to the world of time and space. It must have a realm of its own, outside the actual world.” (Ibid., 14) But, he objects, this is absurd. The law could not be located in a supernatural world beyond the world of time and space, because there could be no *connection* between such a world and the world of time and space:

There is one very simple reason why a law outside the natural world is inconceivable. The law must necessarily be put in some relation to phenomena in this world. But nothing can be put in any relation to phenomena in the world of time and space without itself belonging to time and space. Therefore all the talk of a law, which in some mysterious way stands above the facts of life, is self-contradictory. It makes no sense at all. (Ibid., 15–6)<sup>26</sup>

As Olivecrona sees it, we have here the dividing-line between realism and metaphysics, between scientific method and mysticism in the explanation of the law. To believe that the law has binding force and that therefore the law belongs in a supernatural world is to give up any attempt at a scientific explanation of the law and legal phenomena and to indulge in metaphysics (Ibid., 17).

Olivecrona does not, however, explain *why* there can be no connection between the world of the ought and the world of time and space; he just asserts that there can be no such connection. But, even though he does not say so, his critique owes a lot to Hägerström’s critique of Hans Kelsen’s theory of law, put forward in a 1928 review of Kelsen’s *Hauptprobleme der Staatsrechtslehre* (Hägerström 1953, ch. 4). Hägerström argued that the very idea of the world of the ought is absurd, because this world cannot be *thought of* as even existing alongside the world of time

<sup>26</sup> Olivecrona adds that as a matter of fact the law *is* part of the world of time and space, and that therefore it cannot also be part of some supernatural world. Ibid., 16–7.

and space. For, he reasoned, no *knowledge* of any reality is possible, except through relating its object to a systematically interconnected whole, and the fact that the two worlds – the world of the ought and the world of time and space – are different in kind means that they cannot be coordinated in a systematically interconnected whole. As he puts it, “so far as I contemplate the one [world], the other [world] does not exist for me.” (Ibid., 267). Note, however, that whereas Olivecrona appears to be concerned with the *existence* of the world of the ought, Hägerström is clearly concerned with *knowledge* about the world of the ought.

Olivecrona then turns to consider Kelsen’s theory of law, because he believes that Kelsen’s theory illustrates the necessity for believers in the binding force of the law, to make a distinction between the world of the law and the world of time and space (1939, 17–8). He seizes on the fact that on Kelsen’s analysis, there is a connection between operative facts and legal consequence in legal norms that is as *unshakable* as the connection between cause and effect in nature. And this connection, he continues is such that the legal consequence *ought* to ensue when the operative facts are at hand. He states the following:

A legal rule, according to Kelsen, has a peculiar effect in that it puts together two facts, e.g. a crime and its punishment, in a connexion which is different from that of cause and effect. The connexion is so described that the one fact ought to follow upon the other though it does not necessarily do so in actual fact. The punishment ought to follow the crime, though it does not always follow. Now this “ought” is not, in Kelsen’s theory, a mere expression in the law or jurisprudence. It signifies an *objective connexion* that has been established by the law. (Ibid., 18. Emphasis added)

But, Olivecrona objects, it is simply impossible to explain in a rational way how facts in the world of time and space, such as the activity of the legislature, can produce effects in the world of the ought. As he puts it, “[a]t one time Kelsen bluntly declared that this is ‘the Great Mystery.’ That is to state the matter plainly. A mystery it is and a mystery it will remain forever.” (Ibid., 21)

As should be clear from Olivecrona’s discussion of Kelsen’s theory, the binding force, as Kelsen and Olivecrona understand it, is strictly non-moral and amounts to the idea that valid legal norms (or rules) apply and establish legal relations independently of what anyone may do or think about it. If, for example, there is a legal rule that provides that when declaring one’s income to the internal revenue service, one may

deduct costs for traveling to and from one's workplace, then one is legally permitted to do so, no matter what one may do or think about it; and if there is a legal rule, according to which the buyer of a good must pay the seller when the seller demands payment, then the buyer has a legal duty to do so, no matter what he may do or think about it; and so on. In other words, the binding force is not in any sense a right-making property of legal rules. This means that Olivecrona's critique of the view that the law has binding force applies to our common-sense understanding of the law. Hence you cannot escape the critique by saying that you are just a simple lawyer dealing with mundane, everyday legal problems, and that you don't believe in metaphysical and mysterious notions like the binding force of the law.

Note that Kelsen's analysis, as Olivecrona (and Kelsen himself) understand it, amounts to a *non-naturalist* understanding of legal norms. As Kelsen puts it, “[t]o speak ... of the ‘validity’ of a norm is to express first of all simply the specific existence of the norm, the particular way in which the norm is given, in contradistinction to natural reality, existing in space and time. The norm as such, not to be confused with the act by means of which the norm is issued, does not exist in space and time, for it is not a fact of nature.” (1992, 12). And again: “One will not be able to deny ... that the law *qua* norm is an ideal reality, not a natural reality.” (Ibid., 15)<sup>27</sup> And this is precisely what Olivecrona has in mind when he speaks about an “objective connexion” in the quotation above. As far as I can tell, Olivecrona never contemplated any other version of realism about legal norms than Kelsen's non-naturalism.

Now Olivecrona maintains, in keeping with his belief that there is no such thing as binding force, no unshakable connection between operative facts and legal consequence, that there is *no legal effect to be found*,

<sup>27</sup> See also Kelsen 1945, 45–6. Kelsen speaks about the ‘specific existence’ of norms in the Second Edition of *Reine Rechtslehre*, too, though he is more cautious here and, as far as I can see, is never explicit that norms do not exist in time and space. Kelsen (1960, 5–6, 9–10). Note that Kelsen combines realism about legal norms with anti-realism, specifically meta-ethical relativism, about moral norms. Kelsen (1945, 6–8).

that there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to *act* accordingly. For example, when a clergyman has declared a man and a woman to be married, the citizens as well as judges and other legal officials tend to believe that a change of legal positions has occurred, and they tend to act accordingly. But, he points out, we need not assume the existence of a special legal effect in order to explain these facts, because “[w]e are all conditioned to respond to the act in certain ways, and we do it.” (1971, 225)

But if legal rules do not establish legal relations, what do they do? Olivecrona clearly needs to conceive of the function of legal rules in some other way than Kelsen and others do. And, as we shall see, his view is that legal rules are *psychologically effective*, and that in this way they are part of (what he calls) the chain of cause and effect.

We see, then, that Olivecrona’s critique of the view that the law has binding force is premised on a commitment to ontological naturalism: Since Olivecrona is an ontological naturalist, he cannot accept the existence of a world, *viz.* the world of the ought, located beyond the world of time and space. Moreover, since he is *not* a semantic naturalist (in any sense), he can espouse an error-theoretical *analysis* of the concept of a binding force, while rejecting the *concept* of binding force itself on the ground that does not refer to natural entities.

#### 4.4 Legal Rules as Independent Imperatives

The *content* of a legal rule, Olivecrona explains, is an idea of an imaginary action by a judge in an imaginary situation (1939, 28–9). The *form* of a legal rule, he continues, is *imperative*, because the lawmakers do not aim to inform us about the existence of certain ideas in their minds, but to impress a certain behavior on us (*Ibid.*, 31). He is, however, careful to point out that he does not have the *grammatical* imperative form in mind when he maintains that legal rules have imperative form. Statutory provisions are often phrased in the indicative or the subjunctive mood, but they always express an imperative. (1942, 9)

Pointing out that the *command* is the prototype of the imperative, Olivecrona explains that a command works directly on the will of the recipient of the command, and that this means that it must have a *suggestive character*. He states the following:

A command is an act through which one person seeks to influence the will of another. This may be done through words or signs or perhaps by a determined look only. It is characteristic of the command that the influence on the will is not attained through any appeal to things that constitute values for the receiver of the command. The command may be supported and strengthened by a threat or by a promise. But this is something secondary. The command as such does not contain any reference to values. *It works directly on the will.* In order to do this the act must have a *suggestive character.* Whether words or other means are used, the purpose is obviously suggestion. (1939, 33–4. Emphasis added.)

He maintains, more specifically, that if a command takes effect there arises in most cases in the addressee's mind a *value-neutral intention* to perform the commanded action, that is, an intention that is not motivated by the addressee's own wishes, and adds that in some cases a command may actually trigger an action without the addressee's having had any intervening value-neutral intention. (1942, 7, 10–1)

Olivecrona maintains, however, that legal rules are not commands, but (what he refers to as) *independent imperatives* (1939, 42–9). On his analysis, there are three important differences between commands and independent imperatives. Whereas a command is always (i) issued by a certain person, and (ii) addressed to a certain person or persons, an independent imperative is neither issued by anyone in particular, nor addressed to anyone in particular (Ibid., 32–41). Moreover, as we have already seen, (iii) whereas a command is in no way equivalent to a judgment about a certain normative state of affairs, *an independent imperative can sometimes be expressed by a sentence in the indicative mood*, such as “It is the case that you shall not steal”; and this means that we believe that we can have *knowledge* of what we ought to do (Ibid., 45–6). But, as we have also seen, Olivecrona objects to this view that there are no real judgments behind the sentences that (appear to) express such judgments, but only a *psychological connection*. What really goes on in the process of legislation, he explains, is that the legislature attempts to *influence human behavior* by making use of imperative expressions:

The word “ought” and the like are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality. Their sole function is to *work on the minds of people*, directing them to do this or that or to refrain from something else – not to communicate knowledge about the state of things. By means of such

expressions the lawgivers are able to influence the conduct of state officials and of the public in general. The laws are therefore links in the chain of cause and effect. (Ibid., 21–2. Emphasis added)

On Olivecrona's analysis, then, the effect of legislation, or more generally, legal rules, in society is a matter of *psychology* (Ibid., 52). He points out, however, that the way the individual mind works is a matter for the science of psychology, and that for the purposes of his investigation into the nature of law, he need only point to the general conditions that must be satisfied for legislation to be effective in society. (Ibid., 52)

He identifies, in keeping with this, two general conditions for the efficacy of legislation in society. First and most important, the citizens must display an *attitude of reverence toward the constitution*: "Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as 'binding' and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains." (Ibid., 52–3) This attitude is not self-supporting, however, but must be sustained by means of an incessant psychological pressure on the citizens (Ibid., 53–4). Hence a second condition for the efficacy of legislation in society must be satisfied, viz. that there be an *organization* that handles the application and enforcement of the law: "There must be a body of persons, ready to apply the laws, if necessary with force, since it would be clearly impossible to govern a community only by directly influencing the minds of the great masses through law-giving." (Ibid., 55–6)

One may, however, wonder how this organization, *A*, can become fully functional and give rise to the suggestive character of the rules in question, given that the rules that apply to the officials in *A* could not have the requisite suggestive character, unless there were another organization, *B*, whose officials applied and enforced those rules. And, of course, *B* could not explain the suggestive character of those rules, unless there were a third organization, *C*, whose officials applied and enforced the rules that apply to the officials in *B*. And so on, and so forth.

Olivecrona sticks to this analysis of the function of legal rules in the Second Edition of *Law as Fact*, except that he introduces the concept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (1971, chs 5, 8). He explains that a performatory imperative is an imperative whose meaning is that something shall be the case or come to pass, and points out that

the assumption among lawyers, judges, and legal scholars is that legal effects are brought about through such imperatives (*Ibid.*, 133–4). He offers the example (from Roman law) of a young man who has been sold three times by his father, and who therefore, according to the law of the twelve tables, “shall be free from the father.” This, he explains, is clearly an imperative, though it is addressed neither to the father nor to the son or to anyone else, but “is directed toward a change in the status of the son.” (*Ibid.*, 220)

Olivecrona’s analysis of the concept of a legal rule reflects a commitment to ontological naturalism and to methodological naturalism of the type that requires “methods continuity” with the sciences. For the analysis locates legal rules in the world of time and space, and sees legal rules as psychologically effective, as parts of the chain of cause and effect, in a way that could – in principle – be empirically tested, although it is worth noting that Olivecrona himself never emphasized the “testability aspect” of his analysis.

## 4.5 Conclusion

We have seen that the critique of the view that the law has binding force and the analysis of the concept of a legal rule both illustrate Olivecrona’s commitment to ontological naturalism. More specifically, the claim that there can be no such thing as a world or realm beyond the world of time and space, depends on a belief in ontological naturalism. Moreover, the view that the function of legal rules is to influence human behavior suggests a commitment to methodological naturalism.

## 5 Naturalism in the Legal Philosophy of Vilhelm Lundstedt

Vilhelm Lundstedt was not only a prominent tort law scholar and a social-democratic member of the Swedish parliament, he was also Olivecrona’s senior colleague when Olivecrona was still affiliated with Uppsala University, and a jurisprudent in his own right. Following Axel Hägerström, he put forward a legal philosophy that was at least as radical as Olivecrona’s. There can be no doubt, however, that on the whole his polemical style produced more heat than light, which is why I will devote much less space to Lundstedt’s legal philosophy than to Olivecrona’s.

Lundstedt expounded his mature legal philosophy in a book entitled *Legal Thinking Revised* (1956). Although he did not explicitly consider the nature of reality in this work, his commitment to the narrow conception of *semantic* naturalism and to *methodological* naturalism of the type that requires “methods continuity” with the sciences, is clear from his rejection of (what he referred to as) traditional legal science and his pronouncements on legal science conceived of as a real science. His main objection to traditional legal science was that it operates with metaphysical concepts such as ‘right,’ ‘duty,’ ‘wrong-doing,’ and ‘guilt.’ (Ibid., 42) He argued instead that legal science, conceived of as a real science, must be an empirical science, which deals with social facts: “As a science jurisprudence [that is, legal science] must be founded on experience, on observation of facts and actual connections, and consequently be a natural science.” (Ibid., 126)<sup>28</sup> He added that legal science thus conceived would be concerned with “social evaluations and other psychological causal connections.” (Ibid., 126) Recognizing that legal science thus conceived would be a rather inexact enterprise, he pointed out that it would not be in a worse position in this regard than many other sciences. (Ibid., 127)

He did, however, touch on the topic of *ontological* naturalism, somewhat to the reader’s surprise, in an article from the early 1930’s dealing with problems in international law. Here he argued, following Hägerström (see Section 4 above), that a belief in objective values and an objective ought presupposes a belief in the existence of two distinct worlds – the world of time and space and the world of the ought – and that such a belief is incoherent, because the two worlds simply cannot exist side by side:

... this idea of a dual world is a necessary result of the belief in the existence of objective values, e.g., an objective “ought.” As everything in the world existing in time and space is causally connected with other things, and consequently *is*, of necessity, like this or like that, it must be an insuperable contradiction to maintain that something *ought* objectively to be like this or like that. In order to be able to operate with an objective “ought,” one must consequently remove in the imagination to a world *beyond* the “being,” to a spiritual world, an ideal world, in which the connection in time and space does not raise any obstacles to the assumption of an objective “ought.” By this manipulation, however, one gets entangled in new absurdities. For the

<sup>28</sup> Although Lundstedt speaks of ‘natural’ science, he clearly means ‘social’ science.

idea is, I take it, that the two worlds are to exist *contemporaneously side by side*. But, if so, the spiritual world itself must be determined with regard to time and space, and then again the logical possibility of operating with the “ought” is entirely eliminated.

If one assumes at all a world beyond the connection in time and space, the consequence must of necessity be that the physical world, existing in time and space, must disappear—as a result of this assumption. Otherwise the ideal world itself, as I have mentioned, must be determined with regard to time and space. In one’s argument, whenever one wishes to have the slightest contact with the physical world, the latter therefore dominates entirely, and entirely eliminates every logical thought about the existence of an ideal world. (1932, 328–9)

I suppose Lundstedt means that the “insuperable contradiction” consists in the futility of demanding that something that *is* necessarily the case, *ought* to be otherwise. He may be right about this, but since he is clearly wrong to say that “everything in the world existing in time and space … *is*, of necessity, like this or that …”, he has no basis for the further claim that anyone who believes that “something *ought* objectively to be like this or that” must rationally locate the objective ought in a supernatural world.

Like Ross and Olivecrona, Lundstedt was also a committed non-cognitivist, since he asserted that value judgments can neither be true nor false. The reason, he explained, is that value judgments depend in a peculiar way on the feelings of the person who makes them. He put it as follows:

Judgments of value differ from proper judgments, because they are dependent on the feeling, in a positive or negative direction, in the person who makes the judgment. A purely theoretical examination, which—completely freed from all emotional influences—only established facts, could never lead to: that something ought to be done, that someone has brought guilt (or blame) upon himself, or that something was just. The conceptions ‘ought’, ‘guilt’, and ‘justice’ should in other words be completely incomprehensible to a person devoid of feelings—if such a being, a pure thinking machine, were to exist. This is inherent in the nature of the formulation that ought-, guilt- and justice judgments are subjective and therefore cannot be objective, i.e. cannot have any theoretical meaning, consequently can be neither true nor false. (1956, 45. See also 1942, 18-24.)<sup>29</sup>

<sup>29</sup> It is worth noting that Lundstedt’s line of argumentation in this quotation corre-

As we have seen, Lundstedt also took an interest in questions of international law, especially the question of peace. He argued that international law – the law of nations – is based on metaphysical, even superstitious, notions, such as the ones considered above, and that as a result the world is a very dangerous place. He pointed out that while it is bad enough to assume that *individuals* have rights and duties, etc., this assumption is apt to lead to disaster when applied to *nations*. For, he explained, the idea that nations have rights and duties and can be guilty of wrongdoing that must be punished leads unavoidably to aggression and, in the last instance, to war (1932, 332–3). His idea, then, appears to have been that our use of metaphysical concepts has bad consequences. As Bjarup (2004, 184–5) has noted, Lundstedt’s method of social welfare is similar to utilitarianism. But note that Lundstedt (1925, 24) emphatically denies that his method of social welfare is in any way related to the ethical theories of Jeremy Bentham and John Stuart Mill.

Indeed, on a more fundamental level, Lundstedt maintained that the above-mentioned metaphysical concepts are part and parcel of (what he referred to as) the common sense of justice, and that legal scholars ought to reject (what he referred to as) the *method of justice*, which is based precisely on the common sense of justice, and embrace instead (what he referred to as) the *method of social welfare*, according to which the aim of all legal activities – such as legislation and judicial decision-making, including statutory interpretation – is to benefit mankind.<sup>30</sup> He appears to have believed that the method of social welfare is in keeping with, and is perhaps even required by, his anti-metaphysical approach – his naturalism and his non-cognitivism – to the study and practice of law.

sponds very closely to Hägerström’s analysis in Hägerström’s inaugural lecture of 1911. See Hägerström (1964, 88–9).

<sup>30</sup> For an account of the method of social welfare, see Lundstedt (1956, 171–200).

## 6 Naturalism in the Legal Philosophy of the American Realists<sup>31</sup>

### 6.1 Introduction

Brian Leiter argues in a recent book that the American realists are best understood as philosophical naturalists. He notes in the introduction that philosophers, even those with an interest in the law, have on the whole paid little or no attention to the writings of the American realists, thinking they were philosophical dilettantes. In order to explain this, Leiter suggests that the Americans were really prescient naturalists, who were not – and could not be – appreciated by those working within the dominant jurisprudential tradition, according to which jurisprudence was a matter of conceptual analysis via appeal to folk intuitions (as expressed, *inter alia*, in ordinary language) (2007, 1–2).

Leiter explains that the Americans did not put forward a theory of law, but a theory of *adjudication*, while pointing out that it is a mistake to ascribe to them the Received View, according to which judges “exercise unfettered choice in picking a result,” and “make this choice in light of personal or idiosyncratic tastes and values.” (*Ibid.*, 25) What they did assert, he explains, was the Core Claim, viz. that *judges respond primarily to the stimulus of the facts* – as distinguished from the applicable rule or rules – *of the case* (*Ibid.*, 23). On this account, he explains, “Realists advance (1) a *descriptive* theory about the nature of judicial decision, according to which (2) judicial decisions fall into (sociologically) determined patterns, in which (3) judges reach results based on a (generally shared) response to the underlying facts of the case, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons.” (*Ibid.*, 30)

According to Leiter, American realism thus conceived involves a commitment to (methodological) naturalism and to pragmatism. He explains that whereas (methodological) *naturalism* requires that philosophical theories be “continuous with” the sciences, and rejects the notion that there is such a thing as a first philosophy, that is, a philosophy that proceeds *a priori*, *pragmatism* requires that a satisfactory theory of adjudication for lawyers be able to predict the outcome of court cases. And, he points out, since one can reliably predict court decisions only if one knows what

<sup>31</sup> The first six paragraphs in this section can be found, more or less verbatim, in Spaak (2008).

*causes* courts to decide as they do, the latter theory (pragmatism) presupposes the former (naturalism) (Ibid., 30–1).

In regard to the issue of naturalism, Leiter sees an important analogy between Quine's well-known line of argumentation in “Epistemology Naturalized” (mentioned above in Section 1) and the line of argumentation adopted by the American realists in their critique of traditional theories of adjudication. He points out that Quine's argument for replacement naturalism proceeds in two steps – first, a critique of epistemological foundationalism à la Rudolf Carnap, and then replacement of such foundationalism with a descriptive/explanatory account of the evidence-theory relation – and argues that the Americans reasoned in a similar way concerning theories of adjudication.<sup>32</sup> First, they argued against adjudicative foundationalism by saying that under these theories, the class of legal reasons does not unequivocally determine an outcome in the case at bar, and then they argued in favor of replacement of such “sterile” (because indeterminate) theories by descriptive/explanatory accounts of adjudication. Leiter states the following:

As Underhill Moore [an American Realist] puts it in the beginning of one of his articles: “This study lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field.” Notice how this echoes Quine's idea that “Epistemology … simply falls into place as a chapter of psychology …” Jurisprudence—or, more precisely, the theory of adjudication—is “naturalized” because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology). Moreover, it does so for essentially Quinean reasons: because the foundational account of adjudication is a failure—a consequence of accepting the Realists' famous claim that the law is indeterminate. (Ibid., 40. Footnotes omitted.)

So, on Leiter's analysis, the American realists were *methodological* naturalists who focused on the study of *adjudication*. But while this may be well true, it seems to me that some prominent realists, such as Oliver Wendell Holmes, Walter Wheeler Cook, and Felix Cohen, were also, even primarily, *semantic* naturalists who focused on the analysis of *fundamental legal concepts*. Let us take a brief look at what these authors had to say about naturalism in jurisprudence.

<sup>32</sup> I discuss the plausibility of Leiter's analogy in Spaak (2008).

## 6.2 Oliver Wendell Holmes

In his famous article “The Path of the Law,” Holmes concerns himself with the *prediction* of what courts are likely to do, because he believes that ability to predict this is what counts from the standpoint of most people, good or bad, since they will want to avoid “coming up against what is so much stronger than themselves.” (1896–97, 457) But to be able to predict what the courts will do, he explains, one needs to be clear about the limits of the law, and this in turn means that one must make a sharp distinction between law and morality, between legal rights and duties and moral rights and duties. He then proposes the following analysis of the concept of *law*: The law is nothing but the prophecies of what the courts will do in fact. He puts it as follows:

Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. (Ibid., 460–1)

Turning to the concept of a *legal duty*, he maintains that a legal duty is mainly the prophecy that if a person doesn’t do what he is legally required to do, he will suffer disagreeable consequences:

Take again a notion which as popularly understood is the widest conception which the law contains; – the notion of legal duty ... We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. (Ibid., 461)

I thus take it that Holmes is here concerned with the analysis of fundamental legal concepts, and I believe the approach to conceptual analysis that he advocates is in keeping with the approach advocated by the Scandinavians. Like them, he appears to endorse the narrow conception of *semantic naturalism*, in that he appears to believe that a philosophically acceptable analysis of a concept entails that the concept refers to natural

entities. He also appears to endorse *methodological* naturalism, because the predictive analysis seems designed to emulate the styles of explanation used in the sciences, viz. explanations in terms of cause (the existence of a legal rule) and effect (the judicial decision based on that legal rule). And although he doesn't say so, I suspect he also wishes to substitute the predictive analysis for traditional, normative analyses of legal concepts and institutions. And if this is so, he qualifies as a *replacement* naturalist, too.

We should note, however, that Brian Leiter points out that Holmes wasn't concerned with the *concept* of law, but with giving practical advice to lawyers (2007, 104–6). But while this may have been Holmes's main concern, I believe that Holmes was also concerned with the analysis of concepts,<sup>33</sup> albeit in a more relaxed way than those who aim to establish an analytically true equivalence between the *analysandum* and the *analysans* on the basis of an appeal to *a priori* intuitions. For Holmes certainly wanted to elucidate the concepts of law, right and duty.

In any case, the predictive analysis defended by Holmes has not been well received by most jurisprudents. For example, Olivecrona notes that in the case of the concepts of right and duty, this analysis may be understood either as an interpretation of these concepts as traditionally understood, or as a claim about what empirical facts we normally find in a situation where we say that a person has a right or a duty (1962, 159–60). And he finds faults with both ways of understanding the predictive analysis. The problem with the first alternative, he explains, is that the analysis simply cannot account for the concepts of right and duty as traditionally understood: “[i]f I make the assertion that I have a claim for damages against another person, I am not making a prediction as to what will happen if he does not liquidate the claim at once. I mean that I have a claim now, that he ought to comply with it, and that I am entitled to a favourable judgment by the court because I have a right.” (Ibid., 158. See also Hart 1961, 10) The problem with the second alternative is, among other things, that it does not yield workable concepts, because there are too many conditions that must be satisfied for the analysis to yield the “right result.” (1962, 159–60) Thus the gist of Olivecrona's critique, which I consider to be well founded, is that the predictive analysis does away with

<sup>33</sup> It is worth noting that Felix Cohen appears to have looked upon Holmes's analyses as analyses of concepts, in that he attributes to Holmes a functional definition of law. (1937, 13–5).

the *normative* aspect of the concepts in question, that it cannot account for the circumstance that judges and lawyers treat legal rules and rights and duties as *reasons for action*.

### 6.3 Walter Wheeler Cook

In an essay on the conflict of laws, Walter Wheeler Cook (1924, 457–9) points out that the experimental, or inductive, method – according to which scientists observe what goes on in the world, formulate hypotheses on the basis of their observations, and are prepared to adjust their hypotheses in light of later observations – has come to dominate the scene in the natural and the social sciences, and notes (to his satisfaction) that the same method has also been adopted in the field of law, not least in the conflict of laws. He explains that like natural scientists, lawyers study objective physical phenomena, though they do not, of course, focus on atoms, molecules, and planets, but on *human behavior*; and he argues that terms like ‘law,’ ‘right,’ and ‘duty’ must be analyzed in terms of human behavior, specifically the behavior of judges and other legal officials:

As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we make a *prediction* of their probable behavior in the future. Our statements of the “law” of a given country are therefore “true” if they accurately and as simply as possible describe the past behavior and predict the future *behavior* of these societal agents. [...] “Right,” “duty,” and other names for legal relations are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question, but merely terms by means of which we describe to each other what *prophecies* we make as to the probable occurrence of a certain sequence of events—the *behavior* of officials. We must, therefore, constantly resist the tendency to which we are all subject to reify, “thingify” or hypostatize “rights” and other “legal relations.” (Ibid., 475–6. Emphasis added)

Cook proceeds to draw interesting conclusions for the conflict of laws on the basis of his general remarks on scientific method, regarding questions such as what it means for a Massachusetts court to enforce a Maine right (Ibid., 467–75), though a consideration of these conclusions clearly falls outside the scope of this essay. What is of interest here is that he appears to have been concerned with the analysis of *fundamental legal concepts*,

not the study of adjudication, and that he appears to have accepted the narrow conception of *semantic* naturalism, in addition to *methodological* naturalism of the type that requires “methods continuity” with the sciences.

#### 6.4 Felix Cohen

In his well-known article on the functional approach to legal science (1935), Felix Cohen casts a critical eye on many of the legal concepts that are used by (what he refers to as) traditional jurisprudence (See also 1937). Having considered the way in which courts approach legal problems, such as whether a corporation can be said to exist in a certain state and not in another, he summarizes as follows what he takes to be the basic assumptions of traditional jurisprudence in regard to legal concepts:

*Legal concepts* (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith. *Rules of law*, which refer to these legal concepts, are not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. Jurisprudence, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics and psychology. In effect, it is a special branch of the science of transcendental nonsense. (1935, 821)

As one might expect, Cohen has no patience with (what he refers to as) supernatural concepts, that is, concepts that do not refer to natural entities: “Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it.” (Ibid., 823)

Having criticized traditional jurisprudence and the belief in supernatural concepts, Cohen goes on to introduce (what he calls) the functional approach to jurisprudence. This approach, he explains, involves the eradication of meaningless concepts, the abatement of meaningless questions, and the redefinition of concepts (Ibid., 822–34). The constructive aspect of the functional approach, then, concerns the redefinition of concepts, and the core idea appears to be that of analyzing concepts in terms of

natural entities. Having pointed to a number of (then) contemporary philosophers, such as Charles Peirce, William James, Bertrand Russell, Rudolf Carnap, and Ludwig Wittgenstein, who are all said to endorse the functional approach, Cohen offers the following description of this approach:

It would be unfair to minimize the real differences between some of these schools, but in one fundamental respect they assume an identical position. This is currently expressed in the sentence, “A thing is what it does.” More precise is the language of Peirce: “In order to ascertain the meaning of an intellectual conception one should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception.” The methodological implications of this maxim are summed up by Russell in these words: “*Wherever possible, logical constructions are to be substituted for inferred entities.*” In other words, instead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thoughts as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless. (Ibid., 826. Footnotes omitted)

Cohen thus seems to have accepted the narrow conception of semantic naturalism. He does not seem to have accepted methodological naturalism of any type, however.

## 6.5 Conclusion

We have seen that on Leiter’s analysis, the American realists were concerned solely with the study of adjudication and that they were methodological naturalists of the type that requires “methods continuity” with the sciences, and replacement naturalists who aim to substitute a descriptive/explanatory account of adjudication for traditional, normative theories of adjudication. But we have also seen that at least some American realists, such as Oliver Wendell Holmes, Walter Wheeler Cook, and Felix Cohen, were interested in the analysis of fundamental legal concepts, and embraced the narrow conception of semantic naturalism.

## 7 Jurisprudential Naturalism in Scandinavia and in the United States: Similarities and Differences

We have seen that the Scandinavian and the American realists were not as different in regard to their naturalism or their choice of study-object as one might have thought. Although Leiter presents the Americans as methodological and replacement naturalists, who were concerned solely with the study of adjudication, and although the Scandinavians were primarily semantic and ontological naturalists, who were mainly concerned with the analysis of fundamental legal concepts, we have seen that Holmes, Cook, and Cohen were primarily – in Cohen’s case solely – semantic and possibly ontological naturalists, who were mainly concerned with the analysis of fundamental legal concepts, and that Ross and Lundstedt were also methodological naturalists, even though they were not much concerned with the study of adjudication. This means that Ross and Lundstedt were the Scandinavian realists whose naturalism was most similar to the naturalism of the American realists, and that Cohen was the American realist whose naturalism was most similar to the naturalism of the Scandinavian realists.

I think we might be able to explain the differences that do exist between these thinkers – individually as well as collectively – regarding the choice of jurisprudential study-object by reference to differences in their naturalistic commitments. For, generally speaking, I believe it makes sense to conceive of one’s naturalism – one’s view about the world, about knowledge and scientific method, and about conceptual analysis – as more fundamental than one’s view about what is and what is not an appropriate or interesting jurisprudential study-object. And I also believe it is natural to assume that a jurisprudent who accepts semantic naturalism is likely to focus on the analysis of fundamental legal concepts (like Ross, Lundstedt, Holmes, Cook, and Cohen), and that someone who accepts methodological naturalism of the type that requires “methods continuity” is likely to focus on the study of adjudication, or to advocate a predictive analysis of legal concepts (Ross, Lundstedt, Holmes, Cook). The connection is straightforward in both cases: Since semantic naturalism is a view about conceptual analysis, a semantic naturalist is likely to have an interest in the analysis of fundamental legal concepts; and since methodological naturalism of the type in question aims at causal explana-

tions, a methodological naturalist of this type is likely to have an interest in such explanations, and to choose a study-object that lends itself to analysis in causal terms, such as the study of adjudication, or to advocate a predictive analysis of legal concepts. Against this background, I suggest that the commitment to semantic naturalism on the part of the Scandinavians might explain their emphasis on the analysis of fundamental legal concepts; and that the commitment to methodological naturalism of the type that requires “methods continuity” on the part of a majority of the Americans might explain their emphasis on the study on adjudication and their preference for predictive analyses in the field of conceptual analysis.

But, as Iain Cameron has reminded me, it might also be possible to explain the differences in regard to the choice of jurisprudential study-object by reference to differences between the American and the Scandinavian legal cultures. Of special interest in this regard is the emphasis on the study of adjudication in American jurisprudence,<sup>34</sup> which might explain the preference on the part of the American realists for a focus on the study of adjudication. I must leave it an open question which type of explanation is to be preferred.

I should also like to acknowledge what may be obvious to the reader: that the result of a comparison between Scandinavian and American realism, like any comparison between two schools of thought, may depend to some extent on which writers are chosen as representatives of the respective school. The Scandinavians are easy in this respect: The relevant writers are Alf Ross, Karl Olivecrona, and Vilhelm Lundstedt, and perhaps Axel Hägerström, though in my view Hägerström is better thought of as the “spiritual father” of Scandinavian realism. The Americans are more difficult, because there were so many of them, and because they were quite a diverse group of writers. My choice of Holmes, Cook, and Cohen cannot be said to be neutral, but was designed to show that there were some American realists who were similar to the Scandinavian realists in that they accepted semantic, and possibly also ontological, naturalism

<sup>34</sup> Indeed, H. L. A. Hart (1983a, 123–4) once remarked that American jurisprudence is “marked by a concentration, almost to the point of obsession, on the judicial process,” and explained this feature of American jurisprudence by reference to the “quite extraordinary role which the courts, above all the United States Supreme Court, play in American government.”

and concerned themselves with the analysis of fundamental legal concepts. In this way, my analysis can perhaps be seen as a counterweight to Leiter's analysis, discussed above.

## 8 Naturalism and Conceptual Analysis

We have seen that Ross, Olivecrona, Cohen, Holmes, and perhaps also Cook, believed in and practiced conceptual analysis, while embracing a naturalist research program. One may, however, wonder whether a commitment to conceptual analysis can be squared with a commitment to naturalism, specifically methodological naturalism, given that appeal to *a priori* intuitions – against which the conceptual analyst is supposed to test the proposed analysis – is said to be incompatible with naturalism. George Bealer, for example, has argued that (methodological) naturalists accept a principle of empiricism, according to which a person's experience and/or observations comprise his *prima facie* evidence of beliefs or theories, and that appeal to *a priori* intuitions contradicts the principle of empiricism. (1992, 108–18)<sup>35</sup>

Let us assume that Bealer is right. What should naturalists do? Well, assuming that they are methodological naturalists, it seems to me that they might adopt a more relaxed understanding of conceptual analysis, which does not involve appeal to *a priori* intuitions. For example, they might follow Frank Jackson (1998, 44), who defends “modest” conceptual analysis, which aims to determine not what the world is like, but “what to say in less fundamental terms given an account of the world stated in more fundamental terms” (see also Coleman 2001, 179.), and who recommends that, if necessary, we do opinion polls to become clear about what people think about the application of the relevant concept. (1998, 36–7)

Alternatively, naturalists might go in for *explication* or rational reconstruction of concepts. To explicate or rationally reconstruct a concept, *C*, amounts to transforming *C*, which we may call the *explicandum*, into a concept that is more exact, which we may call the *explicatum*, while retaining its intuitive content, in order to make it more functional for a certain purpose (Carnap 1950, 3–5). This involves starting out from the (abstract or concrete) objects that fall under *C*, and proceeding to provide

<sup>35</sup> Bealer also argues that this means that we should reject naturalism, not conceptual analysis, but that is another matter. See also Bealer (1987).

an analysis of *C* that fits most, though not necessarily all, of those objects. To explicate a concept, then, involves changing both the *intension* and the *extension* of the term that expresses the concept, in order to make the concept more functional for a given purpose, which means that an explication is partly prescriptive.

But one might object to this that if philosophers were to analyze concepts in a more relaxed manner, or to give up conceptual analysis in favor of explicating concepts, they would no longer be in the business of establishing *analytical* equivalences between the *analysandum* and the *analysans*, but only “strictly ethnographic and local” equivalences (See Leiter 2007, 177).<sup>36</sup> And, as Leiter sees it, conceptual analysis would then “become[] hard to distinguish from banal descriptive sociology of the Gallup-poll variety.” (Ibid., 177)

I am not sure that this would be a serious problem, however. Surely even conceptual analysis of the “strictly ethnographic and local” kind may be quite valuable. The interesting question, as I see it, is just how general (or local) the proposed analysis is. The more people you poll about the application of the concept, the more general – and in that sense the better – the analysis will be. Against this background, I find Hilary Kornblith’s characterization of conceptual analysis on the model of the investigation of natural kinds appealing and a possible model for the analysis of legal concepts, even though the latter clearly concern *artificial*, not natural, kinds:

The examples that prompt our intuitions are merely obvious cases of the phenomenon under study. That they are obvious, and thus uncontroversial, is shown by the wide agreement that these examples command. This may give the resulting judgments the appearance of a priority, especially in light of the hypothetical manner in which the examples are typically presented. But on the account I favor, these judgments are no more a priori than the rock collector’s judgment that if he were to find a rock meeting certain conditions, it would (or would not) count as a sample of a given kind. All such judgments, however obvious, are *a posteriori*, and we may view the appeal to intuition in philosophical cases in a similar manner. (2002, 12. Footnotes omitted)

One might, however, object that conceptual analysis of the local kind is *self-refuting*, in the sense that it *presupposes* precisely what it claims

<sup>36</sup> Leiter does not speak of analytical equivalences, but of analytical truths. And he does not discuss the explication of concepts.

does not exist, viz. a *universal* concept of law (or a universal concept of a legal rule or of a legal right, etc.). For if one believes, as one surely must believe, that there is, or could be, more than one local concept of law (or more than one local concept of a legal rule, etc.), one needs to be able to explain what makes them concepts of *law*, rather than concepts of something else. And if one reasons that they qualify as concepts of *law* on the ground that they share certain important features,<sup>37</sup> one should probably conclude that precisely those features are definitive of the *universal* concept of law – what else could they be? So there appears, after all, to be a universal concept of law.

Of course, one might respond to this objection that the features in question are definitive not of the universal concept of law, but of *our* (local) concept of law (Raz 2005, 332), and that therefore modest conceptual analysis is not self-refuting, after all. But, one wonders, doesn't this response lead straight to some type of *relativism*, according to which an entity, *X*, qualifies as a concept of law (or a concept of a legal rule, etc.) only given a certain starting point (a certain concept of law), *Y*, and no such starting point, *Y*<sub>1</sub>–*Y*<sub>n</sub>, is privileged as the one true starting point. I do not think so. For it seems to me that we might conceive of the various starting points (the various local concepts of law) as *conceptions* of an underlying *concept* (the alleged universal concept of law), in the sense that they are interpretations of this concept, or, if you will, attempts to “spell out” its import.<sup>38</sup> And since the conceptions clearly exist on a different plane than the concept, they do not compete with it. Hence the existence of a concept – as distinguished from the conceptions – does not undermine the claim that there are a number of local conceptions and no universal concept.

What, then, about the Realists' positions? Was their commitment to conceptual analysis compatible with their commitment to naturalism in one form or another? They certainly appear to have thought so, though

<sup>37</sup> To be sure, there may be cases where the concepts in question (or the objects that fall under them) will be linked by nothing more than so-called family resemblance. If so, the objection will not hold. On family resemblance, see Wittgenstein (1968, sections 65–7).

<sup>38</sup> For the distinction between concepts and conceptions, see Rawls (1971, 5); Dworkin (1978, 134–6). For a line of reasoning that nicely illustrates the distinction between concept and conceptions, Swedish-speaking readers may wish to consult Ingemar Hedenius's ideal-type analysis of the concept of ownership. Hedenius (1977). I would like to thank Jan Österberg for pointing out that the distinction between concept and conceptions may be useful in this context and Lennart Åqvist for suggesting that I read Hedenius's article.

none of them appears to have touched on this question in their writings. But whereas Olivecrona rarely spoke about conceptual analysis at all,<sup>39</sup> Ross (as we have seen) was explicit that jurisprudence is the logic of legal science, and that the pre-eminent task of jurisprudents is to analyze fundamental legal concepts at a time (1959) when Quine's critique of the analytic-synthetic distinction was widely known and discussed. So Ross cannot have been troubled about the very possibility of conceptual analysis within a naturalist framework. Cook and Cohen, for their part, simply advocated that we analyze concepts in empirical terms.

I believe Ross, Olivecrona, Cook, and Cohen were right to assume that there was no serious problem here, because they all practiced conceptual analysis in a modest way that did not involve appeal to *a priori* intuitions, but rather appeal to what judges and legal scholars in general believe. Moreover, Olivecrona and Cohen do not appear to have accepted *methodological* naturalism, which means that we cannot assume that they accepted the principle of empiricism, mentioned above. And if they didn't, there seems to be no reason to doubt the compatibility of naturalism and conceptual analysis in their cases.

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<sup>39</sup> But see Olivecrona (1928).

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