Torben Spaak

A Critical Appraisal of Karl Olivecrona's Legal Philosophy

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Torben Spaak
Department of Law
Stockholm University
Stockholm
Sweden

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Chapter 5
Naturalism

Abstract I said in Chap. 1 that the realism espoused by the Scandinavian realists is to be understood as a commitment to naturalism, conceived 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 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 thus analyzed refers to natural entities or properties.

In this chapter, I distinguish between ontological, methodological, and semantic naturalism and between a broad and a narrow conception of semantic naturalism, and I argue that the broad conception of semantic naturalism is difficult to square with (what I refer to as) the classical conception of conceptual analysis. I also argue that Olivecrona is an ontological naturalist, that he is not a semantical naturalist, and that he is probably not a methodological naturalist either. In addition, I discuss Alf Ross's analysis of the concept of valid law, in order to gain a better understanding of both methodological and semantic naturalism, and I consider the question whether a commitment to naturalism is compatible with a commitment to conceptual analysis as a central philosophical task.

5.1 Introduction

Ever since W. V. Quine published an essay entitled "Epistemology Naturalized" (1969), naturalism has again been 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—much thanks to the writings of Brian Leiter (2002, 2007)—reached jurisprudence. But, as we noted in Chap. 1, the American and the Scandinavian realists, including Olivecrona, 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. Indeed, naturalism was an issue in the German-speaking legal world even earlier, when Hans Kelsen (1934) defended normativism against naturalism. In any case, the naturalism espoused by Olivecrona—together with his non-cognitivism or, in some cases, his

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error theory—is at the foundation of Olivecrona's legal philosophy, and an important part of what makes this legal philosophy so interesting. I therefore want to devote this chapter to a discussion of Olivecrona's naturalism, and to include some words about naturalism in general.

I said in Chap. 1, and I have argued elsewhere (Spaak 2009), (1) that the realism espoused by the Americans and the Scandinavians alike is to be understood as a commitment to naturalism, conceived 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 thus analyzed refers to natural entities or properties. In the same essay, I also argued (2) that the Scandinavians and the Americans were more alike, philosophically *and* legally speaking, than one might have thought. For even though the Scandinavians were primarily ontological and semantic 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 also appear to have been interested in the analysis of fundamental legal concepts.

I begin with a few words about naturalism in general (Sect. 5.2), and proceed to consider the sense in which Olivecrona was a naturalist (Sect. 5.3). I then consider Alf Ross's analysis of the concept of valid law, in order to illustrate the import of a type of methodological naturalism that Olivecrona seems not to accept, and a type of semantic naturalism that Olivecrona clearly does not embrace (Sect. 5.4). The chapter concludes with a brief consideration of the question whether a commitment to naturalism is compatible with a commitment to conceptual analysis as a central philosophical task (Sect. 5.5).

5.2 Naturalism

Although the term 'naturalism' appears to lack a definite meaning in contemporary philosophy (Papineau 2007, p. 1; Bedau 1993), writers on naturalism make a fundamental distinction between (1) ontological (or metaphysical) and (2) methodological (or epistemological) naturalism. John Post (1999, pp. 596–597), 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 and Warner 1993, p. 12)

Ontological naturalism is a thesis about the nature of what exists: there are only natural entities and properties (see Post 1999). I shall assume here that a natural entity or property is an entity or property of the type that is studied by the social or the natural sciences,[1] though I recognize that it is difficult to find a fully satisfying characterization of natural entities or properties.[2] Some writers prefer, however, to say instead that a natural entity or property is an entity or property that can be found in (what I shall refer to as) the *all-encompassing spatio-temporal framework*. Thus Thomas Mautner puts it as follows:

> In this paper, "naturalism" will primarily be understood as the ontological thesis that every object and every event, indeed all there is, is part of nature. Nature is all-encompassing: there is nothing beyond, above or beneath. It is a system to which we ourselves as psycho-physical beings belong: the world of experience, the spatio-temporal world. Any metaphysics which postulates entities that exist independently of nature, or in any sense separately from it, is rejected. Many philosophical "isms" are naturalist, among them philosophies known as evolutionism, logical positivism and physicalism. (2010, p. 411)[3]

Although I myself find the characterization of ontological naturalism in terms of an all-encompassing spatio-temporal framework illuminating, I shall in what follows stick to the first characterization, on the grounds that it appears to be the one that is preferred by the majority of contemporary ontological naturalists. The reason why they do so, as I understand it, is that the latter characterization of ontological naturalism makes the theory too demanding, since it excludes entities such as meanings and natural numbers from the natural realm. The second characterization of ontological naturalism is, however, closer to Olivecrona's own view of the matter, and to that of Hägerström and the other Scandinavian realists.

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; 19th century physiology, in the case of Nietzsche—in order to "solve" various philosophical problems. Their speculative theo-

[1] This seems to be the view taken in Brink (1989, pp. 22–23) and in Lenman (2008).

[2] Discussing moral non-naturalism, Ridge (2008) calls the attempt to make a choice between the various available characterizations "a fool's errand." See also Copp (2007, Chap. 1).

[3] Armstrong (1978, p. 261) appears to accept a similar view, claiming as he does that (ontological) naturalism is "the doctrine that reality consists of nothing but a single all-embracing spatio-temporal system." For more on this topic, including references to other philosophers who share this view, see Mautner (2010).

> ries 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, pp. 34–35. 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? While it seems that today many naturalists have the natural sciences in mind (Wagner and Warner 1993, p. 1), it is clear that Olivecrona had in mind the *social* sciences, such as sociology and psychology.[4]

One may also wonder about the logical relation between ontological and methodological naturalism. It is tempting to assume that methodological naturalism implies ontological naturalism.[5] For one might argue that it wouldn't make sense to aim at emulating the methods of 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 the properties of 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 is a God, who can causally interact with the natural world, we cannot really *know* that metal expands when heated, say, since God might then choose to stop a heated piece of metal from expanding.[6]

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. He writes:

> 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

[4] Olivecrona never addresses the question of whether there might be kinds of psychological or sociological research that are *not* acceptable from the standpoint of naturalism.

[5] This appears to be the view of Wagner and Warner (1993, p. 12). I shall leave it an open question whether the reverse holds, that is, whether ontological naturalism implies methodological naturalism.

[6] I would like 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. Leiter (2007, p. 35, n 96), too, holds that methodological naturalism does not imply ontological naturalism.

> empirical inquiry by psychology and physiology (assuming that well-being is a complex psycho-physical state). (2002, p. 3).

I believe, however, as I have said above (in Sect. 4.2), that we should make a distinction between a narrow and a broad conception of semantic naturalism.[7] On the narrow conception (NCSN), which Leiter appears to accept, an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed—strictly speaking, the *term* that expresses the concept—refers to natural entities or properties. On the broad conception (BCSN), on the other hand, an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed does *not* refer to *non*-natural entities or properties. Thus the conditions laid down—reference to natural entities or properties and non-reference to non-natural entities or properties, respectively—are *necessary*, but not sufficient, for an analysis of a concept to be philosophically acceptable.

This distinction between a narrow and a broad conception of semantic naturalism is of interest in this context because the non-cognitivist analysis embraced by Olivecrona on most occasions, especially in his later writings—according to which normative or evaluative terms like 'right,' 'duty,' or 'good' have no cognitive (or descriptive) meaning,[8] and do not refer at all—is in keeping with the broad, but not the narrow, conception. For, on this type of analysis, while such terms do not refer to natural entities or properties, they do not refer to non-natural entities or properties either.

But there is a problem here. While the non-cognitivist analysis of normative or evaluative concepts is in keeping with the broad conception of semantic naturalism, it is difficult to square it with what we might call the *classical conception of philosophical analysis*, according to which such an analysis aims to establish an analytically true equivalence between the *analysandum* (that which is to be analyzed) and the *analysans* (that which does the analyzing).[9] The reason is that since on the non-cognitivist analysis, normative or evaluative terms have no cognitive meaning and do not refer at all, one does not and 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,...." Hence somebody who embraces the classical conception of philosophical analysis is likely to prefer the *narrow* to the broad conception of semantic naturalism, in order to avoid the problem with the non-cognitivist analysis of normative or evaluative concepts. Of course, such a person might also reason that a non-cognitivist analysis of such concepts is no genuine analysis at all, but rather clarifies not the content of normative or evaluative concepts, but the *role* these concepts play in moral or legal thinking (Gibbard 1990, pp. 30–31; Toh 2005, p. 81), and that therefore there is after all no tension between a commitment to non-cognitivism and a commitment to the classical conception of analysis. Alternatively, he might restrict his attempts

[7] I would like to thank Jan Österberg for suggesting that this (or a similar) distinction might be useful here.

[8] Instead of cognitive meaning, they may have emotive meaning. On this, see Stevenson (1937).

[9] On the classical conception of philosophical analysis, see, e.g., Langford (1942); Urmson (1956, pp. 116–118); Sosa (1983); Strawson (1992, Chap. 2); Anderson (1993).

at classical analysis to normative or evaluative concepts as they occur in *external*, as distinguished from internal, legal (or moral) statements, since the non-cognitivist theory does not apply to external legal (or moral) statements.[10]

The error-theoretical analysis, on the other hand, which Olivecrona embraced off and on in his early writings—according to which normative or evaluative terms do have cognitive meaning and refer to non-natural entities or properties, and the corresponding statements are all false—comports neither with the broad nor with the narrow conception of semantic naturalism, because it implies what neither version can accept, viz. that normative or evaluative terms do refer to non-natural entities or properties. Note, however, that unlike the non-cognitivist analysis, the error-theoretical analysis can be squared with the classical conception of philosophical analysis. On the error-theoretical analysis, one might say, for example, that *A* has a right to *X* if, and only if, *A* possesses a supernatural power over *X*". If successful, this analysis establishes an analytically true equivalence between the *analysandum* (*A* has a right to *X*) and the *analysans* (*A* possesses a supernatural power over *X*), even though there are no supernatural powers on the error-theoretical analysis and therefore no true statements asserting the existence of a right. That is to say, the adequacy of the analysis does not establish the existence of any rights, and this is precisely as it should be.

Now it seems to me that the *narrow* conception of semantic naturalism does *not* imply ontological naturalism[11]—that the *broad* conception of semantic naturalism does not imply ontological naturalism is obvious. Like the methodological naturalist, the narrow semantic naturalist may allow that there may or may not be non-natural entities or properties, provided that these entities or properties are unable to causally interact with the natural world. For the view that an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties (*NCSN*) is clearly compatible with the belief that there may or may not be non-natural entities or properties that cannot influence the natural entities.

While I find the theses of ontological and epistemological naturalism plausible, I doubt whether the narrow conception of semantic naturalism is defensible. The reason, as we shall see in Sect. 5.3, is that there seem to be concepts that could not possibly be adequately analyzed in terms of natural entities or properties, and should perhaps be analyzed in terms of non-natural entities or properties instead, and that therefore a philosophically acceptable analysis of such a concept should not imply that the concept thus analyzed refers to natural entities or properties—if it did, the analyst would have changed the subject.

[10] I mean by an internal normative or evaluative statement a norm or a first-order (normative or evaluative) statement of this type, and by an external normative or evaluative statement a statement *about* a norm or a second-order (descriptive) statement of this type. For more on this topic, see Sect. 6.5.

[11] I shall leave it an open question whether the reverse holds, that is, whether ontological naturalism implies semantic naturalism.

5.3 Naturalism in Olivecrona's Legal Philosophy

I believe that Olivecrona was an *ontological*, but not a *semantic*, naturalist, and that he probably was not a methodological naturalist either. For he clearly believes that everything that exists is composed of natural entities whose properties determine all the properties of that which exists, and he equally clearly does not believe that an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties, or that it does not refer to non-natural entities or properties. He also does not seem to accept the view that philosophical theorizing must be continuous with the sciences in the sense explained in the previous section.

Olivecrona's adherence to *ontological* naturalism is clear from the insistence in the First Edition of *Law as Fact* that any adequate theory of law must eschew metaphysics and treat law as a matter of *social facts*. The aim, Olivecrona explains, is to *reduce* our picture of 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, pp. 25–27).

That Olivecrona rejects the *narrow* conception of semantic naturalism is clear from his rejection of the predictive analysis of legal concepts espoused by Oliver Wendell Holmes and others. The problem with this analysis, he explains, is that it simply cannot account for the concepts of right and duty as traditionally understood (1962, p. 158): "[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." Thus the gist of Olivecrona's critique, which I consider to be well founded, is that the predictive analysis does away with 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*. What Olivecrona is saying here is that an analysis of a legal concept must capture the import of this concept as it is understood by lawyers, judges, and others who concern themselves with the concept, even if this means that the import of the concept is in some sense metaphysical.

That Olivecrona rejects the *broad* conception of semantic naturalism is clear from his defense of an error-theoretical analysis of the concepts of right, duty, and binding force. Since on the error-theoretical analysis, a concept that is analyzed refers to non-natural entities or properties, such as supernatural powers, and since he must reasonably believe that such an analysis offers a philosophically accept-

able analysis of the concepts in question, Olivecrona cannot also hold, as semantic naturalists do, that an *analysis* of a concept is philosophically acceptable only if it implies that the concept thus analyzed either refers to natural entities or properties, or that it does not refer to non-natural entities or properties. Instead, his position must surely be that while his (error-theoretical) *analysis* of the concept is philosophically acceptable, the *concept* itself is not, referring as it does to non-natural entities or properties. That is to say, he considers his *analysis* of the concept in terms of non-natural entities to be philosophically acceptable, because it captures the import of the concept as it is understood by lawyers and judges, or by people in general, even though he also holds that the *concept* itself is not philosophically acceptable, precisely because there is nothing in the natural world that corresponds to the concept. One could perhaps refer to this stance, too, as a version of semantic naturalism, but I shall not do so because the term 'semantic naturalism' is already in use in the sense explained above.

We should, however, keep in mind that since Olivecrona abandoned the error-theoretical analysis in his later writings, we should not rule out the *possibility* that he might have come to accept the broad conception of semantic naturalism in his later writings. For if we accept the view that a non-cognitivist analysis of normative or evaluative concepts is an analysis of those concepts, albeit in a rather loose sense, we will see that once Olivecrona abandoned the error theory, his analyses of legal concepts were always in keeping with the *broad* conception of semantic naturalism.

I am inclined to believe that Olivecrona was *not* a methodological naturalist. The evidence is ambiguous, however. Since methodological naturalism of the type that requires "methods continuity" with the sciences aims at causal explanations, 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. But, as we have just seen, Olivecrona rejects the predictive analysis of legal concepts, on the ground that it does away with the *normative* aspect of the concepts in question, and he does not seem to be interested in the study of adjudication. This suggests, though it does not prove, that he does *not* accept this type of methodological naturalism. He does, however, maintain that while legal rules cannot establish legal relations, they can influence human behavior because they have a suggestive character, and that this means that they are part of (what he referred to as) the chain of cause and effect (see Chaps. 7–8). This suggests, though it does not prove, that he does accept methodological naturalism of the type that requires "methods continuity" with the sciences.

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, having introduced a distinction between realism and idealism in legal philosophy in a later article (1951), he goes on to characterize realism, that is, naturalism, in the following way:

> *Realism* tends to regard all legal phenomena as part of the existing social order, that is to say, as being purely *factual*. Therefore, realism as such means observation, fact-gathering, and analysis, but not valuation. Legal science as a whole becomes part of social science. There is only a necessary division of labour in that legal science directs its attention primarily to certain aspects of the social context, while sociology, political science, and other branches of social science take up other aspects./.../ Modern realism... is striving to give a consistently factual explanation of the law without immixture of an ought. According to the *psychological* theories all legal phenomena are reduced to certain basic psychological regularities; law is said to consist only of a sum of subjective representations. Another group of theories might be called *sociological*. Their various contents cannot, however, be summarized in a brief formula; the characteristic feature of them all is that law is identified with a set of social facts. (Olivecrona 1951, p. 120, 124)

Moreover, he explains 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, p. vii)

Olivecrona's naturalism comes to the fore, *inter alia*, in the critique of the view that law has binding force, and in the analysis of the concept of a legal rule. We shall take a closer look at these analyses in Chaps. 7 and 8. Here I would just like to offer a sketch of the arguments that Olivecrona adduces in support of his claims, and to point to the sense in which these arguments draw on naturalism of one type or the other.

Olivecrona maintains that anyone who believes that legal rules have binding force will have to locate law in a supernatural world, where the peculiar idea of binding force can make sense, that there can be no connection between the supernatural world and the world of time and space, and that therefore we have to reject the view that legal rules have binding force. This means that Olivecrona's critique of the view that 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 located beyond the world of time and space. And since he also believes that a *concept* is philosophically acceptable only if it refers to natural entities, he cannot accept a concept, such as the concept of binding force, that does not so refer.

Olivecrona conceives of legal rules as independent imperatives, that is, as imperatives that are not issued by a certain person and are not addressed to a certain person or persons, and that may sometimes be expressed by a sentence in the indicative mood, such as "It is the case that you shall not steal." While legal rules thus conceived cannot establish legal relations, they can influence human behavior because they have a suggestive character. Hence, on Olivecrona's analysis, legal rules are part of the chain of cause and effect. One could perhaps argue, then, that Olivecrona's analysis of the concept and function of a legal rule reflects a commitment to methodological naturalism of the type that requires "methods continuity" with the sciences. For the analysis 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. The only problem with this line of reasoning, as we have seen, is

that it is contradicted by Olivecrona's rejection of the predictive analysis of legal concepts.

Let us now briefly consider Alf Ross's analysis of the concept of valid law, in order to gain a better understanding both of methodological naturalism of the type that requires "methods continuity" with the sciences and of the narrow conception of semantic naturalism, which Olivecrona rejects. As we shall see, the circumstance that Ross embraces the narrow conception of semantic naturalism, whereas Olivecrona rejects not only the narrow, but also the broad, conception of semantic naturalism means that the legal philosophies defended by these two Scandinavian realists differ in important ways.

5.4 Alf Ross on the Concept of Valid Law

Beginning with 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 (1959, p. 15). More specifically, the problem is to determine which rules are felt by the players to be binding (Ross 1959, p. 15. Emphasis added.): "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*." He maintains, in keeping with this, that a rule of chess is valid if, and only if, the chess players (1) follow the rule (2) because they feel bound by it (Ross 1959, p. 16).

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

> 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." (Ross 1959, pp. 17–18)

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". (Ross 1959, p. 18)

Turning to a full analysis of the concept of valid law, Ross points out (Ross 1959, p. 34) 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." To say that such a system is *valid*, he explains (Ross 1959, p. 35), is to say that judges (1) apply the norms (2) because they feel bound by them.

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 properties and nothing else (ontological naturalism), he also analyzes the concept in question in terms of such entities and properties (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 normative or evaluative terms have no cognitive meaning and do not refer, cannot be squared with the narrow conception of semantic naturalism, according to which an analysis of a moral or legal concept is acceptable only if it implies that the concept thus analyzed refers to natural entities or properties. Does this mean that the non-cognitivist Ross *contradicts* himself when he accepts the narrow conception of semantic naturalism and applies it to the analysis of legal concepts? I do not think so, because I believe Ross could invoke a distinction between *internal* legal statements, that is, norms and first-order value judgments (the legal object-language), on the one hand, and *external* legal statements, that is, statements *about* norms and second-order value judgments (the legal meta-language), on the other hand (on this distinction, see Sect. 6.5). 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. Of course, this means that the scope of Ross's analysis turns out to be rather narrow, and this takes value away from the analysis.

Let me point out in conclusion that some prominent legal philosophers, such as Jules Coleman (2001a, pp. 202–203; 2001b, p. 116), seem to have inferred from Ross's espousal of a predictive analysis of the concept of valid *law* that all Scandinavian realists espouse a predictive analysis of *all*, or at least most, legal concepts. But, as we saw in Sect. 5.3, and as Enrico Pattaro (2005, pp. 543–546) has pointed out, this is not so. Not only does Olivecrona—together with Ross the most prominent Scandinavian realist—reject predictive analyses across the board, Ross himself does not espouse a predictive analysis of other legal concepts, such as the concepts of right and duty. What Ross is saying is that a rule is a *valid* legal rule if, and only if, judges apply the rule because they feel bound by it (on Ross's understanding of the term 'validity,' see Ross 1968, p. 104, footnote 2). And it does not follow from this that Ross must rationally hold that a person has a legal *duty* if, and only if, he is likely to suffer a sanction in case he does not do what he is required to do, or a legal *right* if, and only if, his enjoyment of that to which he has the right is actually protected in a certain way by the state (on Ross's analysis of the concept of a legal

right, see Ross 1959, Chap. 6). The reason why this does not follow is that a rule—whether valid or invalid—is one thing and a statement about that rule another. A legal rule, as Ross explains, is a normative entity, a directive in Ross's terminology (Ross 1959, pp. 7–9), whereas a statement that a rule is a valid legal rule is not a normative entity at all. In other words, whereas the valid legal rule itself is a normative entity, that is, an *internal* legal statement, the statement that a rule is a valid legal rule is an *external* legal statement.[12] And since legal rules, valid or invalid, are normative, Ross may without contradiction conceive of legal rights and duties in non-reductive, that is, normative terms.

Of course, Coleman might object to my line of argument that a person, p, could not have a legal duty, unless the rule in question, r, were legally valid, that this means that p could not have a legal duty, unless p was likely to suffer a sanction if p did not do what he was required to do, and that therefore he (Coleman) is justified in attributing to Ross a predictive analysis of the concept of a legal duty. But such an objection would not be persuasive, however, because it ignores the important distinction between r and the legal order, LO, of which r is a member. On Ross's analysis, LO is valid only if LO is, on the whole, effective, and r may be a member of LO even if r is itself is not effective, and this means precisely that Ross may without contradiction conceive of legal rights and duties in non-reductive terms and, indeed, that he should do so.

5.5 Naturalism and Conceptual Analysis

It is clear that Olivecrona, following in the footsteps of Hägerström, believed in and practiced conceptual analysis, while embracing ontological, but not semantic, naturalism, and probably not methodological naturalism either. One may, however, wonder whether a commitment to conceptual analysis can be squared with a commitment to 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 (1992, pp. 108–118), for example, maintains that 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.[13]

What to do? Well, to begin with, we have seen that Olivecrona does not seem to have accepted *methodological* naturalism, and this means that we have no reason to believe that he accepted the principle of empiricism, mentioned above. And if he didn't accept this principle, there seems to be no reason to doubt the compatibility of naturalism and conceptual analysis in his case.

[12] On the distinction between internal and external legal statements, see Sect. 6.5 below.

[13] Bealer also argues that this means that we should reject naturalism, not conceptual analysis, but that is another matter. See also Bealer (1987, pp. 289–365).

Moreover, it seems to me that naturalists 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, 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" (1998, p. 44. See also Coleman 2001a, p. 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, pp. 36–37).

Alternatively, they 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, pp. 3–5). This involves starting out from the (abstract or concrete) objects that are commonly thought to fall under *C*, and proceeding to provide an explication of *C* that fits most of, though not necessarily all, those objects. To explicate a concept, then, involves changing the *extension* of the term that expresses the concept, in order to make the concept more functional for a given purpose, and this means that an explication is partly prescriptive.

But one might object to this, as Brian Leiter does, that if legal 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* truths about the concepts in question, but only "strictly ethnographic and local" truths (2007, p. 177). And, as Leiter sees it (Brian 2007, p. 177), conceptual analysis would then "become[] hard to distinguish from banal descriptive sociology of the Gallup-poll variety."

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 valuable. The interesting question, as I see it, is just how general the proposed analysis is. The more people you poll about the application of the concept, the more general 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 type of analysis clearly concerns *artificial*, not natural, kinds. Kornblith writes:

> 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, p. 12)

What, then, about Olivecrona's position? Can his commitment to conceptual analysis be reconciled with his commitment to ontological naturalism? He himself certainly appears to have thought so, though he never touched on this question in his

writings. I believe, however, that he was indeed right to assume that there was no serious problem here, because he 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.

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Chapter 6
Meta-ethics

Abstract In this chapter, I argue that Olivecrona's meta-ethics plays an important role in Olivecona's legal philosophy, and that Olivecrona (and the other Scandinavian realists) differ in this regard from other prominent legal philosophers, such as Kelsen and Hart, who have been careful to develop their legal philosophies in a way that does not depend on controversial meta-ethical assumptions. I also argue that while Olivecrona preferred to speak in a general way of values, rights, or obligations, etc., it is clear from the context that he usually had in mind also moral values, rights or obligations. However, he rarely went further than to assert that there are no objective values and that there is no objective 'ought.' But this claim, or these claims, could be accepted not only by non-cognitivists, but also by meta-ethical relativists and error-theorists, and as a result the precise nature of his meta-ethical position is somewhat unclear. I suggest, however, that in his early writings he vacillated between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board. The chapter also includes a discussion of the important distinction between (what I refer to as) first-order and second-order legal statements, the intriguing notion of a legal statement with a fused modality, and the question whether, if non-cognitivism is true, a second-order normative or evaluative statement can correctly render the content of the corresponding first-order normative or evaluative statement.

6.1 Introduction

Olivecrona accepts, as we have seen, the main tenets of the Uppsala School of philosophy, including the tenet that there are no objective values. But, as we have also seen, the leading meta-ethicist among the Uppsala philosophers, Axel Hägerström, was not content simply to assert that there are no objective values. He defended a fairly radical version of emotivism, a species of non-cognitivism, arguing that moral judgments express the speaker's feelings or attitudes and cannot be true or false (1964). We have also seen, however, that Hägerström is said to have at times defended an error theory of moral judgments.

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Olivecrona never spoke of *moral* values, 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 also moral values, rights or obligations. However, he rarely went further than to assert that there are no objective values and that there is no objective ought. But this claim, or these claims, could be accepted not only by non-cognitivists, but also by meta-ethical relativists, such as Harman (1975, 1996) and error-theorists, such as Mackie (1977, Chap. 1) and Joyce (2001). As a result, the precise nature of his meta-ethical position is somewhat unclear. I suggest, however, that in his early writings he vacillated between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board.

I begin with a very brief introduction to the subject of meta-ethics (Sect. 6.2), and proceed to consider two difficulties that plague the non-cognitivist theory (Sect. 6.3). Having done that, I point to some cases where meta-ethical considerations appear to play an important role in Olivecrona's analysis (Sect. 6.4). I then turn to consider the question whether Olivecrona fails to distinguish between internal and external legal statements in a way that hampers his analysis (Sect. 6.5), as well as the question whether we should take into account a third category of legal statements, viz. legal statements with a fused modality (Sect. 6.6). The chapter concludes with a few words about another difficulty for non-cognitivists (Sect. 6.7), and about the significance of meta-ethical considerations to Olivecronas substantive legal philosophy (Sect. 6.8).

6.1.1 Meta-ethics: A Very Brief Introduction

Crudely put, meta-ethical questions are questions about, rather than in, morality. More specifically, meta-ethics concerns the ontological, epistemological, psychological, and semantic status of moral and other normative or evaluative judgments (Bergström 1990, pp. 8–10; Brink 1989, pp. 1–2; Frankena 1975, pp. 96; Miller 2003, Chap. 1; Schafer-Landau and Cuneo 2007, pp. 1–2; Smith 1994, pp. 1–3). That is to say, it concerns, among other things, the nature and existence of moral values and standards, whether, and if so how, we can have knowledge of them, whether a sincere moral judgment is intrinsically motivating, and whether we are to understand moral judgments as stating facts or as expressing feelings or attitudes.

On the ontological level, moral philosophers make a distinction between *moral realism*, which has it that moral facts are mind-independent in the sense that they are conceptually independent of our moral beliefs or desires, and *moral antirealism*, which has it that moral facts do not exist at all (non-cognitivism or error theory), or else that they are conceptually dependent on the beliefs or desires of human beings (constructivism) (Brink 1989, Chap. 2). Since Olivecrona was a moral anti-realist, we shall pay special attention to non-cognitivism, error-theory, and constructivism. Let us, however, begin with a few words about moral realism.

Moral realism, then, is the theory that moral facts exist independently of our beliefs and desires: As Russ Schafer-Landau (2003, p. 13) puts it, "[a]t the simplest level, all realists endorse the idea that there is a moral reality that people are trying to represent when they issue judgments about what is right and wrong. The disagreements that arise among realists primarily have to do with the nature of this reality." More specifically, such disagreements give rise to two main versions of moral realism: (1) moral naturalism and (2) moral non-naturalism. Moral *naturalists*, such as Boyd (1988) and Brink (1989), believe that moral facts are just a species of ordinary natural facts, such as those studied in the natural and social sciences. The difficulty with this view is to handle the problem of naturalist reduction: What kind of natural facts are moral facts? How do we know whether a certain natural fact, such as the fact that some people are very happy, or that there is widespread unemployment, is a moral fact? Moral *non-naturalists*, such as Moore (1993 [1903]) and McDowell (1998), on the other hand, maintain that moral facts are *sui generis*, and they therefore face the problem of accounting for the nature and existence of such facts, and for our knowledge of them (Schafer-Landau 2003, pp. 65–72).

As we shall see in later chapters, Olivecrona follows Hägerström and does not accept the belief in the objectivity of moral or legal values and standards. His own arguments against such views concern chiefly those coming to expression in natural law theories and in Kelsen's view that the *legal* ought is objective but *sui generis*.

Moral anti-realism, as we have seen, comes in three main forms: (1) error theory, (2) non-cognitivism, and (3) constructivism. Non-cognitivism differs from error theory and constructivism on the *semantic* plane, in that error-theorists and constructivists conceive of moral judgments as judgments (or statements), which have truth-value, whereas non-cognitivists do not conceive of them as judgments (in this sense) at all; and constructivism differs from non-cognitivism and error theory on the *ontological* plane, in that constructivists believe that there are moral facts, whereas non-cognitivists and error-theorists believe that there are no moral facts at all. Let us consider these types of theory in turn. (For some thoughts on which level the discussion ought to be located, see Hare 1988.)

Error theorists believe that there are no moral facts and that there is no moral knowledge, that moral judgments assert something about something, and that therefore moral judgments are always false. John Mackie (1977, p. 35), for example, denies the existence of objective moral values and maintains that ordinary moral judgments include a claim to objectivity, that this claim has been incorporated into the conventional meaning of moral terms, and that therefore the denial of objective moral values has to be put forward as an error theory. Mackie's analysis has been carried forward by Richard Joyce (2001, Chap. 3), who explains that the problem about moral judgments is not that they are thought to be intrinsically motivating, as Mackie might have thought, but that they involve a claim about moral *inescapability*. To maintain that a person, A, ought to perform an action, ϕ, Joyce explains, is to maintain that A has a reason to perform ϕ independently of his wishes, preferences, or goals. But, Joyce objects, this is precisely what is wrong with our ordinary moral judgments. As he sees it, asking for reasons that exist independently of a person's wishes or desires is to ask too much of the world. Hence we must conclude that moral judgments are always false.

Note that it follows from the error-theoretical analysis that there can be no moral relations, no moral rights or duties, no fact of the matter as to what is morally good, or how one ought morally to act, etc. In other words, there can be no moral normativity. Hence if there are moral rules, they do not confer moral rights or impose moral duties.

The error theory may be attractive to those who accept a natural-scientific view of the world, in that it does not assume the existence of moral values or standards. And the idea that moral judgments are straightforward, albeit false, claims about the existence of moral values and standards will likely be attractive to many of those who feel that moral judgments are in some sense subjective. However, the error theory has been criticized by some recent authors. Steven Finlay (2008), for example, objects not only that the assumption on the part of error theorists that moral value has absolute authority (in the sense of a categorical imperative) is false, but also that even if it were true we would have no reason to accept the claim that this assumption "contaminates" the meaning and truth-conditions of moral judgments, making them systematically false. I am not sure that this interesting criticism is justified, but I shall have to leave this an open question.

Like error theorists, *non-cognitivists* maintain that there is no moral reality or moral knowledge, but unlike error theorists, they maintain that moral judgments do not assert anything about anything and that therefore they cannot be true or false. Instead, they maintain that a person who makes (what appears to be) a moral judgment is simply expressing his feelings, attitudes or preferences (Ayer 1947, Chap. 6; Blackburn 1998; Gibbard 1990; Hägerström 1964; Hedenius 1941, pp. 14–38; Stevenson 1944), or prescribing a course of action (Hare 1981). On this type of analysis, the function of moral judgments is to influence people. Schafer-Landau offers the following characterization of non-cognitivism:

> As non-cognitivists see it, the point of moral discourse is not to report some fact about oneself, one's group, or the larger world, but instead to give vent to one's feelings and to persuade others to share them... prescribe some rule of conduct for oneself and others... or express one's commitment to norms regulating guilt and anger.... Such judgments do not... admit of truth and falsity—indeed, there is nothing that could make them true. There is no world of moral facts against which the truth of a moral judgment can be checked. There are no moral properties whose instantiations can determine the qualities of persons, traits, actions, practices, or institutions. There is the familiar world that science speaks of. And there is us, responding to that world. And that is it. (2003, p. 20)

This means that on the non-cognitivist analysis, terms like 'right,' duty,' and 'ought' lack cognitive meaning and do not refer, though they may have so-called emotive meaning (on emotive meaning, see Stevenson 1937). Ingemar Hedenius puts it as follows:

> The thesis of value nihilism that the phrase "this is right" does not express any assumption or statement about anything means... that the word "right" does not denote anything; that this word is, in this particular sense, a meaningless word. For a comparison, one can take the phrase "this is round", which is a phrase of the opposite, theoretical type, and which expresses an assumption or a statement about something. Seen from one perspective, the difference is that the word "round" denotes a fact of a certain sort, viz. a certain form. Precisely because the word "round" thus denotes or "means" something, the phrase "this is

> round" can have theoretical meaning or (which is another side of the same thing) express an assumption or a statement about a state of affairs. In this particular respect, the phrase "this is right" is supposed to relate in the opposite way. The same must hold for all phrases that are equivalent to this phrase. (1941, p. 62)[1]

Note that it follows from the non-cognitivist analysis, too, that there can be no moral relations, no moral rights or duties, no fact of the matter as to what is morally good, or how one ought morally to act, etc. And this was precisely the view of Olivecrona and the other Scandinavian realists. For example, having discussed Alf Ross's book *Theorie der Rechtsquellen* (1929) at length, Axel Hägerström (1931, p. 83) concludes that Ross has convincingly shown that there is no such thing as binding law, that the very idea of binding law evaporates into nothingness. And Ross himself offers the following objection to Hans Kelsen's view that law is a system of norms:

> ... 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, p. 13)[2]

As Schafer-Landau points out (in the quotation concerning non-cognitivism on the previous page), non-cognitivism is very much in keeping with a natural-scientific world-view, in that it does not assume the existence of moral values or standards. Moreover, it explains in a straightforward manner the rather widespread view, often called *internalism*, that moral judgments are intrinsically motivating. Since, on the non-cognitivist analysis, a person who makes a moral judgment expresses his

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[1] The Swedish original reads as follows. "Värdenihilismens tes, att frasen 'detta är rätt' icke uttrycker något antagande eller påstående om något, innebär... att ordet 'rätt' icke betecknar någonting, att detta ord är, just i denna mening, ett meningslöst ord. Som jämförelse kan man ta frasen 'detta är runt', som är en fras av motsatt, teoretisk typ och som uttrycker ett antagande eller påstående om något. Skillnaden består, från en synpunkt sett, däri, att order 'runt' betecknar ett faktum av visst slag, nämligen en viss form. Just emedan ordet 'runt' sålunda betecknar eller 'betyder' något, kan frasen 'detta är runt' ha teoretisk mening eller (vilket är en annan sida av samma sak) uttrycka ett antagande eller påstående om ett sakförhållande. I just dessa avseenden skall frasen 'detta är rätt' förhålla sig på ett motsatt sätt. Detsamma måste gälla alla fraser, som är ekvivalenta med denna fras."

[2] The Danish original reads as follows. "Det normative Udsagn besidder alltsaa netop ingen Mening, der lader sig fremstille i Abstraktion fra den psykologiske Oplevelsevirkelighed. Det er ingen 'Tanke', hvis Sandhed eller Falskhed kan pröves 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 (Fölelser, Indstillinger) 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 Aarsagssammenhang med andre, ikke umiddelbart iakttagelige psyko-fysiske Faenomener, til hvis Eksistens man ad denne Vej kan slutte sig."

feelings or attitudes, non-cognitivism easily explains the assumption that moral judgments are intrinsically motivating.

Moral constructivists (Harman 1975, 1996; Korsgaard 1996; MacCormick 2008, pp. 102–103; Milo 1995; Rawls 1971, 1980; Scanlon 1998) believe that moral judgments are indeed judgments that can be true or false, depending on whether they describe correctly the relevant moral facts, though they insist that those facts are constructed in some way on the basis of our (current or refined) moral views. This means that constructivists are *cognitivists*, in the sense that they believe in moral truth and falsehood, and in our ability to figure out which moral judgments are true and which are false. Different constructivists differ above all in their views about the constructivist procedure. Thus whereas meta-ethical relativists like Gilbert Harman maintain that moral right or wrong, good or bad, depend on our current, unrefined moral views, an objectivist constructivist like John Rawls maintains that moral right or wrong, good or bad, depend on our choices in the original position, in which the agents choose moral principles behind the so-called veil of ignorance. Schafer-Landau offers the following characterization of moral constructivism:

> Constructivists endorse the reality of the domain, but explain this by invoking a constructive function out of which the reality is created. This function has morality as its output. What distinguishes constructivist theories from one another are the different views about the proper input. Subjectivists claim that individual tastes and opinions are the things out of which moral reality is constructed. Relativists cite various conventions or social agreements. Kantians cite the workings of the rational will. Contractarians cite the edicts of deliberators situated in special circumstances of choice. What is common to all constructivists is the idea that moral reality is constituted by the attitudes, actions, responses, or outlooks of persons, possibly under idealized conditions. In short, moral reality is constructed from the states or activities (understood very broadly) undertaken from a preferred standpoint. The absence of this standpoint signifies the absence of moral reality. (2003, p. 14)

Moral constructivism thus conceived is not without its problems, however. As Schafer-Landau (Schafer-Landau 2003, pp. 41–43) makes clear, constructivists must make a choice between imposing moral constraints on the procedure that is meant to generate moral truth and not imposing such constraints. If the constructivist chooses to impose moral constraints, he is necessarily invoking moral considerations that were not the upshot of the constructivist procedure, thus undermining his constructivism. If, on the other hand, he chooses to impose no such constraints on the procedure, he cannot be sure that the procedure will generate anything that we will recognize as moral judgments. Hence constructivism appears to be an unstable position. Of course, this critique does not touch *subjectivist* versions of moral constructivism, such as Harman's relativism.

6.2 Non-cognitivism: Two Difficulties

As I have said, and as we shall again see in Sect. 6.4, Olivecrona was above all a non-cognitivist, even though he appears to have endorsed an error-theoretical analysis at times, at least as regards rights statements and judgments about duty. But at

the time Olivecrona wrote, non-cognitivists were not much concerned with the difficulties of non-cognitivism, but were mainly bent on driving home the truth that moral objectivism (in its various shapes) was untenable and that (some type of) non-cognitivism must be the true meta-ethical theory. Contemporary moral philosophers, including the proponents of non-cognitivism, have concerned themselves more with the troublesome aspects of the non-cognitivist analysis, and in this section I wish to point to two of those difficulties.

The main difficulty that mars the non-cognitivist analysis has to do with the tacit assumption that norms and value judgments can be part of logically valid inferences (for a survey of these difficulties, see Schafer-Landau 2003, pp. 22–37). I shall not here revisit the old difficulty that, on the non-cognitivist analysis, norms and value judgments lack truth values, and that this appears to mean that the laws of logic cannot apply to norms and value judgments (on this see, Alchourrón and Martino 1990). Instead, I shall focus on the so-called Frege-Geach problem (or the problem of embedding), which has been much discussed by moral philosophers in the past 15 years or so (see, e.g., Blackburn 1993; Gibbard 1990; Sinnott-Armstrong 2000; Stoljar 1993; Unwin 1999). This is the problem that, on the non-cognitivist analysis, moral terms like 'right,' 'duty,' and 'ought' do not have the same meaning (sense) in asserted and unasserted contexts, and that therefore an inference such as the one below involves the fallacy of equivocation (*quaternio terminorum*).

(P1) If it is wrong to lie, then it is wrong to ask your friend to lie for you.

(P2) It is wrong to lie.

——

(C) It is wrong to ask your friend to lie for you.

The equivocation arises from the circumstance that on the non-cognitivist analysis, the word 'wrong' lacks cognitive meaning in (P2) and in (C), because both (P2) and (C) are asserted. In (P1), on the other hand, 'wrong' is part of the antecedent, which is not asserted—what is asserted is the whole conditional—and this means that the non-cognitivist analysis does not apply to it. And while it is not always clear just how non-cognitivists conceive of the cognitive meaning of moral terms in unasserted contexts, it is clear that it cannot be the same as in asserted contexts since there is none in such contexts. Hence one who argues in the above-mentioned way is guilty of the fallacy of equivocation.

If we assume that this problem can somehow be solved, we should consider a second difficulty, which concerns our understanding of normative questions. Schafer-Landau describes the situation as follows:

> We commonly ask ourselves what we should do (or think or feel) in a given situation. For non-cognitivists, there isn't anything we should do, really. Doing different things will bring about different consequences, but no result is such that one *ought* to do it, since no result—no state of affairs in the world—could possess value or be obligatory. Value and obligation are normative notions that never refer. There is no such thing as normativity; we live in a value-free world, the world as science describes it. But then what is going on when we ask ourselves, in any given case, how we ought to proceed? (2003, pp. 27–28)

He suggests that the non-cognitivist will answer that one will have to consider the result of the suggested course of action and ask oneself what one's attitude would

be to that result. But, he objects, that cannot be all: We were asking a normative, not a descriptive, question. The question was: Is this attitude of mine a good or proper attitude? He points out that the non-cognitivist will have to answer this question by pointing to yet another attitude or attitudes, perhaps saying that the attitude in question is good or proper if it coheres with one's other attitudes. But then one must ask why one should value coherence, and the non-cognitivist will likely answer that we value coherence because coherence is conducive to other things we want.

But, Schafer-Landau points out, this line of reasoning is unsatisfactory, because it means that one keeps deferring the important, normative, question about the goodness or propriety of one's attitude(s). That is to say, the problem is this:

> Each question in the series is answered by reference to our existing attitudes; yet each question represents another variation on the one that keeps getting deferred, namely: are our existing attitudes fit to be the primary source of evaluation? Since evaluative attitudes are, for the cognitivist, just beliefs, cognitivists will assess the fitness of the relevant attitudes by reference to whether they are true./.../The non-cognitivist, by contrast, continually refashions the question of what we ought to do so that its answer can be given just by an introspective psychological enquiry. But asking and answering normative questions does not seem to be the same thing as asking and assuring ourselves about the implications of our existing mental states. (2003, pp. 28–29)

I find the two difficulties discussed significant. I should add, however, that I find other meta-ethical views, too, problematic, especially the various versions of moral realism. My aim in introducing and briefly discussing these difficulties was to make it clear that part of the philosophical foundation of Olivecrona's substantive legal philosophy is problematic, and to say that any conclusion that follows from a non-cognitivist premise will therefore be equally problematic. But when we assess Olivecrona's substantive legal philosophy, we need to consider the possibility that any other meta-ethical position is just as problematic. I leave it an open question whether this insight should encourage a legal philosopher to minimize the impact of meta-ethical considerations on his or her legal philosophy.

6.3 The Role of Meta-ethical Considerations in Olivecrona's Analysis

I said in Sect. 6.1 that Olivecrona vacillated in his early writings between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board. I believe the analysis in this section supports this claim.

As we shall see in Chap. 7, Olivecrona maintains in his early writings that the reason why judges, legal scholars, and others mistakenly believe that law has *binding force* is that they misunderstand the nature of rules and value judgments (1939, p. 46; 1951, pp. 129–130). I take him to be saying that they wrongly assume that a binding rule or a true value judgment somehow establishes a moral relation, that is,

generates a moral entity or property. For example, they assume that a binding legal rule providing, say, that a person born by a Swedish woman will become a Swedish citizen, necessarily confers the property of being a Swedish citizen on anyone who was born by a Swedish woman. Olivecrona objects, however, to this line of reasoning that legal rules cannot be binding and that value judgments cannot be true (or false): A person who issues a rule or makes a value judgment does not assert that anything is the case, but simply expresses his feelings, attitudes, or preferences. Since this is so, the rule in our example does not and cannot confer the property of being a Swedish citizen on those who satisfy the conditions in the rule. What it can do is to *influence* the subjects of the law on the psychological level and in this way cause human behavior.

And, as we shall see in Chap. 8, Olivecrona conceives of *legal rules* as independent imperatives and maintains that a person who issues an imperative aims to influence the addressee(s) of the imperative. As we shall also see, he maintains that there is no real judgment behind the independent imperatives (1939, p. 46); and this indicates that he embraces non-cognitivism.

Furthermore, we shall see in Chap. 9 that in his earlier writings Olivecrona argues that *rights* and *duties* are illusions. Focusing on the concept of a right, he maintains that even though we believe that rights exist as objective realities, on closer inspection it becomes clear that they exist only in our imagination (Olivecrona 1939, pp. 75–77). His idea here appears to be that rules and value judgments are judgments about entities or properties that do not exist in the natural world, and that therefore they are all false. This indicates an error-theoretical rather than a non-cognitivist account of the concept of a right.

Olivecrona returns to the topic of *legal rules* and *value judgments* some years later in an article on realism and idealism in legal philosophy (1951). Having reiterated the claim put forward in the First Edition of *Law as Fact*, that the grammatical form of value judgments 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 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. (Olivecrona 1951, pp. 129–130. Footnote omitted.)

The reference to "our emotional attitude," and the claim that it would be senseless to describe an action as good or bad if one were completely unmoved and to ask whether our feelings are true or not, indicate quite clearly that Olivecrona now espouses non-cognitivism, rather than the error theory.

Olivecrona returns briefly to the concept of *binding force* in the Second Edition of *Law as Fact*, where he asserts that the question whether or not a legal rule is binding is not a scientific problem, since the binding force—the 'oughtness'—of a rule is no *conceivable* property:

> Ascribing binding force to a rule means proclaiming that it ought to be followed, objectively speaking. This is a value judgment. It has the linguistic form of a proposition concerning a property in the rule. But the 'oughtness' is no conceivable property. To discuss whether certain rules possess oughtness or not is therefore useless. This is no scientific problem./.../... to ask whether a certain system of rules at this or that time was really binding would seem very strange. Indeed, no answer could be given to such a question. (1971, p. 112)

This appears to be a non-cognitivist analysis, because Olivecrona maintains (1) that oughtness is not even a *conceivable* property, and (2) that no answer could be given to the question whether a certain system of rules was really binding.[3] Specifically, claim (1) is in keeping with the non-cognitivist idea that terms like 'binding force' and 'duty' have no cognitive meaning and do not refer at all, and claim (2) is in keeping with the idea that a value judgment is not a judgment at all—if it were a judgment, it would be true or false.

Olivecrona also considers the concept of a *right* in the Second Edition of *Law as Fact*, making 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 and no *Willensmacht* of the imperative theory of law, or we may say instead that the noun 'right' as commonly used "does not signify anything at all," not even something that exists in imagination only, such as a centaur (1971, p. 183). It is clear that the first is the error-theoretical and that the second is the non-cognitivist alternative. Olivecrona 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.

Let us note, finally, that Konrad Marc-Wogau (1940) argues 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 or properties 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 or properties 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 wants to defend the second interpretation, although he frequently speaks as if he were concerned with the first. Marc-Wogau's analysis thus supports my claim that Olivecrona vacillated in his early writings between an error-theory and a non-cognitivist theory in regard to rights statements and judgments about duty.[4]

Olivecrona (1941) responds to Marc-Wogau's criticism, saying that he always meant to endorse the second interpretation, the non-cognitivist analysis, according

[3] I thus assume that in this case Olivecrona means that a statement in which the speaker ascribes binding force to law is an *internal*, not an external, legal statement. This is worth pointing out since it seems to me that, generally speaking, it is more natural to conceive of such a statement as an *external* legal statement. On the distinction between internal and external legal statements, see Sect. 6.5 below.

[4] For more on this topic, Swedish-speaking readers may wish to consult Mac Leod (1973, pp. 19–20) and Petersson (1973, pp. 162–165). Note also that Åqvist (2008, pp. 277–280) agrees with Marc-Wogau's criticism.

to which the entities lack both subjective and objective reality. But despite his protestations, it seems to me that at least in his earlier writings he was not very clear about the distinction between non-cognitivism and error theory either in general or in the case of his own analysis.

6.4 Internal and External Legal Statements

In a celebrated book entitled *Om rätt och moral* (1941, pp. 60–85), the Swedish philosopher Ingemar Hedenius maintains that Axel Hägerström, Vilhelm Lundstedt, and Karl Olivecrona failed to maintain a distinction between internal statements, that is, first-order value judgments and rules, and external statements, that is, second-order value judgments and statements *about* rules, and as a result wrongly concluded that there is no law and that there are no rights and duties. In the same book, he also maintains that in their analyses Hägerström et al. confused the meaning of normative terms, such as 'right,' 'duty,' and 'ought,' with a mistaken *theory* about the meaning of these terms, namely the theory that these terms have a magical meaning (Hedenius 1941, p. 81), and that this caused them to wrongly conclude that there is no law and that there are no rights and duties. Although Hedenius appears to hold that Hägerström et al. committed both these mistakes, he does not make it clear precisely how they relate to one another. I shall, however, focus in this section only on the former (alleged) mistake, viz. that of failing to maintain a distinction between internal and external legal statements.

The distinction between internal and external legal statements is clearly important to legal (and moral) thinking, especially for those who embrace a non-cognitivist meta-ethics, as Hedenius and the other Scandinavian realists do; and even though it may seem obvious in the abstract, it turns out to be quite difficult to maintain the distinction consistently when analyzing legal or moral problems, especially in light of the fact that it is not always clear from the wording of a sentence whether it is of the one or the other type. The significance of the distinction should also be clear from the fact that since Hedenius introduced it, it has been accepted by a number of distinguished legal scholars or philosophers, such as Bulygin (1982, p. 127), Kelsen (1999, pp. 162–164), and von Wright (1963, pp. 103–105).[5]

Hedenius attributes the following line of reasoning to Hägerström, Lundstedt, and Olivecrona. Since according to the non-cognitivist theory, a sentence such as "This is right" (which in its Swedish translation may mean either "This is right" or "This is the law") is *meaningless*, in the sense that the word 'right' lacks cognitive meaning and does not refer, and since on one common interpretation (namely, "This is the law") this sentence is equivalent to the sentence "This rule has binding force," this latter sentence, too, will be meaningless. Moreover, since the sentence "This

[5] Note that A. J. Ayer (1947, pp. 105–106) makes the very same distinction. Note also that H. L. A. Hart's distinction (1961, pp. 52–57) between internal and legal statements of law is closely related to, if not identical with, Hedenius's distinction. On this, see Hedenius (1977, p. 131).

rule has binding force" is in turn equivalent to "This rule belongs to the law," the latter sentence can never be true (or false) either. Hence no rule can belong to the law. Hence there can be no law. Hedenius puts it as follows:

> The phrase "this rule has binding force" is equivalent to a common use of the phrase "this is right". This must mean that the words "binding force of law", and similar expressions, in the meaning they have in everyday conversations as well as in the law, do not refer to any kind of fact. If one draws the conclusions, the results are patently paradoxical. The phrase "this rule belongs to the law", which is equivalent to the phrase "this rule has binding force", can never be true. The law, which according to ordinary usage is the sum of everything that has binding force in a legal sense, is *nothing at all*. There is nothing that these words can refer to according to the use that the words have in ordinary legal language. Worse yet, the whole legal order, which is supposed to be the sum of what we call the law and its application in society, must be thrown out of the world of reality. *There does not exist any legal order.* This blunt assertion must be true in an unrestricted way: the term "legal order", precisely according to common usage, cannot refer to any facts whatsoever. And as that which we call "the state" necessarily involves maintaining a legal order, then there do not exist such things as states. The sentence "some states are monarchies while others are republics", which is based solely on terms with legal quality, cannot "be about" anything at all: it is made up of meaningless words, it does not express any assumption or assertion about anything, it cannot be true or false. (1941, pp. 62–63)[6]

But, Hedenius objects, clearly something has gone wrong here: We have to admit that at least in some cases, a sentence, such as "Brian owns the blue Volvo" or "This is prohibited", expresses a statement *about* something, typically about the law, and can therefore be true or false (Hedenius 1941, p. 63). That is to say, he points out that in some cases such a sentence will express an external legal statement.

As I said in the beginning of this section, the significance of Hedenius's objection to Olivecrona's (and Hägerström's and Lundstedt's) line of reasoning is that Hedenius believes that it may have led Olivecrona (and Hägerström and Lundstedt) to wrongly conclude that there is no law and that there are no rights and duties—if

[6] The Swedish original reads as follows. "Frasen 'denna regel har bindande kraft' är ekvivalent med en vanlig användning av frasen 'detta är rätt'. Detta måste innebära, att orden 'rättens bindande kraft' och likvärdiga uttryck, i den mening de ha både i dagligt tal och i juridiken, icke beteckna något faktum av något slag. Drar man ut konsekvenserna får man uppenbart paradoxala resultat. Frasen 'denna regel tillhör gällande rätt', som är likvärdig med frasen 'denna regel har bindande kraft', kan aldrig vara sann. Gällande rätt, som enligt vanligt språkbruk är summan av det som har bindande kraft i juridisk mening, är överhuvd taget *ingenting alls*. Det finns ingenting som dessa ord skulle kunna beteckna enligt den användning orden ha i det vanliga juridiska språket. Än värre, hela rättsordningen som ju skall vara summan av det vi kalla gällande rätt och dess tillämpning i samhället, åker också ut ur verklighetens värd. *Det existerar icke någon rättsordning.* Denna hårda sats måste vara sann på ett oavkortat sätt: ordet 'rättsordning' kan, just enligt vanligt språkbruk, icke referera sig på några fakta av något slag. Och eftersom det vi kalla 'staten' nödvändigt innebär upprätthållandet av en viss rättsordning, så existerar det icke något sådant som stater. Satsen 'somliga stater äro monarkier medan andra är republiker', som uteslutande bygger på termer med rättslig valör, kan över huvud taget icke 'handla' om något: den är sammansatt av meningslösa ord, uttrycker icke något antagande eller påstående om något, kan icke vara vare sig sann eller falsk."

he (they) had not reasoned in this way, Hedenius implies, he (they) would not have arrived at this mistaken conclusion. Let us therefore take a closer look at the various steps in the argument, as Hedenius portrays it.

If we do, we see that the line of reasoning attributed by Hedenius to Olivecrona et al. starts with the sentence

(1) This is right, and proceeds via the sentences
(2) This is the law, and
(3) This rule has binding force, to
(4) This rule belongs to the law.

The idea is clearly that (1) implies (2), that (2) implies (3), and that (3) implies (4), and that since (1) lacks truth-value, so does (4). But the inference is obviously invalid. For (1) implies (4) *only* if (1) is construed as an *external* statement. If, however, (1) is construed as an external statement, the term 'right' does have cognitive meaning and does refer. More specifically, the equivocation is between (1a) "This is right," which is an internal statement, and (1b) "This is the law," which is an external statement. If (1) is construed as an *external* statement, as in (1b), then (1) is equivalent to (2), though neither (1) nor (2) will be meaningless in the sense contemplated by Hedenius. If instead (1) is construed as an *internal* statement, as in (1a), then (1) is *not* equivalent to (2), which is an external statement; So, either way, the inference is rendered invalid.[7]

I am not convinced that Hedenius' criticism is justified, however. Certainly, both Lundstedt (1942, pp. 24–26, 43–44) and Olivecrona object that they never doubted that we might make statements *about* rules or value judgments, that is, external legal statements. For example, Olivecrona points out that somebody who maintains that German law underwent a radical transformation with the introduction of the *Bürgerliches Gesetzbuch*, is making a true statement:

> As has been pointed out above... the idea that someone has a right can function as an imperative. The very notion that this thing belongs to someone else acts as a prohibition: you must not touch it! But that is of course not to say that all sentences containing the word "right" as subject or predicate could be characterized as independent imperatives or theoretically meaningless phrases for pressuring. Everything depends on the context. The word in question can obviously, like other relevant words such as law in the objective sense (legal order), occur as subject or predicate in real judgments. There is no independent imperative or pressuring phrase if one says, for example, that German law underwent a radical transformation with the introduction of the *Bürgerliches Gesetzbuch*. To be sure, a more or less metaphysical notion of the nature of law can come into play here. Still, the sentence expresses a judgment, and that judgment would seem to be true insofar as it

[7] Moreover, if the relevant sentences are construed as internal statements, which lack truth value, then one sentence could not *imply* another. As is well known, the received view is that the laws of logic apply only to *statements* (or propositions), which can be true or false. On this difficulty, see Ross (1941); Alchourròn and Martino (1990).

explicitly states that a change in a certain system of rules has taken place. (1942, pp. 42–43. See also Lundstedt (1942).)[8]

Of course, the fact that Olivecrona readily acknowledges the distinction when it is pointed out to him does not mean that he has upheld it in his earlier analysis. But the following consideration makes it clear that Olivecrona did not *need* to reason in the way suggested by Hedenius in order to arrive at the conclusion that there is no law and that there are no rights and duties. As we have seen in Sect. 6.4, Olivecrona maintains that the *reason* why people believe that law has binding force is that they do not realize that internal statements are not genuine statements, but only express feelings, attitudes, or preferences. That is to say, he seems to be saying that someone who accepts a non-cognitivist analysis of internal statements has no reason to think that there is such a property as binding force or such entities as rights and duties, but rather a reason to think that there is no such property and no such entities. For example, if an internal statement that one ought to keep one's promises can be neither true nor false, it cannot be true that one ought to keep one's promises. But if correct, this line of reasoning makes it clear that it follows immediately from the non-cognitivist theory, applied to internal statements, that there can be no binding force and no rights and duties. And if this is so, Olivecrona did not need to commit the Hägerström-Lundstedt mistake in order to arrive at the relevant conclusion.

6.5 Legal Statements with a Fused Modality

Svein Eng (2000) maintains that we need to supplement the distinction between internal and external legal statements with a third category of legal statements, namely legal statements with a fused modality. On Eng's analysis (Eng 2000, pp. 247–248), whereas some legal statements fall into the well-known categories of internal or external legal statements, some legal statements fall into the hitherto unnoticed category of legal statements with a fused modality, that is, legal statements that are neither exclusively normative nor exclusively descriptive, but a bit of both. As Eng puts it (Eng 2000, pp. 247–248), "Squeezing layers' propositions *de lege*

[8] The Swedish original reads as follows: "Såsom framhållits ovan... kan idén om att någon har en rättighet fungera som ett imperativ. Själva föreställningen att denna sak tillhör någon annan verkar som ett förbud: du får icke röra den! Men därmed är naturligtvis inte sagt, att alla satser, där ordet rättighet förekommer som subjekt eller predikat, skulle kunna karakteriseras som fristående imperativer eller teoretiskt meningslösa påtryckningssatser. Allt beror på hurudant sammanhanget är. Ordet i fråga kan självfallet i likhet med andra hithörande ord såsom t.ex. rätt i objektiv mening (rättsordning) förekomma såsom subjekt eller predikat i verkliga omdömessatser. Det föreligger icke något fristående imperativ eller någon påtryckningsfras, om man säger t. ex. att den tyska rätten undergick en genomgripande omdaning i och med införandet av Bürgerliches Gesetzbuch. Naturligtvis kan här en mer eller mindre metafysisk föreställning om lagens natur spela in. Likväl uttrycker satsen ett omdöme, och detta omdöme är tydligen sant så tillvida som det utsäger att en förändring i ett visst regelsystem ägt rum."

lata into these dichotomies is liable to obscure their distinctiveness in the modality dimension."

We see that if Eng is right, we cannot rest content with the distinction between internal and external legal statements when we analyze legal or jurisprudential problems. For example, it will not be enough to distinguish internal from external legal statements, and to apply meta-ethical theories to internal, but not to external, legal statements, if it turns out that there is yet another category of legal statements that need to be analyzed in a different way. I shall, however, argue that there are only two types of legal statements, namely internal and external, and that therefore Eng is wrong.[9]

Eng focuses on (what he refers to as) propositions *de lege lata*, that is, propositions about what the law of the land is, either in general or in the particular case, explaining that it is an empirical question whether any given legal statement (or, as Eng says, proposition *de lege lata*) is a legal statement with a fused modality or not (Eng 2000, p. 240). And he explains that when he speaks of legal statements with a fused modality, he has in mind the intention of the *speaker* regarding the meaning of the statement, not the meaning according to some type of objective standard (Eng 2000, pp. 237–238).

Eng's claim, then, is that the majority of legal statements made by practicing lawyers have a fused modality (Eng 2000, pp. 246–248). To show that this is so, Eng considers hypothetical examples of legal statements and the responses he believes these statements would elicit from an audience consisting of lawyers. He considers, more specifically, responses in cases where there is a discrepancy between a given legal statement, such as (Eng's example) "Section 422 of the Criminal Justice Act covers pleasure crafts" (Eng 2000, p. 241), and a court decision. He reasons that if a lawyer were to withdraw his statement in the face of such discrepancy, we may infer that he intended his statement to be descriptive; if instead he were to stick with it, we may infer that he intended his statement to be normative.

On Eng's analysis, internal and external legal statements, as they are usually understood, appear as limiting points on a scale that goes from legal statements that are 100% descriptive, through legal statements that are 99% or 98% or 97%, etc., descriptive and 0%, 1% or 2% or 3% etc., normative, to legal statements that are 100% normative and 0% descriptive. As Eng puts it (Eng 2000, p. 251), "[i]n the middle of this dimension one has pure fusions. From the middle towards the extremes one has degrees of preponderance of descriptive or normative elements." The mistake that believers in the dichotomy between internal and external legal statements make, Eng explains, is to focus exclusively on a small number of legal statements that are either exclusively descriptive or exclusively normative, and to neglect, or misunderstand the nature of, other legal statements.

Eng explains that the reason why we find statements with a fused modality in legal thinking is that the existence of legal institutions that try cases and make decisions gives rise to the need for lawyers to *predict* the outcome of court cases (Eng 2000,

[9] For a sympathetic and illuminating discussion of Eng's analysis, see Bindreiter (2000, pp. 158–166).

pp. 241–244), and that lawyers aim to *solve conflicts* (Eng 2000, pp. 244–246). Whereas the former circumstance explains the presence of the descriptive, the latter explains the presence of the normative component. And since these phenomena are absent in other forms of discourse, we do not find statements with a fused modality elsewhere (Eng 2000, pp. 254–256). He explains that he does not wish to maintain that it is logically impossible to make a distinction between internal and external legal statements in all cases, but only that it is impossible to make a distinction between internal and external legal statements in all cases, while also accepting the doctrine of the sources of law and the interest of lawyers to predict court decisions and to solve legal problems (Eng 2000, p. 258). And thus conceived, Eng's claim is, pace Dahlman (2004, p. 81), a *logical*, not a psychological, claim, and it is strong enough to be quite interesting.

Christian Dahlman (2004) has objected to Eng's analysis that there is no such thing as a fused modality, and that legal statements with an alleged fused modality are either legal statements with a confused modality, or legal statements with an undecided modality. He also asks, very pertinently, what it could possibly mean to maintain that a statement is 70% descriptive, say, pointing out that since it cannot reasonably mean that it does not make its descriptive claim fully, that is, to a 100%, it is quite unclear what it means.

In a response to Dahlman's critique, Eng (2005) maintains that Dahlman fails to understand the idea of a fused modality, because he is stuck within the narrow confines of an empiricist and formal-logical framework, introduced by Austin, Hägerström, Hart, and others, which framework ignores the temporal and institutional aspect of legal thinking (Eng 2005, pp. 431–432). Eng's idea appears to be that the correct or defensible interpretation of the relevant legal materials will never be *fixed*, that this means that a legal statement can never be completely true, and that the theory of fused modality is an adequate response to this circumstance. Eng puts it as follows:

> Within the institutional framework that is constituted by the practice of those enforcing the law, and more broadly, by other lawyers' views, it will never be possible to identify any definitive fixed point that can serve as the factual reference of our propositions *de lege lata*. What the law is, is left to *our* continual determination in and in relation to the temporal dimension. My theory of fused modality relates to and demonstrates the significance of this temporal and institutional framework of our thinking *de lege lata*. In the first place, the theory demonstrates that lawyers adopt the standpoint that there shall be a certain undecidedness in relation to what is constantly taking place in the temporal dimension. Further, the theory shows that in this undecidedness the descriptive and the normative components fuse, constituting the distinctive modality of lawyers' propositions *de lege lata*. Finally, the theory demonstrates that in this fusion lies the connection in the legal dogmatic concept of law with normativity and morals. Thus, fusion represents a clear and conscious choice with an implied claim to rationality and has nothing to do with confused modality in Dahlman's sense, i.e., propositions whose only information is that the sender does not know what he is talking about. (Eng 2005, p. 432)

I do not find Eng's analysis convincing, however. Although I find the idea of a fused modality intriguing and well worth exploring, I nevertheless believe that in the end it must be rejected. Let me explain why.

First, it seems to be self-contradictory (P&-P) to maintain that a particular legal statement can be simultaneously both descriptive (P) and not descriptive (-P), that is, normative, whether the descriptive part amounts to 50 % and the normative part amounts to 50 %, or the proportions are different, say 80–20 %. I assume here, of course, that the categories of normative and descriptive statements are defined so as to be mutually exclusive and jointly exhaustive: If a statement is normative, then it cannot also be descriptive, and vice versa. But I take this to be in keeping with ordinary legal and philosophical thinking.

It is true, of course, that many philosophers hold that value judgments are composed of one normative or evaluative component and one descriptive component (Hare 1952, pp. 17–20), and that many also recognize the existence of so-called thick concepts, such as 'courage,' 'brutality,' 'greed,' and 'carelessness' (Williams 1985, pp. 129–130).[10] But it is also true that these value judgments feature any modality philosophers do not conclude from this that of the type Eng contemplates. To the contrary, they all hold that any given statement that could reasonably be said to be normative (or evaluative) or descriptive is either normative (or evaluative) or descriptive.

Secondly, Eng's analysis does not seem to be internally consistent. For his claim (in the quotation above) that "it will never be possible to identify any definitive fixed point that can serve as the factual reference of our propositions *de lege lata*" clearly contradicts the claim that there are indeed legal statements that are purely descriptive—if there is never any definitive fixed point in the sense explained, then how (on the basis of what) can a purely descriptive legal statement be purely descriptive? True, Eng might respond that a lawyer can *intend* his legal statement to be purely descriptive, even though it could nevertheless never be purely descriptive. But such a claim would be too weak to be of much interest.

Thirdly, it seems to be very difficult to handle a legal statement with a fused modality. For example, the application of meta-ethical theories to legal statements with such a fused modality, will surely be very complicated. How exactly should we apply the non-cognitivist theory or the error theory to a legal statement with a fused modality? If, as Eng suggests, a legal statement with a fused modality may be 75 % descriptive and only 25 % normative, it seems that it would have to be 75 % true or false and 25 % true or false (error theory) or 75 % true or false and 25 % neither true nor false (non-cognitivism). But this is very difficult to understand, and presumably even more difficult to handle in legal analysis. While these difficulties do not show that Eng's analysis is *mistaken*, they do give us a reason to prefer an alternative analysis should such an analysis turn out to be available.

I believe, however, that one can adequately handle the institutional and temporal aspects of legal thinking emphasized by Eng, such as the truth, if it is a truth, that the correct interpretation of the legal materials is never fixed, by making use of what Dahlman (2004, pp. 82–83) refers to as a legal statement with an *undecided* modality. The idea is simply that a lawyer might make a legal statement while remaining undecided regarding the relevant modality. As far as I can see, Eng does

[10] I would like to thank Erik Carlsson for reminding me of this.

not explain *why* the idea of a fused modality is a more adequate response to the institutional and temporal aspect of legal thinking than the idea of an undecided modality, suggested by Dahlman. And since the idea of an undecided modality is easy to comprehend and does not require revision of a well-functioning intellectual framework, namely the empiricist and formal-logical framework identified by Eng, whereas the introduction of the idea of a fused modality requires precisely such a revision, perhaps even the abandonment, of the relevant framework, the latter idea is strongly preferable.

I might add that in his response to Dahlman's critique, Eng does not say anything about the intellectual framework that he himself is operating within and which presumably is capable of accommodating the idea of a fused modality. This is unfortunate, given that on Eng's own analysis the acceptability of the idea of a fused modality appears to turn on the prior acceptance of such an intellectual framework. In any case, I suspect that providing more information about that framework would prove to be easier said than done.

6.6 Non-cognitivism: A Third Difficulty

We have seen in Sect. 6.3 that non-cognitivists confront the Frege-Geach problem. In this section, we shall consider a related problem for non-cognitivists, which is just as disturbing. As we have seen, both Olivecrona and Hedenius (1) maintain that we need to distinguish between (a) internal statements, which express the speaker's feelings or attitudes and which cannot be true or false, and (b) external statements, which are true or false; and (2) assume as a matter of course that an external statement can render the content of an internal statement correctly.

At a first glance, this seems reasonable enough. But on closer inspection, we see that problems arise in regard to (2). If terms like 'right,' 'duty,' and 'binding force' have no cognitive meaning and do not refer when they occur in an internal statement, and if the same holds when they occur in an external statement, then the external statement cannot assert anything about the internal statement and can therefore be neither true nor false. If, on the other hand, these terms do *not* have the same meaning in internal and external statements, as seems to be the case on the non-cognitivist analysis, then an external statement cannot render the content of an internal statement correctly.[11] Either way, the analysis is inadequate.

Konrad Marc-Wogau objects to this line of reasoning that the *conclusion*, that a statement in which a term like 'right' occurs cannot assert anything about anything and therefore cannot be true or false, does not follow from the *premise*, that 'right' does not refer. As Marc-Wogau sees it, a term like 'right' has the same meaning in

[11] That there is a problem here has been pointed out by Åke Frändberg (2005, pp. 66–67). He explains that terms such as 'right' must have the same meaning in internal and external statements—if they don't, the very distinction between internal and external statements will break down. Åqvist (2008, pp. 285–286) agrees with Frändberg and offers a subtle discussion of the problem.

internal and external statements: in neither case does it refer. But, he insists, this does *not* mean that an external statement cannot be a meaningful, that is, a true or false, statement:

> It seems to me now to be a mistake to believe that a sentence could not express a meaningful assertion because it contains meaningless words. The sentence "this rule belongs to the class of rules to which one usually ascribes 'binding force'" is a meaningful sentence, but the expression "binding force" does not for that reason have to be meaningful. The assumption that the sentence "there is a system of rules that is applied in a society and characterized as a 'legal order'" is a meaningful sentence is quite compatible with the proposition that the term "legal order" is meaningless. That these sentences must be meaningless is, in other words, not a consequence of the non-cognitivist thesis that the words "right", "binding force", "legal order"—as they are used in ordinary language—are meaningless words. If this is correct, then Hedenius's argumentation loses its validity. In any case, it remains unproven that the assumption that the sentence "this is right" sometimes has meaning presupposes—as Hedenius assumes—that the word "right" which occurs in the sentence must have a meaning. (1968, pp. 172–173)[12]

Marc-Wogau's line of reasoning is not convincing, however. The problem is that the example he invokes is rather atypical. He may be right that a sentence such as "There is a system of rules that is applied in a society and is characterized as a 'legal order'" makes good sense even if the term 'legal order' does not refer. But once we eliminate the qualifier 'is characterized as' things begin to look different. If we consider the revised sentence "There is a system of rules that is applied in a society and is a legal order," we see that it will not make any sense unless the term 'legal order' refers. So while Marc-Wogau may be right about cases where the term 'legal order' and similar terms are *mentioned*, he is wrong about cases where these terms are *used* (on the use/mention distinction, see Suppes 1957, Chap. 6); and the latter must surely be considered the normal case.

I conclude that the Hedenius-Olivecrona exchange of views has brought a new difficulty for non-cognitivism to the fore, or at least an interesting variant of the Frege-Geach problem, namely that we cannot explain just how an external statement can render the content of an internal statement correctly. To solve this problem we would have to accept something like Marc-Wogau's claim that an external statement can be meaningful even if 'right' and similar terms do not refer. But I cannot see how such a proposal could be made to work.

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[12] The Swedish original reads as follows. "Det förefaller mig nu vara ett misstag att tro att en sats inte skulle kunna uttrycka ett meningsfullt påstående av det skälet att den innehåller meningslösa ord. Satsen 'denna regel tillhör klassen av regler som man brukar tillskriva 'bindande kraft'' är en meningsfull sats, men uttrycket 'bindande kraft' i den behöver för den skull inte vara meningsfullt. Antagandet att satsen 'det finns ett system av regler som tillämpas i ett samhälle och betecknas som 'rättsordning'' är en meningsfull sats är mycket väl förenlig med tesen att uttrycket 'rättsordning' är meningslöst. Att dessa satser måste vara meningslösa är med andra ord ingen konsekvens av den värdenihilistiska tesen att orden 'rätt', 'bindande kraft', 'rättsordning'—såsom de används i vanligt språkbruk—är meningslösa ord. Är detta riktigt, så förlorar Hedenius argumentation sin beviskraft. I varje fall förblir det obevisat att antagandet att satsen 'detta är rätt' ibland har mening förutsätter—såsom Hedenius antar—att ordet 'rätt' som förekommer i satsen måste ha mening."

6.7 The Significance of Olivecrona's Meta-ethics

We have seen that Olivecrona erects his substantive legal philosophy on a foundation consisting of ontological naturalism and a non-cognitivist (and at times an error-theoretical) meta-ethics, and that he invokes such methodological considerations fairly often. On this count, he and the other Scandinavian realists differ from other prominent legal philosophers, such as Kelsen and Hart, who are careful to develop their legal philosophies in a way that does not depend on controversial meta-ethical theories. Of course, while the emphasis on meta-ethical considerations makes Olivecrona's legal philosophy more interesting from a general philosophical point of view, it also makes it more vulnerable to attacks aimed precisely at its philosophical foundation. Nevertheless, I believe Olivecrona's emphasis on methodological questions is on the whole commendable, since it amounts to a serious effort to think things through.

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