Realism about the Nature of Law

TORBEN SPAAK*

Abstract. Legal realism comes in two main versions, namely American legal realism and Scandinavian legal realism. In this article, I shall be concerned with the Scandinavian realists, who were naturalists and non-cognitivists, and who maintained that conceptual analysis (in a fairly broad sense) is a central task of legal philosophers, and that such analysis must proceed in a naturalist, anti-metaphysical spirit. Specifically, I want to consider the commitment to ontological naturalism and non-cognitivism on the part of the Scandinavians and its implications for their view of the nature of law. I argue (i) that the Scandinavians differ from legal positivists in that they reject the idea that there are legal relations, that is, legal entities and properties, and to varying degrees defend the view that law is a matter of human behavior rather than legal norms, and (ii) that they do not and cannot accept the idea that there is a ‘world of the ought’ in Kelsen’s sense. I also argue, more specifically, (iii) that the objection to non-naturalist theories raised by the Scandinavians—that there is and can be no connection between the higher realm of norms and values (the ‘world of the ought’) and the world of time and space—is convincing, and (iv) that Kelsen’s introduction of a so-called modally indifferent substrate does nothing to undermine this objection. In addition, I argue (v) that the Scandinavians can account for the existence of legal relations that do not presuppose the existence of morally binding legal norms by embracing conventionalism about the sources of law, while pointing out that in doing so they would also be abandoning their legal realism for legal positivism. Finally, I argue (vi) that the implications for legal scholarship of the realist emphasis on human behavior instead of legal norms is not well explained by the realists and appear to amount to little more than a preference for teleological interpretation of legal norms.

1. Introduction

Legal realism comes in two main versions, namely American legal realism and Scandinavian legal realism. Both versions flourished in the 1930s and the 1940s.

* Professor of Jurisprudence, Department of Law, Uppsala University. I would like to thank the participants in the advanced seminar in practical philosophy, Department of Philosophy, Uppsala University for helpful comments on the article. I would also like to thank Åke Frändberg, Thomas Mautner, and Patricia Mindus for helpful comments on an earlier version of the article, Brian Bix, Erik Carlsson, Michael Steven Green, and Jaap Hage for helpful

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But in the United States, legal realism disappeared from the forefront of legal thinking in the 1950’s and 1960’s and was succeeded in the 1970’s and the 1980’s primarily by the so-called Critical Legal Studies movement. And in Scandinavia, legal realism more or less disappeared from the scene at the same time, although its leading exponents—Alf Ross and Karl Olivecrona—continued to write in a realist spirit about jurisprudential matters well into the 1970s. The younger generations of Scandinavian jurists have not, however, been willing to take up the mantle of the realists, although some, such as Bindreiter (forthcoming), Eng (2007, 275–314), Mindus (2009), and Spaak (2009b, 2009c, 2011, 2013, 2014) have written appreciatively about them. Indeed, in the past 30–40 years the teachings of Scandinavian realists have evoked more interest in Southern Europe than in the Nordic countries, especially in Italy. Enrico Pattaro’s writings (1972, 1980, 2007, 2009, 2010), in particular, come to mind here.1

The Scandinavian realists were naturalists and non-cognitivists,2 who maintained that conceptual analysis (in a fairly broad sense) is a central task of legal philosophers, and that such analysis must proceed in a naturalist, anti-metaphysical spirit. Indeed, I have argued elsewhere (Spaak 2009c) 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 that which 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 philosophically acceptable concepts must be analyzable in terms of natural entities or properties.3

In this article, I wish to consider the commitment to ontological naturalism and non-cognitivism on the part of the Scandinavian realists and its implications for their view of the nature of law. I argue (i) that the Scandinavians differ from legal positivists in that they reject the idea that there are legal relations, that is, legal entities and properties, and to varying degrees defend the view that law is a matter of human behavior rather than legal norms, and (ii) that they cannot and do not accept the idea that there is a ‘world of the ought’ in Kelsen’s sense. I also argue, more specifically, (iii) that the objection to non-naturalist theories raised by the Scandinavians—that there is and can be no connection between the higher realm of norms and values (the ‘world of the ought’) and the world of time and space—is not

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1 On the reception of the legal philosophy of the Scandinavians in the Latin world, see Faralli 1999.
2 As we shall see in Section 4, the early Olivecrona appears to have embraced at times an error-theoretical analysis of moral and legal judgments. On this, see Spaak 2009c, 252–5.
3 Leiter (2007) has argued that the American realists were methodological naturalists, who were concerned solely with the study of adjudication. This sounds right to me. I review Leiter’s book in Spaak (2008).
convincing, (iv) and that Kelsen’s introduction of a so-called modally indifferent substrate does nothing to undermine this objection. In addition, I argue (v) that the Scandinavians can account for the existence of legal relations that do not presuppose the existence of morally binding legal norms by embracing conventionalism about the existence of the sources of law, while pointing out that in doing so they would also be abandoning their legal realism for legal positivism. Finally, I argue (vi) that the implications for legal scholarship of the realist emphasis on human behavior instead of legal norms is not well explained by the realists and appear to amount to little more than a preference for teleological interpretation of legal norms.

I begin by introducing the core claims of the Scandinavians about the nature of law through a comparison of Scandinavian legal realism and legal positivism (Section 2) and proceed to discuss, rather briefly, the way the theories of naturalism and non-cognitivism figure in the legal philosophy of the Scandinavians (Sections 3–4). Having done that, I turn to consider the critique by the Scandinavians of non-naturalist theories of law, such as the theory put forward by Hans Kelsen (Sections 5–7). The article concludes with a defense of a conventionalist account of the existence of the sources of law (Section 8) and some critical comments on the claims by the realists about the proper methods and study object of legal scholars (Section 9).

2. Scandinavian Legal Realism and Legal Positivism

The spiritual father of Scandinavian realism was the Swedish philosopher Axel Hägerström, who together with his colleague in Uppsala, Adolf Phalén, maintained (i) that conceptual analysis is a central philosophical task, (ii) that subjectivism (conceived as the view that the object of a person’s consciousness exists only in this consciousness) is false, (iii) that metaphysics (conceived as the view that there is a reality beyond the world of time and space) is false, even pernicious, and (iv) that there are no objective values (on this, see Oxenstierna 1938). As we shall see, the Scandinavians aimed to construct their legal philosophies on a foundation consisting of these four tenets, though tenet (ii) does not seem to have played much of a role in the writings of Olivecrona and Ross.

I take legal positivism to be (what I shall refer to as) a second-order theory of law, that is, a theory that lays down a legal-philosophical framework within which a theorist can develop a first-order theory of law, that is, a theory that aims to elucidate the nature of law. Examples of first-order theories of law include, inter alia, the theories of law defended by Hans Kelsen (1999, 1960) and H. L. A. Hart (1961, 1982). What I mean is that Kelsen and Hart both defend theories that aim to elucidate the nature of law, arguing that law is a coercive normative system with a hierarchical structure with a presupposed basic norm at the top (Kelsen), or that law is a union of primary and secondary rules with a social rule of recognition at the top (Hart). While these theories differ in certain important respects, they are both legal positivist theories of law in the sense that they conform to the basic tenets of legal positivism. These tenets are the social thesis, which has it that we determine what the law of the land is using (exclusively or essentially) factual criteria; the separation thesis, according to which there is no conceptual connection between law and morality, and the thesis of social efficacy,
which has it that the existence (or validity) of a legal system presupposes that it is efficacious.\textsuperscript{4}

The Scandinavian realists are rather close to the legal positivists, for it turns out that they accept all three basic tenets of legal positivism. Olivecrona, for example, accepts the social thesis since he maintains that law is a matter of social facts. His aim in the first edition of \textit{Law as Fact}, he explains (see Olivecrona 1939, 25), is to \textit{reduce} our picture of law in order to make it correspond with objective reality: “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.” And, as far as I can see, this reduction thesis, as we might refer to it, implies, but is not implied by, the social thesis. For if the law is a matter of social facts in the sense of the reduction thesis, one will have to determine what the law is using factual criteria, as the social thesis requires. The reverse is not true, however. As Kelsen’s theory makes clear (see Section 5 below), it does not follow from the idea that one has to determine what the law is using factual criteria, that law is not something of another order than facts.

Ross, too, accepts the social thesis. Although he does not expend much energy discussing this thesis in his main jurisprudential writings, he does touch on it in his article “Validity and the conflict between legal positivism and natural law” (Ross 1998). While his primary aim in this article is to explain what legal positivism is and to contrast it with natural law theory, he also makes it clear that he himself subscribes to the social thesis, even though he does not use this particular label (ibid., 148–51). He explains (ibid., 149) that the idea of this thesis, which he refers to as the second fundamental thesis of legal positivism, is that it is possible to “establish […] the existence and describ[e] the content of the law of a certain country at a certain time in purely factual empirical terms based on the observation and interpretation of social facts (human behaviour and attitudes).” Recognizing that different legal positivists may differ somewhat on the question of exactly what types of social fact we refer to when we maintain that a legal rule exists, he points out (ibid., 149–50) that they all agree that “to state the existence of a legal rule as belonging to the law of a certain country at a certain time is to state a set of observable behavioural facts.”

Olivecrona also appears to accept the separation thesis. First, if you maintain that there is a conceptual connection between law and morality (call this the connection thesis), you will very likely maintain that morality is objective in the sense that moral truth or validity is independent of what people do or think about moral questions—if you do not accept some version of moral objectivism, you will have to conclude that the legal force and, in extreme cases, the existence and content of the law, will vary with its moral quality, and this will likely undermine the predictability of court decisions (on this, see Spaak 2009a, 281–2. See also Alexy 1999, 33). Since Olivecrona is a non-cognitivist (see Olivecrona 1939, 46; 1951, 129–30), and in the early days at times an error theorist (see Olivecrona 1939, 75–7), and since both non-cognitivism and error-theory imply that there are no (objective) moral values and standards, he very likely accepts

\textsuperscript{4} Legal philosophers disagree to some extent about the best interpretation of these theses. See Spaak 2003, 471–6.
the negation of the connection thesis, that is, the separation thesis. Secondly, although he conceives of law and morality as two distinct and partly overlapping sets of rules that are related in important ways (see Olivecrona 1940, 42), he does not even consider the possibility that there might be a conceptual connection between the two sets of rules.

Ross, too, accepts the separation thesis, though he appears to believe (mistakenly, in my view) that it is identical to the social thesis. Quoting John Austin’s well-known dictum (Austin 1998, 187), that the existence of law is one thing, its merit or demerit another, he points out (Ross 1998, 150) that this means precisely that “the law is a fact, and that a fact is and remains a fact whether you happen to like it or not, and whether you consider it in harmony or conflict with natural law principles whose truth is presupposed.”

Olivecrona does not give explicit consideration to the thesis of social efficacy, which has it that the existence (or validity) of law presupposes that the law is efficacious, though my guess is that he would accept it if he were to consider it. Since he believes that the determination of the law is a matter of social fact, he must reasonably also believe that the law needs to be effective in order to exist. For he maintains (Olivecrona 1939, 47–8) that the law of a country exists as ideas in the imperative form about human behavior, ideas that are again and again revived in human minds, and that therefore the law conceived as a set of rules does not and cannot have permanent existence. He is not, however, explicit that citizens must obey the law in order for it to exist. I assume that the reason why he does not consider the thesis of social efficacy is that he does not conceive of law as a system of rules (or norms) in the sense of semantic units, as Kelsen, Alexy, and many others do, and that therefore the question of existence does not present itself as a pertinent one. One may, however, argue that since, on Olivecrona’s analysis, independent imperatives have a suggestive character that influences the citizens, widespread disobedience of the law would be incompatible with the existence of independent imperatives.

Ross does not speak about the thesis of social efficacy either, though he does make it clear that he considers the efficacy of law to be a necessary condition for the existence (or validity) of law. The importance of social efficacy in Ross’s legal philosophy is clear from the discussion of a distinction between psychological and behaviorist versions of jurisprudential realism, where Ross explains that while all versions of realism interpret legal validity in terms of the social efficacy of legal norms, psychological realism and behaviorist realism differ on their understanding of the idea of social efficacy. According to the former version, a norm is valid “if it is accepted by popular legal consciousness”; according to the latter, it is valid “if there are sufficient grounds to assume that it will be accepted by the courts as a basis for their decisions” (Ross 1959, 71–3). So whereas Olivecrona defends a psychological version of realism, Ross espouses a combination of psychological and behaviorist realism.

There is, however, an important difference between the Scandinavians and the legal positivists. Whereas writers like Kelsen (1960), Hart (1961), and MacCormick & Weinberger (1986) conceive of law as a system of norms that gives rise to legal relations of various types, the Scandinavians at least in the early days—the 1920s through the 1940s—rejected the idea that there are legal relations, such that a person may be said to have rights or duties or legal powers, or to be a prime
For example, in a review of Ross’s book *Theorie der Rechtsquellen* (1929), Axel Hägerström (1931, 83) notes with approval that Ross makes it clear in the book “how impossible it is to maintain the belief in a binding valid law for a particular society, while preserving the insight that the social reality is the only reality that is real here” and adds that, on Ross’s analysis, “the very idea of a binding valid law for a particular society dissolves into nothingness.” While Lundstedt (1928) for his part was content to maintain that there are no rights, both Olivecrona (1939, chap. 2; 1971, 223) and Ross (1936, 1989) clearly believed that there are no legal relations at all.

Although Olivecrona does not say so in the first edition of *Law as Fact*, it is clear from his analysis in later writings, including the second edition of *Law as Fact*, that he takes the absence of binding force to imply, or to be equivalent to, the absence of legal entities and properties, that is, the absence of legal relations. For example, having made a distinction between value judgments and factual judgments and having introduced the theory of non-cognitivism, he states the following in his article on realism and idealism in legal philosophy: “The belief in the objective ought includes the idea that the sentences are held really to engender the relations which they enunciate [. . .]. This is the great error. We are misled by our own feelings of being bound by the law into believing in these metaphysical relations” (Olivecrona 1951, 130–1). Furthermore, he introduces in the second edition of *Law as Fact* the concept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (see Olivecrona 1971, chaps. 5, 8). The introduction of this concept is of interest in this context, because Olivecrona adds to it a consideration of the nature of the legal effect that is commonly supposed to follow from the utterance of a performatory imperative (ibid., 221–6, but see also Olivecrona 1940, 40–1). Such legal effects, he points out, are clearly supersensible (see Olivecrona 1971, 223): “These rights, duties, and legal qualities are supposed to be created, modified, transferred, and extinguished through operative facts by virtue of the law. They form a supersensible world: in the sensible, natural world there are no rights and duties, or legal qualities.”

Having proposed a non-cognitivist reinterpretation of the notion of validity, as it occurs in traditional theories of law, Ross (1989, 101) proceeds to argue that we can no longer accept the common view that law is a system of norms. He argues, more specifically, that whereas it is possible to comprehend the meanings of a system of statements or propositions in the abstract, it is not possible to comprehend norms in the abstract. His reasoning is not crystal clear, but I think he means that since, on the non-cognitivist analysis, norms have no cognitive, but only an emotive, meaning, we cannot comprehend them in the abstract, but only in close connection with the act of issuing them. For, as we shall see in Section 4, on the non-cognitivist analysis, to issue a norm is to try to influence a person on the psychological level, to try to persuade, rather than convince, him. Judging from this

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5 I thus use the term ‘legal relations’ in a rather loose sense to refer to legal entities, such as rights and duties, and legal properties, such as that of being a judge, or a citizen, or an heir. Kelsen (1959, 276) uses the term ‘legal relations’ in the same way and contrasts it with ‘power relations.’ A legal relation in this sense can, but need not, be a one-place relation. The Scandinavians themselves did not often speak of ‘legal relations.’
line of argument, Ross appears to share Olivecrona’s view that legal norms do not and cannot give rise to legal relations, and that this means that we cannot in a meaningful way speak of legal entities and properties.

Although I find this particular argument dogmatic and unconvincing, I shall not discuss it any further. Instead, I shall be content to point out that Ross seems to have abandoned this radical stance on the question of legal relations in his later writings. For he explains in *On Law and Justice* (Ross 1959, chap. 2) that a legal system is a system of norms that makes up an abstract idea content in light of which we can understand the goings-on in the natural (or social) world as “a coherent whole of meaning and motivation.” In other words, he now accepts the Kelsenian idea that legal norms function as schemes of interpretation, which he used to reject. In addition, he adopts Wesley Hohfeld’s conceptual scheme and uses it to describe these legal relations in a subtle manner (ibid., chap. 5). Clearly, he would not do this, if he thought there were no legal relations. But since he never abandoned his non-cognitivist analysis of norms and value judgments, one may well wonder how he thought he could reconcile his ontological naturalism and non-cognitivism with the idea that there are legal relations in the strong sense he once thought could exist only in a realm beyond the world of time and space.

What this means, then, is that although both the Scandinavians and the legal positivists espouse the three above-mentioned theses, legal positivists, but not legal realists, believe that we may properly speak of legal relations in the sense explained. Let me add three comments to this conclusion.

First, and most important, when legal realists reject the existence of legal relations, they have in mind legal relations that are binding in the sense that they presuppose the existence of morally binding legal norms, but when legal positivists assert or imply the existence of legal relations they have in mind legal relations that are not binding in this sense. True, most of the time the realists speak simply of “valid” or “binding” legal norms, but it is clear that what they have in mind is morally binding legal relations. As Ross (1989, 108) says when he proposes a non-cognitivist reinterpretation of the notion of validity, as traditionally conceived, the mistaken view that law can be conceived of as a system of norms depends in the final analysis on the equally mistaken belief in moral objectivity: “It is this practical illusion of objectivity, this fictive objectivation of an inner experience of restraint on the free inclinations to action, which is transferred to the experience of the legal restraints also.”

What this means is that the legal realists do not, strictly speaking, deny what the legal positivists assert, though they would say that legal relations in the weak sense contemplated by legal positivists are not worth having. My guess is that they take it for granted that one must presuppose that a system of norms, such as a legal system, is morally binding, if one is to speak in a meaningful way of legal rights, legal obligations, legal authority, and so on: if one did not make this assumption, one would have to give up on the very idea of legal normativity. Kelsen appears to share this view, arguing as he does that we may speak of norms only if the “ought” in question is thought of as obligatory not only when seen from the point of view of the person or organ who issues the norms, but also from the point of view of an independent third party (Kelsen 1960, 7), and, as we shall see in Section 5, that one needs to presuppose the basic norm if one wishes to conceive of the legal raw-materials as a system of valid (binding) norms.
Secondly, the metaphysical view of law that the Scandinavians attribute to both legal thinkers and legal practitioners is not as clear as it might be. Thus it is not absolutely clear to me whether the Scandinavians want to say that key normative terms such as “right,” “duty,” “norm,” “authority” and “validity,” as they are understood in legal language, have incorporated the metaphysical elements into their meaning, so that a first-order claim that something is right or valid will have to be false if there are no metaphysical entities or properties; or whether they want to say instead that no such incorporation has taken place, so that such a claim can be true in some cases and false in others (depending on the intentions of the one who makes the claim). Yet a third interpretation would be that one who makes a first-order legal claim is not making any statement at all, but is only expressing his attitudes or preferences. My impression, however, is that Olivecrona embraced the first, error-theoretical interpretation in the beginning of his career and the third, non-cognitivist interpretation in the later stages, whereas Ross consistently espoused the third interpretation.

Thirdly, not only legal positivism, but also Scandinavian legal realism, is conceived here as a second-order theory of law, that is, as a framework theory of law within which first-order theories of law can be formulated. The relevance of the distinction between first- and second-order theories of law in this context is that while legal positivists and legal realists differ to some extent on their positive accounts of the nature of law, both legal positivists and legal realists accept certain basic tenets. What unites legal positivists, as we have seen, is that they accept the above-mentioned tenets and assert or imply that there are legal relations (in a non-moral sense), and what unites the legal realists is that they accept the above-mentioned tenets and maintain that there are no legal relations (in the moral sense) and that therefore law is a matter of human behavior rather than norms. The difference, then, appears to be that whereas legal positivists believe that legal relations in a non-moral sense are worth having, legal realists reject this view. In any case, I believe it is fair to say that the Scandinavians see themselves as exposing widespread and metaphysically tainted beliefs on the part of legal thinkers and legal practitioners, and that they believe that it is necessary to do this in order to be able to develop a defensible, positive and non-metaphysical conception of law and legal phenomena.

The Scandinavians thus reject the existence of legal relations. Since this means that law cannot be a matter of norms, they infer that it must be essentially a matter of human behavior, and they therefore argue (to varying degrees) that the study of law ought to move away from a focus on the interpretation and application of the law to a focus on empirical investigations concerning human behavior of the type undertaken in the social sciences. But, as we shall see below in Section 9, the precise view of the realists on this count turns out to be quite difficult to determine. Consider, for example, Olivecrona’s view that legal rules are independent imperatives, which cannot establish legal relations, but can cause human beings to behave in this way or that, since they possess a suggestive character that influences people on the psychological level (see Spaak 2011, 170–4). If this is so, law clearly consists of independent imperatives, not human behavior. Olivecrona might, however, respond that since these independent imperatives cannot establish legal relations, but only cause human beings to behave in various ways, they fulfill a different function than legal rules are normally thought to do. This means, more specifically,
that it is in the nature of law not to create rights and duties, but to influence human behavior. What is important to the realists, then, is not what a person’s legal position is, but whether this person behaves, or is likely to behave in a certain way or not.

3. Naturalism in the Legal Philosophy of the Scandinavians

Writers on naturalism make a fundamental distinction between (i) ontological (or metaphysical) and (ii) methodological (or epistemological) naturalism. 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, though I recognize that it is difficult to find a fully satisfying characterization of natural entities or properties (on this, see Ridge 2008; Copp 2007, chap. 1). 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. (Mautner 2010, 411)

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. Nevertheless, as we shall see in a moment, the second characterization of ontological naturalism is closer to the realists’ own view of the matter.

In any case, methodological naturalism requires that philosophical theorizing be continuous with the sciences. Brian Leiter (2007, 34–5) makes a distinction between methodological naturalism that requires “results continuity” with the sciences and methodological naturalism that requires “methods continuity,” and he 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. As he points out (ibid.,

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6 Much of the text in Sections 3–4 can be found, more or less verbatim, in Spaak 2009c, 36, 42, 51–2, 62–5.

7 Armstrong (1978, 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 2013, 3.
34), it is the “methods continuity” version that has been at the center of philo-

sophical interest through the years, and it is this version that I have in mind when

I speak of methodological naturalism in this article.

Karl Olivecrona’s ontological naturalism comes to expression when he explains

in the preface to the first edition of Law as Fact (1939) that any adequate theory of

law must eschew metaphysics and treat the law as a matter of social facts. The aim,

he explains later in the book, is to reduce our picture of the law in order to make

it correspond with objective reality:

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.
(Ibid., 27).

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

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

4. Non-Cognitivism in the Legal Philosophy of the Scandinavians

Non-cognitivists maintain that there is no moral reality or moral knowledge, and
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 (Blackburn 1998, Hägerström 1964b, Stevenson 1944), or prescribing a
course of action (Hare 1981). On this type of analysis, the function of moral
judgments is to influence people. 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 (see Stevenson 1937). Ingemar
Hedenius (1941, 62) puts it as follows: “The thesis of value nihilism [non-cognitivism] 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.”

Like non-cognitivists, error theorists believe that there are no (objective) moral facts and no moral knowledge, but unlike non-cognitivists, they believe that moral judgments assert something about something, and that therefore moral judgments are always false. John Mackie (1977, 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.

Like non-cognitivism, 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 (objective) 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 who feel that moral judgments are in some sense subjective but are unwilling to accept the idea that they are not judgments at all.

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, but in his later writings he embraced a non-cognitivist theory across the board.

For example, in a discussion of the concept of binding force in the second edition of Law as Fact (Olivecrona 1971, 112), he asserted that the question whether a legal rule is binding or not is not a scientific problem, because the binding force—the “oughtness”—of a rule is no conceivable property. This appears to be a non-cognitivist analysis, because Olivecrona maintains (i) that oughtness is not even a conceivable property, and (ii) that no answer could be given to the question whether a certain system of rules is really binding. Specifically, claim (i) 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 (ii) is in keeping with the closely related idea that a value judgment is not a judgment at all—if it had been a judgment, it would have been true or false.

Ross’s non-cognitivism was explicitly stated in a couple of early articles. For example, in a 1936 article celebrating the twenty-fifth anniversary of the Pure Theory of Law, Ross maintains that we cannot conceive of the law as a system of norms in the sense contemplated by Kelsen and others, because norms do not express propositions, and do not concern (or refer to) states of affairs, but simply express the speaker’s (subjective) attitudes or feelings. A normative claim, Ross (1936, 313) points out, “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

8 Translated into English by Robert Carroll. 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.”
psychological experience.” This is, of course, the same idea as the one underlying Ross’s claim that non-cognitivists cannot conceive of law as a system of norms (considered above in Section 2).

Ross does not have much to say about meta-ethical questions in On Law and Justice, but his distinction between assertions, which can be true or false, and directives, which lack truth-value (Ross 1959, 6–11), together with his comments on the idea of justice, suggest that he still adheres to the emotivist version of non-cognitivism. As he puts it, “[t]o invoke justice is the same thing as banging on the table: an emotional expression which turns one’s demand into an absolute postulate” (ibid., 275).

5. Kelsen’s Non-Naturalism

If one accepts ontological naturalism, one must of course reject theories of law that place law wholly or partly in a realm beyond time and space. This means that the Scandinavians cannot accept Kelsen’s claim that law is a non-natural entity, which belongs in what both Kelsen (1984, 8, 10) and Olivecrona 1939, 21; 1951, 130) used to call the “world of the ought.” I introduce Kelsen’s theory in this section and discuss Hägerström’s critique of it in Sections 6–7.

As is well known, Kelsen (1960, 1) maintains that his theory of law is pure, in the sense that it holds that law—conceived as a system of valid norms—is separate both from nature and from morality. What the separation of law and nature means is that Kelsen takes law to exist in a realm beyond time and space. He reasons, more specifically, that the peculiar property that turns an alleged judicial decision, say, into a (genuine) judicial decision, that is, its validity (or binding force), cannot find room in the world of time and space (ibid., 2). For if we analyze a piece of legislation or a judicial decision, we will find that it consists of two elements, namely one element that belongs to the world of time and space, such as a human action or an event, or a series of human actions or events, and another element that does not exist in the world of time and space, namely a specifically legal, normative meaning, which legal norms confer on it. Kelsen’s view, then, is that valid legal norms function as schemes of interpretation, in light of which we interpret social or natural acts or events legally (Kelsen 1992, 10). This suggests that he believes that valid legal norms enjoy some sort of non-natural existence. And a few pages later, he is explicit that valid legal norms do not exist in the world of time and space (ibid., 12): “To speak [. . .] of the validity of a norm is to express first of all simply the specific existence of the norm, the particular way in which the norm is given, in contradistinction to natural reality, existing in space and time. The norm as such, not to be confused with the act by means of which the norm is issued, does not exist in space and time, for it is not a fact of nature.”

Kelsen thus conceives of the concept of a norm, or the concept of ought, as the central legal concept. Having objected to the view of traditional legal scholars, that law comprises an ethical minimum, and that this means that the legal “ought”

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9 Translated into English by Robert Carroll. The Danish original reads as follows: “Det normative Udsagn besidder altsaa netop ingen Mening, der lader sig fremstille i Abstraktion fra den psykologiske Oplevelsevirkelighed. Det er ingen ‘Tanke,’ hvis Sandhed eller Falskhed kan prøves som noget, der er absolut uafhængigt af dens psykologiske Oplevelse.”
becomes a moral “ought” (ibid., 22–3), he proceeds to offer a reconstruction of the concept of a legal norm, in which this concept is completely severed from its source, the concept of a moral norm. He does this by conceiving of the legal norm not as an imperative, but as (what he calls) a hypothetical judgment, which connects legal conditions (or legal grounds) and legal consequences by means of the concept of ought: If \( A \), then \( B \) ought to be (ibid., 23). On this analysis, he explains, the legal “ought” is a relative a priori category with the help of which we comprehend the legal data precisely by connecting legal consequences with legal conditions (ibid., 23–4).

Emphasizing the connective function of the concept of ought, Kelsen describes this concept as a formal category that can handle any empirical content regardless of its moral quality:

This category of the law [the category of ought] has a purely formal character, which distinguishes it in principle from a transcendent idea of law. It remains applicable whatever the content of the material facts so linked, and whatever the type of the acts to be understood as law. No social reality can be excluded, on the basis of its content, from this legal category, which is cognitively and theoretically transcendental in terms of the Kantian philosophy, not metaphysically transcendental. (Ibid., 25)

What Kelsen means is that the Pure Theory of Law, in keeping with the separation thesis, accepts any content as a possible legal content. Recognizing that the content of any given legal norm might be such that the norm violates human rights, say, or otherwise contradicts fundamental principles of morality, he insists that it may nevertheless qualify as a legal norm, provided that it has come about in the right way (the social thesis) and belongs to a system of norms that is, on the whole, efficacious (the thesis of social efficacy). He is thus saying that the legal “ought” is not necessarily a moral “ought.” As he sees it, the (voluntary) presupposition of the basic norm—which, on his analysis, is what turns the legal materials into a system of valid norms—is a purely epistemological device that does not imply any moral commitment to the law of the land (Kelsen 1992, 58, 64; 1960, 224).

6. No Connection

The objection on the part of the Scandinavians to the view that there is a world of norms and values beyond the world of time and space was first formulated by Axel Hägerström and was then repeated with some variations by Lundstedt, Olivecrona, and Ross.

Hägerström argued in a 1928 review of Kelsen’s Allgemeine Staatslehre that the very idea of the “world of the ought” is absurd, because this world cannot be thought of as even existing alongside the world of time and space. Pointing out that the reason why Kelsen makes no false statements about social facts is that he does not allow his legal philosophy to have anything to do with such facts, Hägerström states the following:

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10 The claim that norms are hypothetical judgments suggests that Kelsen thought of their logical structure as follows: \( A \supset O B \). But, as Per Ericson has pointed out in conversation, the following is probably what captures Kelsen’s real intentions: \( O(A \supset B) \). It is common to think of the former formula as expressing an all-things-considered “ought” and of the latter as expressing a prima facie (or pro tanto) “ought.” See, e.g., Hintikka 1971, 87–92.
A legal prescript is, in fact, for him [Kelsen] a judgment concerning a supernatural existent, which nevertheless (at least in so far as his view is carried out consistently) must be completely realized in the world of nature. But this is an absurd idea. The supernatural juridical system cannot be thought of as even existing alongside the natural order. For no knowledge of any reality is possible except through relating its object to a systematically interconnected whole. But the supernatural and the natural systems, as being different in kind, cannot be co-ordinated in a single system. Therefore, so far as I contemplate the one, the other does not exist for me. But, if the jurist as such must abstract from the natural order, it is to be feared that the legal prescripts which he sets forth will be far too empty. He cannot, e.g., talk of legal transactions as juridical facts, for that becomes altogether meaningless if one may not assume any natural causal nexus. Again, he cannot speak intelligibly of punishment, since a “punishment” which led to no consequences by way of natural causal connexions could not be called a punishment. He must simply be left gasping for air! (Hägerström 1953, 267)

What Hägerström is saying here is that we cannot even conceive of the two worlds—the “world of the ought” and the world of time and space—as existing side by side, because it is necessarily the case that everything that exists is part of the one (and only one) all-encompassing framework that he mentions. And since, on Hägerström’s analysis, this framework is the framework of time and space, there can be no place for any other framework, such as a non-natural world of norms and values.

Hägerström then proceeds to spell out the implications of the lack of connection between the two worlds. For one thing, on Kelsen’s analysis, a person who is focused on the law cannot even admit the existence of either morality or the goings-on in the natural world. As he puts it in the quotation above, “so far as I contemplate the one [world], the other [world] does not exist for me.” Quoting Kelsen’s pronouncements on this issue, he concludes that the “jurist as such,” that is, the jurist who is focusing on the law, must deny both that there are men in the biological sense and that one ought to act morally (ibid., 268). He notes that in light of this, it is only to be expected that Kelsen should think of the act of legislation as the “great mystery” (ibid., 268), as Kelsen puts it in Hauptprobleme der Staatsrechtslehre (Kelsen 1984, 411).

Hägerström himself did not speak of ontological naturalism, though he did advance a theory of reality that implies the thesis of ontological naturalism. Unfortunately, Hägerström’s texts on the subject matter are difficult to understand, to say the least (see, e.g., Hägerström 1964a). But following a well-known (in Sweden) interpreter of Hägerström, the Swedish philosopher Konrad Marc-Wogau (1968), we may spell out this theory in three main theses, namely (1) that reality means the same thing as determinacy, (2) that there is a certain framework in which everything real can be found and which excludes any other framework, and (3) that this framework is the spatio-temporal framework. What this means is that everything that is real can be found in the spatio-temporal framework, and only in this framework. As should be clear, the combination of theses (2) and (3) amounts to the theory of ontological naturalism, conceived in terms of an all-encompassing spatio-temporal framework.

Olivecrona repeats Hägerström’s criticism in the first edition of Law as Fact. Having rejected several attempts to explain the nature of the binding force by

reference to social facts, such as feelings of being bound, or the inability to break the law with impunity, he concludes (as Kelsen had done before him) that the binding force has no place in the world of time and space, but must be located in some sort of supernatural realm: “The absolute binding force of the law eludes every attempt to give it a place in the social context. [. . .] This means in the last instance that the law does not belong to the world of time and space. It must have a realm of its own, outside the actual world” (Olivecrona 1939, 14). But, he objects, the law cannot be located in a supernatural world beyond the world of time and space, because there could be no connection between such a world and the world of time and space:

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

I find Hägerström’s (and Olivecrona’s) critique of Kelsen convincing. It seems to me that we have reason to accept the thesis of ontological naturalism, and if we do we cannot accept any form of non-naturalism. Hence we must as meta-ethicists accept either some version of moral naturalism (see, e.g., Copp 2007), of meta-ethical relativism (see, e.g., Harman 1975, 1996), or of non-cognitivism, as the Scandinavians did, or perhaps some form of error theory (see, e.g., Mackie 1977, Joyce 2001).

The underlying question, however, is whether Kelsen really needs to locate law in the “world of the ought,” and, more generally, whether we need to attribute to legal norms the property of being valid or binding in the sense contemplated by Kelsen and the Scandinavians, including Hägerström. I answer both questions in the negative. The reason, as I shall argue below in Section 12, is that the existence of legal relations in the sense contemplated by legal positivists presupposes nothing more than the existence of an effective legal system, and this means that Kelsen does not need to operate with the idea of validity (or binding force) in the above-mentioned sense. Note also that Kelsen does not maintain without qualification that law is valid in this sense, but is careful to point out that although legal positivists who wish to conceive of law as a system of valid norms need to presuppose the basic norm, they do not have to conceive of law as a system of valid norms. As he puts it “[i]t [the Pure Theory] thus characterizes this interpretation as a possible one, not as a necessary one, and portrays the objective validity of positive law as conditioned only: as conditioned by the presupposition of the basic norm” (Kelsen 1960, 224).12

7. The Substrate

Kelsen introduced the idea of a substrate (or modus) in his 1928 book Das Problem der Souveränität (1st ed. 1920), perhaps in response to Hägerström’s critique that

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12 Translated into English by Robert Carroll. The German original reads as follows: “Sie [the Pure Theory] kennzeichnet damit diese Deutung als eine mögliche, nicht als eine notwendige, und stellt die objektive Geltung des positiven Rechts nur als bedingt: durch die Voraussetzung der Grundnorm bedingt, dar.”
there can be no connection between the “world of the ought” and the world of time and space. The point of introducing the idea of a substrate was to explain how, despite appearances, the two worlds could be connected. Having invoked Ernst Mach’s principle of economy of thought—which has it, when applied to the legal sphere, that the legal norms ought to correspond to as many states of affairs (Tatbestände) as possible—in support of the idea that one should presuppose the basic norm only if the (purported) legal system is, on the whole, effective (Kelsen 1928, 98–9), Kelsen adds the following in a footnote:

Although Is and Ought are entirely different forms of thought and not reducible to one another, they can however assume the same content. Human behavior is conceivable as the content of being, as a piece of nature or history, i.e. as the object of natural or human science, or as obligatory, as the content of norms and thus as the object of legal science. Only because of this joint “substrate”, in itself indifferent and in this abstraction not at all imaginable, is it possible to evaluate an actual event, or judge it in a special legal sense. The question: Is a particular reality valuable or objectionable, is—given a fundamental dualism between Is and Ought, reality and value—meaningless. If something real can be evaluated, this is only possible in the sense that the content of Is is put in comparison with the content of Ought. (Ibid., 99 n. 1)

The idea appears to be that one can imagine the same human behavior—for example, the same human action—as part of the “world of the ought” or as part of the world of time and space, as the case may be, that this means that there is a substrate that can have as its content the Is or the Ought, and that this substrate is what is common to the “world of the ought” and the world of time and space. Although Kelsen did not to my knowledge elaborate on the idea of the substrate in Das Problem der Souveränität or in any of the writings that followed that book, he did repeat the idea in the second edition of Reine Rechtslehre (Kelsen 1960), without using the term “substrate” (Substrat), and again in General Theory of Norms (Kelsen 1991, 58–62), and this suggests that he was reasonably happy with the idea. The following passage from the second edition of Reine Rechtslehre deserves to be quoted in full:

This dualism of Is and Ought does not mean, however, that Is and Ought stand side by side unconnected. We can say, an Is can correspond to an Ought, that is to say, something can be as it ought to be; and we say, the Ought is “directed” towards an Is, something ought to “be.” The expression “an Is corresponds to an Ought” is not entirely correct. For it is not the Is that corresponds to the Ought, but the “something” that the first time “is,” the “something” that figuratively can be described as the content of the Is or as the content of the Ought. This can also be expressed in the following way: we say, a

certain something, in particular a certain behavior, can have the characteristic of being, or the characteristic of ought-to-be. In the two statements “The door is closed” and “The door ought to be closed” the “closing of the door” is the first time a question of being, the second time a question of ought-to-be. The being-behavior and the ought-to-be-behavior are not identical, but the ought-to-be-behavior is the same as the being-behavior except for the circumstance (mode) that the one is something that is, while the other is something that ought to be. The behavior determined in a norm must therefore be distinguished from the actual, corresponding behavior. But the ought-to-be behavior determined in the norm, as the content of the norm, can be compared with the actual behavior, and thus be judged to correspond or not correspond to the norm (i.e. the content of the norm). The obligatory behavior as the content of the norm can, however, not be the actual behavior that corresponds to the norm. (Kelsen 1960, 6)14

Kelsen comes back to the substrate one last time in the posthumously published treatise entitled Allgemeine Theorie der Normen, which was published in German in 1979 and in English in 1991. The main idea remains the same—that the substrate is that which is or ought to be, as the case may be—though it is more clearly expressed here, and Kelsen is also explicit here that he means by the ‘substrate’ more or less the same thing that Richard Hare (1952, 17–8) had in mind when he spoke of the phrastic, as distinguished from the neustic.15 Kelsen puts it as follows:

“Is” and “Ought” are two essentially different modes, two different forms, which can have specific contents. In the statements that something is and that something ought to be, two different components must be distinguished: that something is, and that which it is; and that which ought to be, and that which ought to be. That which is and that which ought to be, the content of the Is and the content of the Ought, is a modally indifferent substrate. In the sentence “A pays his gambling debts”, the modally indifferent substrate “paying-gambling-debts” is invested with the mode of Is; in the sentence “A ought to pay his gambling debts”, it is invested with the mode of Ought. The norm “A ought to pay his gambling debts” gives the mode of Ought to the modally indifferent substrate. (Kelsen 1991, 60; footnote omitted.)


15 The phrastic, Hare explains, is the part of a sentence that is common to both the indicative and the imperative mood, whereas the neustic is the part that is different. I discuss this distinction in Spaak 1994, 159–61.
But Kelsen’s claim that there is something—a modally indifferent substrate or a \textit{phrastic}—that is common to “Is” and “Ought,” or better, to factual and normative sentences, is not much of an argument. The objection raised by Hägerström is that the binding force of law is such a peculiar property that it cannot find a place in the world of time and space, but must be located in a world that in some sense lies beyond the world of time and space, and that such a world is so different from the world of time and space that we simply cannot conceive of the two worlds together in one conception—they certainly cannot both be part of the one and only spatio-temporal framework. To respond, as Kelsen does, that there really is a connection between the two worlds, because we can distinguish an element that is common to both factual and normative \textit{sentences} is not to address the objection raised by the critics. If we are concerned with the question of whether there is a connection between the two realms, the existence of a modally indifferent substrate is, as far as I can see, neither here nor there.

8. The Existence of the Sources of Law: a Conventionalist Account

We have seen that the objections on the part of the Scandinavians to Kelsen’s theory rest on the theories of ontological naturalism and ethical non-cognitivism. I believe, as I have said, that the Scandinavians were right to object to the non-naturalism of Kelsen, but wrong to conclude that the rejection of non-naturalism, together with a commitment to non-cognitivism, requires the rejection of the view that there are, or can be, legal relations. In this section, I shall argue that the existence of legal relations in the sense contemplated by legal positivists presupposes nothing more than the existence of an effective legal system, and that the foundation of such a system may, but does not have to, be found in a convention that constitutes and identifies the sources of law.

Olivecrona and Ross as well as Kelsen assume, as we have seen, that the existence of binding (or valid) legal norms presupposes a commitment to non-naturalism, and that therefore law, conceived as a system of binding (or valid) legal norms, must be located in a world beyond the natural world. Legal positivists do not and need not, however, assume that legal norms are binding in this strong sense, and this means that they do not, and need not, locate law in a non-natural world. Precisely because, on a legal positivist analysis, legal relations need not be binding in such a strong sense, a legal positivist who is also a naturalist need only provide a naturalist account of the existence-conditions of legal norms, not of the binding force of such norms in the sense contemplated by the Scandinavians.

Legal positivists such as Kelsen and Hart maintain that there is a legal system in a certain territory if, and only if, (i) the norms of the system can be derived from a limited number of recognized sources of law that can be handled on the basis of factual considerations (the social thesis), and (ii) the system thus conceived is, on the whole, efficacious (the thesis of social efficacy). This means that legal positivists need to account for the existence of the \textit{sources of law}. Once they have the sources of law, they can derive all and only legal norms from them and add the requirement of efficacy.

Following Hart (1961, 54–7, 97–107; 1994, 255–6), I suggest that we may think of the existence of the sources of law as a matter of \textit{convention}. If we can find a conventionalist account that works, we will also have provided a naturalistically acceptable account of the ontology of law. Let us consider Eerik Lagerspetz’s (1995,
chap. 1) account of the existence of social rules, according to which a social rule, $R$, exists if the members of the relevant group of people (1a) believe that $R$ exists and (1b) believe that the others in the group believe that $R$ exists, and (2) act accordingly, that is, speak of $R$ as existing and, if occasion arises, treat $R$ as existing, at least partly because they have the beliefs (1a) and (1b).

As should be clear, the account lays down sufficient, but not necessary, conditions for the existence of conventional facts. The reason, Lagerspetz (1995, 19) explains, is that there may be some rules (or other conventional entities) that are not even known by large parts of the population, but which nevertheless may be said to exist in the sense that they are part of a system of rules that satisfies the conditions laid down in the account. I agree with Lagerspetz that we should be content with an account that lays down sufficient conditions for the existence of conventional facts, and I think that the example he gives is good. But my primary reason for resting content with an account in terms of sufficient conditions, and for not insisting on an analysis in terms of both sufficient and necessary conditions, is that I am concerned with the sources of law, not with each and every legal norm, and still less with conventional facts in general, and that I believe that, on a legal positivist analysis, the sources of law may, but need not, have a conventionalist foundation. I see no good reason to insist that an alleged legal system would not qualify as a legal system, on a legal positivist analysis, just because the sources of law of the system did not have a conventionalist foundation. One can easily imagine a legal system in which judges and other legal officials recognize the sources of law because they fear the sovereign, not because other judges and legal officials recognize them. In other words, I do not hold that a belief in legal positivism implies a belief in a conventionalist foundation of law (on this, see Dahlman 2011).

In any case, as Lagerspetz (1995, 6–8) points out, the account is meant to apply to conventional facts and related entities. Whereas most writers speak of institutional facts—such as the fact that a person owns a piece of land, or that he is a Swedish citizen—and maintain that such facts depend for their existence on one or more rules (see, e.g., Searle 1969, 51–2; MacCormick and Weinberger 1986, chap. 2), Lagerspetz operates with a broader category of conventional facts, which includes the fact that the rules themselves exist. The basic idea, he explains (Lagerspetz 1995, 6; emphasis in the original), is the following: “There are things which exist and facts which hold only if the relevant individuals believe that they exist or hold and act according to these beliefs.”

We might apply Lagerspetz’s account either (i) to a fundamental norm that constitutes and identifies the sources of law, such as the rule of recognition, or (ii) immediately to the sources of law without the idea of a fundamental rule functioning as an intermediary. I shall focus on alternative (ii), because I take this to be the less complicated alternative. I do not, however, think much depends on the choice between (i) and (ii). In any case, I hold that a norm is a legal norm if, and only if, it can be traced back to a source of law, and this means that I see no need to apply the account to every single legal norm—it is enough that it applies to the sources of law.16

16 One might perhaps argue that the products of custom, as distinguished from legislative products and court decisions, must conform to the analysis in order to qualify as customary norms, as distinguished from mere habits. The idea would be that whereas the normative aspect of legislative products and court decisions is clear enough, this is not so in the case of custom. I shall, however, leave this an open question in this article.
Focusing on sources of law instead of legal norms, then, I shall say that a source of law, \( SL \), exists if the members of the relevant group of people (1a) believe that \( SL \) exists and (1b) believe that the others in the group believe that \( SL \) exists, and (2) act accordingly, that is, speak of \( SL \) as existing and, if occasion arises, treat \( SL \) as existing, at least partly because they have the beliefs (1a) and (1b).

One may, however, wonder how we are to understand the belief in the account that \( SL \) exists. As far as I can see, the belief will have to concern either (i) a source of law that depends on (is a result of) the account or (ii) a source of law that is independent of the account. Both alternatives are problematic, however. In the first case, it seems that the account will be viciously circular, in that it will presuppose precisely what it is meant to account for, namely the existence of the source of law in question.\(^{17}\) In the second case, it seems that whereas the theorist aims to account for the existence of one source of law, \( SL_1 \), he is in fact basing his account on the existence of another source of law, \( SL_2 \). This cannot be right.

Lagerspetz chooses the first horn of the dilemma. As one might expect, he does not agree that the account is viciously circular: “Descriptions of these things and facts are implicitly circular or self-referential, but the circle in question is not a vicious one. In the descriptions, institutional terms reappear only in the scopes of propositional operators describing the attitudes of the relevant individuals” (Lagerspetz 1995, 6; emphasis added). But does it really matter that the “descriptions” do not include a reference immediately to the entity in question, but only to an attitude (a belief) about the entity? Could one not object to Lagerspetz’s proposed solution that even if the account is not explicitly circular, it is indirectly circular in the sense that it presupposes a true belief about the existence of the entity, a belief that clearly implies the existence of the entity? Lagerspetz does not think so. As I understand it, his position is that we need to distinguish between (i) cases in which a conventional fact is emerging and (ii) cases in which it is already in existence. In case (i), some beliefs about the conventional fact will have to be false. But in case (ii), the beliefs will all be true, if the account is adequate. Let us consider his line of argument.

Lagerspetz (1995, 16–7) notes that the emergence of a conventional fact presupposes a certain incidence of false beliefs about the (alleged) conventional fact. He considers the example of a meeting place in a community called S-ville and observes that the meeting place cannot emerge gradually, unless at least some of the inhabitants of S-ville mistakenly believe that the place in question is already their meeting place. But, he points out, since people in the real world are not epistemically transparent, in the sense that they have direct access to each other’s minds, they can proceed to believe that a certain rule or meeting place exists, perhaps mistakenly assuming that other people also believe this:

A and B have no direct access to each other’s minds. Instead, they accept beliefs when there are reasonable grounds for acceptance. They are considering the question of whether a certain place actually is their meeting-place or not. If they share an interest in having a meeting-place, if the place they are considering satisfies that interest and if there is no obvious alternative to that place, A and B may have reasonable grounds for accepting the belief that the place in question is their meeting-place, and for behaving accordingly. Then, it becomes their meeting-place. (Ibid.)

\(^{17}\) This problem has been noted by den Hartogh (1993, 239–41).
I accept Lagerspetz’s account of case (i). The interesting question is whether we should accept the proposed account in regard to cases in which a conventional fact is already in existence. Let us imagine a situation in which the judges in a legal system, S, (1) believe that a source of law, SL, exists in S, and that the other judges in S believe that SL exists in S, and (2) act accordingly, at least partly because they believe (1). I have said that this account is indirectly circular, if the relevant beliefs are true. But Lagerspetz’s position is that in this case the beliefs can actually be true in a straightforward way, and I have to agree. I take it Lagerspetz reasons as follows. If we allow that the emergence of a conventional fact, C, will have to involve some false beliefs on the part of the members of the community, then C may come to exist in the community; and if C exists in the community, the beliefs on the part of the members of the community that C exists will of course be true.

There is, however, also another, perhaps easier, way of avoiding a vicious circle, namely to focus the account not on the rule or the source of law, but on the relevant human behavior. Consider in this light Hart’s analysis (Hart 1961, 56), according to which there is a social rule in a community if (and only if) the members of the community (i) behave in a certain way in a certain type of situation, and (ii) consider this behavior to be appropriate. The relevant difference between the two accounts in this context is that whereas Lagerspetz takes the belief to be a belief about the entity in question, Hart takes the attitude to be an attitude not to the entity in question, but to the behavior that together with the attitude constitutes this entity. For example, on Hart’s analysis there is in a given community a rule that requires adult men to shake hands when they meet if, and only if, adult men do shake hands when they meet and also display a pro-attitude to this kind of behavior. Since, on Hart’s account, there is no reference in the analysans either to the rule or to an attitude to the rule on the part of the members of the community, but only to the relevant behavior, there is no problem of circularity.

John Finnis (1980, 238–45) discusses a related problem that has arisen in the analysis of the doctrine of opinio juris in the field of international law. He observes that international lawyers maintain that there is a customary norm of international law that provides that one ought to do X, if, and only if, there is a habit of doing X and a belief that doing X is required by international law, and that this amounts to the paradoxical situation that such a customary norm can come into existence only if the actors in international law mistakenly believe that this norm is already part of international law. He therefore proposes a solution that seizes on a distinction between practical and empirical judgments, arguing that what is required in addition to the existence of a habit of doing X is not the empirical judgment that international law requires that one do X, but the practical judgment that it would be good or beneficial to have a norm of international law requiring one to do X. That is to say, in this case, too, the solution to the circularity problem lies in substituting one object of the relevant belief (or attitude) for another.

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18 This has been suggested by den Hartogh (1993, 239–40).
19 Finnis thus appears to espouse a version of what Christian Dahlman (2012) calls the acceptance interpretation, as distinguished from the belief interpretation, of the concept of opinio juris.
We might thus say that a source of law, $SL$, exists if the members of the relevant group of people (1) identify legal norms in a certain way (by consulting the alleged source of law) and believe that one ought to identify legal norms in this way, and (2) believe that the others in the group believe (a) that the members of the community identify legal norms in this way and (b) that they ought to identify legal norms in this way, and (3) act accordingly, that is, speak of $SL$ as existing and, if occasion arises, treat $SL$ as existing, at least partly because they have the beliefs (1) and (2). As far as I can see, the reference to the relevant behavior in the revised account instead of reference immediately to $SL$ means that the problem of circularity does not arise.

There is, however, a problem with this type of account when applied to the legal sphere, namely how to determine the membership of the relevant group of people. If we assume that the persons in question must be legally qualified in some way, we will encounter a problem of circularity. If the account is meant to explain the foundation of law, that is, the sources of law, how can it without circularity refer to legal properties? If, on the other hand, we do not assume that they have to be legally qualified, we will run the risk of making the existence of the sources of law dependent on the views of people—the general public—whom we do not want to include in this connection. As Hart (1961, 113) makes clear, the existence of the rule of recognition does not depend on the behavior of the citizens, but only on the behavior of legal officials—the behavior of the citizens is relevant only to the question of social efficacy. This means, of course, that Hart faces a problem of circularity.

Nevertheless, I believe that Kelsen could in principle accept a conventionalist account of the existence of sources of law (and therefore of legal norms) along the lines suggested by Lagerspetz. If he did, he would elude Hägerström’s objection about the lack of a connection between the two worlds. For such a conventionalist account would be compatible with Hägerström’s theory of reality and with the thesis of ontological naturalism. Kelsen might, of course, rightly object that a conventionalist account could not explain the notion of legal validity with which he operates. But he could avoid that problem by rejecting that notion of validity. I conclude that Kelsen would be better off if he abandoned his non-naturalist account of legal validity and adopted instead a conventionalist account of the existence of legal norms.

9. The Doctrinal Study of Law

We have been discussing the nature of law. Let us now turn to consider the question whether a commitment to ontological naturalism and a non-cognitivist meta-ethics has any implications for the doctrinal study of law. I have said that both Lundstedt and Olivecrona and the early Ross maintain that there are no legal relations, that is, no legal entities or properties, and that this means that legal science in the shape of the doctrinal study of law (Rechtsdogmatik) cannot be a matter of interpreting and systematizing positive law, but must instead take the form of an inquiry into the causes and effects of legally relevant human behavior. In this section, I would like to draw a more nuanced picture of the views of the various realists on the task and object of the doctrinal study of law. Let us consider the three main realists in turn, namely Lundstedt, Olivecrona, and Ross.
Lundstedt devotes considerable space in his book *Legal Thinking Revised* (Lundstedt 1956) to the question of whether, and if so how, jurisprudence can be a science. Having pointed out that traditional jurisprudence (he means the doctrinal study of law), fails as a science, on the grounds that it depends on starting points, connections, and facts that can find no place in the world of time and space, he proceeds to maintain that jurisprudence can be pursued as an “empirically based investigation,” and that the reason why this has not yet happened is that legal scholars cling to the mistaken notion that there is a non-natural and objectively valid law that can be derived from the principles of natural justice (ibid., 123). He maintains, more specifically, that jurisprudence, conceived as a science, “must be founded on experience, on observation of facts and actual connections, and consequently be a natural science.” As he points out, “[e]xperience belongs to and falls completely within reality, i.e. within nature” (ibid., 126). Legal science, thus conceived, he adds, will not be an exact science, though it will not be in a worse position in this regard than many other sciences (ibid.).

Lundstedt’s view is that the relevant facts would be social evaluations and other psychological causal connections, e.g., that people react in this way or that upon learning that a certain rule is a valid legal rule, or upon being informed about the content of a certain legislative proposal (ibid., 126–7). He maintains, inter alia, that the existence of positive criminal law influences the willingness of the citizens to commit crimes and thereby run the risk of suffering a sanction, as well as the attitudes on the part of the citizens to crimes in general, pointing out that such influence is a matter of causal connections in the world of time and space (ibid.). He notes, however, that we are currently (in the 1950s) a long way from attaining clarity in these matters, but he hopes that future research will bring such clarity.

The discussion of the way in which legal science might be turned into a natural science, or rather a social science, is too abstract to be helpful. To be sure, the example from the field of criminal law gives the reader a general idea of what Lundstedt has in mind. The problem is not to understand what he means in general terms, but to see more precisely how the doctrinal study of law could be transformed into an empirical science. To make this clear, he would need to adduce some other, more elaborate examples. Moreover, the discussion of the possibilities of empirical investigations leaves his view on the possibility and extent of traditional doctrinal study of law unclear. Does he mean to suggest that a tort law scholar, say, should focus exclusively on human behavior and its underlying reasons to the exclusion of the usual interpretive work? No, I do not think so. Not only is it difficult to see how this could be done, but Lundstedt’s own works on contract and tort law do not differ much from the works on these topics by other legal scholars.

Although not without interest, Olivecrona’s writings on this topic do not advance the issue very much. Having rejected the view that law has binding force and can establish legal relations, Olivecrona cannot accept the common-sense view that the function of legal rules is to guide human behavior by establishing legal relations. Instead, as we have seen, his view is that the function of legal rules is to influence human beings and thus cause human behavior (Olivecrona 1939, 21–2; 1951, 131). He argues, more specifically, that the form of legal rules is imperative, because the lawmakers aim to impress a certain behavior on us: “To
this end the imaginary actions are put before the eyes of the people in such a way as to call up the idea that this line of action must, unconditionally, be followed. Therefore the imperative form is used” (Olivecrona 1939, 31). He points out, however, that legal rules are not commands (ibid., 35–40), but rather independent imperatives. But, he explains, both commands and independent imperatives work directly on the will of the recipient of the command, and this means that they must have a suggestive character (ibid., 33–4). He maintains, more specifically, that if a command (or an independent imperative) takes effect there arises in the addressee’s mind a value-neutral intention to perform the commanded action, that is, an intention that is not motivated by the addressee’s own wishes, and he adds that in some cases a command may actually trigger an action without the addressee’s having had any intervening value-neutral intention (Olivecrona 1942, 7, 10–1).

What is missing in Olivecrona’s discussion of legal science, however, is an account of what, exactly, legal scholars should be doing, given that they cannot reasonably be concerned with the interpretation and systematization of positive law. Judging from Olivecrona’s doctrinal work, especially the important treatise on civil procedure entitled Law and Judgment (Rätt och dom: Olivecrona 1966), Olivecrona is not ready to give up the traditional focus on the interpretation and systematization of positive law. Although his treatment in this book on the Swedish law of civil procedure is quite philosophical and involves an extensive discussion of the concept of a legal right (ibid., chap. 3) as well as a division of court judgments into three main types (ibid., chap. 5), Olivecrona is clearly concerned in his book precisely with the interpretation and systematization of positive law. He treats, inter alia, the topics of the reasons for a court judgment, the legal significance of a court judgment, and the court judgment conceived as an obstacle to a new trial (ibid., chaps. 6–9). In his treatment of these topics, he naturally considers specific provisions in the Swedish Code of Procedure.

The early Ross, too, takes the view that legal scholarship must be of an empirical nature. Having proposed a reinterpretation of the notion of validity, he proceeds to argue (as we saw in Sections 2 and 4) that we can no longer accept the widespread view that law is a system of norms. To grasp the nature of law, we must see law not as a set of meanings, but as a collection of psycho-physical phenomena. He concludes that the study of law cannot as dogmatism, that is, the interpretation and systematization of positive law, be “absolutely contrasted with social theory as a knowledge of social reality.” He does not, however, develop this suggestive notion. However, it is clear from the 1959 book On Law and Justice that the later Ross does conceive of law as a system of norms of different logical types, namely norms of conduct and norms of competence, that he holds that those norms function as schemes of interpretation in Kelsen’s sense (Ross 1959, chap. 2), that one can trace positive law thus conceived back to certain sources of law (ibid., chap. 3), that one can and needs to interpret those norms with the help of (what he refers to as) the judicial method (ibid., chap. 4), and that legal scholars and others can describe and discuss the content of law using Hohfeld’s fundamental legal conceptions (ibid., chap. 5). This makes it clear that Ross, although he still insists that law thus

20 The differences between commands and independent imperatives are not important in this context.
conceived is not and cannot be binding (ibid., 34–50), cannot reasonably believe
that legal scholars should give up the traditional task of interpreting and systemat-
izing positive law and devote their energy exclusively to the observation and
quantification of human behavior.

We see that if we are to trust the Scandinavians, taking a realist view of the
nature of law does not commit one to the view that there are no legal rules at all
or to the view that one should pay little or no attention to the rules that do exist.
But, and this is important, if we accept a realist analysis, we cannot allow ourselves
to speak of binding legal rules or of legal relations, unless we make it clear that our
understanding of legal relations in no way involves metaphysical elements. Given
that it seems rather easy to speak of legal relations, while disclaiming any
metaphysical beliefs or implications of this way of speaking, and given that the
doctrinal writings of the Scandinavians do not differ much from similar works by
non-realist legal scholars, one may well wonder if a commitment to realism in its
Scandinavian version really has any important implications for the doctrinal study
of law.

I cannot see that there are any such implications. The reason is simply that a
main premise of the inference whose conclusion is that legal scholars should focus
on human behavior rather than on the interpretation and systematization of
positive law, namely that there are no legal relations, is false. Indeed, that this
premise is false was the main claim in my discussion of the existence conditions
of the sources of law above (in Section 8). If I am right about this, legal scholars have
no reason to doubt either the possibility or the value of doing what they purport
to be doing, namely interpreting and systematizing the law of the land. In saying
this, I do not, of course, wish to reject or belittle the important work done by
sociologists of law and sociologically inspired legal theorists, but simply to insist
that such work cannot be a substitute for the interpretive work done by those who
engage in the doctrinal study of law. On this, I follow the lead of Kelsen (1999,
162–78).

However, there may perhaps be room for a more nuanced picture. Håkan
Andersson, in a very interesting and historically inspired discussion of the tort law
culture in Scandinavia, suggests that the Scandinavian realists have inspired both
contemporary and earlier generations of Scandinavian legal scholars to focus less
on legal concepts and their logical relations to one another, and more on legal
analysis and argumentation in light of social circumstances (Andersson 2012,
215–6). He speaks, in keeping with this, of a more pragmatic approach among the
Scandinavians to legal thinking, which emphasizes the functional (or teleological)
interpretation of legal norms and the attaining of so-called good solutions to legal
problems (ibid., 217–8). If Andersson is right, as I think he is, we may conclude that
while the realists spoke in general terms about the need to focus on human
behavior instead of legal norms, legal scholars in Scandinavia, although they are
clearly concerned primarily with legal norms, not human behavior, have come to
focus quite a bit on the social consequences of legal norms and their application
and have in this way perhaps taken one or two steps toward a focus on human
behavior. I do, however, wish to add that the logical—as distinguished from the
causal—relation between the legal philosophy of the Scandinavian realists and the
emphasis on the part of legal scholars in Scandinavia on the social consequences of
legal norms and their application is not crystal clear, and that therefore it is not
clear just how much the emphasis on the social consequences of legal norms and their application have to do with the legal philosophy of the Scandinavians.

Let me conclude this section by pointing out that Hägerström himself, who was a philosopher, not a legal scholar, took an interest in the question of how to understand the task of legal scholars in light of the circumstance that there is no such thing as valid or binding law. He argues in the above-mentioned (see Section 2) review of Alf Ross’s 1929 book *Theorie der Rechtsquellen* (i) that there clearly is and will be a system of rules for action that is upheld in society, and (ii) that we may well refer to this system of rules as the law of the land, and to the study of what actually happens and will happen because of the capacity of this rule system to determine human behavior as legal science (Hägerström 1931, 83–4). To study rule-governed human behavior would thus, on Hägerström’s analysis, be the primary task of legal scholars.

Observing that the legal officials need guidance in their work of interpreting and applying the rules, Hägerström points out that a secondary task of legal scholars would be to provide judges with information about the rules of the system, which the judges can make use of when interpreting and applying the law. He maintains, in particular, that legal scholars can provide judges with information about the intents or purposes of the legislature, these being important interpretive data (ibid., 86). This is clearly closer to the traditional task of interpreting and systematizing the law, but it is not quite the same thing.

Hägerström is, however, careful to point out that we need to distinguish between the “ought” that pertains to the primary and the “ought” that pertains to the secondary task of legal scholars. In the former case, the “ought” is tied to a person’s personal interest of avoiding sanctions; in the latter case, it is tied to the general interest of the citizens in a fair and predictable administration of the law. I do not understand what, exactly, Hägerström has in mind here, but I take him to be saying that these two types of hypothetical “oughts” are the only “oughts” that are relevant in this context, and that there is therefore no room for an objective or categorical “ought” that inheres in the law. Here is Hägerström:

To be sure, the claim itself, as a psychological reality, is a fact. But every statement saying that the judge would be obligated to carry out any special acts, i.e., that the claim would have some kind of objective validity in respect to certain acts, and that the judge would be obligated, irrespective of whether and to what extent the claim asserts itself in his case, is meaningless. It is meaningless because the ought itself is nothing other than a word in which an urgent interest finds expression. Therefore every objective legal order that would obligate the judge is merely a chimera, just like the whole refined extract from ancient superstition that the idea that the law determines rights and duties encompasses.21 (Ibid., 89)

21 Translated into English by Robert Carroll. The Swedish original reads as follows: “Naturligtvis är själva kravet såsom en psykologisk realitet ett faktum. Men varje påstående, att domaren skulle vara förpliktad till några särskilda handlingar, d.v.s. att kravet skulle ha någon slags objektiv giltighet i avseende å särskilda handlingar, och att domaren skulle vara förpliktad, oavsett om och i vilken grad kravet faktiskt gör sig gällande hos honom, är meningslös. Det är meningslös, därför att borrar självt ingenting annat är än ett ord, i vilket ett pressant intresse tager sig uttryck. Därför är varje domare förpliktande objektiv rättsordning endast en chimär, liksom hela det förfinade extract ur gammal vidskepelse som idén om rätten såsom bestämmande rättigheter och skyldigheter innesluter.”

We see, then, that the Scandinavians, including Hägerström, recommend a focus on human behavior rather than legal norms, though this very general recommendation leaves much unsaid. If we assume that what really characterizes realist legal scholarship is an increased awareness that law fulfills a social function, and a corresponding emphasis that a proper understanding of what the law requires and permits presupposes that legal scholars pay attention to social circumstances in the interpretation and systematization of the law of the land, we should also give some thought to the question about the logical relation between the legal philosophy of the Scandinavians, on the one hand, and the emphasis on the social consequences of legal norms and their application on the part of Scandinavian legal scholars, on the other. In my estimation, as I have said, this relation is not very clear.

Stockholm University
Department of Law
SE- 106 91 Stockholm
Sweden
E-mail: Torben.Spaak@juridicum.su.se

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