Ross and Olivecrona on Rights

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Introduction

The Scandinavian legal realists, critically-inclined theorists from Denmark, Norway, and Sweden, who wrote in the early and middle decades of the 20th century,[2] are not as widely read as they once were in Britain, and they seemed never to have received much attention in the United States. This is unfortunate, as the work of those theorists, at their best, is as sharp in its criticisms and as sophisticated philosophically as anything written by the better known (at least better known in Britain and the United States) American legal realists, who were writing at roughly the same time. The focus of the present article, Alf Ross and Karl Olivecrona, were arguably the most accessible of the Scandinavian legal realists, with their clear prose, straightforward style of argumentation, and the availability of a number of works in English. Their work continues to repay attention: it is provocative in the best tradition of 'realist' and critical theory.

This article will examine the theories of Ross and Olivecrona through the lens of their analyses of legal rights.[3] It is perhaps not surprising that both writers devoted a great deal of attention to legal rights. As Olivecrona pointed out, legal rights raise the challenge of, on one hand, implying a metaphysics (ontology) that the Scandinavian legal realists deny, but on the other hand, being seemingly indispensable to any discussion about law.[4]

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2 The most prominent of whom were Axel Hägerström (1868-1939), Vilhelm Lundstedt (1882-1955), Karl Olivecrona (1897-1980), and Alf Ross (1899-1979).

3 The focus of this paper is the narrower category of 'legal rights', and while much of Ross's work is similarly narrowly focused, some of Olivecrona's analysis could be seen as directed at 'rights' generally (that is, including moral rights as well).

4 See Karl Olivecrona, 'Legal Language and Reality', in Ralph A. Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (1962) 151-91, especially 166-69; see also Karl Olivecrona, *Law as Fact* (2nd ed., 1971) 158-59, 165-67, 184.

Part I of the article will introduce Ross's approach to legal theory; Part II will offer an overview of Ross's writings on legal rights; Part III will summarize Olivecrona's approach; and Part IV evaluates a variety of criticisms that have been offered, or could be offered, to the approaches of the two theorists, before concluding.

I. Alf Ross and Avoiding Metaphysics

Ross's approach to jurisprudence was simultaneously simple and radical: he wanted to rid from our thinking about law all the mystifying references to abstract concepts and metaphysical entities:

> The leading idea of this work is to carry, in the field of law, the empirical principles to their ultimate conclusions. From this idea springs the methodological demand that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the verification demand that the fundamental legal notions must be interpreted as conceptions of social reality, the behavior of man in society, and as nothing else.[5]

This is the power - and the mystery - of Scandinavian legal realism: its efforts to translate legal concepts into the stuff of verifiable social sciences.[6] For Ross, concepts like 'right', 'validity' and 'obligation' have to be translated into observable behavior (including perceptions of bindingness, inclinations for behavior or likelihood of behavior).[7] Consider the following example:

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5 Alf Ross, *On Law and Justice* (hereinafter, Ross, *OLJ*) (1959) ix; see also Alf Ross, *Towards a Realistic Jurisprudence* (hereinafter, Ross, *Realistic*) (1989) (1946) 10 ('The way to conquer dualism and its unfortunate consequences is ... to interpret the ideas of a superempirical 'validity' as rationalisations of certain emotional experiences and thus include them in the world of facts.').

6 H L A Hart's description of Axel Hägerström's work was meant also as an overview of all of Scandinavian legal realism:

> [It] is a sustained effort to show that notions commonly accepted as essential parts of the structure of law such as rights, duties, transfers of rights, and validity, are in part composed of superstitious beliefs, 'myths', 'fictions', 'magic' or rank confusion.

H L A Hart, *Essays in Jurisprudence and Philosophy* (hereinafter, Hart, *Essays*) (1983) 161.

7 See, e.g., Ross, *OLJ*, above n 5, 17-18 (offering an analysis of 'valid law' that is meant 'to raise doubts as to the necessity of metaphysical explanations of the concept of law').

'That A is "bound" to perform a certain action F, then only means that the opposite behavior, non-F, is one of the conditions determining the expected occurrence of a reaction of compulsion against A.'[8]

The argument is not merely that one should generally avoid interpreting the world (legal and otherwise) in a way that required the existence of additional metaphysical entities - a kind of 'Ockham's razor.'[9] The point - and this has been noted by many legal commentators[10] - is that the ontology of law is doubly strange: law seems to use conventional normative language, about what 'should' or 'should not' be done, but simultaneously holds itself separate from conventional normative discourse - thus, one can say that 'according to law, I ought to do X', and, at the same time, assert that 'morally [or prudentially or all things considered] I ought *not* to do X'. All of modern legal positivism (especially the works of Hans Kelsen, H.L.A. Hart, and Joseph Raz) can be seen as attempts to create a way of talking about the normative discourse of law without, on one hand, reducing it to purely empirical terms, but also without, on the other hand, treating law (as some natural law theories do) as merely a subset of morality.[11] However, Ross rejected creating a whole new normative universe for legal discourse.[12]

There was a similar demystifying element to some of those who worked in the American version of legal realism.[13] However, while on the American

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8 Ross, *Realistic*, above n 5, 176. One should note the similarity of Ross's analysis of rules (here discussing not legal rules, but the rules of chess): 'The rules of chess have no reality and do not exist apart from the experience of the players, that is, their ideas of certain patterns of behaviour and, associated therewith, the emotional experience of the compulsion to obey.' Ross, *OLJ*, above n 5, 16. (Ross makes it clear that he means a similar analysis to apply to legal rules. *Id.*, 17-18.)

9 This is the principle of parsimony, associated with William Ockham [sometimes spelled as 'Occam'] (c. 1285-1347), which holds that 'entities should not be multiplied beyond necessity' in the construction of theories, Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (2nd ed., 1999) 629.

10 See, e.g., Hans Kelsen, *Introduction to the Problems of Legal Theory* (1992) 8-14; Joseph Raz, *Practical Reason and Norms* (1990) 170-77.

11 Joseph Raz, 'On the Nature of Law' (Kobe lectures of 1994), *Archiv für Rechts- und Sozialphilosophie*, 82 (1996): 1-25, at 16 & n.16.

12 See Ross, *OLJ*, above n 5, x: 'I reject the idea that legal cognition constitutes a specific normative cognition, expressed in *ought*-propositions, and interpret legal thinking formally in terms of the same logic as that on which other empirical sciences are based (*is*-propositions).' It is important to note that Ross thought 'metaphysical speculation' to be equally 'empt[y]' in law and morality.

13 The best example probably being Felix Cohen, 'Transcendental Nonsense and the Functional Approach', (1935) 35 *Columbia Law Review* 809-49.

side the demystification often involved remaking strange legal concepts in more familiar forms, the work of the Scandinavian legal realists often seemed to have the opposite effect, making the familiar seem strange. Such was the case with the analyses of legal rights one finds in both Ross and Olivecrona.[14]

II. The 'Magic' of Rights

If one is bothered by metaphysical terminology in legal analysis C and Ross and the other Scandinavian realists sometimes took their disaffection with metaphysics to high levels[15] - nothing might be more irritating than the way legal commentators talk about 'rights.' Not only do discussions of 'rights' and 'duties' seem to refer to magical entities more frequently discussed than seen, the references themselves seem to have no internal coherence, even putting aside the metaphysical/ontological problems.[16]

This looseness of expression regarding rights has provoked other proposals, some almost as radical as Ross's.[17] The American legal realist

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Demystification was also an important objective for the great English commentator on law and politics, Jeremy Bentham. See H L A Hart, *Essays on Bentham: Jurisprudence and Political Theory* (hereinafter, Hart, *Bentham*) (1982) 21-39.

14 For Ross, see Ross, *OLJ*, above n 5, 170-201 (ch. 6: 'The Concept of Rights'; ch. 7: 'Rights *In Rem* and Rights *In Personam*'); see also Ross, *Realistic*, above n 5, 175-210; Alf Ross, *Directives and Norms* (1968) 106-38. Olivecrona's approach (and the relevant sources in his work) will be covered in Part III.

15 Consider Hart on Ross's discussion of 'legal validity': '[F]or Ross legal validity is a dangerously septic notion; unless we handle it carefully, wearing the protective rubber gloves of an 'empirical methodology' determined to admit into our stock of notions only hard empirically verifiable facts, we shall catch the infection of "metaphysics".' Hart, *Essays*, above n 6, 164.

16 A. W. B. Simpson suggests that Ross goes wrong because he does not recognize the connection between legal words and the same words when used in a non-legal context. A W B Simpson, 'The Analysis of Legal Concepts' (1964) 80 *Law Quarterly Review* 535 at 551-3. While this critique might have bite for legal terms like 'possession', it is far less telling for 'rights'. If anything, as Jeremy Bentham understood, see n 56 below, legal rights are more grounded and have less reason to be suspected of being non-sensical than rights outside the legal context (moral rights, human rights), because legal rights are connected with descriptions of how certain institutions have acted or predictions of how they will act.

17 It might be worth noting that there are times when Ross's discussion of 'rights' can be fairly conventional. See, e.g., Ross, *OLJ*, above n 5, 183-6 (on the 'scope' of rights); *id.*, 189-201 (on *in rem* vs. *in personam* rights);

Wesley Hohfeld famously offered a set of stipulative definitions to try to bring order to the legal discussion of rights. Hohfeld showed that the term 'right', as used in legal discourse, can be more precisely defined in one of four ways, each of which has a precise correlate: (1) a 'claim' (or 'right', narrowly understood) involves a specific entitlement to assistance or non-interference, to which another party has a correlative 'duty'; (2) a 'liberty' is a freedom from any duty to avoid such action, and is thus correlated with another party's 'no-right' concerning that action; (3) a 'power' is the ability to modify one's entitlements, correlating with another party's 'liability' to that modification; and (4) an 'immunity' is protection from another party's actions, and that other party can thus be said to have a 'disability' in such matters.[18]

A few decades later, H.L.A. Hart (in some of his earliest work) tried to avoid the apparent metaphysical implications of rights-talk by assuming that rights-talk could (often) be understood as statements of illocutionary acts.[19] That is, according to this analysis, statements of legal rights were not so much descriptions of what was the case, but rather conclusions meant to affect future behavior. 'With this ring I thee wed' is an illocutionary act in this sense: it does not merely describe a state of events, nor is it meant as a prescription; it is a statement which *by itself* has *effects*, changing a couple's social and legal status.[20] Similarly, Hart's argument went, a judge's statements that 'X has a right' or 'Z violated the contract she had with A' should be seen as declarations that changed the legal status of parties as regards control over property.

It is important to note that though Ross was critical of the metaphysical implications of much talk of rights, he dissented from the views of other Scandinavian legal realists who would excise the term from legal discourse.[21]

Ross, *Realistic*, n 5, 179-88 (on 'will theories' vs 'interest theories' or rights).

18 Wesley N Hohfeld, 'Some Fundamental Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1917) 26 *Yale Law Journal* 710.

19 H L A Hart, 'The Ascription of Responsibility and Rights' (1948-49) 17 *Proceedings of the Aristotelian Society* 171. Hart was building on the speech act theory of J.L. Austin, see J L Austin, *How to Do Things with Words* (1962), where Austin pointed out that some statements, like 'I now pronounce you man and wife', were not meant to *describe* anything in the world, but to *do* something. Hart disavowed this approach in his later work. See, e.g., Hart, *Essay*, above n 6, 1-2.

20 See generally Austin, above n 19.

21 Alf Ross, 'Tû-tû' (1957) 70 *Harvard Law Review* 812 at 817-25 (hereinafter, Ross, *Tû-tû*) & n 4; Ross, *OLJ*, above n 5, 186-88; see

He thought that concepts like 'right' (or 'ownership') simply were useful shorthands, 'tools of presentation' for rephrasing the legal consequences of a series of loosely related factual circumstances.[22] A 'legal right', or a particular kind of 'legal right' is a convergence point: a variety of different factual predicates (all the ways that one can come to 'own' property or have a contract-based 'right') will lead to identical, or highly similar, remedial or punitive consequences (*e.g.*, the ability to recover money damages in court from those who act in an unauthorized way regarding the property or the contract).[23] 'Sentences in which [the word "right"] occurs can be rewritten without making use of the term, yet indicating the connection in the directives of the law between conditioning facts and conditioned consequences.'[24]

Still, Ross was concerned that we not fall into the trap of believing that 'rights' or 'claims' represent some entity, or indeed a magical sort of force:

> We ... express ourselves as though something had come into being between the conditioning fact (juristic fact) and the conditioned legal consequence, namely, a claim, a right, which like an intervening vehicle or causal connecting link promotes an effect or provides the basis for a legal consequence. Nor, really, can we wholly deny that this terminology is associated for us with more or less indefinite ideas that a right is a power of an incorporeal nature, a kind of inner, invisible dominion over the object of the right, a power manifested in, but nevertheless different from, the exercise of force (judgment and execution) by which the factual and apparent use and enjoyment of the right is effectuated.[25]

Olivecrona, *Law as Fact*, above n 4, 176 (summarizing Vilhelm Lundstedt's position).

22 See Ross, above n 21, 817-25 & n 4, Ross, *OLJ*, above n 5, 170-5.

23 Ross, *OLJ*, above n 5, 174.

24 Ross, *OLJ*, above n 5, 172-3.

25 Ross, above n 21, 818. For a similar analysis, see Axel Hägerström, *Inquiries into the Nature of Law and Morals* (1953) 1-6; Olivecrona, *Law as Fact*, above n 4, 183-5. See Hägerström, above, 5-6:

> It seems, then, that we mean, both by rights of property and rightful claims, actual forces, which exist quite apart from our natural powers; forces which belong to another world than that of nature, and which legislation or other forms of law-giving merely liberate. The authority of the state merely lends its help to carry these forces, so far as may be, over into reality. ... We feel that here there are mysterious forces in the background from which we can derive support. Modern

The temptation to this sort of conclusion is encouraged by the 'grammar' of rights statements: 'The use of the concept of rights occurs in statements which do not seem to give an account of rules of law but to be descriptions of pure facts.'[26] Instead, Ross would have us remember that the statements are at most factual, within the context of a particular set of legal rules.[27]

Ross does not claim that the people who first used such terms necessarily thought that they in fact represented strange entities or forces; Ross thinks it better (perhaps, in Donald Davidson's terminology, 'more charitable'[28]) to think of concepts like 'rights' and 'ownership' as an intuitive, 'pre-scientific' simplification and rationalization.[29]

III. Olivecrona's Approach

Some commentators have argued that Ross and Olivecrona had distinctly different approaches, but the two approaches seem to converge more than they diverge.[30] While it is true that Ross affirmed logical positivism (or something close too it[31]) while Olivecrona asserted a vague anti-metaphysical

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> jurisprudence ... seeks to discover facts corresponding to these supposed mysterious forces, and it lands in hopeless difficulties because there are no such facts.

26 Ross, *OLJ*, above n 5, 173. The later work of Ludwig Wittgenstein also emphasized how sometimes grammar can mislead us. See, e.g., P M S Hacker, *Wittgenstein's Place in Twentieth-Century Analytic Philosophy* (1996) 109 (summarizing Wittgenstein's analysis about the grammatical similarity but real differences between first-person avowals of pain and normal descriptive sentences, 'I have a pain' vs. 'I have a pin').

27 Ross, *OLJ*, above n 5, 15-8, 170-5. This aspect of Ross's analysis seems similar to that of his teacher Kelsen (*id.*, x). See, *e.g.*, Kelsen, above n 10, 32-35. There are a number of other similarities between Ross's analysis and that of Kelsen - though many significant differences as well. One such convergence is in the view of legal rules as primarily directives to judges authorizing the imposition of sanctions. Compare, Ross, *Directives*, above n 14, 90-2, with Hans Kelsen, *Pure Theory of Law* (1967) 203.

28 See, e.g., Donald Davidson, *Inquiries into Truth and Interpretation* (1984) 136-37, 152-53, 196-97, 200-01.

29 Ross, above n 21, 821; Ross, *OLJ*, above n 5, 172.

30 *See, e.g.*, Jes Bjarup, 'The Philosophy of Scandinavian Legal Realism' (2005) 18 *Ratio Juris* 1, at 10.

31 To my knowledge, Ross never directly adopts the label 'logical positivism' for his own approach, but his comments regarding the need for verification and scientific method indicates a position at least roughly comparable to that of the logical positivists. See, e.g., Ross, *OLJ*, above n 5, 38-50, 64-70. While Ross's work seems to endorse a kind of logical positivism, it does not endorse a different kind of reductionism, that of behaviourism. See, e.g.,

position (associated with Axel Hägerström[32]), and without affirming logical positivism as such, the endpoint of the two approaches seems roughly similar: skepticism of any object or claim that cannot be translated into an empirical observation or prediction.

While this skepticism about metaphysical-sounding language in law parallels similar themes in American legal realism, Olivecrona rejected the American legal realists' effort to translate legal rights into summaries of past official actions and predictions of future official action.[33] The American legal realists attempted to equate legal rights with certain facts in the world – a project with which Olivecrona clearly sympathizes – but their conclusions were, from his perspective, insufficient. Contrary to the American realists, Olivecrona argued, a legal right does not equate with the state's having enforced the right-holder's interest, or a guarantee that it would do so if and when a conflict arises.[34] We speak of rights even when such descriptions or predictions would not be well grounded.

Olivecrona compared legal rights with money, in the way that legal rights can operate as central elements in our (legal) life, even without having an object, just as 'dollar' and 'pound (sterling)' operate as central to our (economic) life without having any object they describe (at least since the end of the gold standard).[35] And, like H.L.A. Hart, in his earliest works (discussed above), Olivecrona thought that insight on the nature of legal rights could be found by reference to J. L. Austin's idea of 'performative sentences'.[36]

Olivecrona's theoretical end-point regarding legal rights was emphasizing their psychological effects on other participants in the legal system. Where there is sufficient regularity in legal practice and social expectations, the declaration that someone has a legal right (or legal duty) brings forth in hearers ideas of powers, permissions, and prohibitions; rights are 'an instrument of social control and social intercourse',[37] even though there

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Ross, *Directives*, above n 14, 86-88. As discussed, Olivecrona does not endorse logical positivism, but a roughly similar position grounded on the anti-metaphysical theory of Hägerström There is no time here to develop a full exploration and critique of Hägerström's theory.

32 A good summary of the connections between Olivecrona and Hägerström is given in Bjarup, above n 30.

33 Olivecrona, *Legal Language and Reality*, above n 4, 156-60.

34 Olivecrona, *Legal Language and Reality*, above n 4, 156-60, 185; see also Olivecrona, *Law as Fact*, above n 4, 171-4.

35 Olivecrona, *Legal Language and Reality*, above n 4, 170-3; see also Karl Olivecrona, *The Problem of the Monetary Unit* (1956).

36 Olivecrona, *Legal Language and Reality*, above n 4, 177-81.

37 Olivecrona, *Legal Language and Reality*, above n 4, 191.

is no objective entity that corresponds to 'legal right' (or 'legal duty').[38] Under this approach, legal rights serve as 'signs' telling us what to do and what not to do (*e.g.*, that we can do what we like with the objects we 'own', but should not interfere with objects that 'belong' to another); legislation establishes and regularizes the standards by which legal rights are created and modified; and court decisions, backed up by official means of enforcement, serve both to effect and reinforce claims and expectations connected with legal 'rights' and 'duties'.[39]

IV. Criticisms

This section will briefly consider some criticisms of the approaches of Ross and Olivecrona, and some actual and potential responses to those criticisms.

A. Olivecrona on Ross: Not Skeptical Enough?

Olivecrona argued that Ross's analysis of 'rights' was not really as skeptical or as critical as it was presented as being, and that Ross's analysis in fact makes little headway in figuring out the 'real nature' of rights.[40] Recall

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38 Olivecrona, *Legal Language and Reality*, above n 4, 177-89; see also Olivecrona, *Law as Fact*, above n 4, 183-216.

39 Olivecrona divides the functions of legal rights into their 'directive function' ('signs'), their informative function (how, *e.g.*, being informed that X owns property A gives us likely information about the relationship of X and A, as well as what legal procedures will be required should one wish to purchase A, or rent space in A); and their role in the administration of justice (how judicial declarations regarding rights necessarily take precedence over any pre-existing 'truth' regarding those rights). Olivecrona, *Law as Fact*, above n 4, 186-216.

40 At the same time, in one of Olivecrona's last works on legal rights, his discussion seems to echo Ross's views. See Olivecrona, *Legal Language and Reality*, above n 4, 189:

> Thus the expression 'right or property' serves as a connecting link between two sets of rules: on the one hand the rules about the acquisition of property, on the other hand penal rules and rules about damages, etc., which refer to the situation where one person is the owner of an object and another person does something with regard to the object.

This certainly sounds like Ross's '*tû-tû*' analysis, Ross, above n 21, but with no reference to Ross in sight near the quoted Olivecrona text. In Olivecrona's defense, one might argue that his analysis of legal rights *extends beyond* Ross, adding reference to psychological effects and sign

that Ross's analysis of rights is that they have no semantic content, but serve only as 'a tool of presentation' to connect a series of operative facts and a series of (comparable) legal conclusions involving available remedies. The difficulty is that the operative facts can often not be described in purely factual terms, and seem themselves to require the concept of a 'right', or something comparable.[41] For example, when one offers as an operative fact that leads to A's 'ownership' of X, that 'A purchased X', 'purchase' already implies right(s) of ownership (of the seller, and the transfer of such legal rights through a certain kind of commercial transaction). A different sort of problem occurs at the other end of the analysis, Olivecrona argues, in connecting ownership to the ability to recover in court. For example, if someone steals my wallet, empirically, there may be little chance of a recovery (in most cases the thief is never found). The claimed connection only makes sense if one understands the conclusion as a 'right to recover' rather than a factual likelihood of recovery.[42]

The challenge can be restated either as one about sufficient care in presentation – in keeping separate the (relatively) factual from the (relatively) normative – or as a potentially broader challenge to the ability ever to re-characterize normative (legal or moral) claims in factual terms. Olivecrona's challenge was likely intended to raise the first, less ambitious objection, but the second, broader potential challenge needs to be kept in mind (though its examination must await another occasion).

B. The Generative Power of Rights

One objection one might have to Ross's view of 'rights', as a mere 'technical tool of presentation', is that it seems in conflict with the practice (in some legal systems) of 'rights' as an independent basis for creating *new* (legal) duties.[43] The idea of rights as the justification for the creation of new duties seems to be in conflict with the idea of rights as merely a place-holder simplifying existing, established legal consequences.

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functions to the Rossian analysis of rights as mere shorthand-terms or connecting links.

41 Olivecrona, *Law as Fact,* above n 4, 179-82.

42 'Ross is not aware of the fact that he simply reverts to the standpoint which he begins by refuting.' Olivecrona, *Law as Fact,* above n 4, 181. However, as discussed in above n 40, Olivecrona's own final position is not that far from Ross's view.

43 See, e.g., Neil MacCormick, *Legal Right and Social Democracy* (1982) 154-66, especially 158-64; Joseph Raz, *Ethics in the Public Domain* (1994) 238-60, especially 250-53, 258. For an analysis which downplays the challenge of the MacCormick/Raz position for a Hohfeld (or a Ross) approach to rights, see Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (2nd ed., 2002) 285-88.

However, it is not clear how seriously Ross needs to take this objection, even assuming that it does accurately reflect practice in (some or most) legal systems. The fact that judges or lawmakers act on the basis of some supposed entity, does not mean either that the entity exists or that the judges and lawmakers were wise to act in the way they did or for the reasons they did. It was an important part of the American legal realist critique that the American courts were regularly acting on the basis of bad reasons, relating to non-existent entities - in particular, reified versions of legal concepts. The argument was that courts would decide cases on the basis of 'the nature of' (reified ideas of) corporations, property, fair value, due process, title, contract, conspiracy, malice, proximate cause, and so on, when all of these (as independent entities) were only the imagined creations of the law itself to begin with.[44]

Ross offers a comparable critique of what he labels the 'hypostasis'[45] of rights into 'a substance': 'a way of thinking in which "behind" certain functional correlations a fresh reality is inserted as the "bearer" or cause of these correlations', in this case 'a tendency ... to look upon a right as an independent reality distinct from the functions.'[46] Ross continues: 'This tendency permeates even professional thinking - concealed metaphysical ideas reveal themselves in false problems, fictions and delusions which can have an unfortunate influence on the treatment of practical legal questions.'[47]

While those who purport to theorize about law should be hesitant to dismiss an aspect of legal practice, I think it is open to the Ross (and the American legal realists) to argue that the reasoning used by some judges and commentators is constructed from flawed foundations.

C. Describing the Practice, and Rule Following

The problem with a social scientific description of rights, one which tries to reduce that legal concept to predictions about behavior combined with descriptions of psychological feelings (of compulsion, and the like), is that such descriptions fail to match the way the terms are actually used in legal

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44 See Cohen, above n 13, 809-20. 'Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormitive principle.' *Id.*, 820.

45 What most modern writers call a 'reification' (and what Cohen, above n 13, called a 'thingification').

46 Ross, *OLJ*, above n 5, 178, 179.

47 Ross, *OLJ*, above n 5, 179. Ross goes on to discuss confusions relating to the analysis of third-party beneficiaries, trusts, corporation ownership, and the like. *Id.*, 179-83.

practice.[48] As Hart has made clear, one response to theorists like Ross and Olivecrona, who offer unusual analyses of 'rights' because they wish to avoid undue metaphysics, is to point out that there are 'non-factual, non-predictive uses of language inseparable from the use of rules.'[49] What seem like strange entities and strange forces may just be an over-reading of the way people talk who have accepted a standard of behavior, and are using that standard of behavior as a basis for justifying their own behavior and criticizing the behavior of others.[50] The language of rule-following may be different from that of normal descriptive discourse, but that does not mean that it entails unusual and unwarranted metaphysical assumptions.[51]

It is not that Ross (or Olivecrona[52]) does not understand the idea of equating meaning with rules for use.[53] In his sharp satire on the metaphysics of law, 'Tû-tû', Ross writes of the (fictional) tribal state of ritual of uncleanliness, 'tû-tû':

> Although the word 'tû-tû' in itself has no meaning whatever, yet the pronouncements in which this word occurs are not made in a haphazard fashion. Like other pronouncements of assertion they are stimulated in conformity with the prevailing linguistic customs by quite

48 Hart makes a similar point about Ross's largely-predictive analysis of 'legal validity'. Hart, *Essays*, above n 6, 165-6.

49 Hart, *Essays*, above n 6, 167.

50 See, e.g., H L A Hart, *The Concept of Law* (rev. ed., 1994) 55-60 (discussing rules, their 'internal aspects', and their difference from habits).

51 See Hart, *Essays*, above n 6, 13. Hart wrote:

> Hägerström's explanation of the phenomenon [that certain uses of language within the law are anomalous] in terms of beliefs in 'mystical bonds' and 'the magical' powers of language to produce changes in a supernatural world of rights and duties simply abandoned the task of serious analysis of an important dimension of language, the use of which is not confined to legal contexts, and led his followers into a blind alley.

52 Olivecrona makes regularity in the use of 'legal right' central, as a necessary condition for its having a directive and informative function in society. See Olivecrona, *Law as Fact*, above n 4, 186-200. Also, Olivecrona tries to incorporate Hart's internal point of view within his own more skeptical analysis. *Id.*, 215-6.

53 See, e.g., Ross, *OLJ*, above n 5, 175, in which Ross introduces an analysis regarding 'the conditions under which the concept of rights is applied', while distinguishing that analysis from 'one of deciding what a right "actually exists" [because] a "right" does not designate any phenomenon that exists'.

> definite states of affairs. This explains why the tû-tû pronouncements have semantic reference although the word is meaningless.[54]

As Ross indicates, the question remains whether the users of the term 'tû-tû' *merely* equate it with the rules for the term's use - including descriptions of what has occurred to some individual (she did some 'unclean' act) or what should be done to that individual (she must undergo ritual purification) - or whether they think there is an object or force (some state of uncleanliness) being described.[55] Ross does not dissent from the idea that 'it is possible to talk with meaning about rights, both in the form of prescriptions and assertions.'[56] However, he simultaneously would assert that a 'right' is a 'word[] without meaning, without any semantic reference'.[57]

Both Ross and Olivecrona refuse to take the law at its face value. The discussions of 'legal rights' and 'legal duties' imply that there is something in the world that makes claims about such rights and duties true or false. Ross and Olivecrona deny any sense in (i.e., deny any direct referents for) the normative references in the law, beyond a general correlation between such references and the subjective psychological feelings of strength or burden in the individuals who perceive themselves has 'having' these legal rights and obligations.

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54 Ross, *Tû-tû*, above n 21, 814. Forty years later, Pierre Schlag offered an analysis comparable to Ross's 'Tû-tû', in which the self-understanding of law and legal theory was compared with the scientific-sounding nonsense of phrenology. Pierre Schlag, 'Law and Phrenology', (1997) 110 *Harvard Law Review* 877.

55 Ross, above n 21, 814-6.

56 Ross, above n 21, 822. Bentham's view was similar: that the concept of '*legal* rights' might have some content, if it could be reduced to talk of real things C sovereigns and sanctions C but that the concept of '*natural* rights' was nonsense ('nonsense upon stilts', in his memorable phrase) because they cannot be so reduced. See Jeremy Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) 35-36. On this point, Bentham's views on natural rights are often considered more radical for their time than they in fact were. As one commentator notes: 'In fact, Bentham was, in this regard, firmly in a long tradition of voluntarist natural lawyers with a deep-seated suspiciousness of rights considered as ultimate or inalienable.' Knud Haakonssen, 'Protestant Natural Law Theory: A General Interpretation', in Natalie Brender & Larry Krasnoff (eds), *New Essays on the History of Autonomy* (2004) 92-109, at 105.

57 Ross, above n 21, 821. As Simpson points out, Ross is neither as precise nor as consistent as he might be when speaking about 'tû-tû' as having no semantic reference. Simpson, above n 16, 536-42.

It is important to note that one need not be a skeptic about legal normative facts to perceive difficulty in the question of the grounds of legal truth. As some other commentators have pointed out, it is difficult to speak about the truth of legal propositions, because law itself has different aspects, which are often in tension: law as a series of historical official actions, and the efforts of judges and commentators to impose coherence and structure on those decisions, and law as a process of dispute resolution, a process that may require or result in the (intended or unintended) modification of existing rules.

One path some legal theorists have taken to try to explain (legal) normativity without recourse to metaphysical entities is by reference to practical reasoning. Picking up a theme from the previous line of criticism discussed (the generative power of rights) and using the terminology of Joseph Raz, legal rights give *reasons for action*.[58] This can still build off Ross's analytical point that 'rights' can be seen as a shorthand, as long as rights are seen, not as a shorthand for the empirical (what is or what has occurred) or the predictive (what judges will do), but rather for the normative (what citizens and/or judges *have a reason to do*). In this sense, talk of rights perhaps needs not entail reference to strange metaphysical entities or forces. A (legal) duty is a reason to act consistent as the duty requires. A (legal) right creates reasons for action for the person who holds the corresponding duty, or for the judge or other legal official who is in charge of enforcing that right. One can have reasons for action without any complex metaphysical entity creating or mediating those reasons. One's being hungry is a reason for eating; one's wanting a good job is a reason to get an advanced degree; and so on.

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[58] See Raz, *Ethics in the Public Domain*, above n 43. On Raz's 'reasons for action' practical reasoning analysis, especially in application to law, see Raz, *Practical Reason and Norms*, above n 10. Raz has recently suggested that the concept of rights has changed over time:

> Because legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture, it has a built-in obsolescence, since the self-understanding of cultures is forever changing. A clear example of such a change occurred over the last half century in the English-speaking cultures regarding rights. The notion of a right changed from designating concrete enforceable entitlements to designating any normally sufficient ground for a judgement about what ought to happen, even when there is no one who ought to bring it about, provided it is based on the interest of an individual human being or another animal or group.

Raz, above n 11, 6.

However, 'reasons for action' may merely push the analysis back one step. It may be relatively straight-forward to state that one's hunger gives one a reason for action, but another matter to state that a legal right or legal duty gives one a reason for action. For the legal realist (Scandinavian or American) can still ask about the nature, or reality, of that reason-giving entity, the (legal) right or duty. So it may be that practical reasoning analysis may not offer us any easy way of circumventing the objections the realists raise.

D. Against Logical Positivism

One could also criticize Ross at a more general level, responding to his basic approach to law, which can be seen as a kind of logical positivism. 'Logical positivism' is the set of ideas and attitudes associated with the 'Vienna Circle', a group of philosophers from the early decades of the 20th century, which included Moritz Schlick, Rudolf Carnap, Friedrich Waismann, and Otto Neurath. The most prominent position of these theorists was that statements had no meaning unless they were verifiable or falsifiable by experience (thus, challenging the sense of, among other things, metaphysical claims), and that the meaning of a proposition was to be equated with its mode of verification.[59]

The argument is that this approach - both in general, and in Ross's instantiation of it - goes too far, and that in the effort to avoid a world with too many (or too many *strange*) entities, he offered a picture of the world in which there are *too few* entities. This is not the place to rehearse in detail the weaknesses of logical positivism[60] (or the weaknesses of the alternatives to

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59 See, e.g., David Pears & Anthony Kenny, 'Mill to Wittgenstein', in Anthony Kenny (ed), *The Oxford History of Western Philosophy* (1994) 239-74, at 262.

60 Here is one commentator's quick overview:

> Logical positivism retreated under a combination of pressures. First, it shared the traditional problems of radical empiricism, of satisfactorily describing the basis of knowledge in experience. Secondly, it depended on there being one logic for science, or in other words a confirmation theory with a unique authority, yet no such structure, and certainly no basis for its authority, ever forthcame. These two problems bedevilled accurate formulation of the verification principle, and gradually persuaded philosophers of science that a more holistic and less formal relationship existed between theoretical sentences and the observations supporting them. When this relationship was allowed to be indirect, the despised theses of metaphysics began to look capable of climbing back into respectability.

logical positivism) or the relative merits of various realist and anti-realist theories C a conversation that could and does take up whole books and whole philosophy courses without coming to a final resolution. Suffice it to say that Ross is too quick in dismissing 'rights' from his world. There are many terms that refer, without referring to simple physical objects. We want to speak of the reality of 'rights' much as we want to speak of the reality of 'intentions' or numbers, two other categories without clear sensible objects.[61]

To be sure, the better analogy for 'rights' is probably not numbers, but rather ethical properties, in part because 'rights' *are* part of moral discourse, as well as legal discourse, but more importantly because 'rights', like moral properties, seem to supervene[62] on descriptive properties,[63] a point Ross's own analysis emphasizes. However, it is far from clear that we want to give up all moral evaluation and metaphysical speculation unless and until we have a more persuasive set of reasons than the Vienna Circle was able to formulate.

One can come to a similar conclusion from the opposite direction. If the problem with 'rights' derives from its not being sufficiently 'factual', its being, like 'tû-tû', just the product of a normative system, one might respond that there is little that is *not* similarly, in some sense, such a product.[64] This sort of argument is sometimes made in terms of Wittgensteinian rule-

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Simon Blackburn, *The Oxford Dictionary of Philosophy* (2nd ed., 2005) 215 (cross-references omitted).

61 The questions about ontology, about what entities 'exist', often formulated as debates between 'realism' and 'anti-realism', covers not only mental states and events, but also universals, numbers, legal concepts and moral properties, the past, and the future. On the realism/anti-realism debate, see, e.g., Michael Dummett, *Truth and Other Enigmas* (1978) 145-65. For a discussion in the context of moral and legal concepts, see Michael S. Moore, 'Moral Reality Revisited', (1992) 90 *Michigan Law Review* 2424.

62 Supervenience indicates a strong connection between properties of one kind and properties of another. The connection is sufficiently strong that 'if one thing possess the underlying properties and is F, then any other thing with the same underlying properties must share the resultant property F', but the connection falls short (somehow) of the *reduction* of one set of properties to the other. Blackburn, above n 60, 356.

63 Intentions, and other mental states, could be said to supervene on physical states (the underlying biochemistry of the brain), but since such biochemical facts are not easily accessible to us, were we to stop talking of intentions, it would be very difficult to substitute physical descriptions in their place. The replacement of rights talk or moral discourse with descriptive discourse would inevitably be awkward, but it might be feasible.

64 Simpson seems to be hinting at a similar point in Simpson, above n 16, 542-5, but the discussion goes off in a quite different direction from there.

following and forms of life,[65] sometimes in terms of Nietzschean metaphors,[66] and sometimes in terms of 'social construction'.[67] In general, the point is that much of what passes for descriptive language is already in part the product of theory, so efforts to distinguish ('good', 'reliable') empirical matter from ('bad', 'misleading') abstract, theoretical, or metaphysical matter may be impractical.

It could be that it is counter-productive for moral, legal, and social theorists to become too concerned about ontology. Perhaps Ronald Dworkin and Stanley Fish go too far when they advise theorists to forego ontological theories entirely,[68] but the basic advice to focus primarily on understanding actual practices, preferably from an 'internal perspective', is probably wise.

Conclusion

I think our jurisprudential discourse is poorer for the present scarcity of sharp skeptical writers like Alf Ross and Karl Olivecrona,[69] and it is also poorer for the relative inattention (at least by English-language commentators) to their work. Writers like Ross and Olivecrona remind us to be wary when throwing about abstract entities as though they were ordinary physical objects - or, as though they were extraordinary supernatural forces. They bring to our attention that the apparently simple question, 'what *is* a (legal) right?', actually raises some quite difficult issues.

At the same time, I think we can also learn from the way that Ross's and Olivecrona's critiques fall short. The inability of their analysis to come to terms with the language we use in following rules is, in the end, a basis for criticizing the analysis, not a basis for criticizing normative language. While we should avoid the temptation of seeing '(legal) rights' as strange objects or strange forces, rights can, and usually do, play a role within a normative discourse regarding (legal, or moral) reasons for action.

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65 One finds quite different versions of this Wittgensteinian approach in Peter Winch and Stanley Fish. See, *e.g.*, Peter Winch, *The Idea of Social Science and its Relation to Philosophy* (1958); Stanley Fish, *Doing What Comes Naturally* (1989).

66 Friedrich Nietzsche, 'On the Truth and Lies in a Nonmoral Sense', in D Breazeale (ed & tran), *Philosophy and Truth: Selections from Nietzsche's Notebooks of the Early 1870's* (1979) 79-97.

67 See, e.g., John R. Searle, *The Construction of Social Reality* (1995).

68 See, e.g., Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It', (1996) 25 *Philosophy & Public Affairs* 87; Fish, above n 65, 356-98.

69 Or Jeremy Bentham, Oliver Wendell Holmes, Jr., Felix Cohen, and Arthur Leff, just to name four others.