Chapter 14
Topics in the History of Legal and Political Philosophy

Abstract In this chapter, I consider Olivecrona's treatment of certain topics in the history of legal and political philosophy. Olivecrona touches in these essays on questions that he had been, or would later be, concerned with when developing his own legal philosophy; and although the essays concern rather different topics, they all illustrate some aspect or aspects of his legal philosophy, such as his naturalism, his meta-ethics, his critique of will theories of law, or his analysis of the concept of a rule. Thus he considers the theory of the *universitas*, according to which a corporation is a type of composite entity that is neither fictional nor identical with its members, arguing that this theory correctly captures the Roman jurists' understanding of the nature of corporations. He also considers the Swedish medieval practice of adjudging someone a king, explaining that the act of adjudging someone a king was a magical rite, in which the court aimed to confer an ideal legal property, namely kinghood, on the person in question. Moreover, he clarifies the import of the concept of a person's *suum*, or private sphere, in the works of the natural law philosophers Hugo Grotius and Samuel Pufendorf, and points out that this concept is needed to understand the important natural law precept, that one must never harm another. Finally, he clarifies, though he does not clearly assess, John Locke's thoughts on the appropriation of property and considers and rejects Jeremy Bentham's view that law is the content of a sovereign will, arguing that the will theory cannot be squared with a thoroughgoing naturalism.

14.1 Introduction

Olivecrona wrote his first essay on a topic in the history of legal and political philosophy in 1928 and again touched on historical topics in the early 1940s. After that he did not write on such topics until the late 1960s, and then again in the 1970s. In this chapter, I want to briefly consider what Olivecrona had to say about these historical topics. As we shall see, he touches in some of these essays on questions that he had been, or would later be, concerned with when developing his own legal philosophy; and although the essays concern rather different topics, they all illustrate some aspect or aspects of his legal philosophy, such as his naturalism, his meta-ethics, his critique of will theories of law, or his analysis of the concept of a rule.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_14,

I begin with Olivecrona's thoughts on the nature of corporations in Roman law (Sect. 14.2) and on king-making in early medieval Swedish law (Sect. 14.3). I then consider what Olivecrona had to say about the natural law philosophies of Hugo Grotius and Samuel Pufendorf (Sect. 14.4), the political philosophy of John Locke (Sect. 14.5), and the legal philosophy of Jeremy Bentham (Sect. 14.6). I shall devote more space to the last three topics than to the first two, because I find them especially interesting.

14.2 Roman Law: The Nature of Corporations

In his little book on Roman law (1949), Olivecrona treats (i) the nature of corporations (or juridical persons), (ii) theft, and (iii) the acquisition of possession. I shall focus here on the first of these topics, the nature of corporations, because I find the topic intriguing and because it has been of considerable interest to philosophers of law throughout the ages. As I said in Chap. 2, Olivecrona wrote his doctoral dissertation on this topic (1928); and H. L. A. Hart dealt with it in his inaugural lecture on definition and theory in jurisprudence (1954).

Olivecrona begins by noting (1949, p. 5) that "[o]ne of the outstanding contributions of the Roman jurists to legal thought is the idea that rights and duties can be ascribed to an organization as an entity distinct from its members." He observes that we can find in the literature two distinct and competing views about the nature of corporations as they were understood by the Romans, namely (i) the view that the corporation is a fictitious person, and (ii) the view that the corporation is identical with its members. He objects, however, that neither theory is satisfactory. But, he continues, there is actually a third theory on this topic, which is supported by the available evidence, namely the theory of the *universitas*, according to which a corporation is a type of composite entity that is neither fictional nor identical with its members. He then sets himself the task of showing that it is this theory that correctly captures the Roman jurists' understanding of the nature of corporations.

In order to understand the theory of the *universitas*, Olivecrona explains, we need to understand the general theory of *corpora* (or bodies); and he proceeds to explain that the latter theory is based on the idea of *species* (or *spiritus*), which is a cohesive power or spirit that inhabits each and every object that appears as a separate thing to the "natural way of looking at things" and determines the nature of that thing (Olivercrona 1949, p. 18). He writes:

> The *species* is opposed to the material, or the physical *substratum* that gets its individual determination through the *species*. The *species*, and consequently the identity of the thing, is in a way independent of the identity of the *substratum*. The material may change without altering the individuality of the thing, provided the change happens successively and does not transform the object into a thing of another kind. Thus the identity of a ship remains unaltered even if new planks are fitted; the human body remains the same though its component parts are changing, etc. (Olivercrona 1949, pp. 18–19.)

The Romans distinguished between three classes of *corpora*, Olivecrona explains, namely between (i) homogeneous bodies, such as persons, animals, and trees (Olivercrona 1949, p. 21), (ii) bodies that are made up of parts, such as buildings, ships, and tables (Olivercrona 1949, p. 23), and (iii) bodies *ex distantibus*, that is, bodies that are made up of parts that do not lose their individuality as a result of becoming part of the main body (Olivercrona 1949, p. 25), and they conceived of corporations as *corpora* of the third class, as bodies *ex distantibus*. Olivecrona describes the bodies in the third class as follows (Olivercrona 1949, p. 25): "[t]heir parts are physically independent of each other as, e.g., the sheep in a flock or the men in a legion. They are held together by some ideal or conceptual bond of unity and have a name of their own: *uni nomine subiecta sunt*."

Now a *corpus* that belongs to the second or the third class of *corpora* is a *universitas*, Olivecrona explains (Olivercrona 1949, p. 28), that is, "a thing, an entity, consisting of parts (*singulae partes*) with potential or actual individuality." He summarizes his main claim as follows:

> The individual members were not the real subjects of the corporation's rights and duties; nor was a corporation conceived of as a fictitious entity. The right and duty bearing entity was the *corpus ex distantibus* formed by the members as united by coming together (*coire*) into a college or whatever other name was used; it was this *universitas* conceived as remaining identical during changes in the membership that was the subject of the rights and duties referred to as belonging to the corporation. (Olivercrona 1949, p. 31. Footnote omitted.)

Olivecrona concludes his analysis of the concept of a corporation with a brief consideration of the question *why* the Roman jurists made use of the doctrine of *corpora*. Noting that they offer no such explanation, he hypothesizes that they made use of it because they saw a need for it, because it "… was such an excellent means of introducing those rules that are required for permanent associations of men, above all rules referring rights and duties not to the particular members but to a distinct entity represented as remaining identical during changes in the membership." (Olivercrona 1949, p. 37.)

We see that Olivecrona contemplates the existence of some sort of ideal bond that unites a number of distinct entities, namely the *species* or (*spiritus*). But, as we have seen (in Sect. 5.3), he is an ontological naturalist, who does not accept the existence of non-natural entities or properties and holds that an *analysis* of a concept, such as the concept of a corporation, in terms of non-natural entities and properties can be philosophically acceptable, if it captures the import of the concept as it is understood by those who use it, while insisting that the *concept* itself cannot be philosophically acceptable, unless there is something in the natural world that corresponds to it. One would therefore have expected him to point out that the concept of a corporation, as it was understood by the Romans, although it can be analyzed in a philosophically acceptable way, is not a philosophically acceptable concept. He does not, however, touch on these questions in his discussion of the theory of *corpora*.

While I find Olivecrona's discussion of the theory of *corpora* historically interesting, I do not find in this theory a convincing *explanation* of the nature of corporations. What we learn from Olivecrona's discussion is that the Roman jurists

conceived of corporations as a type of non-fictional, composite entity that is distinct from its members. But this is, of course, precisely how we view corporations today; and interesting as this piece of historical information is, no one who is looking for an explanation of the nature of corporations is going to be satisfied when told that our view was the view of the Roman jurists, too, and that we have indeed inherited it from them. The problem is that since, on this analysis, a corporation is neither a fiction nor identical with its members, it is unclear *what* it is. And that is precisely why jurists and philosophers since the days of the Romans have been puzzled by the nature of corporations. I conclude that the theory of *corpora* is lacking in explanatory value.

14.3 Early Medieval Swedish Law: Becoming a King

Olivecrona's second essay on legal-historical matters was his 1942 essay *Becoming a King* [*Döma till konung*] (1942). Here Olivecrona is concerned with the interpretation of some provisions in early medieval Swedish law, according to which a court could adjudge someone a king. What, Olivecrona asks, did adjudging someone a king *mean*? His answer is that the act of adjudging someone a king was a magical rite, in which the court aimed to confer an ideal legal property, namely kinghood, on the person in question.

Olivecrona begins by pointing out that according to the received opinion at the time of writing (that is, 1942) a court judgment was a *report* about a legal state of affairs. For example, a court judgment that *A* has a right to performance vis à vis *B* is a report, that under Swedish law *A* has indeed a right to performance vis à vis *B*. He objects, however, that this is a false view. For, he maintains, as we have seen in Chap. 11, that a court judgment is not a report at all, but an *imperative*. The true nature of court judgments is of interest in this context, he explains, because we must not read a false contemporary view about the nature of court judgments into our analysis of early medieval Swedish law (Olivecrona 1942, pp. 9–10).

He then explains that the essence of the ceremony in which a person was adjudged a king was that this person was placed on a rock called *Mora Rock*, which was located on a meadow a few miles out of Uppsala (Olivecrona 1942, p. 11). He proceeds to explain that the act of adjudging someone a king was a *rite* the purpose of which was to *make* the person in question king, not to choose the person who was to become king (Olivecrona 1942, p. 12):

"However it was decided in a given case who would become king—whether it depended on birth, election, combat, or perhaps in ancient times a sign of the gods—this rite was used to *make* him king. He is not a king when the act begins. But he is when it ends."[1] This rite, he continues, was *magical*. The acts clearly aimed at conferring on the person in question—the king-to-be—an ideal, that is, a

[1] The Swedish original reads as follows: "Hur det än i ett givet fall blivit bestämt vem som skulle bli konung—vare sig det berott på börd, val, vapenskifte eller kanske i forntiden ett tecken av

non-natural property, namely kinghood (Olivecrona 1942, p. 13). Having discussed the details of the rite in question, he pauses and reiterates his earlier claim that the act of adjudging someone a king was part of a very old heathen rite that included a type of verbal magic:

> By speaking in conjunction with positioning on the stone the candidate to become king is made into a king. He is adjudged a crown and a kingdom [*kununx dömi*]. This entails that he is conferred a certain power belonging to the dignity of a king. But he does not get this power to be used capriciously. By means of a continuation of the formula it is determined to what end this power shall be used, and this manner of use is confirmed by the king's oath. (Olivecrona 1942, pp. 24–25.)[2]

Olivecrona's analysis of king-making in early medieval Swedish law is clearly in keeping with the view that legal entities and properties are understood to be non-natural, and that there is a close, if implicit, connection between legal thinking and a belief in magic. Although Olivecrona does not speak of the necessity of conceiving of law and legal phenomena in terms of social facts in this context, it is obvious that he could not accept the medieval way of looking at king-making. On Olivecrona's analysis, to make someone a king does *not* mean that one somehow confers on him a non-natural property, but simply that one impresses upon people, by means of independent imperatives that possess a suggestive character, a way of looking at things and of acting accordingly. Note also that Olivecrona conceives of king-making in medieval Sweden in error-theoretical, not non-cognitivist, terms, in that he takes the concept of a king to refer to a non-natural property that does not exist and takes all (positive) claims about kings (in the metaphysical sense) to be false.

14.4 The Natural Law Philosophies of Grotius and Pufendorf: The *Suum*

Olivecrona had a strong interest in the natural law philosophies defended by the seventeenth century giants Hugo Grotius and Samuel Pufendorf (see Olivecrona 1973, 1977, 1978).[3] And while his discussion of these natural law philosophies is generally interesting and illuminating, I believe his main accomplishment was to draw our attention to the import and significance of the concept of a person's *suum*, his private sphere, in the works of these thinkers.

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gudarna—har denna rit använts till att *göra* honom till konung. Han är icke konung när akten börjar. Men han är det när den slutar."

[2] The Swedish original reads as follows: Genom talandet i förbindelse med placerandet på stenen göres kungsämnet till konung. Därpå tilldömes han krona och "kununx dömi". I detta ligger, att han tilldelas en viss till konungavärdigheten hörande makt. Men han får icke denna makt till godtyckligt bruk. Genom den fortsatta formeln bestämmes vartill denna makt skall användas, och detta användningssätt befästes genom konungens ed.

[3] The relevant works are Grotius (2005 [1738]) and Pufendorf (2001 [1672]). Olivecrona also discusses the natural law philosophies of Grotius and Pufendorf in his essays on Locke's theory of appropriation, which we shall consider in Sect. 14.5 below.

Olivecrona begins by explaining that the theories put forward by these thinkers concerned the relation between human beings in the state of nature, where there was no state authority and all were free and equal (1977, pp. 79–81; 1978, p. 26). He then points out that Grotius and Pufendorf argued that the law of nature was grounded in the social nature of humans, which involved a striving toward peaceful coexistence on earth. On this analysis, human reason was able to discern the *means*, that is, the right way to behave, to this end, that is, peaceful co-existence on earth. The instructions, that is, the means, discerned by human reason did not, however, attain the status of *laws*, until God had commanded that they be followed. According to Grotius and Pufendorf, the law of nature thus conceived included two main precepts: (i) that one must never harm another, and (ii) that one must keep one's promises (1977, p. 81; 1978, p. 26).

But to be able to understand and apply the first precept, one must obviously become clear about the precise meaning of the phrase "harm another." Olivecrona explains (1977, p. 81; 1978, pp. 26–27) that although the law of nature had nothing to say on this topic, Grotius and Pufendorf had an explanation readily available. They maintained that harming a person meant taking something away from him that belonged to him, and that a thing belonged to a person if (and only if) it was part of his *suum*. And while they did not define the concept of *suum*, they did explain what was *included* in the *suum*, namely life, liberty, body, actions, reputation, and honor. Olivecrona writes:

> According to *Grotius,* his life, his body, his limbs, his freedom, his good reputation, his honor and his own acts belong to a person by nature… *Pufendorf* gives a similar list… he adds *pudicitia* [modesty], whereby he is thinking of sexual integrity…. In fact *Grotius* also reckons *pudicitia* to the *suum*, even though it is not found in the catalog… (1977, p. 82. See also 1973, pp. 198–9.)[4]

Olivecrona explains (1978, p. 26) that Grotius and Pufendorf based the theory of the *suum* on what they took to be a person's natural moral or spiritual ability to possess something rightly: "A *qualitas moralis ad aliquid juste habendum* had from the beginning been conferred upon humans. Based on this assumption, the two natural law teachers erected a minutely detailed theory concerning what belonged to human beings by nature, i.e. irrespective of all law and all agreements."[5] (Emphasis added.)

He also explains that on the basis of the concept of *suum*, Grotius and Pufendorf then defined right and wrong action, respectively. To act rightly is to not act wrongly, and to act wrongly is to violate the law of nature, that is, to take from another person what belongs to him or to break a promise (1973, p. 197; 1977, pp. 82–83).

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[4] The German original reads as follows: "Nach *Grotius* gehören einem Menschen von Natur aus das Leben, der Körper, die Glieder, Die Freiheit, der gute Ruf, die Ehre und die eigenen Handlungen…. *Pufendorf* gibt ein ähnliches Verzeichnis…. Er fügt die *pudicitia* hinzu, wobei er an die sexuelle Integrität denkt…. Tatsächlich zählt auch *Grotius* die *pudicitia* zum *suum*, obgleich sie im Katalog keinen Platz gefunden hat…."

[5] The Swedish original reads as follows: "Ett qualitas moralis ad aliquid juste habendum hade från början tilldelats människorna. På detta antagande byggde de båda naturrättslärarna en noga utformad teori om vad som av naturen, d.v.s. oberoende av all lag och alla överenskommelser, tillhörde människan."

To encroach on another's *suum* was a sin, Olivecrona explains, and such an action would be punished by God (1977, 94; 1978, p. 27). But, he continues, Grotius and Pufendorf were well aware that punishment by God would not be enough, since one might have to wait a long time for such punishment to be inflicted. Accordingly, Grotius and Pufendorf maintained that if *A* encroaches on *B*'s *suum*, then *A* will as a result immediately lose the ideal protection of his own *suum*, and that therefore *B* can strike back without having to worry about encroaching on *A*'s *suum*. Interestingly, neither Grotius nor Pufendorf required that the severity of the counter-attack must be proportional to the severity of the attack. As Olivecrona explains (1978, p. 27), "[i]t was a matter here of the principle of all or nothing. Either the sanctity endured or it had disappeared. There was no third possibility. Thus even trivial offences entailed that unlimited violence was allowed to be used."[6] He offers the following example:

> A well-known and much debated case was that in which a man was exposed to an impending risk of getting a box on the ears. Was it then permissible to kill the attacker if he could not ward off the box on the ears in any other way? Both Grotius and Pufendorf answered this question in the affirmative, unlike authors of a more pacifist leaning who argued that it was better to endure wrongs, and even to allow oneself to be killed, than to inflict an injury upon another human being. (Olivecrona 1978, p. 27.)[7]

But, as Olivecrona points out, a state of affairs in which a person is permitted to strike back at an attacker without having to worry about proportionality is likely to degenerate into a war of all against all. And this, he points out, is precisely why human beings came to agree to institute society. Indeed, we may say that the purpose of entering into society was to protect each person's *suum* (Olivecrona 1978, p. 27). He adds, however, that the sovereigns—kings, emperors, etc.—never entered into any such contract with each other, and that therefore they remained in the state of nature regarding their mutual relations (Olivecrona 1978, p. 28).

Olivecrona maintains, in keeping with this, that the theory of the *suum* came to constitute the foundation of private law (Olivecrona 1978, pp. 28–29). Of course, to accomplish this one had to be able to expand the *suum* so that it could also include physical objects. And, as one might expect, Grotius and Pufendorf did argue that a person's *suum* could be expanded by human will to include other things beside the ones mentioned above, and this could be done in either of two ways, namely by acquiring (i) property rights or (ii) rights to performance (1977, p. 83). Olivecrona points out, however, that on Grotius' analysis, the existence of private property is actually founded not on the law of nature, but on human will. For, he points out, Grotius imagined that God had given the earth to the humans and that in the

[6] The Swedish original reads as follows: "[h]är gällde principen allt eller intet. Antingen bestod helgden eller hade den fallit bort. Något tredje fanns inte. Även obetydliga kränkningar medförde alltså att obegränsat våld fick användas."

[7] The Swedish original reads as follows: "Ett berömt och omdiskuterat fall var det att en man blev utsatt för en överhängande risk att få en örfil. Var det då tillåtet att slå ihjäl angriparen, om man inte på annat sätt kunde avvärja örfilen? Den frågan besvarade både Grotius och Pufendorf jakande, till skillnad från mera pacifistiskt inställda författare som hävdade att det var bättre att tåla oförrätter och t.o.m. låta sig dödas än att tillfoga en annan människa något ont."

beginning everything was common property. But, he explains (Olivecrona 1977, pp. 83–84), Grotius reasoned that the humans were granted the authority to agree to introduce the institution of private property before they entered into society.

On the analysis put forward by Grotius and Pufendorf, the act of *occupation*—that is, the act of "occupying" or seizing an unowned object—was the prototypical act-in-the-law (*Rechtsgeschäft*) (Olivecrona 1977, pp. 84–86; 1978, p. 29). The idea was that the occupier of an object exercises his will, in the sense that he wills that the object be incorporated into his *suum*. To occupy and incorporate the object with one's *suum* was possible, Olivecrona explains (1978, p. 29), because human beings possessed (as we have seen) a natural moral or spiritual power to possess objects rightly.

But, Olivecrona continues, it was also possible to transfer ownership from one person to another by means of corresponding declarations of will, that is, by entering into a contract. If the owner, *A*, of an object, *X*, wanted to transfer ownership of *X* to another person, *B*, then *A* could declare his will that *X* be separated from his *suum*, though he could not make *X* part of *B*'s *suum*. For this to happen, *B* had to declare his will that *X* become part of *B*'s *suum*. As Olivecrona explains (Olivecrona 1978, p. 30), this way of looking at things depends on the view that a person's actions are part of his *suum*.

Olivecrona points out that it is clear from the above analysis of the concept of a promise how the natural law teachers conceived of the concept of a *right*. The idea was that a right in the strict sense is a *moral power*, a *facultas moralis*, over another person, in the sense that the right-holder, *A*, has the ability to put forward a claim against the other party, *B*, that gives rise to a duty on *B*'s part to fulfill the claim (Olivecrona 1978, pp. 30–31): "Ownership also included such power, namely the power to claim one's possession back from every unauthorized holder. This power was derived from an agreement entered into in connection with the introduction of private property."[8]

We see, then, that the view ascribed by Olivecrona to judges, lawyers, and ordinary citizens, that the concept of a right is conceived of as a supernatural power over that to which it is a right (an object, an action, etc.), can be traced back to the natural law philosophies of Grotius and Pufendorf. This is at least part of what Hägerström, Lundstedt, and Olivecrona had in mind when they maintained that ordinary legal thinking is permeated by elements of natural law theory.

Given Olivecrona's very high appreciation of Axel Hägerström as a legal and moral philosopher, it is also worth noting that Olivecrona points out that in his penetrating analysis of the Swedish legal thinker Nehrman-Erhenstråle's inquiry into the basis of the binding force of a promise, Hägerström (1934) failed to take into account the very idea of a person's *suum*, an idea that Olivecrona regarded as belonging to the core of classical natural law theory. This is one of very few critical comments on Hägerström's work that can be found in Olivecrona's writings. Olivecrona puts it as follows:

[8] The Swedish original reads as follows: "Även äganderätten inneslöt en sådan makt, nämligen makten att kräva saken tillbaka från varje obehörig innehavare. Denna makt härledde sig från en överenskommelse som träffats i samband med införandet av privategendomen."

> Like so many others before him, Hägerström thought that the *suum* concept was devoid of content. It might be true that every attempt to define property leads to circularity. But Grotius and Pufendorf believed that they knew what belonged to the human being by nature. They listed what this was in their catalog, which came to form the basis of their line of argument. In the literature treating of classical natural law that I have read I have never found any account of this catalog and its importance. The *suum* doctrine, however, is a prerequisite of both the theory of wrongs and the theory of the content of legal acts. In conjunction with the idea of the sanctity of the human personality, the *suum* doctrine constitutes the core of classical natural law theory. (1978, p. 31.)[9]

Let me also repeat in conclusion what I said in Sect. 2.6, namely that Olivecrona seems to have developed with time an appreciation of the classical natural law thinkers. His discussion of the theory of the *suum* is free from critical comments on non-natural entities and properties, such as the alleged moral or spiritual ability to possess an object rightly, whose existence could not possibly be squared with Olivecrona's naturalist legal philosophy in either the First or the Second Edition of *Law as Fact*. One might perhaps guess that besides an appreciation of the intellectual qualities of Grotius and Pufendorf, Olivecrona also felt that it was important to really understand the natural law foundation on which he considered much of contemporary legal thinking to rest. The dependence of the popular understanding of the concept of a right on the teachings of Grotius and Pufendorf is, as we have seen, a case in point.

14.5 John Locke: Appropriation of Property

Olivecrona devotes three articles (1969, 1974a, 1974b) and one slim book (1971/72) to Locke's theory of appropriation of property. Since the different texts overlap considerably, I shall focus on only one of the texts, namely (1974a), though I shall cite the other texts too when they are relevant. Olivecrona's main claims in his writings on Locke are (i) that Locke's concept of property is identical with the concept of *suum* defended by Grotius and Pufendorf, and (ii) that Locke's attempt to justify private property rights does not depend on the labor theory of value, but on the concept of *suum* in conjunction with the so-called Lockean proviso. Olivecrona does not, however, express any view about the defensibility of Locke's attempt to justify private property rights.

Olivecrona's thoughts on this topic are of considerable interest, because Locke's theory is quite famous and has been put to good use by no less a figure than Robert

[9] The Swedish original reads as follows: "Liksom så många andra före honom ansåg Hägerström att suum-begreppet var innehållslöst. Det må vara riktigt att varje försök att definiera tillhörigheten leder i cirkel. Men Grotius och Pufendorf ansåg sig veta vad som av naturen tillhörde en människa. Vad detta var räknades upp i deras katalog, som kom att ligga till grund för deras resonemang. I den litteratur angående den klassiska naturrätten som jag läst har jag aldrig funnit någon framställning om denna katalog och dess betydelse. Suum-läran utgör dock en förutsättning för såväl teorin om orätten som för teorin om rättsakternas innebörd. I förbindelse med idén om den mänskliga personlighetens helgd är suum-läran själva kärnan i den klassiska naturrättsläran."

Nozick (1974, pp. 174–182)). As is well known, Nozick argues that the existence of private property rights can be justified by reference to Locke's theory in a somewhat revised form. Under Nozick's entitlement theory (Robert Nozick 1974, pp. 150–153), a person rightfully owns what he has acquired either by appropriation in Locke's sense or by just transfer of previously appropriated property; and this means that, on Nozick's analysis, the justification of private (and, of course, collective) property depends ultimately on a Lockean theory of appropriation. An additional reason why Olivecrona's thoughts on this topic are so interesting is that this appears to have been the only time Olivecrona discussed in his legal-philosophical writings proper a question that is immediately relevant to normative or evaluative questions.

Olivecrona explains that Locke followed Grotius and Pufendorf in assuming that God gave the earth to the humans collectively, while rejecting the view that the existence of private property can be justified by reference to some sort of agreement among humans (1974a, pp. 221–222): "It would have been impossible to reach an agreement between all men on earth, he thought. If the consent of all had really been a prerequisite for individual appropriation, men would have starved in the midst of plenty…." (See also Locke 1988 [1690], p. 286, 288)) Locke was therefore faced with the problem of justifying the existence of individual property rights in some other way: "How," Olivecrona asks (1974a, p. 221),[10] "could the original communism, instituted by God, have given way to private rights of property?" This, he explains, is the question to which Locke proposed to give an answer in the chapter on property in the *Second Treatise on Government*.

But when reading Locke on appropriation, Olivecrona explains (1974a, p. 222), one must distinguish between two periods of time, namely the *age of abundance*, in which there was more than enough of everything, and the *age of scarcity*, in which there is not enough of everything, and keep in mind that Locke's analysis concerns the age of abundance: "What he [Locke] sought to do was to explain how people in the age of abundance had been able to establish property-rights in things common to all without the consent of others and yet without causing injury to them." As Olivecrona points out (Olivecrona 1974a, p. 230), on Locke's analysis, the age of abundance ended because the population had increased and the concept of money had been introduced into society (see Locke 1988, p. 293). The latter circumstance, he continues, was particularly important, because it meant that a person could now appropriate much more than he could immediately consume. He also makes it clear that Locke's view was that the existence of property rights as well as the actual distribution of property in this period did not rest upon the theory of appropriation, but on agreements and laws:

> Locke assumes that in the age of scarcity communities had been formed. By common consent the different communities gave up "their Pretence to their natural common right" and settled "the Bounds of their distinct Territories". Within each community property-rights were regulated by laws… Thus contemporary distribution of property was not based on the theory of appropriation. It rested on a series of agreements to introduce money, to divide

[10] See also Olivecrona (1974b, p. 222).

> the earth, and to institute governments which issued laws concerning property-rights. The theory of appropriation only served to explain how men had been able to break loose from the original community of property. (1974a, pp. 230–231.)

To understand Locke's analysis, Olivecrona continues, one also needs to understand what Locke means when he maintains that something—an acorn, an apple, a piece of land, etc.—is one's own, that is, one's property. And, he explains (1974a, p. 222), on Locke's analysis, an object is a person's own, if, and only if, it is part of that person. Locke himself puts it as follows:

> … being given for the use of Men, there must of necessity be a means *to appropriate* them some way or other before they can be of any use, or at all beneficial to any particular Man. The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his Life. (1988, pp. 286–287.)

But, Olivecrona asks, how can an object be *part of* a person? He finds the answer to this question in the concept of *suum* introduced by Grotius and Pufendorf. As we saw in Sect. 14.4, to be able to follow the law of nature, one must know what it *means* to harm another, and this in turn assumes that one knows what is each person's own. And this, Olivecrona explains (1974a, p. 223), is where the *suum* enters the picture. But, as we also saw, the *suum* could be expanded to encompass physical objects, in addition to life, liberty, honor, and actions. On the analysis put forward by Grotius and Pufendorf, Olivecrona explains (Olivecrona 1974a, pp. 223–224), a person could make an object part of his *suum* either by "occupying" it or by entering into a contract with the owner of the object.

We see that Olivecrona shows that Locke's claim that an object is a person's own, his property, presupposes the concept of *suum* in order to be fully intelligible. This is surely a very illuminating observation by Olivecrona: Not only does it help us understand Locke's analysis, it also identifies an important connection between this analysis and the natural law philosophies of Grotius and Pufendorf.

Having pointed out that Locke reasoned that appropriation of objects and land simply *must* be possible without the consent of all others, because God had given the earth to the humans to make use of it, and because one cannot make proper use of either objects or land unless one owns them (Olivecrona 1974a, p. 225; 1974b, p. 222. See also Locke 1988, p. 286), Olivecrona then follows Locke in making a distinction between the following three questions (1974a, p. 225): (i) How is appropriation possible?, (ii) How is it done?, and (iii) How can one appropriate something without harming others? He treats these questions in turn.

Let us note, however, before we proceed to consider Olivecrona's discussion of the three questions more closely, that Olivecrona emphasizes (1969, pp. 154–155; 1974b, p. 223) that Locke never mentions and still less makes use of the concept of a moral faculty, a *facultas moralis*, which was a central concept in the natural law philosophies of Grotius and Pufendorf. On their analysis, as we have seen, a right was a moral power on the part of the right-holder over the object he owns or the actions of others to which he has a right of performance (Olivecrona 1969, pp. 150–151). And, Olivecrona points out (Olivecrona 1969, p. 155), since Grotius

and Pufendorf had argued that the *facultas moralis* was based precisely on an agreement, the fact that Locke ignores this concept makes it easier for him to reject the view that private property rights are based on some sort of an agreement between the people of the world. In other words, since Locke does not operate with the concept of a *facultas moralis*, he has rid himself of *one* compelling reason to assume the existence of such an agreement.

Beginning with the first question mentioned above, Olivecrona considers a passage in the *Second Treatise*, where Locke maintains that a person can appropriate objects as well as land by *mixing his labor with it*, and that the reason why this is so is that each person has the *potestas in se*, that is, property in his own person. Here is Locke:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his hands, we may say, are properly his. Whatsoever then he removes out of the State that nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by his *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others. (Locke 1988, pp. 287–288.)

On Olivecrona's interpretation (1974a, p. 225), Locke is here saying that making an object one's own is making it part of oneself, and that this means that nobody else can have a right to it. For if this other person had a right to it, he would have a right over the right-holder, and this would be absurd. Olivecrona argues that this is the *only* possible interpretation of this text. For, he reasons, Locke could not have meant that a person becomes the owner of an object when he has *created* it, or when he has *enhanced its value by his work*, since these interpretations could not be reconciled with the examples Locke gives. As Olivecrona notes (Olivecrona 1974a, pp. 225–226), the examples include picking up an acorn or an apple or drinking the water in a river, and these simple acts of appropriation involve neither creating the object nor enhancing its value by working on it.

Turning to consider the second question, Olivecrona observes (Olivecrona 1974a, pp. 227–228) that Locke makes a distinction between appropriating objects (movables) and appropriating land, and points out that appropriation of land is more difficult to justify than appropriation of objects. For while the idea that a person can make an object his own by mixing his labor with it may seem reasonable in the case of acorns, apples and similar things, it may seem less reasonable in the case of land. But, Locke insists (1988, p. 290), the principle is the same in both cases. However, as Olivecrona explains, it is clear from what Locke says on the topic that there is in the case of land one more condition that must be satisfied, namely that the land be *delimited*. Olivecrona writes (1974a, p. 228): ""He [the occupant] by his Labour does, as it were, inclose it from the Common," Locke says in the introductory

paragraph to the exposition on the appropriation of land…. Enclosure therefore seems to be an essential feature in the appropriation of land: the effect of the labour is that the land is considered to be enclosed."

Finally, Olivecrona turns to a consideration of the third question, which concerns what Nozick (1974, pp. 178–182)) refers to as the *Lockean proviso*. The question is whether, and if so how, a person can appropriate objects or land without harming anyone else in the process. If he can do that, his appropriation seems prima facie to be justified, since it seems that no one can have a legitimate complaint unless he or somebody else has been harmed; if he cannot do that, the appropriation seems prima facie to be unjustified. Locke's solution to the problem, Olivecrona explains, was to argue that an appropriation of an object, or a piece of land, would be legitimate *only* if the person acquiring the object left *as much and as good* for other people to acquire later, or, as Locke (1988, p. 288) himself put it, "at least when there is enough, and as good left in common for others."[11] Olivecrona writes:

> The solution to the problem was that people suffered no injury if there was as much left for them to appropriate in turn… This principle applied even when land was appropriated. If somebody enclosed a piece of land, this was not to the prejudice of others provided there was "still enough, and as good left". Locke goes to the length of contending that appropriating a piece of land when enough is left for others is just like taking "a good Draught" out of a river… This theory is supplemented by the thesis that during the first ages of the world nobody could "ingross" anything to the prejudice of others… Locke presupposes that hired labour was not used before the introduction of money. But what a man was able to appropriate by his own labour could not be very much… (1974a, p. 229.)

But, Olivecrona continues (Olivecrona 1974a, pp. 229–230), on Locke's analysis, there is a *limit* to appropriation set by one's needs. One cannot legitimately appropriate more than one can consume. In the words od Locke (1988, p. 290), "[a]s much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others."

At any rate, Olivecrona does not discuss the precise meaning of the phrase "enough and as good left," and one may wonder just how one is to understand it. In which circumstances has one person's appropriation left "enough and as good" for others? Consider, for example, a situation in which ten cows are grazing on a piece of land. If *A* appropriates cow *A**, if *B* appropriates cow *B**, if *C* appropriates cow *C**, and so on, then *J* cannot appropriate cow *J**, since this would leave *K* with no cow *K** to appropriate. But this also means that *I* made *J*'s situation worse, since *I*'s appropriation of *I** created a situation in which *J* could not appropriate *J**. Of course, although *J* could not appropriate *J**, he could perhaps *make use of J**, provided that this did not exclude others from making use of *J** as well. Does this, or does it not, mean that *I*'s appropriation of *I** left "enough and as good" for *J*?

Nozick (1974, p. 176) prefers the weaker condition—that "enough and as good" is left for *J* if he can make use of *J** without appropriating it—and incorporates it

[11] In my view, *Locke's* formulation of this condition suggests that he thought of it as a sufficient, but not a necessary, condition for justified appropriation.

into his entitlement theory. But Nozick's discussion of the Lockean proviso has been criticized by Cohen (1995, pp. 74–84), who objects that Nozick mistakenly assumes that the proper baseline for comparison is that the relevant objects or land remain common property (Cohen 1995, pp. 79–84). While I am not convinced by Cohen's suggestion that we should also take into account the possibility that some other person might have appropriated the relevant object or piece of land, I do believe that Cohen's lucid discussion sheds important light on the problem. But a consideration of Cohen's critique of Nozick's analysis would obviously fall outside the scope of this discussion of Olivecrona's discussion of Locke's theory of appropriation.

Olivecrona concludes his analysis with a few words about the above-mentioned labor theory of value, according to which a person adds value to an object or to a piece of land by "mixing his labor" with it (1974a, pp. 231–233; 1969, pp. 156–157). He emphasizes that it is a mistake to think that the labor theory of value is meant to *justify* the appropriation of property. Instead, his view, as we have seen, is that the justification of property appropriation turns on the incorporation of the object or the piece of land with one's *suum* and on the circumstance that the appropriator left "enough and as good" for others. Olivecrona infers from this that Locke's intention when introducing the labor theory of value must have been to justify the actual distribution of property in seventeenth-century England, where the differences between rich and poor were considerable:

> Locke probably often encountered the question how prevailing inequalities could be justified in spite of the fact that everything had been given to mankind in common… The theory of appropriation, which referred to the remote age of abundance, gave no satisfactory explanation of the contemporary situation. The supposition that glaring inequalities had been tacitly sanctioned by the agreement to introduce money was not much of an answer to the persistent murmurs about how strange it seemed that so many people have been deprived of their rightful share in God's donation.
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> The tenor of Section B [in Locke 1988, pp. 296–298] is to belittle the ground for such complaints. It is labour that puts the greatest part of value upon land, without which it would scarcely be worth anything. "Nature and earth furnished only the almost worthless Materials, as in themselves"… Therefore what has been taken from the common is insignificant. (Locke 1988, p. 232.)

Let us note in conclusion that Olivecrona's discussion of Locke's theory of appropriation, which is thus to be distinguished from the labor theory of value, is purely analytical and descriptive, and that it is unclear whether Olivecrona believes that this theory can justify property rights. But given that Olivecrona believes (i) that Locke's attempt to justify property rights depends on the assumption that each person has a private sphere, the *suum*, (ii) that the *suum* is a non-natural entity (or property), and (iii) that there are no non-natural entities or properties, Olivecrona clearly cannot accept Locke's line of argument. One may well wonder why he did not state this conclusion clearly.

14.6 Jeremy Bentham: An Empiricist Theory of Law

Olivecrona, who devotes only one article to the legal philosophy of Jeremy Bentham, notes with satisfaction that Bentham aimed for a thoroughly empiricist theory of law (1975, p. 97): "Bentham's theory represents a great attempt to give a coherent explanation of the phenomena covered by the word "law" on the basis of sensory experience." This suggests that Olivecrona takes Bentham to be a fellow naturalist in the field of legal philosophy. For, as we saw in Sect. 5.3, Olivecrona makes it clear in the preface to the Second Edition of *Law as Fact* that his aim is precisely to "fit the complex phenomena covered by the word law into the spatio-temporal world."

Olivecrona begins his discussion of Bentham's theory by pointing out that Bentham follows in the footsteps of natural law thinkers like Grotius and Pufendorf in assuming that law is the content of a sovereign will, although he (Bentham) was careful to point out that he would disregard the moral quality of the sovereign will in his study of the law. As Olivecrona explains (1975, pp. 96–97), Grotius and Pufendorf, as well as other natural law thinkers, had assumed that law possessed binding force, *vis obligandi*, which "created an inner necessity in those subject to it," and that this binding force was based on the social contract, which in turn derived its binding force from the law of nature. But, he continues, Bentham flatly rejected natural law thinking, arguing that knowledge depends on sense impressions and that this means that there is no room for a law of nature. Olivecrona writes: (Olivecrona 1975, pp. 96–97. Footnotes omitted): "He [Bentham] firmly adhered to an empiricist philosophy… This theory of knowledge left no room for assuming the existence of a law of nature. The law of nature was a "formidable non-entity," "an obscure phantom." The chimera of an original contract had been "effectually demolished" by Hume. This fiction might once have had its use in the political work, Bentham concedes. "But the season of *Fiction* is now over," he [Bentham] adds."

According to Olivecrona, Bentham was above all concerned with the question, "What is a single law?", what Raz (1980, pp. 70–92) would later refer to as the problem of the individuation of laws. Olivecrona (1975, p. 99) considers in some detail Bentham's analyses of the concept of *a law*, according to which a law is roughly "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state," and the concept of a *sovereign*, according to which the sovereign is the person or persons who possess actual supreme power in the community.

Having reviewed Bentham's analysis, Olivecrona identifies two problems in it, namely that it is difficult to show (i) that the common law, conceived of as a collection of rules derived from precedents, is part of the content of a sovereign will, and (ii) that the laws of previous sovereigns are part of the content of the sovereign will (Olivecrona 1975, pp. 105–107). He notes that Bentham's solution to these problems was to announce that the common law is no law at all (Olivecrona 1975, p. 105), and that the present sovereign "adopts" the laws of previous sovereigns (Olivecrona 1975, p. 107). The root of these difficulties, he continues, is to be found

in the idea that *a law is the content of a sovereign will*, which he (Olivecrona) calls an unempirical and unjustified assumption. Bentham, he complains, does not start his investigation into the nature of law with an open mind:

> As he states himself, he took his point of departure in the theory that "the body of law" is a collection of "expressions of will" by the sovereign power. He inherited his theory from natural law doctrine and never questioned its validity. His treatise may be regarded as a magnificent attempt to reconcile the will-theory to empirical facts. He thought that this could be done only if the theory were shorn of the natural law framework on which it had previously rested. If the ideas of a law of nature and of a social contract were discarded as having no foundation in experience, the body of law would appear nakedly as the sovereign's commands and prohibitions. This preconceived idea took precedence over unbiased observation of social facts. When the implications of the will-theory were at variance with existing conditions, some juridical construction was supplied to fill the gap. The sovereign's adoption of old laws is a case in point. Sometimes this attempt to harmonize theory and reality broke down altogether, as when it proved impossible to find a place in the system for the principal part of the laws of England, the common law. (Olivecrona 1975, pp. 107–108.)

Olivecrona maintains, more specifically, that Bentham's attempt to define the concept of a sovereign exclusively in non-legal terms fails, because the sovereign's power is not, and cannot be, independent of the law (Olivecrona 1975, p. 108). Hence it would amount to circular reasoning to argue that the law is the content of a sovereign will. Thus Olivecrona is here repeating the objection raised by Axel Hägerström to will theories of law, discussed in Sect. 4.5, namely the objection that law cannot be the content of a sovereign will, because the power of the sovereign is dependent on the existing law. But, as I said in Sect. 4.5, while Hägerström's *reasoning* is clearly sound, one may wonder about the truth of the *premise*, that is, the claim that the power of the sovereign is factually dependent on the existing law. Could there not be a person who has the necessary power over the people independently of the law? Having thought about it, I am, however, inclined to answer this question in the negative.

Bentham's view that the citizens are disposed to obey the sovereign is thoroughly criticized by Olivecrona, who maintains that in reality the citizens obey the law not because they respect the King or some other individual, but because they revere the constitution:

> There was certainly widespread loyalty toward the King, Lords, and Commons. But the loyalty was toward the institutions, not toward certain individuals. The persons who were members of the lawgiving body got their positions by virtue of constitutional rules about elections and succession. They exercised power by proceeding according to constitutional rules about sessions, voting, etc. The final exercise of power took place when King, Lords, and Commons were "in Parliament assembled" and the royal assent was given.
>
> It is therefore apparent that legislative power for certain individuals derived from the constitution; and the constitution was a source of power because it was the object of general veneration. Moreover, the legislative process could only take place in an ordered society, governed by rules of civil and criminal law. The constitution functioned as part of the law as a whole. The possibility of lawgiving with practical effect therefore derived from the entire legal system and its hold on the minds of the people. (Olivecrona 1975, p. 108.)

We see that Olivecrona is here invoking his own view, discussed in Chap. 8, that legal rules are not declarations of will, but independent imperatives that influence the citizens because they possess a suggestive character. On this analysis, the relevance of legislation in accordance with the relevant rules in the constitution is that the product of legislation—that is, the statute(s)—becomes psychologically effective, that is, comes to possess a suggestive character, on the grounds that the citizens revere the constitution and are therefore disposed to obey acts of legislation that they can trace back to the constitution. He writes (Olivecrona 1975, p. 109): "The psychological effect of promulgating a text as a law was therefore to invest it, in the eyes of the citizens, with a new quality: that of being a law. Thereby, automatically and without a question, it was placed within the great system of rules to which obedience was due."

Olivecrona concludes his analysis of Bentham's theory on a positive note, however, emphasizing his admiration for Bentham's groundbreaking work:

> After more than two hundred years much of Bentham's thinking is, of course, open to criticism and sometimes obsolete. Still, his work makes fascinating reading, and it remains truly a milestone in the history of legal theory. When seen in the context of his time, Bentham's approach cannot fail to arouse admiration. With his principle of investigating the facts covered by the term "law" in a strictly empirical way he introduced something radically new. For those who adopt such a principle (though not necessarily Bentham's epistemology), it is most instructive to follow his argument with a critical mind. In particular, the lucid exposition of the will-theory serves to lay bare its weaknesses. (Olivecrona 1975, p. 110.)

I share Olivecrona's concluding assessment of Bentham's legal philosophy. But I also share Olivecrona's view that Bentham's will theory is unacceptable, and I was surprised to learn that H. L. A. Hart nowhere mentions Olivecrona's interesting critique in his own masterful discussion of Bentham's legal philosophy (Hart 1982).

The main reason why I find Olivecrona's critique of Bentham's analysis to be so interesting is that it is clearly dependent on Olivecrona's own legal philosophy, specifically the belief in ontological naturalism, the critique of will theories of law, and the view that legal rules are independent imperatives that possess a suggestive character, on the grounds that the citizens revere the constitution. While it is obvious that Olivecrona appreciates Bentham's legal philosophy, he clearly believes that Bentham was not a thoroughgoing naturalist, since he deviated from the tenets of naturalism at crucial points. In this regard, his analysis of Bentham's legal philosophy differs a bit from his discussions of the nature of corporations in Roman law, the natural law philosophies of Grotius and Pufendorf, and Locke's theory of appropriation of property. While his discussions of those theories are both illuminating and interesting, they are not as clearly connected with his own legal philosophy as is his discussion of Bentham's theory, even though they do identify and discuss examples of non-naturalist, even magical, thinking that he thought was still present in contemporary legal thinking.

Let us note in conclusion that Olivecrona speaks of *empiricism*, not naturalism, in his discussion of Bentham's legal philosophy. But while empiricism, as we have seen, is naturally conceived of as an *epistemological* theory, or family of

theories, according to which we can have knowledge only of that which we can detect using our five senses, Olivecrona's naturalism is *ontological*. The empiricism that Olivecrona has in mind is, however, a natural, albeit not a necessary, epistemological companion to ontological naturalism.

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