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THE IMPORT OF ORDINARY LANGUAGE PHILOSOPHY
FOR LEGAL THEORY.

A Thesis submitted by Vincent N. Corrigan, LL.B.
for the Degree of Master of Laws.

GLASGOW UNIVERSITY.

1978.

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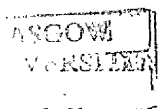
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Summary.

The general theme of this thesis is an exploration of the relationship of Legal Theory to the general part of philosophy. Ordinary Language philosophy is uniquely role-conscious, concerned not only with the what but with the why of philosophy; as such, it offers jurisprudence not only a contribution ab extra, but holds forth a more intimate offer in a role of philosophy which it may adopt to rehabilitate or accommodate itself within the realms of that very philosophy.

This general theme is sometimes explicitly considered, but is implicit throughout the four chapters of this thesis, of which the following synopses are provided.

CHAPTER 1.

ORDINARY LANGUAGE PHILOSOPHY

The development of this modern philosophy is traced from its earliest adumbrations in the concerns of Frege and Russell with logic and language. The career of Wittgenstein, universally recognised as its most influential, if its most idiosyncratic philosopher, is used as an ideal narrative vehicle for the chronicling of that development, and the ideal exponent of its characteristic doctrines. The ideas of the earlier and the later Wittgenstein are in turn considered with due regard paid to his methodological and substantive contributions and the extent to which these changed, endured, or interinformed throughout his philosophic development.

Finally, his relationship to the generality of ordinary language philosophers, is considered by means of a comparison with Gilbert Ryle, equally a member, if less

the leading light, of that movement.

CHAPTER 2.

ORDINARY LANGUAGE PHILOSOPHY AS APPLIED TO LEGAL THEORY

To illustrate this, the writings of H.L.A. Hart are considered, firstly, to exhibit how the methods and substantive ideas of that philosophy can, almost intact, be applied within jurisprudence; secondly, it is shown, beyond this mere fact of application, that Hart's insights are not only successful applications, but are effective almost in proportion as they are exact applications of that philosophy's insights.

Two major contributions by Hart, those on Ascriptive Language, and the Law as a system of rules, are subjected to an in-depth and corrective criticism. This chapter concludes with a brief statement of the significance of the argument to date upon the relationship of legal theory to general philosophy.

CHAPTER 3.

ORDINARY LANGUAGE PHILOSOPHY - REVIEW AND CRITICISM

Here are treated several criticisms of crucial importance to this philosophy, the rebuttal of which is necessary to confirm our earlier advocacy of it as the most rewarding method of philosophy.

Firstly are considered criticisms made by structural linguists, that ordinary language philosophy, especially Wittgenstein's, is too much an abreaction from the errors of Logical Positivism, and so misconceives the role of language in philosophy.

Secondly, a set of criticisms, made by several philosophers, among them, phenomenologists, is considered to the effect that this philosophy has too arbitrarily

and too behaviouristically excluded the "inner" or the "mental" from philosophy.

Thirdly, an attempt is made to characterise, or expose the manner of conviction sought and achieved by this philosophy to vindicate it against charges of subjectivity.

CHAPTER 4.

JURISPRUDENCE - AN ALTERNATIVE APPROACH

To provide a useful comparison, Scandinavian Realism, and the writings of Olivecrona, among other realists, are examined. As a relatively modern school in jurisprudence, its development, and that of Olivecrona's thought, are traced to reveal the important formative influences, upon Olivecrona, of the theories of Petrazycky, and upon both, the broadly anti-metaphysical movement in philosophy of the early part of this century.

Olivecrona's ideas are critically evaluated with reference both to ordinary language philosophy, and to other theorists of the realist school.

A comparison of the Realist and the Linguistic approach, as a philosophy of law, concludes this chapter.

CHAPTER 5.

A SHORT EXERCISE IN JURISPRUDENCE

The thesis is concluded with a brief practical example of the use of a linguistic approach as a solvent to some traditional problems of legal theory. The grammar of the legal rule is examined to provide a distinction between rule as practice and ruling as 'speech-act'; this distinction is then applied to the relationship of the courts etc. to the corpus of legal practice and behaviour in both municipal

and international law, and usefully extended to provide some insights into the interrelationship of those two structures of law themselves.

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CHAPTER 1.

Ordinary Language Philosophy

CHAPTER 2.

Ordinary Language Philosophy Applied to Legal Theory

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Ordinary Language Philosophy - Review and Criticism

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Jurisprudence - An Alternative Approach

CHAPTER 5.

A Short Exercise in Jurisprudence

CHAPTER 1.

ORDINARY LANGUAGE PHILOSOPHY.

To give, in an essay on jurisprudence, first and cardinal importance to the works of Wittgenstein, and writers and theorists who share his approach to pure philosophy, stands in need of some apology, if only to lawyers and jurists whose recourse to the abstractions of purely philosophic works (sc. those not applied to legal problems) has been infrequent.

Since the whole tenor and argument of the chapters which follow is precisely to demonstrate how large a jurisprudential fabric can be rested on the foundations of ordinary language insights and methods, I shall here offer only a short justification, by way of preface, of the approach adopted lest any reader feel discouraged by the (only) apparent irrelevance of the themes initially introduced.

In theory, there is not, and I have never seen anyone argue directly that there is, any boundary at all to be drawn between philosophy, tout court, and legal theory or, if preferred, jurisprudence. (Here no distinction is made between these terms). I omit to make much mention of Roscoe Pound's pragmatist approach, in his Philosophy of Law¹, where he sees philosophy, per Dewey,¹ as the analyst of the values of the times, and can therefore conceive of jurisprudence as merely the tabulator and explicator of law as seen and operative in our era and society. Now that pragmatism has been rehabilitated from those excesses of that relativism with which it shocked us in its infancy, few would like to imagine philosophy as circumscribed either in its objectivity or in its relevance to particular disciplines. Nobly, it is seen as available to the solution of problems etc. in every field of human activity.

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In fact, however, jurisprudence, at least that of English-speaking universities, operates at some remove from general philosophy. This distance could be instantiated on a variety of planes; for example, a noticeable time-lag separates the philosophically avant-garde, even the modern, from its appearance in or ingestion into, legal text-books. At universities law faculties behave with an isolation more typical of professional lawyers than academics; in application, too, jurisprudence, if seen as worthy of any prominence, or even bare inclusion in a syllabus, is felt to be of necessity of a practical orientation, to review, or hover near to, the phenomena of the courts, statutes, criminal behaviour or contracts etc.; to such an extent is this so that, in some particularly shallow pieces,² it ranks merely as a prosaic journalistic coverage of court work and decisions on conceptually "tricky" cases.

Further exemplification of this poor contact on the part of jurisprudence, its shallow short-changing treatment of problems epicene to philosophy, is presently unnecessary, as such is later to be substantiated in full; but so much, I think, has been said at least to clear the way for the ensuing attempt to approach jurisprudence, or to demonstrate such an approach, only after some generally valid philosophic ground has been established. It is in this regard that ordinary language philosophy is, besides being to jurisprudence new-fangled, a "paradigm case"; it offers, explicitly in Wittgenstein, both a method of philosophical analysis, a set of "doctrines" or insights, and, most importantly, a description of the role philosophy will play vis-a-vis other disciplines, and here is meant rather the study of law, than

jurisprudence. It may well be that, however well such a case were argued, however damnatory an indictment it proved against current researchs and, indeed, current authorities within jurisprudence, the ideal of the "Philosopher-Lawyer" will be as impracticable as an earlier "Philosopher King". It will yet be stressed that, until such a radical new approach is used, until the devices of modern philosophy are pressed into the service of the law, jurisprudential books, articles and perhaps research, will seem to any critical philosophical eye, as superficial, shallow and of little or no use outwith that narrow market, of undergraduate and "thinking" lawyer, the past practice of jurisprudence has created for itself.

The Philosophy of Wittgenstein.

Wittgenstein's career in philosophy is unique in ways more numerous than can shortly be mentioned; of all his distinctive and unparalleled achievements, feats, insights or behaviours, however, I could best commence by the introduction of the "earlier" and the "later" Wittgenstein. While these "nicknames" are as commonplace as they are vital to any treatment of the philosopher, or of ordinary language philosophy, they must be introduced at the outset of our argument addressed, as it is, to the philosophy of law. For many philosophers produce one weltanschauung, the one and only statement of their philosophical 'confession'; some, unfortunate, or perhaps unequal to the magnitude of the problems they grapple with produce a plurality of philosophical accounts which, in fairness, show a pattern more of vacillation than consistent or continuing development. Wittgenstein alone, in a working

career from 1912-1953 produced 2 almost complete, and mutually disparate, philosophical statements; the earlier is contained in the Tractatus Logico Philosophicus,³ and the later, in a variety of loosely-knit collections, of which the Philosophical Investigations⁴ is the best known and annotated. We may pro tempore, characterise the former as a categorical and a priori description of the relationship necessarily obtaining between thought, language and the world, the latter as a more fluid and dexterous treatment of the same matters, to which no such peremptory, though no less complex, a categorisation is applied. Each of these philosophies was widely accepted, acclaimed and dominant in the age of its promulgation; to such an extent that, in understanding his works, in seeing them as, between and betwixt the two, some unum quid, or through-going and consistent body of thought, it is necessary to attempt an examination of each corpus of thought, early and later. Only then may be identified what continuing elements characterise both, given that the later Wittgenstein i.e. that of the Philosophical Investigations,⁴ has much to say in direct criticism of his earlier publications.

A further complication than the temporal length and variety of Wittgenstein's philosophy, is its sheer breadth of application, and the appeal it provides to a scholar of any discipline, mathematics, physics, moral philosophy, logic etc. This would make any exhaustive treatment of his contributions to them beyond the reach of anyone not the equal of their author. It is doubtless in consequence of this amplitude of thought that the shelves of libraries abound with summaries of Wittgenstein's thought, or summaries of

its development, or its author's career of thought etc., seen from a bewildering number of viewpoints.

I apologise, then, for now adding yet another summary account, lest it be considered that I presume to censure existing summaries as inadequate, or inferior to what I might provide. Rather, it will be my aim to sift out of the vastness of Wittgenstein's works, those insights which, it is believed, can be directly of service in the prosecution of, and the solution of the problems of, jurisprudence. It is hoped, further and just as importantly, by the expedient of comparing the thought of the earlier Wittgenstein and that of the later, as Wittgenstein himself did, there can be identified the genesis and the subsequent operation of a quite novel philosophical method which some, e.g. Strawson⁵, have with reason considered as Wittgenstein's foremost contribution to philosophy.

The Earlier Wittgenstein.

The Tractatus Logico Philosophicus stands apart from any other philosophical work, even from later writings of its author. It is, in style, terse, elliptical, severe and almost biblical in its enunciation; still more awe-inspiring, it professes openly to be the last word in philosophy, a profession which its author, at any rate, took and meant seriously enough to abandon philosophy for some 10 years or so.

Treating it, anyway, as the "last word", our understanding of the import of the Tractatus will be facilitated by canvassing what the earlier words were in the philosophical problems on which the Tractatus was, in its author's eyes, the final arbitrament.

Frege⁶ and Russell⁷, to whom Wittgenstein acknowledges a great debt, had made important discoveries on the nature of language in the course of their endeavours to express arithmetic/mathematics as, au fond, a logical system governed by finite axioms, just as, in fact, Euclidean geometry was so governed. In applying the algebraic notions of 'function', 'argument' and 'value' to the 'predicate', 'subject' and truth value of the proposition, it was discovered that language was somehow too lax, or equivocal as expressed, to function with the consistency and coherency one has in arithmetic or any other axiomatic system. Sentences such as "The present King of France is bald" seemed, as stated, to elude categorisation as true or false. The role of proper names, as against 'universals' further complicated any straightforward grasp of the logical implications of sentences containing them.

The important upshot of this was the determination to re-express ordinary language in an economic and unequivocal language of logical symbols, whose operation would be a priori and, in isolation from ordinary parlance, governed by the determinate axioms of a logical system, i.e. a "propositional calculus" was invented. As in all idealist programmes, snags later occurred: the notion of set, introduced to define natural numbers, and in language, to depict the structure of logical implication and inference yielded insoluble paradoxes. Russell's own remedy, of a theory of types, to outlaw classes of classes, and of an axiom of infinity, to allow for a definition of natural number not dependent upon classes, proved unacceptable.

In an important respect, then, the Tractatus must be seen as complementary to, and critical of, the work of Frege and Russell: in another equally important

respect the Tractatus accepts a similar general view of the nature of language and its relationship to the world of facts.

In the former regard, Wittgenstein diagnosed Russell's error re classes as an illegitimate attempt to state 'semantic' laws, where really only 'axiomatic' laws are applicable to bare symbols. Further, he considered that the Frege-Russell treatment of the logical structure of language as aimed at, or concerned with, propositions nearly in the form of ordinary language e.g. "Socrates is Greek", or "All Athenians are Greek" was still too shallow. Their intractability to consistent logical re-ordering was due to the fact that these sentences are, despite appearances to the contrary, complex. A correct exposition of the logical form must reveal the elementary propositions which are the components of any proposition of our language as we see it.

In the latter regard, it is important to understand just how much, and it was a great deal, of the Russell "stage-setting" that Wittgenstein does in fact incorporate.

1. It is accepted that there underlies our ordinary expression of a proposition a logical form which only careful analysis will reveal. This structure will be set out systematically to reveal, in logical form, the structure, in Wittgenstein's case, of the world mirrored or represented by language, just as, in Russell's case, logic represented the structure of mathematics.

2. It is accepted that the proposition is the basic unit of language, that it is truth-functional: it says

"what is the case". What does not have this truth functional quality is ^{either} a tautology, which says nothing of the world, or is said in total alienation of sense.

3. A proposition derives its sense according as it properly reflects reality.

4. Philosophy is composed of logic and metaphysics; that is, the business of philosophy is to show the real structure of a proposition, and to apply that accuracy so obtained to unravelling the mistaken metaphysics of 'subsistent' meanings⁸ and all such like 'essences' which have hitherto filled the vacuum of philosophical puzzlement.

From these two sources, a recognition of, and acknowledged debt to the pioneering work of Frege and Russell, and a criticism of its shortcomings, Wittgenstein fashions a philosophical theory distinctly his own, but which is directly intelligible as an alloy of those component influences which shaped it.

In the Tractatus, then Wittgenstein professes to exhibit the relationship of language, thought, and the world, or all that is the case. We are told briefly, and with the sense of one being a privileged guest at the fount of definitive knowledge, the following tenets of a new and final philosophical credo.

1. The world is composed of objects which are combined in their being into the facts of reality. These facts in turn combine to form a state of affairs.

2. These objects, facts and states of affairs, and their relationship are mirrored in language. This consists of names, for objects, which combine into elementary propositions, which in turn combine into

the familiar propositions of ordinary language.

3. The relationship of 1 to 2 is pictorial, in that the state of affairs, of the world, shares the same logical form as the proposition, of language, that states that it is the case or not. This pictoriality is just like that of the courtroom "mock-up" using models etc. of the facts in issue in a case.

It is to be noted that Wittgenstein considered it unnecessary, not difficult, to identify what a 'simple' object was, or to example an elementary proposition. His atomism was a logical necessity, not an empirical contingency, and that was no business of philosophy. His logical certainty of this relationship, and the existence of simples, is based on his utter conviction that this had to be the case, or language and the world could not be the case.

4. Propositions are true or false as they describe a state of a affairs, obtaining or possible.

5. Since the world is composed of objects combined into states of affairs elementary names and propositions describe the totality of all possible and actual states of affairs according as they combine throughout the whole gamut of their combinations. As earlier said, Wittgenstein was helped towards, or led to this reduction of the world to 'simple' objects, and language to 'elementary' propositions to avoid Russell's Theory of Types. He proceeds to construct a set of truth tables which combine conjunctively, not hypothetically, elementary propositions, composed of simple objects, into the totality of those statements of which alone it may be said "true or false."

6. What does not, like such a proposition, say something in picturing the world is nonsense - and cannot be said. Tautologies say nothing of the world, and fail of effect by trying, like the dog trying to eat its tail, to picture their own logical form. Statements of metaphysics too, cannot exist, as, not picturing reality, they can have no logical form. Finally, and most enigmatically, the sentences of philosophy, as exegetic of the 'phenomena' of logical form and pictorial relationships, which are neither 'simples' nor any complex of such, cannot mean anything.

7. It follows that there is logically a limit to what can be said - the world of reality, or the possible, is the limit of language. What we cannot say e.g. a proposition of philosophy, we can at least allow that it shows something, while recognising its lack of propositional sense. In a nutshell, the logical form of ^{such} a proposition must exist, but as it is not of the stuff i.e. simples, that facts and propositions are composed of, we cannot say it exists: saying it, however, does show its operation, though the proposition making such an assertion is strictly not meaningful.

8. It will, given the validity of 1-7, henceforward be the business of philosophy to do no more than point out where the limits of language and sense have been overstepped. In Wittgenstein's own terms then, whenever someone says something metaphysical we shall simply point out that he has failed to impart any meaning to his terms. Equally, there can be no 'propositions' of ethics, or aesthetics etc. Indeed, conclusions like these and others of Chapter VII of the Tractatus seem

to toll the knell of philosophic aspiration and method as then known, however much they are the inexorable, pitiless conclusion of the preceding argument. As we flounder in the vacuum of speech and sense which Wittgenstein has made out of conventional philosophy, he further complicates our perplexity by introducing i.e. showing, not saying, a somewhat mystical account of what, possibly, can be left over for philosophic consolation or meditation, beyond the limits of language and the world. This is not how the world is, (since he has now demarcated its limits, as at one with those of language), but that it is. But the mystery of its existence in the existentialist manner, like that of ethics, aesthetics, poetry etc. and all that we recognise perforce as not traceable to reality, or expressible in genuine propositions of truth or falsity, seems to lie in the realm of the merely "showable". If it helps to clarify the embarrassment of our perplexity, it lies in the realm of the senseless which is not like a contradiction, or a tautology; these say nothing of the world, being, respectively, analytically false or true. Nor is the fact of the world's being a statement of metaphysics which neither says, nor shows anything. Rather the totality of facts that are the world is beyond the limits of a language which may exhibit the propositional form only of facts within that totality; language can do no more than show, but not depict, this existence.

Before addressing any criticism to this picture of the world and philosophic analyses of it, certain important themes manifest within the Tractatus should be identified as characterising, in one mode, continuing

leitmotifs of Wittgenstein's philosophy which survive the "wreck" of the Tractatus. Indeed, in view of my overall purpose, it is relatively immaterial what are, for example, the flaws in the 'picture-relationship,' or just where logical atomism is wrong etc.; my present concern is to note the continuing themes in Wittgenstein's philosophy and to see how these were orientated, or redirected in response to a diagnosis of faults such as in Logical Atomism, or the proposition as a 'complex' or a 'simple' etc.

1. Generally, Wittgenstein fundamentally sees the solution of the problems of philosophy as achievable only by means of an examination of language: how language works is how we think; it is, somehow or other, the mode of rendering the world intelligible.

2. Language needs analysis; we can be "beguiled" by a failure to identify accurately what a sentence, a word, or a proposition performs. The 'surface' grammar is equivocal, and any superficial intelligence it holds forth must be sifted to disclose the nuances of a deeper grammar, underlying it, as in the Tractatus, or somehow otherwise implicit in it like the many facets of a cut stone.

3. The role of philosophy is to describe, not to discover. It will show what always, of meaning or truth or significance, has been there: it will not, as some natural science, synthesise or fabricate or invent, ex nihilo, something new. It is in this uncovering facility of philosophy that the philosopher will achieve his goal i.e. to get a clear sight of things as they are, such that, no further philosophical

perplexity existing or sullyng the clarity of our vision of reality, he may in peace and contentment, give up his philosophy.

I shall purposely eschew any more particular description of these 3 major themes, or indeed, add any supernumeraries: it is not to be denied that all manner of particular parallels could be drawn between themes of the Tractatus and the same echoed in later works; it is the delight of one or another commentator upon Wittgenstein to see the picture-theory, or atomic facts, or the 'proposition' etc. etc. alive and well in the Philosophical Investigations⁹ or the Brown Book¹⁰ or doctrines of logical form in On Certainty.¹¹ I submit that this labour on their part is, at worst, highly tendentious and hair-splitting, and at best, adding but little, and that only in details, to what are above set out broadly as the principal continuing themes in Wittgenstein's philosophy; these will be exemplified in later consideration of his writings after the Tractatus.

To return, then, to the instant criticism of the Tractatus, notwithstanding the powerful, compressed and tightly-knit force of the argument, once its initial "shock" has been absorbed, there must be noted certain matters not sufficiently enlarged upon in the text.

Firstly, Wittgenstein mentions, or rather legislates that there must be elementary propositions, that there must be 'simples' to which names are attached. Yet nowhere are they exemplified; indeed no clue is offered as to how we (i.e. when not doing philosophy) should go looking for them. Doubtless, we could, as the Logical Positivists¹² did, identify these as elementary 'sense-data' and incorporate them, together with Wittgenstein's stress upon the centrality of the truth-functional

proposition to philosophical rectitude, into that philosophy which sees the meaning of a statement as its method of verification (verificationism).¹²

For those not so inclined, however, sense-data seem as elusive in empirical application to concrete examples of meaningful language, just as much acts of faith as the simples they are replacing. A table is not a 'complex' of simples, "legs", "shape", "atoms", "perspective" etc., and if 'simples' are not these, it is surely too much to accept Wittgenstein's stipulation of the logical necessity of their being, as base elements in a proposition, solely to underwrite the picture-relationship of language to the world.

Further, this picture-theory, on closer analysis seems to be divested of its initial attractiveness as seeming to indicate what all propositions do. We may consider propositions which advert to a composite situation e.g. "All the players in the team are wearing green jerseys", or "All even numbers are divisible by two" - it seems impossible or, if not, highly implausible to interpret these, per the picture theory, and the atomic view of propositions as composed of elementary parts, as "x wore a green jersey..." "y wore a green jersey..." etc. etc. This enumeration, anyway, in universally quantified (e.g. open) statements, is impossible, and the need always to 'decompose' a proposition into its elements renders complications which may easily be imagined, in all manner of disjunctive statements; e.g. "this is either red or not any other colour than blue", would, per Wittgenstein's account, have to be reduced to as many propositions as there are colours excluded.

Thirdly, Wittgenstein maintains in the Tractatus

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as a stipulation vital to the whole argument, that all elementary propositions are mutually independent. This is a necessary requirement in the construction of his truth-table schematisation of all possible states of affairs. In virtue of this, a statement that "x is y" pronounces not only its own factuality, but the simple non-factuality of all contrary situations. Now, for the pool of such elementary propositions to represent all possible states of affairs, it is necessary that their power of combination be not circumscribed e.g. by one being conditional upon another. In fact, however, many propositions of our language do imply a variety of consequent propositions, and the original of a variety of elementary propositions would, in virtue of its consequents, alike complex, effectually pre-condition the truth or falsity of other elementary propositions.

The importance of these criticisms is not that they prompted Wittgenstein or anyone else, to try to make a better picture-theory, or plug the gaps in logical atomism; in fact, little or no attempt was made on his part to defend his theories in these regards. Rather their significance was in the effect they had upon their author to examine not the articles of his philosophic creed but, much more radically, to review those philosophical methods which he came to believe had misled him into the enunciation of such theses. It is this fundamental overhaul in his philosophical methodology on Wittgenstein's part that, more than anything else, accounts for his pre-eminent position among modern philosophers. So important is this methodological concern on his part that we can see his future philosophical writings, in one major dimension

not as substantive contributions or essays upon particular problems, but rather as repeated self-schooling in a correct method of doing philosophy. In Wittgenstein, then, it is no exaggeration to say that the method is elevated to equal importance with the subject matter; while none doubted, either before Wittgenstein or after, that, in philosophy, the method and the subject-matter are mutually-conditioning, the unprecedented primacy now given by Wittgenstein to the method is unquestionably revolutionary.

In our examination, then, of the later Wittgenstein, that is, his career subsequent to the Tractatus and the realisations of its errors and what caused them, there will be seen an amalgamation, or co-operation, of those three signal themes set out above on the role of language in philosophy and the goal of philosophy, and a new method of analysis, with each, theme and method, informing the other.

The Later Wittgenstein.

I do not think we do Wittgenstein an injustice in presenting only two representations of his philosophic thought over a period of 40 years. It is realised, of course, that to some extent his radical alteration of earlier opinions was a gradual phenomenon. Much time and discussion could be expended in tracing in the note-books, even of 1913, undeniable adumbrations of his later views, such as "Distrust of grammar is the first requisite of philosophizing" (Notes on Logic)¹³ in like manner, we could dissect the Blue or Brown Book¹⁴ authentic statements or versions of the author's thought in the period 1930-33 and say what looks back to a rigid view of language and philosophy, or still hankers after a 'pictorial' rendering of the proposition. There

might be found much that is indistinguishable from the more mature and considered writings of the philosopher in later years: the notion of the language-game is most prominent, indeed almost full-grown, in the Brown Book.¹⁴

All this is indisputable; yet it will suit our purpose, and indeed conform to Wittgenstein's last and most certain opinion on the course of his own philosophical career if we contrive, by foreshortening the sequence of time and thought-development, a somewhat sharper contrast between the later and the earlier Wittgenstein. This stark contrast will be achieved in order to highlight the changes in methodology, for, as I hope to argue, the basic themes remain, in substance, similar.

In the Philosophical Investigations, then, the most mature and comprehensive of his writings, Wittgenstein himself looks from a distance at the Tractatus and offers a diagnosis of the faults which rendered that work unsatisfactory; this may well serve as the best introduction to the description of the ideas later put forward. The tone of the latter work, relaxed and informal, and without any serious attempt to arrange in any systematic chapter and verse, immediately marks the contrasts to be drawn from the Tractatus framed as that work was in a tight, almost breathless, compressed style, with a numbering system of almost mathematical precision. His self-condemnation is candid and explicit, and allows our objective criticism of the faults of the Tractatus, not an opportunity merely to agree or disagree with the opinions of a critic of his own work, open to suspicions of bias and evasiveness. I shall consider these criticisms in temporary isolation from what insights and replacement

doctrines they led to, for there will emerge such a clear link between the two that a temporary severance will not obscure this clarity. I shall refer later to these errors, as diagnosed, by the serial number here attached.

1. Wittgenstein first makes an assault upon his own view of the name-object relationship, one, however, by no means uncommon in the course of philosophy. The view is that a word functions only as the name of an object; that we learn a language simply by being presented with an object, and then being given a name to it, like some label or recognition "tag". In the Philosophical Investigations, the version of this theory recorded is that of Augustine,¹⁵ but it could equally well be that of Wittgenstein as exhibited in the Tractatus. This view in the Philosophical Investigations, is now subjected to lengthy criticism, one which amounts to an empirical testing of this "explanation schema" of "naming by word" in a variety of ordinary circumstances. Its total inadequacy is demonstrated by the overwhelming weight of instances of word-usage so diverse and differing from that limited sphere of operation where a name-object mechanism does work i.e. the primitive 'language games' of para 2. and para.8.¹⁶ This leads, and here methodological considerations are paramount, to:-

2. In the Tractatus, Wittgenstein's approach had been a priori: as he says¹⁷ "The answer to questions (so it seemed) is to be given once and for all and independently of any future experience", and later¹⁸ again "tongue-in-cheek", "Yet this is how it has to be..." He elsewhere diagnoses his mistake here as stemming from a desire to fabricate a solution, and then, like some Procrustes, construe all facts to fit the a priori mould prepared for them, "as a requirement"

or a "must" dictated in advance by the pattern of our views. He says¹⁸, in the same spirit "We predicate of a thing what lies in the method of presenting it..." He says in Zettel¹⁹ simply and illuminatingly, "We want to replace wild conjectures and explanations by quiet weighing of linguistic facts." We can remember what of the a priori had informed the author of the Tractatus.

- a word names an object (see 1)
- atomic 'simples' must exist, the "must" here being a requirement of logic.
- a proposition has the shape of "This is how things are.."
- there can be no propositions of ethics etc. etc..

Indeed, these pontifications, and a host of others, there being no shortage of them in the Tractatus, were all stated, merely as true, and left unexampled, unvindicated and most grievously of all, quite unconsidered in relation to reality. Henceforward, a new almost fanatical empiricism will replace this a priorism.

3. The proposition of the Tractatus was taken as simply of the form "This is how things are". He returns to this earlier arrogation on his part²⁰ "A proposition (seemed) a queer thing...we sublime the signs themselves... we assume a pure intermediary between the signs and the facts" (sc. a pictorial relationship). All this is jettisoned by the empirical consideration of examples of what a proposition can be used for, and how little a part of its meanings and roles are to state "This is how things are."

4. He had earlier established a distinction between 'simple' and 'complex'. This distinction is applied at

two levels; firstly, a word, such as "table" was seen necessarily as signifying a combination of elements within it; and secondly, a proposition as uttered was to be resolved, for the purpose of exposing the mode of its significance as a proposition, into a set of elementary propositions, which determined its truth value.

This black-and-white a priorist distinction is demolished within the Philosophical Investigations;²¹ the mundane example of the name "Excalibur" which survives the dismantling or destruction of its bearer is sufficient to expel this error. There is equally no justification upon empirical examination for supposing that ordinary propositions as spoken should be rejected as inferior to some ideal construct of a philosopher unable immediately to fit it to his idealised ends. He writes,²² by way of autobiographical comment on this very error on his part, "The idea now absorbs us, that the ideal must be found in reality..." and²³ "we misunderstand the role of the ideal in our language." Simply, not all statements are truth-functional - we do our language scant justice by outlawing, or revamping, or condemning as senseless what on its face bears not the cast of a proposition of purest logical form.

5. In the Tractatus, Wittgenstein had professed to have ended philosophical speculation, on his part anyway, by solving the problems confronting the philosopher - thus it was he would gain that goal of philosophy i.e. peace of mind. In the Philosophical Investigations he will still achieve the same ultimate goal, but rather by dissolving the problem. His remarks on this topic are many²⁴ "Philosophy is a battle against the bewitchment

of our intelligence by language." In Zettel²⁵ "the difficulty (sc. in our philosophical speculations and endeavours) is to stop...we have already said everything...not anything else follows" (sc. after solution by description merely...) In Philosophical Investigations²⁶ "the results of philosophy are the uncovering of one or another plain piece of nonsense and bumps that the understanding has got by running its head up against the limits of language..." In fine, then, the role of philosophy is therapeutic: it will tackle a problem by showing how it is not a problem at all in fact, but has the appearance of one so long as we fail to interpret the language in which it is clothed correctly. "For the clarity we are aiming at is indeed complete clarity...the philosophical problems should completely disappear. The real discovery is the one that makes me capable of stopping doing philosophy when I want to."²⁷

6. Finally, the essentialism of the Tractatus is disowned. By essentialism, Wittgenstein means not so much the old-fashioned metaphysical type, of souls or faculties etc., but rather the desire or the itch philosophers, like himself in the Tractatus, have felt to offer one single explanation or rendition of the problem or matter under examination. It is as though if we look at a problem or word long enough a unique monist solution will emerge: "Philosophers use a word, and try to grasp the essence of the thing, for example 'knowledge', 'being', 'object', 'I' etc."²⁸ Of the broader sense of essentialism, i.e. seeking a 'monistic' or universal solution, coute qui coute, Wittgenstein says²⁹ "A main cause of philosophical disease - a one-sided diet; one nourishes one's thinking with only one kind of example." This fixation on only one example is due to our inability to resist

the search for a unique, total and universal solution at all costs. It accounts for 'name-object' theories, private pain theories, and, indeed, this pernicious habit has fathered so many chimeras of explanation that it must be continually resisted by keeping a constant eye to the realities and the variety of phenomena within them, that we are supposedly explicating.

In attempting thus to serialise Wittgenstein's nonetheless objectively valid criticisms of his own errors in his philosophy as given out in the Tractatus, it has proved impossible severely to separate, as though by some surgical dissection, six isolated and independent philosophical cancers. There is a necessary overlap. Yet for easy future reference, I shall rehearse briefly the changes and substitutions made to afford thereby a more informed understanding of the substantive doctrines, i.e. those not merely methodological or in recantation of those of the Tractatus.

1. The name-object relationship is not fundamental to language; its undue primacy has obscured a proper understanding of the nature of language which will now in the Philosophical Investigations be outlined.

2. All a priorist notions and conjectures will be outlawed. Philosophical investigation will consist of observing the role or the "play" of language in context, as used variously in numberless situations and environments. ('forms of life').

3. Language is not a machine for churning out true/false propositions. This narrow view of language has, like 1. above, obscured a properly broad picture of many other regions of our language just as important, yet manifestly not "in the business" of making assertions of truth or falsity.

4. The distinction made between simple/complex, applied to words and propositions, has no genuine warrant; the error was to see ordinary language as somehow defective, and to try and supplement its inadequacy by fabricating an underlying substratum of "ideal" elements and propositions. In similar vein, 'exact' and 'inexact', the currency of strictly logical assessments of adequacy or validity, can have no primacy in the empirical examination of language - these, like 'simple' and 'complex' are evaluations showing the prejudices of a priorist standards.

5. All strivings after "one-eyed" solutions or explanations will be ended: our inquiry should have no predetermined 'postulates' of thought, such as will preclude us from seeing what the facts are, and, if only seen properly, proclaim themselves to be.

6. The goal of these researches, according to the new lights of empirical examination, and through the widest possible gamut of examples, will not, Heureka-like, be to proclaim an ingenious discovery, the whole solution, but rather to see how that puzzlement which conjured up the problem to bewitch us, arose, not from any real source of doubt, but from a misconception or misconstrual of the initial terms in which it was framed.

It is briefly to be noted that nowhere does Wittgenstein amend the earlier doctrines or practice of the Tractatus in seeing the primary source and substance of philosophy as language, the examination of its grammar, and the establishment thereby of its limits.

In considering the major substantive contributions of the later Wittgenstein as provided in the Philosophical Investigations, which it is intended later to apply to the problems of jurisprudence, and to exhibit as already applied by Hart inter alios, I shall consider Wittgenstein's doctrines under the following subject 'headings'.

1. By the meaning of a word is meant its use in ordinary language.
2. The notion of a 'language-game' i.e. the context of a word's use and 'the form of life' which is its home.
3. The notion of a rule and its practice.
4. "Inner processes" as standing in need of an outward (i.e. behavioural) expression.

This notation above, it might be noted, could be set out in tabular form, exhibiting on the left-hand side things verbal i.e. meaning, language-game, rule, inner process, and on the right-hand side, matters of behaviour or practice as overtly observable. It is precisely this application of language in all its component parts to human behaviour in every problem under consideration, or in respect of any phenomenon mental or sensible one may wish to understand, that characterises the later and empirical Wittgenstein.

1. The meaning of a word.

As said, Wittgenstein condemned his earlier opinions, as in the Tractatus, whereby he saw a name related to an object as some label stuck upon it. The examination he now offers of the same matter earlier treated is professedly empirical and 'anti-essentialist'. That earlier theory was explained or suggested itself to us by a consideration of how a word was learned

i.e. by 'ostensive definition'. This childhood scene is in the first forty paragraphs of the Philosophical Investigations exhaustively examined; a fictitious society of builders is imagined who do in fact portray such a way of using and learning the word. This reductio ad absurdum shows the poverty of such an account. In fact, the 'language-game' i.e. context of use of the word as a 'name' is so primitive and limited and almost alien to our own ordinary linguistic environment that it must be seen that 'naming' an object is only a viable teaching-aid to one who already has a developed grasp of the language. 'Ostensive definition' likewise is not an unimpeachable or unquestionably acceptable matter. For how do we know what of the shape, colour, or outline, for example, of any matter 'ostensively defined' is in fact intended. Once disabused of these too simple notions of the operation of language, and having now not the complacent certainty the Augustinian theory³⁰ held forward, Wittgenstein attempts to wean the now discomfited reader away from his habit of clutching at any one solution towards a looser, less clear-cut, but more accurate appreciation of what the meaning of a word can be.

2. The notions of language-game and form-of-life.

These concepts, indeed, these terms themselves are vital to any treatment or consideration of not only of Wittgenstein's later philosophy, but almost, if one is to judge by the frequency of their use by other philosophers and commentators, in the general body of ordinary language philosophy.

The notion of the language game is not a difficult one; its hold over us is not in respect of its profundity, but the future all-round utility it can provide

within ordinary language philosophy. Wittgenstein introduces the language-game in para.7 of the Philosophical Investigations: he has described, as above, a primitive, non-existent society of builders and blocks who use words as Augustine¹⁵ would say we always use them: "We can think of this process...as one of those games by means of which children learn their language...I will call these language-games... and will sometimes speak of primitive languages as language-games."³⁰ As successive contexts, (forms of life) are later constructed as needed to exhibit a typical use of a word, Wittgenstein generalises the term language-game to do duty for the linguistic practice appropriate to that context. He defines their purpose:³¹ "The language-games are rather set up as objects of comparison which are meant to throw light on the facts of our language by way not only of similarities, but also of dissimilarities."

This is almost an epitome of that method in philosophy known as ordinary-language analysis, and it will later be fruitful to compare the work of Ryle³² and Austin,³³ briefly, as almost identical in method to this. What is of especial significance in Wittgenstein's device of the language-game and its environment ('form-of-life') is that it encapsulates at once his new-found post-Tractatus empiricism and anti-essentialism. The language game is a mode of providing, and identifying as by language game (2) or (47)³⁴ of the Philosophical Investigations a particular instance considered to throw light on any problem of meaning or usage. It is a device which renders example-hunting so easy, and just as importantly will allow limits, albeit not of any sharp delimitation, again to be set up in regard

to language, just as surely, though differently located in the Tractatus. There philosophical error consisted of overstepping the terminal limits of sense, by saying the unsayable etc. In the Philosophical Investigations, philosophical error will consist in a failure to identify to which language-game a word, on any occasion belongs, or in fact playing the wrong language game;³⁵ one must always ask "is the word ever actually used in this way (sc. the way we would like, in the interests of discerning an essence), in the language-game which is its original home".

Further, the language-game, like the rule, need for the same reasons have no sharp boundaries; yet that it has boundaries is still not less certain for all their lack of sharp definition. This sureness, then, will provide us with a dissolution of our puzzlement, will spare us the pursuit of essences, inner 'shadow performances', in short, the long catalogue of philosophical vanities.

3. The notion of a rule.

Wittgenstein has considered the word "game". He has examined, by example, various games to see what they have in common. Example quickly shows that they have not enough in common, e.g. squash, draughts or monopoly, to afford any basis for ostensive definition per genus et differentiam. Nonetheless, none are in doubt as to how to characterise a game or recognise one. The loose similarity they share is rather in the nature of a family resemblance; the family of cases we call or recognise as games he further compares in contiguity, to the fibres of a worn thread.

It is perhaps unfortunate that Wittgenstein has a double object in introducing the notion of "game": it is a paradigm case both of a word whose meaning he asserts is governed by rules of usage, and also of a 'rule-bound' activity, of which 'meaning a word' is another case. Yet the concept of a rule is so crucial to his argument that this rather confusing introduction is excusable.

The meaning of the word 'game' is known to us from a consideration of how it is used. We know the meaning by knowing when to apply it and actually applying it throughout the whole range of its application. This application is public knowledge, ordered and held reasonably constant by common observance of those rules circumscribing its correct use. These cannot be exact; cannot we imagine doubtful cases? But the desire for exactness is to be resisted, as not a result of our into the actualities of word usage, but rather as a requirement we had for no reasons other than the philosopher's compulsion to "solve or die", a compulsion now resisted and castigated.

Having thus proved that rule-governance is, however less exact than a label, an effective delimitation of a word's use, and therefore its meaning, Wittgenstein proceeds to examine the phenomenon of 'rule-bound' behaviour itself. His concentration on the notion of the "rule" at this early stage is for the following vital reason: he has located language firmly on the level of the public and the shared. It is learned by being enacted in ordinary shared contexts; its usage is ordered, indeed functions only by dint of agreement of usage according to the rules, and, importantly, agreement on judgment upon what deserves an application of the word according to those rules. He will later use

these foundation doctrines to attack the doctrine of 'inner processes' i.e. 'seeing', 'thinking', 'reading', 'wishing', 'hoping' etc. as mental events going on within the head of the private individual, independent of, or inwardly shadowing the external public performance. An important example of such 'myths' is the so-called doctrine of the 'privacy of sensation' whereby it is imagined that 'one knows pains from one's own case', and has in fact "christened" one's own sensation.

It is important, then, that Wittgenstein settle at the outset the public nature of obeying a rule lest it later be alleged by the private-pain theorist that he can, privately and in isolation from any public language use 'words' for his own secret sensations.

Wittgenstein is therefore from the outset obliged fully to exhibit the nature of the practice of rules. A rule is not the set of consequences which follow its observance; one who obeys a rule does not weigh a situation, seek an end, or envisage an end, by an interpretative consideration of the rule as here or there applied. One does not ponder over a rule, at least when one is observing it: observing a rule is a practice. It is likewise a basic article of our common humanity to do, alone of animate things, what is involved in following a rule. The observing of a sign-post consists not in a diagnosis of what a sign-post is, and where it points, not in any purely cerebral process of interpretation, but in the common praxis of going in its direction, which constitutes the sign-post as a prop of rule-bound behaviour, and ourselves, as seen, as rule-bound in behaviour.

It must be said that what Wittgenstein here says of rule-bound behaviour is among the most difficult of his writings, and has attracted, e.g. from Findlay³⁶

in his essay "On Meaning and Use"³⁶ criticism, not as being difficult, but rather downright obscure. I shall treat this criticism at length in later chapters, but I here submit that there is a distinction, however subtle and difficult to grasp, between a practical application of a rule on the one hand and a (considered) interpretation of it, which latter would alone allow the private-pain theorist to justify his claim that private pain identification and naming is a feasibility. The ground is thus cleared for Wittgenstein to advance to

4. Inner processes stand in need of outward criteria.

It is in respect of the later Wittgenstein's concern with these matters so central to epistemology that the greater amplitude of philosophical thought, concern, and coverage of the later Wittgenstein's writings, as compared with the earlier, can most readily be recognised. In his earlier work, he makes passing reference to 'reading', 'thought', 'belief' etc. which concepts are, of course, the stuff of philosophy, however brief and elliptical the philosopher's treatment of them may be. Beyond this brief mention, e.g. "A proposition is a thought", he spends little effort on their elucidation other than to fit 'thought' 'the real', 'belief' into their respective positions in the framework of the world and language.

In the Philosophical Investigations, indeed, in all his works from 1930 onwards, the themes of consciousness i.e. the mental processes which, since the dualism of Descartes, had formed the 'Philosophy of Mind' appear in Wittgenstein, conventionally, as themes

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of the first importance. In turn, the concepts of 'understanding', 'reading', 'wishing', 'imagining', 'sensation', are all subjected to an exhaustive analysis in order, in each case, to show the emptiness of traditional beliefs that there is a shadow 'inner' act within the mind, the counterpart of the external physical 'show' of the experience in question. The examinations, in each case, consist in the collation, or assembly, of a series of language-games designed to display the variety and fecundity of uses that these 'mental process' words can assist in. In consequence of this variety no one inner process can be identified, or if it can, in terms of brain-impulses, or odd isolated 'feelings', is not anyway that inner process our dualists had in view when advancing their theory. In the analysis of 'pains', perhaps a case to be differentiated from the typical intellectual inner process, there is an attack not only upon a dualist account, but on that equally pernicious 19th century empiricist account³⁷ of how we know sensations, that is, as from an 'inward eye' to our own personal and private mental experiences. I know what "tooth-ache" is, by remembering, or consulting some private file I keep of those sensations I have had, to recall a personal experience of the sensation; or, I know what 'red' is by seeing the likeness between a perceived instance of that colour and an 'image' of that colour which reposes in my mind and is peculiarly my own.

However much the difference in special import, and thus length and depth of treatment they receive, Wittgenstein's message is always the same; in the philosophical examination of these 'process' words, we look to how they are used and the context of such

usage. In Wittgenstein's terms which I feel may now be used with understanding, we look out the language-game and the form of life; we note not an essence, common or responsible in every instance, but a family of cases, or contexts where what is responsible for the characterisation of 'acts of understanding' is the behaviour, both before and after the alleged 'flash of understanding', 'act of faith', 'hardening of intent', 'meaning', not any instantaneous inward act. He advises us³⁸ "Try not to think of understanding as a mental process...but ask yourself 'In what sort of case, in what kind of circumstances, do we say we know how to continue the series?" The message is repeated over and over again, with remembering, imagining, a 'sense or feeling for a word's meaning', dreaming, calculating in the mind, and we shall here detail, in order to illustrate the method of research by 'compare and contrast the language-game', only his examination of the phenomenon of reading. It may briefly be schematised as follows:-³⁹

Para 156.

1. Wittgenstein considers, first, the case of a reader of 'ordinary competence' reading a newspaper, as we may do with varying degrees of attentiveness and concentration.
2. To this we contrast one learning to read.
3. This tempts us (and we make some start to a solution by admitting a plurality of 'essences' or mental processes) to concede or discern two different inner acts of consciousness.

Para. 157.

4. We next consider the case of one being trained, human or creatures of some other kind, to read.-this introduces further doubt over the existence of that inner process

of reading of which Wittgenstein's dialectical adversary was at the outset so certain.

Para. 158.

5. A standard "get-out", that of supposing it is only our present lack of complete neurological knowledge on these matters that stops us short of pronouncing, with 100% certainty, an 'inner act'. This is shortly and rightly dismissed as a priori, and in no way legitimated by any of the prior stages of the examination.

Para. 159

6. We next consider one pretending to read, or, para. 160, one reading under the influence of a drug.

Para. 162.

7. In desperation, to counter the threat made by such diverse and difficult cases to smother our erstwhile confidence of our belief in an inner act, we try to define reading.

"Derivation" is suggested and, as a definition, is tested variously as differing modes of derivation; cyrillic, codes etc. in para. 163, are considered and are found quite unhelpful.

Para. 165.

Next it is alleged that what characterises reading is "the way words come in a special way" when we read, as against, say, deciphering a strange code.

Para. 168.

"Words causing our reading them as they properly should be read," is next considered as an explanation, if not a definition, of what reading means. "When we

read, don't we feel the word-shapes causing our utterance?" This, as the previous suggested solution, is quickly demolished by the absurd example of a jumble of type-symbols (para.169) which have no less a causative operation upon us to "mouth" sounds; no such "mouthing" however could ever be termed reading.

Para. 170.

'Guiding' is next considered as the key to the phenomenon of reading, and, as by now we can expect, in para.172, Wittgenstein invites us "to consider the experience of being guided...(and)...imagine the following cases"; on our consideration of them, he asks, as though any answer could possibly be given uniquely to comprehend the gamut of variety his examples display, what is there in common to them. Wittgenstein concludes, therefore, in para.178, that in suggesting that "guiding" was the quintessential mental experience of reading it was "a single form of guiding which forces the expression on us." As he concludes with reference to these purported definitions and others on other concepts, in para.182.. "This role [sc. of words in language] is what we need to understand in order to resolve philosophical paradoxes. And hence definitions usually fail to resolve them."

The conclusion Wittgenstein reaches, and the nearest one in doubt is to get to a definition for reading, is in fact what Wittgenstein has said as far back as para. 164, i.e. that what we have alone are criteria for judging 'reading' etc. to have been, or to be case. "We use the word 'read' for a family of cases." In all instances, too, our use of these criteria must be founded upon the external behaviour, context, and situation of the person reading.

The same method of analysis is repeated with equal illumination, and displaying a bewildering talent on Wittgenstein's part for the effortless serialisation of a host of suggestive examples, for the other standard "type" mental processes whose elucidation has been the object of the philosophy of mind. Further consideration of these matters in themselves is of course not my purpose, and I consider it now appropriate, with this example clearly before us of the full-blown operation of the later Wittgenstein's matured philosophy so empirically and flexibly at work, to reconsider, by way of summarising our argument to date, his principal and vital insights and how these may be of fundamental use to us as we advance to the problems of jurisprudence.

Summary.

1. I noted that, for no good reasons, jurisprudence seems to stand at some remove, to its own prejudice, from the general body of philosophy and its modern currents. As philosophy is a unity, we should not be discouraged from looking to its more avant-garde and vital areas for inspiration.
2. Ordinary language philosophy seems to offer us both a method of philosophical analysis and a set of substantive doctrines on the nature of philosophy just as much as on the nature of its traditional elements.
3. Wittgenstein was the natural choice of exemplar of this philosophical movement as his philosophical career discloses the rarity of having provided two distinct but related philosophical 'confessions'. There

could, it might earlier have been thought, have been chosen, for example, J.L. Austin, or Ryle, or Searle etc.⁴⁰ as a typical philosopher of ordinary language whose writings would equally well have demonstrated what are the concerns or aims of this philosophy. It is here not necessary to rely on the fact that they all owe much to Wittgenstein, rather than vice versa. It is enough to note, what I hope is now obvious, that Wittgenstein's longer career can be seen as almost a history of twentieth century philosophy out of which ordinary language philosophy was borne, and makes background, or preliminary context-drawing almost unnecessary. Had Austin been chosen, not only Frege,⁶ Russell,⁷ but the earlier Wittgenstein would have had to be sketched in anyway.

4. These were each in turn articulated to reveal how generally language may be seen as the "open sesame" or "lynch-pin" to the problems of philosophy and the resolution of philosophical puzzlement. In both instances we are shown how errors arise, classically, by a failure to notice when we overstep the boundaries of language; dispensing with Wittgenstein's metaphor, one fails to see that false ideas arise from a mistaken construal of our representation in linguistic form of the phenomena under examination.

5. By considering how Wittgenstein developed his matured ordinary language philosophy by progressing from the Tractatus to the Philosophical Investigations, we have been able to witness stage by stage the growth and "breeding" of ordinary language philosophy. I have tried to state not only the fact that, but explain the

reasons why, in turn, a priorism yielded to empiricism, why scientific rigour and desire for definitiveness at all costs yielded to a looser and more flexible attitude of seeking dissolution rather than solution of the problems of philosophy, and how, within this total volte-face of philosophic orientation, language still remains central, but differently "rotated round the axis of our real need."⁴¹

6. Finally, I tried to assemble the principal material i.e. as against methodological (though it is as ever almost impossible to separate these), contributions of Wittgenstein, i.e. the concepts of 'language-game,' 'forms-of-life', the concept of the 'rule', and his exposition of the phenomena of language as a learned process, and 'inner states' as, in all important cases, to be replaced by consideration of the external circumstances and criteria founded upon them.

In the course of this preparatory work, certain key terms have been introduced with explanations of their use and importance; it has been the aim of such an introduction not idly to eulogize Wittgenstein or ordinary language philosophy as such. It is rather so to define such terms that they may now subsequently be used as the vital currency of the jurisprudential analysis offered in the following chapters, in which terms like 'rule', 'a priori', 'inner process' etc. are as worthy of lengthy definition as they are indispensable to accurate analysis. Some such terms are already familiar and, in well-known cases,⁴³ an integral part of jurisprudence. That others are still esoteric to legal theorists, who use these ^{terms} either with a gaucheness so revealing, e.g. Olivecrona⁴⁴, or not used at all when the matter in question cries out for their usage, is in itself proof of that backward and

anomalous state of contemporary jurisprudence I adverted to at the commencement of this essay.

Before passing on to the more familiar terrain of jurisprudence, albeit to be worked with an apparatus imported from other fields, I should like to offer one other aspect of Wittgenstein's work which it is hoped may throw some light on the relationship between Wittgenstein and the general corpus of ordinary language philosophy. As names or references in this thesis, they may appear to some extent interchangeable, perhaps in the same way as "Hoover" is to "vacuum-cleaner". This relationship, i.e. that of the foremost exponent, or inventor, naming his class, is perhaps less than accurate, and in hope to show more accurately how we should see Wittgenstein vis-a-vis ordinary language philosophy, I propose briefly to compare his philosophical approach as already described, with that of Gilbert Ryle, as revealed, on his part, in The Concept of Mind.⁴⁵ I shall spare the reader any more lengthy rehearsal of a philosopher's career and central submissions, in Ryle's case, having devoted ample space already to that of Wittgenstein. Here need only be considered what Ryle saw as his object or purpose in the Concept of Mind, and how this is somewhat different, and, taken all in all, somewhat less, or as displaying a lesser number of philosophical dimensions than Wittgenstein.

It is not to be denied that Ryle and Wittgenstein share much common ground: the substantive doctrines, both those attacked and those put forward, are much the same:-

- Wittgenstein's 'inner processes' are Ryle's 'ghosts in the mind.'
- Ryle's 'categories', which mark divisions in language, and whose non-observance or 'confusion' have spawned almost all the confusions or problems in philosophy, are the other's 'language-games'.

- Ryle, too, perhaps more methodically, runs through the gamut of 'inner acts' and likewise directs us always to a consideration of the context of the employment of the word ('wish', 'imagine', 'obey' etc.) in ordinary language. The catalyst of this examination is, naturally, the 'category' appropriately selected.
- In sum, Ryle believes the meaning of a word is its use.

Similarities like this could be endlessly noted. Yet to pronounce an identity between Wittgenstein and Ryle merely on the content of their philosophical writings would show, in the pronouncer, a too shallow discernment, a failure in seeing the overall worth of a philosopher merely in those worthwhile 'propositions' of sense we can lift out of his work. It is as though Plato were an idealist only, and the 'dialectics', or the early but sophisticated grapplings with language as the difficult medium of philosophy, merely incidents to substantive themes. We look, then, to Ryle's overall project; he does not conceal it, but proclaims it with candour and determinedly in the preface to The Concept of Mind:⁻⁴⁶

"This book offers...a theory of the mind. Its arguments are not to increase our existing knowledge about minds, but to rectify the logical geography of the knowledge we already possess." He begins his argument with the "official myth" that Cartesian heritage which says that humans have body and mind, the first public, the second private etc. etc.

His avowed aim is to disabuse us of this false notion and, in so doing, explain how it has arisen i.e.

by 'category' confusions.

Wittgenstein, in contrast, in his preface to the Philosophical Investigations⁴⁷ tells us he "is assembling a series of remarks;" these are informal in their juxtaposition, and, in form, a very easy, sometimes too easy, blend of dialectic. The reader, imaginary disputants, and theorists of one sort or another easily become the casual colleague of Wittgenstein's inquiries. The book, we are told, is an "album", recording "a number of sketches of landscapes, made in the course of...long and involved journeys."⁴⁸ He informs us, lastly, that it is not intended "to spare other people the trouble of thinking...but, if possible, to stimulate someone to thoughts of his own..."

It cannot be denied, least of all by myself, that Wittgenstein does more in this book than present, for our use as we may, some "handy hints"; when Strawson says⁴⁹ that Wittgenstein did arrange his thoughts etc. he tells us, what all must see, that Wittgenstein unquestionably did have a relatively concrete set of views, some of which I have already considered. Not all is mere showing, helping, therapy etc; in a satisfying measure, rather, some of Wittgenstein's ideas are fully-fledged and developed philosophical theories e.g. the language of pain, the nature of the rule etc.

That Wittgenstein is constantly a blend of a method of philosophy, and a body of philosophy, I have already tried to make clear. But it is confusion on just this equiparate conjunction of these two facets that has led to fallacious interpretations of Wittgenstein in a manner that would not be possible with Ryle. We may see this confusion manifest firstly, in those who see Wittgenstein as 'cloaking', like some

charlatan, merely Rylean ideas, under a "jargon" of a "bewitching style" which is not a dynamic part of his philosophy e.g. Hems,⁵⁰ regards the stylistic, idiosyncratic Wittgenstein, who sees philosophy as "showing the fly the way out of the fly-bottle", as to be explained simply by merely biographic considerations of the author's admittedly strange lifestyle or psychological history. Hems, most ungenerously and anyway, courtesy apart, quite unwarrantedly makes the following and other similar points:-

- Wittgenstein's concentration on ordinary language, and his concern for how language is learnt, is simply the result of his interwar years as a schoolteacher in an elementary school. His concern with the ordinary "everyday" use as against the type of scientific esoteric language of the Tractatus marks a merely personal preference.
- The "dialectic", or "governessy" style of the Philosophical Investigations likewise is a residue of his teaching period.
- His "anguish" at philosophy, his desire to "put a stop to it" is again not objectively warranted, but just one neurosis among the many others Wittgenstein entertained.

Hems' error is, in short, to see Wittgenstein as a stylist; he sees under the stylistic "front" the man, and in seeing these only is blind to the philosopher. We may remember Frege's⁶ pertinent remark that a thought has an existence apart from its thinker. Wittgenstein himself feared that his later work would, if it made any lasting contribution, provide only a 'jargon'.⁵¹ To see him as providing simply a style, or

even, in some predominating way, a mode, rather than the articles, of a philosophy, is simply unrealistic.

The via media between these two opposite confusions must surely be to allow that Wittgenstein is magnanimous enough to contain concerns both for the method and ^{for} the substance of philosophy. It is in virtue of this recognition of the size of his contribution that I argue that Wittgenstein offers more, in respect of "number of philosophic dimensions" than Ryle.

Wittgenstein offers, in short, an alternative mode of seeing philosophy, or what the business of philosophy is - to dissolve problems, and give peace of mind enough to stop doing philosophy; he offers us, too, a method of achieving that end i.e. empirical, non-essence seeking, research among the 'ground of philosophy' where we may clear away 'the rubble'. Finally he proposes, for our acceptance or not, for we too may philosophize, a set of tailor-made doctrines. Each of these three we may freely accept or reject, but it is a measure of the artifice of their composer, that the three, in providing at all stages, a mutual and coherent support, must all be digested before any one, or others in consequence, wholly or partially, may be rejected.

In contrast to this, a criticism of Ryle does not require us to rethink what is the object of philosophy or what is its role vis-a-vis other disciplines; nor, indeed, need one reconsider how we may practice philosophy according to those guidelines made manifest by the course of his inquiries. It is thus in regard to the breadth of matter, not so much that matter Wittgenstein compresses into his philosophy, but rather that matter we are given for future consideration

and digestion, that Wittgenstein is lifted far above other ordinary language philosophers. For the actual digestion or realisation of these depths, or successive dimensions implicit within his work, does almost realise within the reader the author's hope that his book will help, or 'stimulate' others to produce a philosophy of their own. Among these "others" we may number Searle, Malcolm, Strawson, Anscombe etc.⁵² all of whom acknowledge a great, almost embarrassing debt to Wittgenstein, and yet have not failed to qualify consensu prudentium as original contributors to the problems of modern philosophy.

In less spectacular fashion, it is my purpose only to examine how Wittgenstein's philosophy has in the past aided and may further aid the current pursuits of jurisprudence.

References - Chapter 1.

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27. ~~At~~ - para. 133. Philosophical Investigations.
28. Ibid., para. 116.
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32. Gilbert Ryle, whose major work is The Concept of Mind, Hutchinson's University Library, 1949.
33. J.L. Austin, another Oxford contemporary of Wittgenstein. See his Philosophical Papers, How to do things with words. etc.

34. Op.cit., paras. 2 and 47.
35. Ibid., para. 116.
36. Findlay's article is in Theory of Meaning, editor Parkinson, O.U.P. London, 1968. The criticism there contained is considered in detail at Chapter 3 of this thesis (q.v.)
37. Typical of these empiricist views are those of Bishop Berkeley.
38. At para. 154. Philosophical Investigations.
39. All para. references in the margin are to the Philosophical Investigations.
40. For Ryle and Austin, see 32 and 33 supra. Searle, a contemporary American philosopher, acknowledges a great debt to Wittgenstein; see his Speech Acts, 1968, O.U.P.
41. Philosophical Investigations.
42. It is, as ever, almost impossible to separate these.
43. e.g. Hart and his reliance upon the concept of the rule in The Concept of Law - see Chapter 2 of this thesis.
44. K. Olivecrona, leading author of the Scandinavian Realist School of legal theory - see Chapter 4 of this thesis for a detailed critique of his work.

45. See 32 supra.
46. Op.cit., p.1.
47. Op.cit., p.vii.
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49. Op.cit., pp.22ff.
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CHAPTER 2.

ORDINARY LANGUAGE PHILOSOPHY APPLIED TO LEGAL THEORY.

It was the explicit aim of the first chapter of this thesis to make quite apparent what the methods, and the substantive themes, (and the development of both of these), were of ordinary language philosophy. I now wish to show how the import and insights of this philosophy, with its content and method specified in detail and its terminology, especially that of Wittgenstein, exhibited and explained, may be applied within legal theory.

It is hardly to be thought, if we bear in mind that this technique of philosophy is by no means the invention of yesterday, or last year, or anyway hot from the presses, that its insights etc. have not as yet illumined the area of legal theory. In fact, that it has been applied to a large extent and with no little success and skill by H.L.A. Hart¹ makes this task or project of illustration on my part in some regards easier. I propose, then, to consider in turn the following general aspects of ordinary language philosophy as applied to legal theory.

(1) An eclectic examination of the contributions to jurisprudence of Hart, as exemplifying ordinary language techniques and aims.

(2) A consideration of criticisms made against that philosopher's views which will, it is hoped, contain not only an assessment of already published criticism, such as that of Sartorius² or Hall² or Bodenheimer² and others, mainly American, who perhaps regard true analytic philosophy as some pre-war and American vintage, but also to add further criticisms that may be applied to Hart's work in the light of what here has already been

said of ordinary language philosophy.

3. To canvass yet further matters or areas where an ordinary language analysis can be looked to, to extend our understanding of persistent problems in legal theory; in particular, these are the nature of legal rules, the matter of judicial interpretation and how jurisprudence should treat that matter, and the ever vexatious question of strict liability.

1. THE WRITINGS OF H.L.A. HART.

It is not my purpose nor is it necessary, or even appropriate to the overall project of this thesis, to review the whole content of Hart's contributions, and these are many, to jurisprudence. What is here my intent is to show ordinary language philosophy as effective within jurisprudence, not to argue that Hart has all the answers, or that his explanation-in-sum of law and a legal system is the correct one. Indeed there are important reasons of methodology, as much as of his being right or wrong, why even Hart himself would not thank or admire anyone for such a vindication of his ideas.

It is necessary to adopt, as said, an eclectic rather than a generalising or comprehensive approach in selecting, not randomly or broadly, but carefully, of all his theses those that exemplify as ideally and evidently as possible the use of ordinary language techniques. These may allow us in their mere exhibiting to add or interpolate at each stage a precise identification of that particular ordinary language method or theme Hart is in fact applying. It is recognised of course that this exercise of identification does not

in itself constitute any proof of his intentions which must, and will, be attended to in due course; but I think that it is legitimate for my present purposes to name, and otherwise evaluate, Hart's submissions, as though exercises capable of separation.

By way of preface to a consideration of Hart, it is not irrelevant to consider, what perhaps needs no saying to a student of philosophy, that Hart is an Oxford academic, and taught at that University in those vital post-war years which saw the growth of ordinary language philosophy, more narrowly known as the Oxford School of English (and analytical) philosophy. It is not surprising that Hart should catch the full "blast" of the ideas of Ryle, Austin, and of course, those of Wittgenstein, whose ideas, formed at Cambridge, as one critic has colourfully put it, at Oxford "were grafted on to an Aristotelian philological stock...the resultant fruits (of) which.... are considerably drier and cooler..."

It is thus no accident that Hart's magnum opus, The Concept of Law³ seems like a "sister volume" to Ryle's The Concept of Mind;⁴ and, since it proved useful to examine the preface to that latter, we may commence best our examination of Hart by looking similarly at his prefatory remarks as set forth in the preface and first few pages of that work. Hart tells us, in fact, in that preface that his book "is concerned with the clarification of the general framework of legal thought", (which seems merely a translation of Ryle's "rectification of the logical geography" of what epistemology we know already), and concludes his preface with an assertion that".....

in this field of study" (sc. jurisprudence) "it is particularly true that we may use, as Professor J.L. Austin⁵ said, 'a sharpened awareness of words to sharpen our perception of the phenomena'".

Even beyond the preface, the first chapter appropriately and significantly entitled "Persistent Perplexities" is devoted to establishing that by now characteristic climate which ordinary language philosophy desiderates, namely, a recognition of that conceptual fog that philosophy is designed or ordained to dispel in its clarificatory, or re-charting, role. Hart informs us⁶ that the past course of jurisprudence has contributed many "assertions and denials concerning the nature of law, which... seem strange and paradoxical...such statements," (e.g. that Law is the primary norm which stipulates the sanction), "are both illuminating and puzzling: they throw a light which makes us see muck that is hidden...but leaves us without a clear view of the whole."

Indeed it is no exaggeration that the aim of this first chapter is not to say simply, as Olivecrona might do in Law as Fact⁷, that as yet no totally accurate or satisfactory explanation of the phenomena of the law has been given, but to present what is basically the same information, but with a leading emphasis upon the "confusion", the "paradox", the "seeming" illumination, the partial knowledge etc. that characterises jurisprudence and its persistent struggle to understand those three questions which Hart,⁸ (and they are sufficiently comprehensively stated for us to accept them), sees as central to that

science, the Command Theory of Law, the nature of legal obligation, and the place of rules in an explication or understanding of a legal system. These three questions are treated as equally manifesting the issue of attempts to provide a definition, and that on the simple Augustinian model,⁹ which Hart, in typical ordinary language style recognises or pillories as the stock "bête noire" of philosophical analysis, and the source of all the paradox and confusion he has earlier exhibited. He concludes this introductory chapter¹⁰ saying in advance of a contextual examination of such simplistic attempts, notably that of Austin, to provide a definition of law that "nothing concise" (sc. simple or handy) enough to be recognised as a definition could provide a satisfactory answer "to these three major problems."

In fine then, we have in this preface and the introductory chapter an almost explicit avowal of intent to apply ordinary language analysis to the law; firstly, his method will be to remove puzzlement or,¹¹ to "dispel doubt and perplexity"; secondly this method will involve looking, again quoting Austin¹², "not merely at words...but at the realities we use words to talk about a sharpened awareness of words...to sharpen our perception of the phenomena"; and thirdly his target, (or, in Wittgenstein's terms the ground he will just clear the rubble from), will be the simplistic definitions which humanity craves for, and past philosophy has too indulgently and confusingly provided.

Having struck the by now familiar therapeutic or clarificatory note at the outset, it remains now to

examine the succeeding analysis of unsatisfactory attempts to define law or laws, to see how faithful Hart is to this avowal of intent so clearly and confidently set out above. To show this, and further provide an opportunity to show, in context and in detail, the use of ordinary language devices, will be best done by considering the arguments Hart applies against perhaps the most notorious of the attempts to provide a definition of the law, in Chapters 2-4 of The Concept of Law, the command theory of Austin.¹³

Such a choice is surely not an accidental one. Just as Wittgenstein began by a description or statement of the Augustinian name-object theory of meaning and Ryle with Cartesian dualism,¹⁴ which, with equally simplistic motives, showed mind and body as separate entities, in both cases for cogent reasons of strategy, so too Hart strategically begins with a description of Austin's theory. The successive stages of its examination are as follows:

At Chapter 2 of The Concept of Law

- 1) Law is described by Austin as basically and simply effective in that we obey it because a sovereign or state literally commands us to obey; if we do not, then a punishment or sanction will extort obedience, and equally, act as an example to others to obey.
- 2) Hart proceeds to investigate the nature of 'command' by an empirical consideration of the forms of life of imperative language or command situations, and¹⁵ notes that there is no essence in common to the various uses of the interrogative if "The varieties of social situation in which use is...made of imperative forms are not only numerous but shade into each other..." Being told that law is imperative, then, is not to define it after all, for it still may be comparable to any one of a number of possible imperative practices.

3) Hart then looks to the law to see what imperative use it suggests as appropriate to it. This consideration, again empirical, leads to an identification of certain nuances in 'obedience to a law', i.e. those of the general nature of the commands of the law, and the permanence both of that sense of authority we feel in so obeying it and the threat or sanction that will visit us should we disobey. All these features differentiate law as effective from the face-to-face order/threat "gunman situation" which Austin's description contemplates.

4) These empirical examinations of law and reality via language lead Hart to conclude that Austin's theory,¹⁶ only seems to convince as a model or version of, if anything, a penal type of statute. Even that much praise is too much for Austin's theory, for when he adverts to a person who is habitually obeyed, his description does not do justice to the complexity or hierarchical plurality of these persons of authority, and those offices of authority, that are a characteristic part of any legal system.

5) In short, Austin's system is too "one-sided", or monistic, in that he fails to do justice to the variety of laws (and legal personalities) that can be seen in a legal system, which Hart¹⁷ now proceeds to exhibit by a consideration of yet more forms-of-life, and a determination after the precepts of ordinary language methodology to replace, for the instinct to define, a pluralistic, looser consideration of the variety that is reality.

6) Hart enumerates various types of law¹⁸ as, laws which confer powers on ordinary individuals, to make a will etc., or to officials to exercise authority,

laws which bind the legislators themselves, laws which set up standards of behaviour, failure of which will entail punishment etc. To comprehend this gamut of types of law, the simple model, if it is to survive as a realistic representation, will have to be modified to account, principally, for differences in respect of the content, the mode of origin and the range of application of the various laws. One might remember here a similar "hauling over the coals" process, in Wittgenstein's Philosophical Investigations where the advocate of a name-object view of meaning or the private pain theorist was suffered to suggest emendations to his original unembroidered and so easy definitions.

7) In regard to content, then, Hart points to the real distinction between power conferring, and duty imposing laws (at p.27 op.cit.)¹⁹ How can one see the Austinian 'sanction' as relevant to the former? Two suggested solutions are dismissed as artificial, and prompted²⁰ by "the itch for uniformity in jurisprudence."; firstly, to say that the nullity that attends a failure in respect of a power-conferring law is a sanction, is really the artificial transfer to the (epiphenomenal) stage of sanction of what is part of the rule's existence as a rule; secondly, the Kelsenian²¹ theory, which would make of both types of rule merely antecedents, or "if-clauses" to a command properly, or really, addressed only to an official ..., does not reflect the evident reality that, in respect of power-conferring rules, the law has been really entrusted, really is at the disposal of the individual. This is a distortion, plausible only because

it is a distortion that seems to provide uniformity of explanation where otherwise a vexing plurality would have to be acknowledged.

In regard to the range of application, too, an empirical canvassing of the variety in this respect again shows the poverty of the command theory. So far is it from being the case that there is one sovereign or many, the reality of law seems to confound, in many instances and manners, the "commanded" with the "commanding".

Finally, in regard to the modes of origin of laws, diversity of custom, of statute, of judicial promulgation, such variety cannot be fitted into the strait-jacket of Austin's theory without serious distortion to preserve the theory as a uniform or universal explicator of law. We are forced to invent the "tacit order" to allow for delegations of sovereign-power to ministers or judges or other agents of the sovereign, and, in an arbitrary and a priori fashion, say that a rule of customary law is not in fact law until applied by a court.

In sum, Hart has outlined as much the "itch for uniformity" and the need to resist it as the unreal distortions of reality that such an itch leads us to commit in jurisprudential analysis; in his own terms²² that "the effort to reduce to this single simple form the variety of laws ends by imposing upon them a spurious unity." He importantly adds that to look for uniformity is not a mistake merely insofar as it produces distortions, but much more damagingly obscures a true appreciation of the "distinguishing characteristic of the law" (which lies) "in its fusion of different types of rule."

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Hart continues to make a good case better by exposing yet further flaws in Austin's account in respect of the nature of the "sovereign" that that theory postulates, in particular, his identity, his succession etc. and what the continuity not only of the "habit of obedience", on the part of the subjects, but of legislative authority, in fact, the impersonal permanence of a legal system, can be, or how they may be analysed. This is clearly with a view to giving us the "fresh start" of Chapter 5, having conclusively exposed the errors of the command-theory, and introducing his own suggested explanation of law as a system of rules. For the present, however, rather than follow Hart to the issue of rules as though a mere addendum to his criticism of Austin's theory, and not, as is the case, as an important matter deserving, and later to receive, a full assessment, it will be more appropriate to recapitulate shortly what Hart has been about methodologically.

He has indeed remained faithful to the statement of intent; he has considered the forms of life of legal language by a linguistic concern for the adequacy of a theory's descriptive fidelity to the facts it would hope to portray. In the archetypal sense of ordinary language methodology, he has as yet only therapeutically dissolved or explained where that puzzlement noted at the outset of the book comes from, i.e. the distortions consequent upon an "itch for uniformity". By achieving a "fresh start", he has "cleared away the ground" and, in that very act of clearing, we can see clearly the underlying reality, that law is in fact a system of various, diffuse rules, not to be uniformalised. His attitude, again in the model, or mould, of ordinary language analysis, is

distinctly empirical and a posteriori i.e. he looks to the facts and then will record, or comprehend, in his account, their variety, contrary to the a priorism, and almost other-worldliness of Austin or Kelsen etc. It is submitted that this is, in fact, a palmary and effective exemplification of the precepts of ordinary language philosophy both in its methodological and substantive doctrines, within jurisprudence, and it is mostly in virtue of the closeness of Hart at this stage to this model of analysis as the ideal that this early part of the Concept of Law is most respected.

To exhibit again this application, I propose next to examine, having already justified my eclectic attitude,

Hart's essay, "The Ascription of Responsibility and Rights"²³. It is Hart's aim to consider,²⁴ so far as jurisprudence is concerned, "the logical peculiarities which distinguish these" (sc. ascriptive) sentences from descriptive sentences. Hart's concern is, of course, wider than merely jurisprudential in that it is his aim to characterise ascriptive uses of sentences within the sphere of legal usage. Having there constructed a working "model" or characterisation, he looks to the more general matter of action-sentences of the form "He did it" etc., to argue that these too are misconstrued if considered merely descriptive; which misconstrual he says²⁵ is the source of yet more "philosophical puzzles."

Hart's jurisprudential target is that view which sees law as²⁵ "...a set, if not a system, of legal concepts such as 'contract' ... 'trespass' ...", which he considers as yet another instance of "a disastrous oversimplification." To see just how over-simplified this attitude is, Hart examines the use of legal language, or the forms-of-life in which, in court,

such concepts or words are used, and particularly...".. the distinctive ways in which legal utterances can be challenged"; he hopes that these will reveal the basic fallacy of assuming, or postulating an "inner state", such as mens rea, voluntariness or foresight by way of imposing a spurious unity"²⁶ upon heterogeneous matters.

An examination of the stages or steps of this particular theory or insight provided by Hart will be additionally illustrative of ordinary language methods in that, while it is possible to see it as only in part jurisprudential, it is better to see it as an unum quid in that Hart here is conducting a much more broadly-based research into a certain language game, i.e. that of ascriptions. There is no good reason to see a language-game, or a form-of-life bounded by an academic boundary. If his article is seen in this light, the whole becomes an intact and tightly woven linguistic exercise in that compare-and-contrast method Wittgenstein adverts²⁷ to in the Philosophical Investigations. "The language-games are set up as objects of comparison...to throw light on the facts of our language by way not only of similarities, but also of dissimilarities." It is precisely this search for and provision of similarities in respect of ascriptive language, that, at one, lead Hart from an initial legal context to consider more general areas of human behaviour, or forms-of-life; and at the same time they make his conclusion of equal relevance as he says, to the philosophy of action as to legal theory. Indeed, the article may be seen as a vindication of what I have earlier argued, in theory, that there are no real and therefore ought

to be no arbitrary divisions of philosophy.
Hart's argument may be analysed as follows:-

- 1) He attempts to characterise ascriptive uses of language in the legal i.e. judicial context, where a correct application or examination of their use in this context shows that 'trespass', 'contract' etc. are not used to describe bluntly what is a fact the result of the obtaining of a necessary and sufficient set of other blunt facts, but are used to label or describe the case as, in the absence of possible traverses, rejoinders etc. being a 'contract', 'trespass' etc.
- 2) This conditional "labelling" he names 'defeasibility'; the palmary instance of a defeasible concept is that, in the criminal law, of mens rea, which exhibits this conditional quality; here the charges of the prosecution stand or fall, i.e. are "defeated", as and if the usual defences of diminished responsibility, duress etc. are held to apply.
- 3) A failure to see the reality of this, (and it is after all merely a recitation of what in fact is the progression of charge, defence, counter-charge etc.) leads to, or accounts for, the tendency to see mens rea (or in Scots law, more graphically, dole or a guilty mind), as a particular positive mental quality which all these responsibility absolving pleas fundamentally (must) disclose. This same error underlies the more modern variants of "foresight" and "intention".
- 4) Having characterised, in the ideal exemplary context of the law, the notion of defeasibility, Hart steps outside the law-courts²⁸ to consider comparisons

and contrasts, or in his own terms, cases "similar in important respects in spite of important differences.." and considers a variety of contexts in which appear legal words, applied defeasibly in the context of the court. The difference is not so much that they are now non-ascriptive, or non-defeasible; for clearly the case of a layman's saying "He bought a house", where a lawyer would not, in recognition of some obvious defect of form, is a defeasible assertion. This is shown by the fact that it is withdrawn, or at least not re-asserted once the defect at law is recognised. The difference is rather the non-judicial role of the utterer of the defeasible statement, and, equally importantly, the similarity is that in both contexts judicial/forensic, and ordinary, we mistake the nature of these utterances as merely the summary of factual circumstances which seem their only obvious or simple basis.

5) Emboldened, then, by this wider than legal relevance, or manifestation of defeasible utterances, Hart moves, at one, from jurisprudence to the philosophy of action, and from legal contexts, in whole or in part, to everyday contexts, to look for others where the same error may be discerned i.e. the confusion of descriptive and ascriptive (defeasible) language. He describes the error in his own terms,²⁹ as that of "identifying the meaning of a non-descriptive utterance ascribing responsibility, with the factual circumstances supporting that ascription", or assumed to do so.

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6) Once again the surveys a variety of ordinary circumstances, all exhibiting the action statement "x did y" i.e. typical admission or accusation situations, and applies to them the standard set of theories of action, which have sought to discover under the outer expression of such utterances inner acts of will, or decision, or choice. He considers successively,³⁰ as possible solutions "voluntariness", "consciousness", "intention", "ability to have chosen otherwise" or "having freedom of will" as some magic human quality, and by empirical testing, shows how these attempted or seeming universal solutions just do not account for or explain the various contexts and shades of usage in the "family of cases" of human action and the language games we use in connection with that family. No uniform solution can account for our attribution or discernment of "accidental", or "under duress" or "unforced" or "unintended" or "unforseen" consequence" etc.

7) He concludes on the basis of this empirical survey that, in these typical cases, what we do is ascribe, and our use of terms such as "accidental", "foreseen" etc. advert not to any inner process, but rather to our need, if their application is to alter or inform us of anything, "to judge (i.e. ascribe) again: not to describe again".

8) Finally, again employing the by now familiar precept of compare-and-contrast Hart distinguishes that ascriptive use of language he has tried to identify from two other notions it might seem to resemble, or restate. Firstly, he is not preaching behaviourism, which would say we know a human action only from its

external aspect or perception, and there is no more to it than that. Hart's point is rather the linguistic one that, in an important class of action statements, we are not out to describe all that an action is, which is, after all, what the behariourist too is actually doing. Rather, in this class, our aim is to ascribe, or determine responsibility for that action, which appears in a descriptive "guise" tailored by that very attributive intent upon our part.

Secondly, he distinguishes his ascriptive use from any evaluative i.e. praise-bestowing or morally reprehending uses of language, such as have been suggested by moral philosophers as exhibited in certain areas of moral discourse. Hart's point, as he repeatedly tells us, is a logical one; the difference between describing and ascribing is not that we praise or blame with the latter, but stay neutral, as it were, with the former; it is rather that when we ascribe, like the judge, we are in a domain neither that of fact, or truth and falsity, nor that of moral praise or censure. Just as there is a via media open to a judge in virtue of the logic or the nature of his office to condemn legally, as a judge, without informing his judgment with moral import, so too, for the same logical reasons, can we, in using language ascriptively, do so without any need as an inevitable consequence to imply moral praise or censure.

Once again we may instructively look at what sort of examination Hart here is conducting, and again we see an almost total observance of the precepts of ordinary language philosophy. He has conjured up for our attention somewhere over twenty various examples of certain ascriptive or other uses of language and invited us to make with him the inevitable conclusions.

He has again noted the traditional error of philosophy in difficult cases, that of hypostatizing the inner process, which, it is remembered, is always to stand in need of outward justification; his analysis of cases or examples has shown that this justification is not forthcoming.

Further, the analysis that he offers is appropriately not a substitute universal analysis of action-statements, (and I think Hart has been unfairly criticised for affecting to provide such a solution), but merely an "investigation" which brings to our attention a particular type of case, the judicial and those comparable to it, which Hart is careful to specify narrowly. Nor indeed does he say, even in regard to those examples of statements that are ascriptive in nature, that they are exclusively so, or cannot, in other contexts have quite unequivocally descriptive senses. It is important to understand that it is the context of the use of a statement that characterises it as ascriptive, and it is this attention to the context as well as the form (the language-game as language in context of use or in its form-of-life) that Hart, as an exemplar of ordinary language analytical techniques must, and is too seldom especially in regard to this article here under discussion, be given credit for.

Finally, as the natural or double-effect of his analysis, to extend our understanding of language, Hart is ever as much conscious of the need to dispel confusion or puzzlement as to create new insights. His aim has been to solve³¹ some of "the philosophic puzzles concerning action", and³² "many philosophical difficulties" that come from ignoring the distinctions he is to point out in this article.

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It is of course too much to expect of Hart, as fundamentally a jurist, to state such therapeutic aims explicitly, as though the main, or one major object of his work, as Wittgenstein might do, were to remove puzzlement as an end in itself. Hart is not doing the philosophy of law, in fact, to let himself, or us for that matter, find a way of "stopping" or giving up that exercise; nor can his consciousness of the rationale of philosophy be a matter that he will expressly state in a book of jurisprudence³³ (it is clear from his lecture "Definition and Theory in Jurisprudence" that his consciousness of the importance of methodological, or, if you like, "meta-jurisprudential" concerns is vastly more than in any contemporary, or even precursor, in jurisprudence.)

We do have, however, abundant evidence of his awareness of the therapeutic role of philosophy, not explicit in his books, but implicit in his constant reference to "philosophic puzzlement" etc. references which are not mere empty "window dressing" or verbiage, but important indices of what Hart's guiding lights are, i.e. the precepts of ordinary language philosophy. Perhaps more importantly, there is in Hart's writings, the "double" effect that a philosophical approach so inspired will inevitably produce - on the one hand creative or substantial contributions or insights, and on the other, a removal of those fond, simple notions that produce, in their inadequacy, our confusion. It is this double-effect that can allow, in the criticism of Hart, a rare measure or dimension of selectivity of acceptance of his insights. In regard to the instant example of

ascriptive language, as I shall argue later, we have every reason to accept his excellent critique of old-fashioned themes, i.e. the therapeutic part, but accept the creative only with reservations. Yet in recognising, as with Wittgenstein, so too with Hart, that there is a close internal relationship or mutual informing of method and substantive insight, whereby the one supports the other, we realise that the above measure of selectivity must be nicely applied. That this duty is one we owe to Hart marks him pre-eminently as following faithfully and effectively the guidance or inspiration of ordinary language philosophy.

Before advancing to criticism of Hart's work along the lines indicated above, I wish to consider not only from a methodological viewpoint, but also out of regard to its crucial importance to jurisprudence, and to general ordinary language philosophy, the treatment Hart offers of the notion of the rule as applied in the explication of law and a legal system. It is not my purpose to examine the overall adequacy of Hart's structuring or representation of a legal system as, among other things, a fabric of rules, or having as one fundamentally distinguishing characteristic a union of primary and secondary rules; this task would require a major thesis on its own part and involve other matters (such as the distinction or relationship of law to morals etc.) quite removed from my present concern.

Rather, I wish to set out Hart's use and reliance upon the notion of a rule to show how the use of that notion in his work parallels or is meant to parallel the role and use of the concept of a rule, as we have shown it, in Wittgenstein's exposition of language-use.

It is thus, in this case, not so much that Hart has borrowed or followed a method, but rather that he has applied, en bloc, a complete and substantive theory or insight of ordinary language philosophy. To illustrate this, we may first rehearse those steps on Hart's part, which lead him or allow him to introduce rules into his analysis of the law, as follows:-

1) He considers Austin's notion of "habitual obedience to a sovereign", in Chapter IV, as inadequate to account for the persistence of laws and the continuity of authority, for reasons already here cited.

2) He conducts a linguistic inquiry into the uses of the word "habit",³⁴ and contrasts it to the notion of a social rule, which, as a communal thing rather than a personal or individual thing as suggested by the command theory, seems to be of more use in "identifying" the phenomena of legal obedience and persistence. He concludes this comparison by noting these differences between habit and social rule; the former needs only a convergence of behaviour which need not be conscious; the latter imports a reflective consciousness, e.g. in criticism of non-conformance with the rule, and more importantly or generally, has an internal aspect, in that the rule is looked to not as a mere precipitate of uniform practice, but somehow as setting a standard of judgment, optimal behaviour etc., or by which, as in a game, comments, acknowledgments, demands, etc. may be made.

3) To this now characterised "social rule", Hart adds³⁵ another distinction, made earlier between power-conferring and duty-imposing rules.

4) Hart concentrates³⁶ on the other "limb" of the habit of obedience, to inquire into the linguistic use of the term "obligation", or, in ordinary language terminology, to conduct a depth-grammar analysis. Austin had assumed that the obligation, i.e. to obey the command of the sovereign or the gunman, was to be presumed at least, if all else failed, from the fact that he was obeyed. This analysis does not do justice to the reality of what an obligation is in that it does not cease to exist when it is not in fact responded to. It is in realisation of this aspect of an obligation that the predictive theory, which sees legal rules etc. as predictions only of what is likely to transpire, in effect, was provided; by so picturing the operation of legal rules and obligations, it pre-arms itself against any factual disproof, such as the "obligation" disappearing if not recognised and responded to. It makes of obligation, as it does of a rule of law, a mere likelihood, or a matter of high or regular probability.

5) Hart reverts to the notion of the rule, and particularly its internal aspect, to scotch this proposed solution by observing³⁷ that the "characteristic use" i.e. of a statement citing rules, "is not to predict" (a certain course of action)", but to say that a person's case falls under a rule". It is just this direct involvement, or critical and present awareness of the persistent force of a rule which enables us, as governed by or sharing in it, to display this characteristic use.

6) Hart illustrates the converse of the internal aspect, again by the compare-and-contrast method, by

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considering the case³⁸ where an observer merely views, but does not take part in the social practices of a group. Here is the form-of-life (or the language-game) of predictions based upon the patterns or regularities of the observed conduct. One might in this form of life achieve some success at prediction even hazard explanations or theories, but one could never pretend to criticise or mark as deviant or abnormal etc., save in the simply statistical sense. Ordinary involvement in legal rules, via the internal aspect, is much more, and other than, merely statistical.

7) Hart completes the introduction of rules by considering³⁹ the empirical realities of a legal system and how its refined ends, or specific needs, bear upon the as yet unqualified notions of the social rule and its internal aspect, which he terms, thus unqualified, primary rules. Because these primary rules are uncertain, or possibly in need of arbitration, static and in need of an agency of change more speedy in operation than the cumbersome shift of social consensus and, indeed, without an enforcement agency, not guaranteed as efficient, Hart looks to a secondary set of rules which will specifically remedy each of the above defects. He observes that "the union of primary and secondary rules is at the centre of a legal system," and it is into this two-tiered explanatory scheme that Hart will fit all the elements, personalities, and phenomena of the law that hitherto have been so grievously misplaced by earlier jurisprudence.

By way of comment, which need, since Hart's technique should be by now familiar, only be brief, it is to be noted that, at least to stage (6) above, Hart is, as ever, and ideally, empirical and linguistic in his analysis. He considers the concepts of obligation and rule not as matters of theory, still less

ones that allow of any a priori assumptions or personal introspections, but concepts whose meaning consists in or is illumined by an interrogation of the contexts and occasions where we say a rule is in force or an obligation exists. At stage (7), however, in The Concept of Law⁴⁰ where Hart outlines the elements of law, his attitude changes; he is no longer considering the realities of social or legal practice, but considering in a non-empirical manner what ideally a legal system wants, almost a priori and by definition, or what qualities it must possess if it wants to be an effective, or indeed a genuine fully-constituted legal system. The change is marked; from the reality of the forms-of-life, of chess games, social rules of etiquette, gunmen, there is a sudden other-worldliness of "this regime of primary rules" "a legal system" "the simplest forms of social structure". In fact, these latter are idealised abstractions or the theoretical desiderata of a system of representation of the phenomena of law, not those flesh-and-blood matters which, prior to their introduction, Hart had been dealing with.

To say, simply, that Hart has forsaken his erstwhile faithfully followed method is of course to imply no criticism; yet it will be seen later, in a consideration of criticisms made of Hart by Ralph Sartorius,⁴¹ among others, concerning precisely this fusion of primary and secondary rules into an instant explanatory scheme, that Hart's sacrifice of his model is a matter of more than merely casual significance.

What is more remarkable than either of these matters, and more deserving of immediate consideration,

is the extremely close parallel between Hart and Wittgenstein in making the concepts of the rule and rule-governed behaviour primary (I do not here intend Hart's use of the word) and central to their analyses, respectively, of the law and language; both alike make considerable explanatory use of the phenomenon of "games" as the paradigm case of rule-bound behaviour.

To explore or assess the extent of this parallelism, it is helpful to consider that Wittgenstein was, to a considerable extent, doing something new, or providing an analysis of language radically different to any that had preceded it, when he showed us how language could be seen as a network of uses of words; these uses were loosely, but undoubtedly and effectively, circumscribed by rules. An appreciation of these rules, and the uses of language, he argued, was a vital preliminary to any further philosophical analysis of those concepts traditionally the subject of philosophical analysis. In Hart's case, however, it can hardly be said that an explication of law on the basis of rules, or even a view of law as a framework of rules is, in itself, anything new. Legal rules, simply, had always been there in jurisprudence* whereas rules, that is, the rule-practices of language and its use, not the trivially important prescriptive rules of grammar or prose etc. had not before figured in the philosophy of language.

Notwithstanding this difference, more apparent than real, there may be identified what of the "new" Hart

* This very fact, however, would make it all the easier, or quite natural for Hart to apply the rule-theory of ordinary-language philosophy to the analysis of the law.

does share with Wittgenstein, if we consider not his use of rules of law as the innovation, but his concentration upon the internal aspect of the rule, for which he makes an otherwise exaggerated claim⁴² that "most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view."

It will be remembered that, by this internal aspect of a rule, Hart intends the fact that a rule does not exist apart or in isolation from those that it applies to, as some statistical reading, or some dry matter which exists only in a legal text-book or statute. A rule is a practical matter, a thing used by those bound by it, to criticise by, to behave by, to appeal to as well as to conform to, to demand conformity with, apply social pressure with etc. etc. It is this pragmatic, or practical dimension of rule-bound behaviour which is the counterpart, almost but not quite the exact counterpart, of Wittgenstein's concept of a rule as a practice, and only to be considered as existent as behaved, not theorised or conceptualised as something apart from behaviour.

It is, to express the parallel in another perhaps more graphic way, almost as though Hart sees rules as the words of the language of the law; that is, if we are to say what the law is, in any context, either jurisprudential or practical, it will involve the use of legal rules and a full understanding of what a legal rule signifies. So too in philosophy, a treatment of its subject matter must intimately involve, or even develop upon, a consideration of the use of language and the rules that govern that use.

Yet it might be thought that there must be some limitation to this parallel. Wittgenstein, for example, has shown, or at least is taken in this thesis to have shown, that a rule of language is the regular practice which constitutes that rule, that a rule is, in fact, a regularity in and of practice, not any empty formula (see pages 143ff of this thesis). Hart, on the other hand, while he has recognised the all-important practical dimension of the (legal) rule, never goes so far as to say that a legal rule is that practice or regularity of behaviour in itself, that there, in being enacted or exhibiting its regularity, it exhausts itself. He puts limits to the internal, practical aspect of a rule, saying that its practical aspects consist of a critical, reflective consciousness on the part of those bound by it. That this limitation is necessary on his part is clearly because Hart still sees or wishes to see a legal rule as fundamentally and traditionally the prescriptive production of the legislature, or its delegates, or judges, or customary creation. To Hart, a rule is still a blend of prescription and practice, i.e. both rule and regularity, and I do not think that he imagines that practice should alter or shape prescription, certainly in any constitutive manner. In regard to the rules of language-use, however, there being no prescriptive element, clearly a change in practice is a change in the rule.

I think it is important to ask whether Hart's choice so to limit the practical dimension of "rule-bound" behaviour, even in the law, to a purely critical or reflective level of operation, and to exclude from it any self-constitutive or self-changing role, is a correct, or justifiable one. The question may be

alternately seen as being whether the traditional attitude to a rule of law, which Hart accepts, as fundamentally and immutably the creation of statute etc., and thus rigid or impermeable or unchangeable by mere practical considerations, is to be defended against, or is allowed to stop all consideration of what the actual practice of that rule is. It may be that in that practical context one might characterise it better, or more accurately, even if so characterised, it differs from the text of the statute that created it. In short, are we to see rules as pre-eminently formal matter beyond the effects of practice, save, casually, by criticism, or substantive matters? Here we could consider a situation in a society, after the fashion of Wittgenstein, which had a law that formally prescribed that all adults wear black hats, but their practice in the matter of hats, is in fact to wear blue on Sundays, red on Mondays etc. Here we would ask what is the rule of law—the practice or the prescript? Less fanciful and much more familiar examples could easily but perhaps less emphatically outline the two dimensions of a rule of law e.g. the disparity between the practice of observing speed-limits and their enforcement, and the letter of the law.

This double dimension of the rule and Hart's treatment of it will be examined in the next section of this chapter, in conjunction with an examination of other criticisms of those insights or contributions of Hart earlier discussed.

In summary, then, of this present part, I think it may accurately be said that Hart does exhibit, indeed a fundamental characteristic of his approach to and treatment of the problems of jurisprudence is,

the application of the whole gamut of ordinary language devices, both in regard to its method of analysis, its substantive themes, and its therapeutic aims in philosophy. It will be my aim to demonstrate that this application on his part, if it is not already apparent, has been vastly effective, despite what will later be said in criticism; indeed, I shall try to show that these very criticisms signify his departures from that method, as in those two instances noted above, rather than defects inherent in or attributable to that method of philosophy.

II Criticism of Hart's contributions.

It will be remembered, from the earlier analysis given of Hart's article "The Ascription of Responsibility and Rights"⁴³ that he was there concerned to portray the ascriptive nature of certain judicial utterances, or utterances made in contexts very similar to the judicial one, and, at the same time, put forward a theory of general relevance to the philosophy of action. In his own words,⁴⁴ he says that "I now wish to defend the similar, but perhaps more controversial thesis that the concept of human action is an ascriptive and a defeasible one."

Whatever else is certain in Hart's article, it is now clear that the controversial nature of his thesis was an accurate prediction on his part, given the seeming broad, almost sweeping, generality of the thesis he puts forward. I now wish to consider Feinberg's criticisms of this thesis.⁴⁵ He is by no means alone in criticising Hart on this matter, but his article, written a number of years after, and published in 1965 presents therefore a seasoned and balanced criticism, one free from earlier more indignant reactions and responses to Hart's thesis; indeed, more positively, it would not be inaccurate to say that the criticism is

a model of tolerant and unprejudiced comment, neither indulgent nor, on the other hand, lacking in firm and positive adverse criticism.

Now, I earlier argued in regard to Hart, as to the general body of ordinary language philosophers, a care in criticism, or in exact terms, a mindfulness that their work is a blend of methodological and substantive insights. Mindful of this obligation, it is here intended to present and consider the criticisms put forward by Feinberg, and see whether perhaps they stand in need of adjustment in the light of a certain aspects of Hart's article not fully appreciated on the part of the critic.

Feinberg's assessment of Hart's thesis takes the form of a stage by stage application of that ascriptive manner of interpreting action-statements to each broad type of such statement as used in everyday existence. He commences at "faulty-action" sentences and descriptions, and concedes that in certain notable contexts, and those non-legal, there are "defeasible" faults which figure or are framed in, an ascriptively functioning "action-statement"; these are, among others, the institutional contexts of the school, and the report card, the contexts of card-games "cheating", (or indeed, any other game where there is a quasi-judicial appeal to rules), the context of the performance-record of a baseball player etc. Feinberg's basic attitude or stance here is shown⁴⁶ when he submits that "There is something quasi-judicial or quasi-official about the defeasible ascriptions, even when uttered outside of institutional contexts which...distinguish them from the non-defeasible ones." He examples the latter class by the statement, which he says is purely descriptive, "He broke down and cried" or "He stammered". He concludes, then, with reference

to this class of 'Faulty-action' statements there are disclosed, contrary to Hart's generalisation, certain purely descriptive statements.

He proceeds next⁴⁷ to 'normal-action' sentences, and inquires in what sense such ordinary sentences involve^{ascribing} responsibility to the subject. He discerns five categories within this class of statement, the first two being ascriptions of simple causality, physical or personal, and ascriptions of causal-agency, which are distinguished from the first as representing a "telescoping" or various "sub-acts" into a seeming unity of action; e.g. "Jones startled Smith" really adverts to a concatenation of acts and circumstances which we encapsulate or condense in one monolithic utterance. Thirdly, there are "simple agency statements", disclosing no such telescopic effect, such as "he moved his finger" in the course of opening a door. The remaining categories of statement are imputations of fault, which he has already examined, and imputations of liability which not only note a fault but propose or suggest further consequences, or exposure to consequences, in respect of that fault.

He says then that there is no class among the above that could not be ascriptive, insofar as an ascriptive sentence ascribes 'responsibility', or indeed, responsibility is a matter we ascribe, rather than describe; this type of ascriptivity then has the nature of an analytical truth. Yet, equally importantly, we sometimes give an action-statement in answer to the question "What did x do?" not "Who did it?", when we say "x did it"; and this shows us that action-statements are not always ascriptive, however much they bear the

same form both when ascriptive and descriptive.

He concludes this section⁴⁶ by saying that his five-fold classification does give Hart some qualified support in that all action-statements, insofar as a "responsibility" aspect is/may be seen in them, could function ascriptively; this "could function", is of course, less than Hart's "are". Yet Feinberg qualifies this measure of acceptance by saying that Hart's rider, that they are also "defeasible in the manner of legal charges" needs further qualification.

In the third section, then, Feinberg sets out to explain or analyse just what these qualifications are. His aim is to identify firstly what distinguishes the same sentence as, in one context, descriptive, and, in another, ascriptive, and secondly having identified that distinction, use it to characterise exactly or expand the notion of defeasibility to allow us to see just to what extent that characteristic applies to the class of action statements as a whole.

1. He considers⁴⁹ as a possible distinction the suggestion that descriptive uses concern or report matters of fact as against matters of attribution. Yet the indicative mood, so "matter of factual", seems to figure in both uses. Still, the ascriptive use he suggests can be contrasted with the "fact-reporting" use if we consider statements which represent decisions on our part, not discoveries. Ascriptive sentences have an irreducibly discretionary aspect. A further characteristic he terms their contextual relativity, where the user of such a sentence must not merely decide but judge relative to the situation in which he judges. Factors conditioning that judgement may be, variously, the less than total set of

facts available, a particular purpose e.g. an insurance claim, or a practical interest where we assign a cause to a phenomenon in hope thereby to control it.

2) Having thus characterised what is in essence the ascriptive quality in a statement, Feinberg says⁵⁰ that these two qualities (of discretion and contextual relativity) do entail that ascriptive sentences "exhibit a vulnerability logically analogous to the defeasibility of some legal claims."

Returning then to his five-fold categorisation, Feinberg says⁵¹ of all the classes of causal attribution i.e. all classes save that of "simple agency" that "properly rebuttable causal ascriptions commit the error, not of misdescribing, but of misrepresenting."

He concludes, however, by saying, and I think we may agree with him, that sentences of simple agency cannot be anyway seen as ascriptive, as ascriptivity has been characterised in his terms. And it is with these types of utterance that the philosophy of action is archetypally concerned in the question of what differentiates an action and a mere bodily movement, or, in Wittgenstein's terms "What is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?"⁵²

To summarise, Feinberg has added the following important qualifications to Hart's generalisation.

1) Action-statements are capable of both an ascriptive and descriptive use, not always ascriptive.

2) Defeasibility is not, as Hart alleged, the essential quality of all action-statements (as ascriptive) but only, as analysed into a union of discretionary and contextually

relativising functions, what serves to distinguish an ascriptive from a descriptive use of a statement.

3) An important class of action-statements, those of simple agency, as not disclosing any discretionary or contextually-relativising quality whatsoever, are never capable of being used as ascriptions of responsibility, or defeasible;* insofar as the philosophy of action is concerned with their analysis, Hart has not after all cleared up the problem or the puzzlement, as was his boast.

I do not consider that anyone would like to deny the accuracy or the truth of these conclusions on Feinberg's part. Indeed, so far are we from denying them that it must rather be admitted that his analysis or exploration of the nature of ascriptive language and the concept of defeasibility is an extension and considerable refinement of Hart's analysis. It makes the latter's original insight genuinely universalisable beyond the limits of the judicial context, or a real and safe contribution to the philosophy of action, if no longer a total solution to one of its major problems.

Something yet remains to be said by way of mitigating the bluntness with which Feinberg forces us to recognise the errors of Hart's analysis. It is not that Feinberg has said Hart was totally wrong; as noted, his criticism is in extension of, or in rehabilitation of much that Hart has said. Rather he has shown Hart to be, in one

* It is realised that, with an effort of imagination, almost any statement of action may be seen as ascriptive, even "x moved his finger"; yet in every non-trivial philosophical use, or consideration of basic statement of simple agency, it is clearly non-ascriptive.

respect, totally wrong, namely, in imagining that he had provided a solution by seeing what is fundamentally wrong on both the new and old version of the traditional analysis of action.

I propose now to trace or attribute Hart's error to a confusion on his part between two theses, a weaker and a stronger, that he can be seen to put forward in the article in question, and between which he alternates and is led, by this confusion, to an ultimately wrong conclusion.

When he characterises, by example, the archetype, or essence, of the ascriptive utterance, he cites⁵³ "I did it", "you did it", "he did it" etc. or "Smith did it" "Smith hit her"⁵⁴ etc. and observes that the ascriptive use is mainly in the past tense, or aorist "timeless" tense, which aoristic sense distinguishes them from merely descriptive uses. At this stage, he recognises that these verbs have a descriptive use which in fact is so important as to obscure the non-descriptive use, which sentences containing these verbs in the past tense have in common with...judicial decisions by which legal consequences are attached to facts." I shall call this the weaker thesis, that verbs of action have both descriptive and ascriptive uses, and that their ascriptive use is comparable to the use, in the judicial context, of sentences involving legal concepts i.e. both are to be treated as "defeasible utterances".

On the other hand, in those very same pages, Hart says that "our concept of action is fundamentally not descriptive but ascriptive in character, and a defeasible one." This is the stronger thesis, where, by contrast with the weaker, the ascriptive use is the

fundamental one, and no qualification of tense is stipulated for action verbs. They are in any tense ascriptive.

I consider, then, that the weaker thesis is eminently acceptable, indeed, represents that part of Hart's thesis that Feinberg accepts. In Feinberg's terms, past tense statements like "Smith hit her" are typical ascriptions of causal agency, being "telescopic" formulations of various "sub-acts" and further Hart's sense of the "timeless", "aorist" quality implicit in the typical past-tense framing of the ascriptive utterance is surely just that "non-matter-of-factuality" that led Feinberg to the correct characterisation of the ascriptive use.

That Hart should confuse this thesis with the stronger, and use the same data or grounds to prove both, is both an easy and understandable confusion, revealing not so much an over-exuberant application of a valuable insight as perhaps a basic confusion over exactly what is the central problem of the philosophy of action. It is as though Hart, to some extent, sees that philosophy as in puzzlement over how to construe actions always presented for analysis in the past tense, "hitting", "moving" etc. always being linguistically framed as "he hit her", or "he moved the table". Indeed, if that were how Hart without saying as much pictured the puzzlement of the philosophy of action, his claim to have solved it may well have, thus qualified, not been exuberant. In this context, it is perhaps instructive to consider that Hart, in a later work, the essay "Acts of Will and Responsibility"⁵⁵ again contributes to the philosophy of action with an examination of the concepts "voluntary" and "involuntary". He is there explicitly

concerned with the crucial distinction between a physical movement and an act, and offers an account or a distinction based upon external criteria of when we would say or recognise an action as one or the other, which nowhere includes or suggests a recanting on his part of what he earlier said in his article "Ascription of Responsibility and Rights." However this may be, whether Hart misconstrues or mischaracterises the aims of the philosophy of action, between the weaker and the stronger theses as set forth above there is still a large, and unpardonable leap on the part of the philosopher, one that is additionally to be reprimanded in that it illustrates, on his part, the very "un-linguistic analytical" practice of a limited "diet of examples" leading to an irresponsible generalisation. For what he has done in going from weaker to stronger, is to assume that what is the case in regard to past tense utterances is the case in all action-statements. Of the additional contention that the ascriptive use is fundamental, it can only be said that it is an a priorist pontification nowhere supported by example or by reasoning on his part.

In conclusion it may be added that on his later enquiry into the nature of an action in Punishment and Responsibility, whether consciously in correction of his earlier views or not, Hart offers a much more careful and lengthy analysis of an act and how it may be differentiated, for the purposes of ascribing responsibility, from a mere physical movement. He there approaches the problems not via a performative use of language, i.e. ascription, but from a consideration of the language-games in more orthodox use of ordinary language methods, of the words "voluntary"

and "involuntary". He rejects "inner act" theories, making them stand in need of the external criteria of "appropriateness" to one's project, for voluntary actions, and "ability to control" for involuntary acts etc. Such an analysis not only avoids the substantive errors we have noted, with Feinberg's assistance, inherent in his earlier article, but shows, I think, an instance of Hart's occasional lapses from his methodological model, and the severe cost of such a lapse. I now wish to consider another contribution to jurisprudence earlier considered primarily from a methodological point of view, and now to be criticised in substance, that of Hart's use of rules in the explication of a legal system.

Hart's use of the concept of the rule.

I have earlier made it clear how important, indeed, central to Hart's explanation of a legal system is the notion of a rule; his reliance upon that notion is twofold. Firstly, he sees the crucial difference between a "pre-legal" society, and a modern legal system as marked by the presence in the latter of secondary rules of recognition, change and adjudication. Secondly, the analysis of a rule of law and its internal aspect as perceived or sensed by those subject to it is vital both to seeing what is wrong, or missing, in earlier attempts to explain the operation or effectiveness of law, and to our understanding of what we are doing when we observe the law and thereby render it effective. I propose now to examine each of these two matters in turn.

- 1) Hart proposed as the basic cause or need for the existence or addition of secondary rules to primary

ones the fact that, without them, the primary regime would be static, inefficient and uncertain. Secondary rules were, in essence, remedial. At p.92 of The Concept of Law Hart characterises the distinction and relationship between them as follows; "...primary rules are concerned with the actions that individuals must or must not do...secondary rules are all concerned with the primary rules themselves". At p.79, however, he characterises them in another way, as follows: "rules of the first type impose duties; rules of the second confer powers, public or private". Indeed, he had earlier made this distinction between power-conferring and duty-imposing rules when earlier considering the variety of types of law and legal rule.

Now, as Sartorius points out clearly in his article "Hart's Concept of Law"⁵⁶ Hart is really making two different distinctions, which are so misleading as to allow, in many instances, an allocation of the same rule of law to either class of primary or secondary rules, according as which criterion is used. According to the first criterion laws governing marriage or wills etc. are primary, whereas, if the second is followed, they are secondary.

If we ask what is the unique and unequivocal distinction between the two types of rule, a number of possible answers could be seen as offered by Hart; possible answers are that secondary rules are "constitutional" or that they are "public", or that they are "power conferring" or, as Sartorius suggests, if anything, Hart's real preference behind the obscurity of ambivalent expression is that the only real secondary rule is the rule of recognition. The inevitable conclusion is that there is no one clear distinction between two types of legal rule, at least

to be drawn from Hart's account. This is not to deny that all the above distinctions are valid and important, only that they will not fit into that neat bifurcation of primary and secondary that Hart proposes.

It might further be said that this lack of any clear distinction does not directly bear upon the internal aspect of a rule, which is not in virtue of its relationship to any other rule but simply that of its nature as a rule. Hart does state,⁵⁷ however, that, as minimum conditions necessary and sufficient for existence of a legal system, those rules deemed valid by the system's ultimate criteria of validity i.e. the rule of recognition, must generally be obeyed and its rules of change and adjudication must be accepted as common public standards by its officials. This seems to show that Hart does not consider it necessary, or indispensable that the internal aspect of a rule be sensed by the citizens, but must be sensed by the officials though only in regard to the "secondary" rules of change and adjudication. As for whose is the sense of the internal aspect of the rules of recognition which yield the validity here mentioned, Hart does not seem here concerned to answer, or even aware that the question might be put. That he takes it as an unquestioned donné doubtless supports Sartorius's suspicion that ultimately the secondary rule is the rule of recognition.

Now it is not my purpose here to examine the overall adequacy of Hart's explanation of a legal system as some union or other of primary and secondary rules; when Sartorius is prepared to concede⁵⁸ that, despite the lack of clarity above noted, "the distinction between primary and secondary rules....is an important distinction with considerable explanatory power...to traditional

problems of legal philosophy", he leaves intact, or accepts Hart's formal, if not substantive, point that a legal system of rules is a "two-horse" affair, as though rules were either primary, or secondary, or had spells at being one or the other, or sometimes were both. It is submitted that Hart's error is not only creating "hybrid" distinctions, as Sartorius characterises him⁵⁹ "...between the constitutional rules...on the one hand, and those rules which impose duties etc...on the other hand," but one of imposing an unjustifiable limit on the variety or number of rules he might distinguish within a legal system. Indeed a recognition of just this unwarranted assumption of a binary system of rules might have spared Sartorius, had he made it, the "will-o'-the-wisp" pursuit after the elusive distinction between the two, which is surely only to be seen among many.

Hart has, in fact, failed to canvass the full variety of legal rules; they may be duty-imposing, power-conferring, institutional, analytical, general or restricted in application, temporary, permanent, constitutional, adjudicative, dynamic, static etc. and may refer to or regulate other rules, which last type of rule may, in its turn, be the subject of yet another rule of interpretation. This failure of Hart, otherwise more than eager and adept at an empirical examination of the variety of the instance of the phenomenon he is examining (which examination usually puts out of the question any uniform, or, for that matter, binary, explanation) is to be explained by his eagerness to explain the essence or essential characteristic of a legal system. He wishes to mark a particular stage of development at which an informal

"pre-legal" society becomes a legal system, or a particular quality or essential characteristic which a legal system must have to be a legal system.

I noted earlier that this change, from empirical to speculative, in Hart's thesis, was marked by the introduction of the "other-wordly" terms such as "pre-legal", "simple regime of primary rules", which change made obvious Hart's departure from the model of ordinary language methodology. He should rather have considered what, rightly, had been said on rules in Wittgenstein's Philosophical Investigations, to the effect that our use of them, to be effective, need not require any exactness, that rules may be about rules, that they take various forms as applied to games, to language, or indeed, embodied in sign-posts or charts etc. etc.; of this variety of rules Hart is certainly aware; indeed the very diversity of the distinction he makes, perhaps more intuitively than consciously, between primary and secondary rules, can only be the product of this awareness. We may agree with Sartorius that all these distinctions are illuminating but their value owes nothing to being supposedly in hope to characterise "primary" and "secondary" rules, but simply and solely in making clear to us the need to see the many possible types of rules of law.

So far as Hart's "pre-legal" society is concerned, and his attempt to use that "myth" to detect or identify what a modern legal system must have as an essential characteristic, I can see it, methodological considerations apart, as no better or more useful than many other and older "myths" of the metaphysical sort. Indeed, like other such myths, it threatens to obscure

the reality, in this case, of the nature of legal rules as a practice, to which matter, which I have already given some consideration, I shall now return.

I have already, in this chapter, and elsewhere in this thesis, made it clear that a rule is a practice, the summary or formulaic statement of a regularity in human behaviour. I have also tried to show that the internal aspect of the rule which is a major contribution to the elucidation of the concept by Hart is, though of great importance, still not expansive enough as defined or elucidated by Hart, to comprehend the constitutive nature of rule-governed behaviour of the rule that summarises it. I earlier distinguished this relationship as that between the form and the practice of the rule.

I wish now to interrogate Hart's concept of rules as primary and secondary the fusion of which is a major essential characteristic of a legal system, and having an internal aspect in the light of the above analytical criteria; this interrogation will show just how his "myth" of the pre-legal society is misleading and perhaps further indicate a more accurate analysis of a legal rule as a practice.

When Hart talks, then, of pre-legal and modern societies, he suggest that law, or a legal system is (to use the not inappropriate biological term) an "emergent" phenomenon, which term is used in that science to signify "the appearance of a qualitatively different phenomenon at a specific stage of complexity of organisation" (This succinct expression is that of Chomsky in Language and Mind).⁶⁰ In the case of Hart's exposition of a legal system, the "qualitatively different phenomenon" is the set of secondary rules, and, to a certain extent, insofar as Hart sometimes seems to imagine that the internal aspect is indispensable or a necessary aspect only

in respect of the secondary rules of change and adjudication observed by the officials of the system, the internal aspect itself.

It is submitted, then, that this belief or view of the development of rules is not compatible with the logic or logical nature of rule-governed behaviour as here presented as its genuine nature. As Wittgenstein has said, and as his view has been expanded and analysed elsewhere in this thesis, rule bound behaviour is, like language, a fundamental part of our humanity. It is impossible to imagine not only, as Wittgenstein says at para. 199 of the Philosophical Investigations, a situation where only one man follows a rule, or does that only once in his life, but, equally, a situation where someone suddenly invents at a particular stage a new "secondary" type of rule, or, just as importantly a new "internal aspect" or sense in a rule.

As Wittgenstein says⁶¹ "there exists a regular use of sign-posts)" i.e. rule-governed practices, "a custom", which I have taken, I think accurately, to mean that human beings have rules as they have language in such a way that it is not possible to imagine them without rules or language, and still be talking or thinking of human beings. Rule-governed behaviour is, in fine, a non-emergent phenomenon. Contrary to that "mythical" picture of a process of development, humanity has all at once the full power of using and following rules, or behaving in a complex variety of regular, patterned ways we identify as rules or customs. Given that this human trait or characteristic is full in the sense of non-emergent, there can be no temporal distinction between primary and secondary rules, or

indeed any logical distinction traceable or explainable by reference to that temporal distinction. The distinctions that do exist among rules are various and logical, such as are discernible in that catalogue of types or varieties of rule provided above, but in no sense is any one type finer, or superior, or more developed than any other.

By the same token, if all rules are equally basic, or primary in the sense only of being fundamental to, or inhering in, human behaviour, if rule-bound behaviour is a sine qua non of humanity, so too the internal aspect, if it exists as a part of the universal logic of rules must belong to, or be shared by all rules, not only those supposedly "second-order" rules of Hart.

In this respect, then, none could accept Hart's contention, as he has argued it, that a legal system is a fusion of primary and secondary rules, though it is incontestable that it is, as he importantly stresses, a matter of rules, and that our understanding of a legal system is to be furthered most of all by a consideration of what is, or constitutes rule-bound behaviour; misunderstandings of these truths, especially in regard to the internal aspect of rules, have, he not inaccurately or exaggeratedly states⁶² been the source of "most of the obscurities and distortions concerning legal and political concepts."

It is in view, then, of this crucial importance of the rule and its internal aspect that I venture now to suggest that Hart has not done full justice to that aspect, or the nature of the rule, not only in seeming to see it as necessary only in the rules of change or recognition, but in restricting the meaning or content of the internal aspect of the rule to purely reflective aspects of rule-bound behaviour, such as criticising, demanding conformity etc. This

he does, as said earlier, because he takes the traditional attitude to rules of law, as basically prescriptions given out fully-formed by the legislator or judge etc. His criterion of a rule is, shortly, a formal one.

I now wish to suggest that a more accurate or fuller appreciation of a rule, whether or law or not, ought rather to be seen as a formal expression and a behaved practice; indeed this suggested attitude is the inevitable consequence of what I have already said, that a rule is fundamentally a practice as much as a formula or summary of that practice. Football, for example, is both a matter of its rules and the many games that have in fact been, or will in the future, be played. To consider a less mundane example, that of morality, it has long been recognised that a moral rule cannot, in any Kantian or other sense, have only a formal validity - it must be validated in practice. Indeed, it is by observation of the practice of moral agents that we recognise a moral rule in force, and not merely an empty form. As an empty form, it is not only not moral, but not a rule either.

It is clear that law is neither football nor a matter of morals, and certain special characteristics of a legal system must be considered, so that we qualify, to some extent, any simple equation of the law, morals and football, etc. as like matters of formal rule and practice. It is submitted, however, that, even in consideration of these specific differences, there is no reason in any of them why the logical point that all rules are somehow matters of form and practice should not be made with reference to a legal system.

It is recognised that legal rules may be created

instantly, as it were, ex nihilo, to prescribe a conduct that, at the time of the formation of the rule, may not exist; an example would be a new tax or a new divorce régime, or indeed a whole new code. It is recognised too, that rules of law are prescriptive, unlike many social rules which really are descriptive of an observed regularity, which regularity does not seem directly the product or the creation of its mere formulaic expression. Thirdly, it may be said that it is possible for a legal rule to go directly contrary to what is actually the current regular practice in that matter or activity the rule prescribes for e.g. all cars may, as at present in Great Britain, drive on the left-hand side of the road, or we all here use pounds, shillings and pence, and suddenly a rule of law would prescribe that we drive on the right, or use decimal currency etc.

It is submitted, however, that these differences are more apparent than real. The rules of football may be instantly or radically changed and there is only a temporary lapse between form and practice. This temporary discrepancy will eventually be repaired, either by the prescriptions being effectively incorporated into the area of behaviour it prescribes for, or the original practices proving so incorrigible as to render the rule a mere form, and bringing about its repeal. Indeed there is a tertium quid, where rule and practice might never fuse, but I do not see this either as surprising, for it is a real phenomenon, or likely to make us abandon the view here put forward that a rule is a matter of form and practice. For it is indubitable that when this third situation does come about, a judge or anyone in applying it clearly modifies his application of the rule by

reference to the practical dimension of that rule, whether practice reflects its observation or no.

In the case, too, of an "informal" social rule, it might seem that there is merely a contingent, i.e. non-internal, relationship between the form of the rule and the behaviour. That this is apparent only may be shown by a consideration of how we go about learning or copying or conforming to a simple, non-legal, social rule. It is enough merely to consider how table manners are learned to see how, even in contexts not usually seen as "prescriptive", or governed by any enforceable norms of law, the form, or expression of the rule, as "always hold the knife in the right hand" or "don't smoke during a meal" etc. is a vital part, or plays a vital role in sustaining and disseminating the practices they describe. The expression even of such rules, then, is not merely descriptive, but in an unmistakable, though relatively weak, sense, prescriptive.

To show these similarities is not, of course, to argue, nor is it necessary to argue, that there is any complete underlying identity between rules of law and their operation, and any and all other rules. I am content only to argue that rules of law, rules of football, rules of morals or etiquette etc. constitute a "family" of rule-governed activities in the Wittgensteinian sense. There are many similarities, enough to classify them into that one family but enough significant individual differences to be revealed by, and at the same time, demanding, a careful analysis surely to be undertaken by the philosophy of law, applying the methods of ordinary language philosophy.

It is submitted, however, that the major family

resemblance is that rules and rule-governed behaviour are a matter of form and practice; both form and practice may be as various as the different human activities and needs, i.e. the forms-of-life, make them and in fact show the varieties in the relationship, or interplay itself, of form and practice. It is submitted, too, that the internal aspect so importantly noted by Hart is in fact a partial glimpse on his part of this relationship as sensed, both consciously and critically, and non-reflectively, in his behaviour, by the observer and follower of the rule in the very act of observance.

It is submitted, lastly, that had Hart remained faithful to his methodological model rather than introduce, in an a priori manner, his notions of primary and secondary rules, as speculations on what a legal system as a system of rules must have, and how it must have developed from a pre-legal society, he would have arrived at a more accurate sense of how, as above, we should analyse law and a legal system as a system of rules.

It would not be safe to leave the matter of legal rule as a mutually complementary fusion of form and practice without pausing to consider some notable and perhaps to be expected objections; these are likely upon any emphasis however qualified upon the practical or behavioural dimensions of the observance of a legal rule. It scarcely need be said that there are many who see law as au fond a prescriptive science; its mechanics are as formal and prescriptive as its reality^{is} so importantly normative as to be factual or behavioural only in a trivial sense. To such a view any suggestion that a rule is a practice must be ex facie offensive.

To appease such objections, and to confirm what has

above been argued in a positive manner, it will prove useful to state clearly what is not meant by the submission that legal rules are a blend of form and practice. In short, I have outlined a dynamic relationship between the form, that is, the verbal expression or reference of a practice, and the shape or performance of that practice. I have given various examples of this fusion without any attempt to quantify what weight of ultimate efficacy attaches to practice or prescript; one may as well, in another dynamic relationship, inquire whether an electric current owes more to the conductor or conducted. Notwithstanding this general characteristic of a functionally and conceptually complementary relationship, it is not impossible for especial reasons to concentrate upon one or other part to make precise and unequivocal the articulation of the relationship. Lest then future criticism of this account of legal rules be too superficial in condemning it as behaviourist or sociological, a serialisation of what is not implied by it will provide just this individual attention to the component parts of the rule.

1. By practice is not meant that to identify a legal rule one looks merely to what people do, and having compiled statistically so many like instances and exceptions so enunciate the legal rule. As Hart has pointed out,⁶³ the legal rule has an internal aspect in virtue of which the citizen sees the rule, practice or form, as a standard of criticism, correction, emulation etc. In short, one needs no statistician to tell us the law; nor, if he told us, would his intelligence promote or account for this reflexive consciousness of the legal

rule. This important observation is not ignored or its significance lost by any submission on my part that a legal rule is something more than what Hart allows it.

2. To say that a legal rule is form and practice does not imply that the observance of the rule is unthinking; that, in effect, what people do, regardless of what was in their minds at the time of action and decision, shows the rule. There is an obvious intellectual or critical dimension in conformity to a legal rule; simply, one may always choose whether to obey or not, in whole or in part etc.

Yet this intellectual dimension must be qualified. One may debate, soul-search etc. whether to follow a legal rule; equally, one may, if a keen enough player, agonise over whether and how to play a game of football, as a sportsman or not etc. What doubt or intellection is not logically possible is that doubt which is based upon a spurious separation of the observed practical instances of a rule and the idealisation or perfect form after which all real instantiations are mere shadows, perhaps distorted, unreal and only approximations of the real. Stressing the dynamic relation of form and practice is calculated directly to scotch this fiction; in the science of law and legal theory it is as pernicious an essentialisation as it is in the philosophy of language. Nor is this to deny the role of interpretation in the law; interpretation is intrinsic to the office of judges, advisers, commentators etc. Indeed anyone at all may hazard, with more or less consequence or credibility, his own interpretation of any legal rule. What a legal rule may be so interpreted and differing constructions imposed on the same verbal format is not more surprising than that various differing colours may be called "red". Equally, that one may not term every piece of legal behaviour an

interpretation at that much remove from the idealised rule or prescript is as important as the realisation, per Wittgenstein etc.⁶⁴ of the fallacy of seeing among or above the actual varying reds the quintessential ideal hue.

3. To stress practice in the analysis of law as a system of rules is not to reduce legal behaviour or conformity to precepts of the law to a mere matter of habit, either in the sense considered in (1) above, where statistician becomes law-giver, or in any sense which seeks to obliterate the prescriptive dimension of legal behaviour.

Many laws are explicitly imperative. Legal rules, for example, which embody complex tax provisions, adding the labour of calculations to the injury of material confiscation, are scarcely likely to be habit-forming. It is a logical matter too that a newly promulgated law sits upon no pre-formed habit. Other legal rules, on occasions that can be imagined, may be exceedingly aggravating and require an effort of conformity which belies any suggestion of their being merely the habit of the observer; of any 100 red lights a driver passes, one may say simply that some 70 times he stopped duly, some 20 times with great reluctance, some 10 times not at all.

Here then is no real case of habitual behaviour, but of obedience to a prescription. What induces response to the prescription may be variously the fear of sanction, a well-disciplined sense of conformity, mere chance, a desire to give good example etc. not any general inner experience of validity or otherwise. It is sufficient here to acknowledge, indeed, stress the important prescriptive dimension

in the legal rule, not to consider what the teleology or aetiology of that conformity it induces might be. Having thus restored the reality of the prescriptive element in law, it is not diminished but rather its analysis is improved by showing its complementary relationship to practice, and this in the following manner.

The distinction between the form and the practice of the rule should be by now familiar, the form being the verbalisation or reference of the rule, the practice being what is done and then so described. As it is necessary, to know what any word means, to look to its uses in its "forms of life" or characteristic contexts, so too it must be understood that a (prescriptive) rule can only be understood by reference to its actualisation in the practice of those conforming, or indeed flouting it. This necessary attention to the empirical dimension of legal behaviour is not in the nature of a sociological exercise; as though when the legislators leave the benighted chambers of their parliament to see their laws flouted or observed, such evidence is a mere contingent matter upon the reality as law of their enactments; or as though the observance of a rule were an epiphenomenon, fortunate or otherwise upon the formal integrity of the rule which is not to be impaired, conditioned or any way ratified by that observance etc.

These imaginings cannot be acceptable in so totally denying the internal relationship of form and practice. Rather the practical extension of a legal rule's formal and prescriptive terms concretise or deliver, if you like, into reality the otherwise empty form. Once this realisation or actualisation is effected, it is important

to note that the practice so developed must thereafter inform the meaning, of interpretation of and conformity to the form of that rule. To example, one may consider those various statutes which introduce a new "key" term, thus making an almost overt appeal to the courts to set about, in the course of the earliest actions brought under the terms of that new act, to give substance to the emptiness of the new terms in the circumstantial and practical data of the cases before them. Less immediately, this cross-fertilisation may be seen in the not infrequent occasions where a precedent of some antiquity is cited in support of a point of law to be made with reference to some contemporary legal relationship. Somewhat outlandishly, the duty of alimentary provision owed by a wife to her husband imprisoned for civil debt in 1700 might be now adduced to support a more modern claim dependent upon perhaps less worthy incarceration, and complicated by the appearance of all sorts of welfare provisions etc. It can scarcely be alleged that, if such a prescription were reapplied, it was in deference to the endurance of Restoration social norms; should it not rather be said that the practices and contexts of modern society remould the casual form of the earlier prescription conformably to modern needs and adjudications?

Further exemplification would be tedious; the point made here, that a rule is form and practice, is, if true at all, in the nature of an analytical truth inherent in the grammar and logic of rules and not, as such, to be vindicated by empirical example. If examples, however, may not be looked to for conclusive proof, it is hoped that at least they serve to

indicates how the view here argued does not fail to do justice to the necessary prescriptive element of legal rules.

4. Lastly, and in peril of some repetition, the above view does not imply that the legal rule, its practice informing and informed by its prescriptive form, is thus reduced to the status of some moral rule which the courts of law do no more than occasionally canonise, or the statutes of the legislature merely sponsor. What has here been said might mistakenly though perhaps pardonably be interpreted as follows:

- the court creates a rule of law.
- society, in realising it, in adopting it into their behaviour and in appreciation of its normative character using it as a standard of criticism etc. (i.e. the internal aspect) alter it independently of the courts' control.
- the courts thereafter must interpret that legal rule in deference to that now manifest social practice. They are thus impotent, if anyway so minded, to restore or re-impose the pristine expression of the rule in face of obvious social rejection.
- the court must therefore merely canonise, not alter or dictate to popular mores.

That this is not so or here contemplated may be made clear by the following considerations.

Generally, it should be said that there is, perhaps since Austin⁶⁵ and positive morality, a rather facile tendency on the part of legal scholars to use "morals", "morality" etc. as a kind of waste-paper basket for what blue-prints for a legal system they find at odds.

with the standard view of law as, classically, courts, legislatures, sanctions etc. Any additions to these essential elements are accordingly viewed as illicit importations of considerations of

ethics and are thus relegated to moral philosophy. This practice is all the more reprehensible in that it is done without any regard to what moral philosophers consider to be the elemental matters of their philosophy, the role of moral argument, the nature of moral terminology etc. Not only are these concerns little likely to be aided by the gratuitous addition of rejects from jurisprudence but they are, as composing the general part of current ethical theory, so advanced in analysis as to convince anyone familiar with them that there is a clear divide between moral and legal behaviour. Whatever that latter is, it is not a matter of personal codes of conduct; no more does legal argument or analysis or debate depend upon those matters seen to underlie moral argument and analysis.

Less academically and with an eye to the realities of legal rules in a legal system, the role of the courts and legislature in the formation and the enforcement of a prescript has no counterpart within moral behaviour; neither these nor the composite behaviour or practice of society in the realisation of a legal rule are moral agents in any intelligible sense. It is surely by now clear that, whatever else morality is, it is a thoroughly personal and humanistic matter; the importation into its subject matter of states, systems, courts etc. however anthropomorphically garbed leads to inevitable logical impasse and paradox.

Quite bluntly, courts, parliaments, statutes etc.

are the characteristic specific materials and axes of a legal system and legal behaviour. To say that the operation of these is complemented, affected, or shaped by the practice of their prescripts in society is to point out a fact necessary to the full understanding of a legal rule as a dynamic and continuing relationship of form and practice. These so conspire to yield the efficacy of the legal order, and if this interaction is appreciated, cannot but give a more balanced and realistic account of the phenomena of that legal order. This does not imply either that law is a mere morality, nor, in showing the mutual adjustment of practice and prescript, does it seek to exaggerate the import of social behaviour as the concretising agent of legal rules or diminish the role of the institutions of the law as their prescriber in either case beyond what in fact is the case.

3) I wish to conclude this chapter by a brief consideration, not by any means a summary, of the import of the various arguments etc. here set forth, and this, by way of indicating some further areas of inquiry into the nature of law to be undertaken by the philosophy of law as here considered ideally utilising the methods of ordinary language philosophy.

What in fact has been shown is how a method or a set of substantive doctrines, developed and more familiarly seen in general philosophy, can usefully be applied to the problems of legal theory. Now given that the acknowledged aim or concern of philosophy, sans phrase, is to examine or show how we may understand reality,*

* this characterisation of philosophical endeavour is necessary loose, and to be taken only as a short reference to my lengthier attempts to treat of the matter.

if, too, it provides, when it is applied to the service of jurisprudence, a measure of real insight, or a greater measure of understanding of its concepts than we had before such application, it is now to be asked how we may set that knowledge of the realities of the law against what statements or dicta emerge from the courts, or are set forth, indeed, in statutes or codes or constitutions etc. about the law. For it is no revelatory statement on my part that there has often been, and will often be, a discrepancy, not to say "head-on" conflict, between the two accounts provided of what is the law or what a particular legal phenomenon is.

There is, of course, the additional complication in the phenomenon of law and its analysis, that, when judges etc. pronounce upon its meaning or role, a part of the very subject matter of the law, which our philosophy concerns, is itself affecting to pronounce its meaning. It is as though that usual goal of philosophical pursuit the "quarry" of its "hunt", has been pre-empted by "judge and coy."

It is submitted that this seeming impasse must be resolved, or more accurately, it is necessary to indicate at least on which side the resolution of necessity must be, if jurisprudence, as a genuine beneficiary or part of philosophy, is to be of maximum use. It is considered, then, that judges' dicta, statutory expressions etc. cannot be taken as expositions of the meaning of the law, but, primarily and basically, only as part of its content. It may be that dicta of the courts or carefully framed codes do, as a matter of fact, accurately reflect truths

acknowledged by philosophy, but neither is this frequent nor is it necessary to their being what they are i.e. the content of the law which its philosophy then will examine and, if we are fortunate go some way to elucidate. We may consider the following examples of the conflict and need for resolution, generally outlined above. Both philosophy and judges and statutes etc. concern themselves with the concepts of "intention", "rule", "obligation" etc. and different versions or understandings of those concepts are given. Here we might very briefly consider what J.L. Austin in his article "A Plea for Excuses" says⁶⁶ of the utterances of the judge and counsel in R. v Finney 1974 12 Cox 625: "The learned judge's conclusion is a paradigm of these faults" (sc. misuses, or misunderstandings of the usage, of the words "voluntary", "inadvertent", "intentional" etc.)

In^{an} article by P.J. Fitzgerald on "Voluntary and Involuntary Acts"⁶⁷ he concludes his examination of the same concepts as used in the same judicial context, by advising us⁶⁸ "...that the correct definition of the word 'act' is to be found by looking at the use made of the word by lawyers". It is submitted that this is just what we cannot do, if that use is a "paradigm of faults" and revealed as such by philosophical considerations, which are here, as in any other matter of analysis, our final touchstone, or where we must ultimately resort to for ultimate clarification.

We can, of course, understand those practical considerations that lead Fitzgerald to his conclusion. He is writing for lawyers, he is a lawyer, and, as a counsel of prudence, if not a proposition of truth,

his conclusion is justifiable. I have here tried to argue, and here again will state that it should be, indeed, is the business of jurisprudence to supply propositions of truth, not counsels of prudence, and invigorated by the analytic strength of the methods of ordinary language philosophy, it is surely able now to challenge or question the rather supine attitude it has shown or acceptance it has too readily given, as in the case of Fitzgerald's article, to the statements of the courts. Should we not rather demand, as philosophers of the law, or provide, a language-game analysis of these concepts and their use, considering judicial uses, of intention etc. whether in cases of strict liability or not, only as one or some among many as Austin does? Should we not criticise the courts, not for failing overtly to do this but for misusing the concepts which should be clear, did they but look to the philosophy of their science, or were its findings more confidently asserted? And, should we do both of these things, would we not then be fashioning a fuller and more authentic jurisprudence as the philosophy of law?

References - Chapter 2.

1. Hart's major work is The Concept of Law, O.U.P.1961
2. R. Sartorius has published a criticism of The Concept of Law in his article in More Essays in Legal Philosophy, ed. Summers, Blackwell, 1971, "Harts Concept of Law" at pp.131-161.
For Hall, see "Analytical Philosophy and Jurisprudence", 1966 Ethics 77.
For Bodenheimer, see "Analytical Positivism, Legal Realism, and the Future of Legal Method", 44 Virginia Law Review. These two latter are typical of the usual transatlantic attitude to Hart's jurisprudence.
3. See 1 Supra.
4. See Chapter 1 of this thesis.
5. The Concept of Law, at p.VI of the preface. The quotation, from "A plea for Excuses" by J.L. Austin (see note 40 of Chapter 3 of this thesis) is repeated at p.14 op.cit.
6. Op. cit. at p.2.
7. K. Olivecrona Law as Fact, Stevens, London 1971.
8. Hart's statement of these three problems is sufficiently comprehensive for all to accept.
9. See Chapter 1.
10. Op.cit. p.16.

11. Ibid. p.14.
12. Op.cit. p.14.
13. John Austin, the famous Victorian jurispudent, whose work is now seen as heavily reliant upon that of Bentham. See The Province of Jurisprudence Determined (and the uses of the study of jurisprudence) ed. H.L.A. Hart, Weidenfeld and Nicholson, London, 1954.
14. See The Concept of Mind, Chapter 1.
15. Op.cit. p.19.
16. Op.cit. p.24.
17. Op.cit. Chapter 3.
18. Op.cit. p.26.
19. Op.cit. p.27.
20. Op.cit. p.32.
21. Hans Kelsen, see "The Pure Theory of Law" trans. C.H. Wilson, 50 L.Q.R. 474. For a lengthier account see Kelsen's "The Pure Theory of Law" trans. M. Knight, Univ. of California Press 1967.
22. The Concept of Law p.14.
23. This article appeared originally in the Proceedings of the Aristotelian Society, 1947-8; all references here are to the reprint in Logic and Language (1st Series) ed. A.G.N. Flew, Oxford, 1951.

24. Op.cit. pp.145-6.
25. Ibid. p.146.
26. Ibid. p.153.
27. See Chapter 1.
28. Op.cit. p.156.
29. Op.cit. p.161.
30. Op.cit. pp.162-5.
31. Op.cit. p.146.
32. Op.cit. p.160.
33. From his lecture "Definition and Theory in Jurisprudence" Clarendon Press, 1953, it is clear that Hart's consciousness of the importance of methodological of, if you like, meta-jurisprudential concerns is vastly more acute than any contemporary or precursor in jurisprudence.
34. The Concept of Law pp.54-6.
35. Op.cit. p.79.
36. Ibid. p.79.
37. Op.cit. p.86.
38. Op.cit. p.87.
39. Op.cit at pp.89-96.

40. Op.cit. p.89.
41. See 2 supra.
42. The Concept of Law p.96
43. See 22 supra.
44. Op.cit. p.160.
45. In "Action and Responsibility" in The Philosophy of Action, ed. A.H. White, O.W.P. London, 1968.
46. Op.cit. p.100.
47. Op.cit. p.104.
48. Ibid. p.110.
49. Ibid. p.110.
50. Ibid p.115.
51. Ibid. p.115.
52. Philosophical Investigations para. 621.
53. "Action and Responsibility" at p.160.
54. Ibid p.162.
55. An essay in a collection of essays entitled Punishment and Responsibility O.U.P. 1968.

56. Op.cit. pp.131-161.
57. Op.cit. p.113.
58. Summer's edition p.149.
59. Ibid. p.138.
60. Noam Chomsky Language and Mind (Enlarged Edition)
Harcourt, Brace and Jovanovich, New York 1972
at p.70.
61. Philosophical Investigations. para. 197.
62. The Concept of Law, p.96.
63. See Chapter 2.
64. See Chapter 1.
65. John Austin, see Chapter 2 where Hart's criticism
of the "command theory" of law is considered.
66. Included in The Philosophy of Action pp.19-42.
67. See The Philosophy of Action, pp.120-143.
68. Ibid p.142.

CHAPTER 3

ORDINARY LANGUAGE - REVIEW & CRITICISM

Having described, in the first chapter of this thesis, the precise nature and development of ordinary language philosophy, and, in the second, considered its applications both as already instanced and still further conceivable in extension of these, I think it now appropriate and necessary to consider a number of criticisms that an advocacy of such techniques must inevitably have to deal with as constituting serious threats to the overall justification of, and the present preference for it, as here argued.

These criticisms will be dealt with seriatim. Insofar as this treatment must artificially separate in some regards, or deal in two places with, what is in substance perhaps the same basic criticism, it is hoped nevertheless that such an arrangement will facilitate a clear and comprehensive, if not perfect, consideration of these criticisms, albeit at the expense of some repetition on my part. I propose to consider, then, the following:

1. The issues raised vis-a-vis ordinary language analysis by the new developments of the science of Transformational Grammar, or, the name here used, Structural Linguistics.
2. Criticisms of longer standing of particular theses advanced by Wittgenstein, particularly, but not only, in respect of his denial of the inner events of the mind and his exclusive location of language etc. in the public rather than the private plane. Such criticisms are too frequent and common to be attributable to any one critic as logically or proprietorially "his", but they are most succinctly expressed by J.N. Findlay, in his essay, "On Meaning and Use", on language use in The Theory of Meaning.¹ To this text and author, then, these criticisms will be attributed.

3. Finally, I propose to examine the ordinary language techniques in respect of those "postulates of analysis" it can be seen to have in its operation established for itself. I will thus consider criticisms such as have variously been levelled against it as generally and even fatally subjective, fickle, or more accurately, failing to ensure a credibility for its insights; these, it is alleged, though clever, are the product of what is basically the self-opinionation, not of the incontrovertibly logical cogency of their authors.

By way of preface it should be said of each of the above criticisms, that they are aimed at ordinary language techniques in general, not merely their application to the problems of jurisprudence; the examples here considered are, of necessity, of general philosophical importance, but, mutatis mutandis, can be seen, without any need on my part constantly to provide a fitting jurisprudential context, equally to apply to the philosophy of law. It hardly needs saying at this stage that jurisprudence is too little concerned, to its own prejudice, with considerations of philosophical methodology; that Hart, however evidently a linguistic philosopher, is, in jurisprudential circles, examined and reproved somewhat unfairly for the substance, not the method, of his doctrines. My resort, then, to general philosophy to canvass criticisms of ordinary language techniques is therefore necessary.

1. The Criticisms of Structural Linguistics.

The growth of this science and the "school" of structural linguistic theorists, among them most notably Noam Chomsky and J.J. Katz,² is yet another instance and proof that language, in all its aspects and modes of study, has been in modern times looked to for the elucidation of the fundamental problems of philosophy.

In an illuminating way, structural linguistics may be seen as a convergence of hitherto uncoordinated branches of linguistic scholarship. On the one hand, Chomsky takes as his starting point the science of linguistics, which he saw, in 1950, as in a rather sterile position. On the purely syntactical side of the study of language, the Indo-European grammarians had completed, indeed perfected the scientific techniques of analysing a language; the semantic side had been neglected, and this neglect was becoming apparent from the ineptitude of behavioural sciences to explain or even to begin to understand what were the "discovery procedures"³ of a language. Chomsky's powerful criticism of brute "stimulus-response" pseudo-scientific experiments on this, among other matters of linguistic competence, is set forth explicitly and convincingly in Chapter 1, Language and Mind.⁴ He argues that we should look rather to the general or universal nature of language, to elucidate those rules, both syntactic and semantic (and phonological), which alone can explain the faculty of speech. These rules, which can be seen under the surface (in the "depth grammar") of a sentence, act as "rewrite" rules to transform the basic data of spoken experience into a myriad constructions and creations every competent speaker can in fact produce. Since these rules are not the product of experience, and therefore unexplicable by stimulus-response patterns of explanation or the like, they must be in the nature of innate ideas, pre-programmed into the human mind. Language, then, if successfully and accurately explained, cannot but contribute to the solution of problems of an epistemological nature. It is at this stage that his theme and philosophic goal is fully consonant with those of Katz.

On the other hand, Katz is led to structural linguistics from a consideration, not of the science of linguistics, but of the failure of the logical positivists, e.g. Carnap⁵, to produce a version of, or indeed appreciate the nature of a logical syntax. His view of that misunderstanding and his own suggested solution to it, on the basis of which he is to direct strong criticism at ordinary language philosophy, is therefore of crucial importance to my present concerns; I shall therefore examine Katz's argument in more detail than Chomsky's, having already demonstrated that latter's ultimate identity of purpose with Katz.

It is significant that Katz, like the earlier Wittgenstein, commences his argument, in The Philosophy of Language, with the words of Frege,⁶ "...that the structure of the sentence serves as an image of the structure of thought." He accepts that the inspiration of that philosopher, that there is to ordinary language, an underlying, but not more or less perfect, syntactic reality, was genuine. It was, however, wrong to see this underlying structure, one where the ambiguities, contradictions or metaphysical aberrations of philosophers etc. would be made clear as what and how they were, as leading to or pointing to an ideal and non-natural language. That was precisely the error of Carnap and the earlier Wittgenstein. In the latter case, in the Tractatus Logico-Philosophicus,⁷ Wittgenstein considered that language could be seen as a picture of the world, thus setting its own limit of sense; on the other hand, the propositional form underlying it could not be shown. The former, at first looking for an ideal language in which all metaphysics would be by definition outlawed,

thought this could be done by creating an ideal language, one not needing any similarity in structure or any other regard to natural languages; these he ignored in a rather abrupt and a priori way. Only later, when the construction of a logical syntax, his ideal language, became confounded in a mass of semantic, not syntactic, problems, did Carnap try to conform the ideal to the pattern of the natural. In both instances or essays, the failure of his scheme was attributable to a failure to realise the precise relationship of the surface manifestations or practices of a natural language to our display or characterisation of these in an idealised fashion.

This idealisation lies, Katz argues, in the discerning via a study of natural languages, what is universal in syntax, semantics, and phonology; such a discernment will yield a universal grammar or set of rules which will explain, or will graphically, as a model, represent the operation not only of linguistic competence or those procedures that it consists of, but, of central philosophical concern, such traditional concepts as analyticity,* contradictoriness, synonymy etc. In fact, Katz's scheme is in his own words⁸ "... (to) formulate his arguments (as a philosopher of language) from language to philosophy as inferences from premises about the nature of language found in the theory of language to conclusions about the nature of conceptual knowledge."

* One example of this technique will suffice. Katz proposes to establish a lexicon for all terms of a universal language; each term will be indexed and re-indexed with entries for synonym, opposite, class inclusion/exclusion, truth-value aspects etc. That a sentence, then, is an analytic truth will be then an automatic result of pre-programmed indexing of its terms; similarly, its truth/falsity or nonsensicality will be automatically, and a priori, determined.

This pattern is much more direct and one-way than Carnap's. Katz sees that an exhaustive critique of universal grammar, yielding an account or articulation of, for example, synonymy, leads to a solution of problems not even expressible at the moment, given the paralyzing logomachy that besets any present attempts at elucidation; he remarks⁹ "...unclear cases...many of them the most interesting issues in philosophy, are relegated to the limbo of endless quibbling."

Carnap, on the other hand, flits pusillanimously from logical syntax, to "pragmatic" texts for the categories of each and all, and nowhere gives any clear or practicable programme for, or indeed characterisation of, his idealised language. If Carnap is found wanting in this regard, however, Katz considers ordinary language philosophy as equally, though in a different way, misguided.

His principal criticism of Wittgenstein and fellow ordinary language philosophers, (though the first of these is seen as most reprehensible), is that they too readily abandoned the search for an underlying "syntactical reality" below or underwriting its surface appearances; in fact, the "depth grammar" of language as applied by the later Wittgenstein to the business of the philosopher, in examining areas or shades of the use of language, was an illegitimate appropriation of the terms "depth grammar". His argument is that for Wittgenstein to imply or assert that it is impossible, not merely difficult, to uncover a true "depth-grammar", i.e. as underlying, not as merely intricately distributed on the surface under the "rubble of language", was quite

unwarranted. Equally so were his contentions that philosophy was concerned solely with the misuses of language, and that, should anyone uncover "cerebral mechanisms" or "innate ideas", these were either irrelevant or the concern of neurophysiologists, not philosophers. Such cerebral mechanisms, of linguistic rules or whatever, would not do duty for those "mental processes" or "inner events" ^{the exposure of which as "frauds"} Wittgenstein saw it as his purpose in, or constituting, his doing philosophy.*

Katz considers on the contrary that, for the reasons already stated, an attempt to describe the underlying syntactic reality of language is the business of philosophy, which has been seriously retarded by the stubborn refusal of ordinary language philosophers to theorise about what the nature of that might be, in their absorption with "dissolutive" philosophy.

To this first and major criticism by Katz, it may be retorted that to some extent he misconstrues Wittgenstein's antipathy towards speculation about ideal "logically-perfect" languages. Katz considers that "Wittgenstein confuses the attempt rationally to reconstruct languages with attempts to describe their structure, (and therefore) fails to provide any reason why the latter enterprise be renounced..."¹¹ I do not think Wittgenstein does so confuse the two matters; his comments in the Philosophical Investigations¹² certainly are in severe, and surely fatal, criticism of his earlier attempts (and those of others) to build an

* Here we may agree with Kenny at P.146
Wittgenstein:10 "Wittgenstein did not wish to rule out the possibility of either type [sc. neurophysiological or transformational rule-based] of explanation of behaviour. The notion of a mental mechanism, which he thought was the result of confusion about language, was different from either of the two notions outlined above... It is a metaphysical fiction, not a scientific hypothesis."

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ideal language, which his later philosophy shows unnecessary and misguided. Nor, as Kenny rightly interprets,¹⁰ is he against properly scientific attempts to explain any unknown matters concerning the workings of the human mind. His target is rather that false pseudo-empiricism, the falsity of which he characterises in the Philosophical Investigations "How does the philosophical problem about mental processes...arise... We talk of processes and states and leave their nature undecided. Sometime perhaps we will know more about them - we think. But that is just what commits us to a particular way of looking at the matter",¹³ i.e. in a mechanistic way, without having been in the least empirical. Wittgenstein would not then reject the truly scientific researches of Chomsky or Katz; nor would he see their representational model of language on the basis of the transformational rules of a universal grammar as at all comparable to or to be in any way confused with, his own picture-theory of language. His was, self-confessedly, a priori; theirs is, and they stress it, quite scientific. Indeed, Katz sees himself in Linguistic Philosophy¹⁴ as undertaking the empirical proving or discovering of the underlying syntactical reality of language, as doing for language what atomic theorists have done for physics.

Of this criticism, then, it may be said that ordinary language philosophy may indeed have retarded, may indeed still retard, the development of structural linguistics, with all its rich promise; this retardation, however, is not attributable to it as though by some mistaken doctrine it propagated. Ordinary language philosophy can still justify itself on its own merits,

regardless of the unfortunate effects Katz notes it had upon progress towards a genuine, not spurious, science of language. Katz himself acknowledges that "ordinary language philosophy made an important contribution to research in semantics, indeed far more.... than was made by professional linguists in the first half of the twentieth century"¹⁵ It is doubtful whether, without this contribution in respect of semantics, the errors of the logical positivists like Carnap, in trying to construct an ideal syntactical language, would ever have been subjected to the criticism they now seem so plainly to warrant in the light of structural linguistic ambitions.

In sum, if Katz and structural linguistics can provide insights by working on the theory, not the use of language, and apply these to the problems of philosophy, they will be additional to, not (so far as can be ascertained a priori) in contradiction to, any insights developed from ordinary language philosophy.

If so much disposes of the substance of Katz's general criticism, he further lists¹⁶ a number of more particular criticisms, adduced to prove the superiority over ordinary language techniques of his own professed attitude to the philosophy of language.

He states that ordinary language philosophy was mistakenly antipathetic to generalisations, and examples Ryle's comment that "in philosophy, generalisations are unclarifications."¹⁷ He goes on to say that its emphasis was on acquiring insights concerning the use of particular words that could be applied in philosophical therapy, and here by "particular" he means, or intends,

perhaps trivial or narrow, or something similarly "de trop".

Insofar as Katz makes out a reluctance to generalise and an excessive fondness for dwelling at length on particular words and their particular contexts as a failing, I can say only that such characteristic practices could only appear as a failing to one who has an ulterior motive. Indeed Katz is not slow to tell us what his ulterior motive is, when he says that these traits in ordinary language philosophy prevented the development of any systematic theory of language, or of anything for that matter. This fact of prevention does not constitute any objective criticism, but once again only a personal dislike on the part of Katz. In fact, when he tries to make this personal rancour more objective, his argument, that ordinary language philosophers failed to see the operational use of generalisations, as correctives and guides, on successful testing or otherwise, to reformulations etc., is nothing but empty casuistry. Further, it threatens to obscure what has earlier been argued as one major insight of ordinary language, namely, the realisation of just how few generalisations are legitimate and how much more often is it the case that matters will not of their nature conform, other than by distortion of the facts, to a generalisation.

Katz next¹⁸ suggests that ordinary language, as mostly concerned, in regards to its raw material of analysis, with current English idiom, is assuming without any empirical or absolute right that all languages function like and display the same general "logical geography" as English. This is of course taken for granted, and naturally so in philosophy,

an intellectual pursuit that no one to date has seen complicated by a language barrier problem. We may note too, that Wittgenstein's works include Augustine in Latin, his own German, and his translator's English; this polyglot collection has, in despite of language barriers, been read and understood by all manner and language-type of reader. One must suspect Katz as an extremely tendentious and prejudiced critic in this respect too, since his purpose is clearly to vindicate his own project of universal grammar at the expense of ordinary language philosophy.

Katz summarises these criticisms, saying that it "unearthed numerous minute details of English usage, (but) it made no effort to go beyond such particular facts in the direction of a theory of language that would reveal their systematic structure..."¹⁹; I think there can be seen in that one sentence, in which he also summarises the import of the logical positivists' programme of construction of an ideal language, the substance of Katz's error. In The Philosophy of Language he has presented an impressive statement or impression of how he sees the history of the philosophy of language since 1920. It is seen to pass straightly and progressively through three distinct states of development, i.e. logical positivism, to ordinary language, to structural linguistics. Katz wishes us to see this last as the natural or expected culmination of the two earlier stages of development. To lend cogency to this picturing of the facts, he has supplied, as we have seen, criticisms genuine and forced.

But his error lies not in the forced criticism, but in a misconstrual of the historical pattern of development.

The logical positivists were concerned in a narrow way with language and logic, with hopes to give or to see the former somehow in the shape of and structured like the latter. Katz too is vitally concerned with language and its systematisation whereby all natural languages may be seen to share a universal grammar. But ordinary language philosophers, if they are concerned with or use as analytic tools the "minute details of usage" are not solely or primarily concerned with facts of language per se; their overriding concern is rather with those special areas or details of language that repay, in terms of philosophical clarification, our close attention to them. Ordinary language philosophy is epistemology, is moral philosophy, and is, if you like, the philosophy of law, etc. It is the traditional problems of these areas of philosophical speculation, not the grand schemes of the linguist, that will dictate and direct what areas of language it will concentrate upon. There is, as yet, from these sources no great, or any likely necessary demand, for a "systematic, scientific or generalised theory of language", and this lack of demand can be a failing only to one who has radically or wantonly misapprehended the significance of ordinary language philosophy. The method of that philosophy is most certainly, indeed vitally, linguistic, but its substantial doctrines, as earlier shown, are vastly more than linguistic.

In sum, then, this vindication of ordinary language techniques against a critic who, if believed, would render or present it to us as some passe school of thought, as dead as the Vienna Circle etc., is of course no reason against seeing in the more positive

ideas of that critic and his school no little promise. If structural linguistics does provide a better alternative, does produce a more accurate technique of analysis, (and nowhere is it here asserted that ordinary language devices are "easy", uncomplicated techniques in philosophy) these will be welcomed as another avenue of insight and understanding, as Katz has indicated, of traditional issues in the philosophy of mind. Yet the prospect of such developments, as great, it may be added, as they are remote, is not any reason to disparage ordinary language philosophy either as a mere linguistic exercise, or as only an era, now waning, of a continuing exercise in linguistics.

The Criticisms of J.N. Findlay etc.²⁰

I wish now to consider several more particular and specific criticisms concerning certain key matters in ordinary language philosophy. It has already been demonstrated how the explication or understanding of the concept of the rule and the rule-based practice, and the attack upon or extirpation of the inner event, which is always to "stand in need of external criteria", are central, almost axiomatic ideas within that philosophic method. It is largely by these two vital and of course related elements, that most criticism and controversy has been stimulated; those criticisms here considered have these elements as their targets. As in all branches of philosophy, it is sometimes as difficult and as rewarding a task to identify or to characterise exactly what is the idea or error the object of the criticism as to provide or suggest a solution in virtue of that criticism; the maxim of

solvitur ambulando, or solution by careful description, will here be employed. In order clearly to characterise the errors widely but variously sensed in ordinary language philosophy, I shall lay out two "sets" of criticism, not untypical in themselves of many similar but differently ordered or phrased critiques, and from both, attempt that important primary task of identifying the common and serious objection both "sets" have as their object.

J.N. Findlay²⁰ listed the following defects in ordinary language philosophy, as represented by Ryle and Wittgenstein (For ease of reference, I shall number each individual criticism in the series).

1. The slogan "Don't ask for the meaning; ask for the use," (that of Ryle, but closely paralleled in Wittgenstein) is deceptive in that it seems, at first, to tell us to attend to something clear, simple, and pleasantly ordinary. In reality, "use" as employed by Wittgenstein, Ryle, and, indeed Hart, is far from clear or ordinary; in fact, it includes that denotational or connotational use, i.e. meaning in the traditional sense e.g. as described by J.S. Mill.²¹ That act of inclusion, or suffocation, threatens to hide the truth of the matter, which is that use is only explicable after these fundamental powers of connotation and reference are explained. As Findlay expresses it,²² "In saying what is the use, (really) I have to say what the denotation or connotation is."

2. Further puzzlement is produced when it appears, that the "use" of a word may not ever be used to explain a set of circumstances; i.e. when the situation is that of a man who opens a drawer, sees three apples within it,

and says "There are three apples", ordinary language philosophy will not allow the facts to explain the utterance as a fusion of physical state and appropriate denotative words, but rather sees the whole as just a portion of a wider set of uses which constitute the meaning of "three" and "apple".

3. The concept of rule in Wittgenstein, (and, though Findlay does not mention it, Ryle's concept of 'disposition' which is, in Ryle's terms, "law-like" in operation, about which the same criticism could equally be made) are despite their seeming simplicity and familiarity, in reality extremely vague, blurred and unsatisfactory concepts. When Wittgenstein says that a rule is something we may (only) do, not think about, or debate over, or interpret, but only discern from observation of ordinary regularities in experience, he makes of it that same ineffable sort of thing the "propositional form" was in the Tractatus.

4. Ordinary language philosophy gives a totally incomprehensible and bizarre explanation of inner, unseen phenomena, such as dreaming, recollections of past sensations, memories etc. Because of its concentration on the external associated facts, it allows no other facts to be considered. Thus dreaming becomes a tendency apparent in those awakening from sleep to tell stories; recollection of sentiments, sensations, notions etc. one felt at some time in the past, similarly are dispositions to use the language of sensations etc. in the past tense as though, but not genuinely, in the mode of recording objective or real fact.

5. Use-doctrines further forbid all talk of inner events, such as "thought", "taste", "pain" if such talk is taken to refer to private, inner, or non-public events. It is unremittingly concerned only with the outward verifiable or observable "shows" of such inner matters, to the extent of denying their inner existence at all; it construes the meaning of these words in an examination of the contexts of their use, as exhausted by those uses. Findlay on the contrary argues for a necessary inter-operation of private and public language use, whereby those phenomena which are of their nature unobservable can inform and be informed by the phenomena and words of the external world. To exemplify this two-way "information", or co-existence of the inward and outward experience, he might argue, contrary to Hart, that "guilt" as a sentiment or feeling inwardly existent, does contribute to the common, public meaning of mens rea, which is not exhausted by a mere set or listing of "exemption" circumstances to be established in the public world. He concludes or summarises these criticisms by saying that our understanding of these epistemological problems will be best provided "by reviving... connotation and denotation," and "the intentional nature of thought;" this last will enable us to take a word or a rule etc. and, by a "meaning intention" alone, subjectively impart to its emptiness or bruteness or incompleteness as a sign, what in fact gives it significance as word or rule.

I turn now to a second set of criticisms. J.M. Hems in "Husserl and/or Wittgenstein"²³ provides a severe analysis of Wittgenstein which may be summarised as follows. (The same number sequence is maintained).

6. Wittgenstein argues that meaning is exhausted in the use. He can allow no "act of meaning", such as an intendment or intentional consciousness of meaning prior to actual use, since this would clearly be circular, indeed self-stultifying. If we consider, Hems argues, the very first utterance of a word as a sign or with intention to mean by a child to whom that one word is the whole language, there must surely be an intention, which alone could differentiate for the child, that word as language, and that same word as a meaningless noise. Wittgenstein's reading of this situation, as one in which we would be justified merely in saying of the child that he/she spoke does no justice to the child, and only partial justice to the complete phenomena here under analysis.

7. Wittgenstein collapses the meaning of an act with its expression. While his rendering of the meaning of a word as its use is perhaps the major instance of this "collapsing", it is not the only one. As Hems colourfully puts it, Wittgenstein is obsessed with the cognate accusative, which he splits down the middle and then suppresses, as in the case of the child above, the subject term. In simpler terms, to Wittgenstein or Ryle, an instance of "understanding", "reading", "seeing as" etc. is a fact the analysis of which concerns only those aspects of the matter which all can see and agree upon, not on any aspect of the individual's own intention or consciousness in so behaving or intending.

It is to be noted in passing that a phenomenologist, as Hems is, will see almost an identity between acts of meaning (words) and acts of meaning as "meaning to understand", "sing", "read" etc., given that particular philosophy's fondness for interposing between mind and

every point of contact it has with the world an act of consciousness or intentionality. Like all universally applied notions in philosophy, "polyfills" notions like 'sense-data', or 'acts of will' in the Austinian sense, one should be wary of them.

8. Wittgenstein is a behaviourist, as he sees the nature of language fully accounted for in an exhaustive observation of its functions; this fear of going beyond the evidence of observation is basically an unreasoned fear of metaphysics. Indeed there are occasions in the Philosophical Investigations,²⁴ where Wittgenstein seems on the point of admitting a (phenomenological) consciousness or a feeling apart from the external criteria, when he says that it may be only said of a human being that it has pains, hinting at, but not enlarging upon, the notion of humanity in a thoroughly non-behaviourist sense, or, in Zettel,²⁵ that poetry uses the language-game of information, but is not reciting information. But much more characteristically and importantly, Wittgenstein has set himself obstinately against going beyond the functions of language and the external signs of behaviour, which he sees as their only source and anchor, to any inner or further investigation of consciousness.

He summarises his criticism by portraying Wittgenstein as typical of the would-be scientific modern age, where all must lie in the open at all costs, even if it means wilfully closing our eyes in horror, anti-metaphysical or other, at what beyond may lie unfathomable to any analysis on a "scientific" level. It is this same failing, Hems argues, that accounts for Wittgenstein's peculiar

view of philosophy as "an end to philosophical cravings towards solutions," or as an achievement of a stage where, in Wittgenstein's terms, we may stop, or, in Hem's again colourful terms, commit the suicide of philosophy. Doubtless this summary on Hem's part is slightly fanciful, but given the importance of those criticisms he has made, and his burning sense of that importance, these hyperbolic expressions may be excused.

It will be noticed that there emerges from these eight separate criticisms a recognisable pattern. This pattern or residue of solid criticisms, i.e. in which each single criticism does not represent merely an individual facet or instance of an otherwise instanced error, may be extracted by bracketing together certain of our eight into a more compact expression as follows.

Taking 1 and 2, which is really a special case of 1 and 5 from Findlay, in which he upbraids the bypassing by ordinary language of denotative meaning and the inner acts of consciousness as matters of fact and negligible interest, we arrive, as indeed he does,²⁶ at a desideration of "the intentionality of thought", which alone could germinate denotative meaning etc. This bypassing of the "inner consciousness" is explicitly noted by Hems, who shows the structural similarity in ordinary language philosophy's treatment of language and other human "mental acts". He expands the account of this failure by noting as its particular characteristics, a collapsing of meaning into external expression in all cases, and a failure to give the subject its proper place in epistemology. In Findlay's terms, this is expressed as a failure to do justice to the inner as

well as outward phenomena of language, which naturally has
"backrooms continuous with those opening on the public
square."²⁶ I shall call this general criticism (A).

Beyond this, on Findlay's part, we have the
additional indictments, per 1 and 2 that ordinary
language is characterised by a continual vagueness,
never defining what "use" or "rules of language" are
in any precise or non-misleading way. I shall call
this general criticism (B). Hems' individual criticism
is that Wittgenstein's view of philosophy as a way
of "stopping" philosophy (or indeed more generally to
include Ryle, Austin etc., as not of its nature de-
signed to discover anything, but "only to rearrange
what we know already."²⁷) is a product of a mistaken
desire to put any however inadequate terminus to our
inquiry rather than suffer the frustration of only
partial knowledge. I shall call this general criticism (C).

I shall consider these generalised criticisms in
their order as above characterised.

A) To say that ordinary language ignores or denies
the existence of inner acts of consciousness, or indeed
'meanings', in Findlay's sense, is simply not accurate.
Wittgenstein's statement re language use is not that
in every case, when we ask for the meaning of the word,
we should replace meaning by the use of that word. Use
is not a substitute for meaning; nor is it meant to
include meaning as Findlay thinks it was, as some piece
of cunning, or question-begging. Wittgenstein, in fact,
as early as para 43²⁸ says only that:- "For a large
class of cases - though not for all - in which we
employ the word 'meaning' it can be defined thus:
the meaning of a word is its use in language." We may
presume that by this reservation, Wittgenstein does
allow a traditional "denotative" meaning. He does not

dwell upon what that might be, simply because his interest, and the interest of the whole of ordinary language philosophy, is on those misuses of words which have developed a mass of philosophical errors, among them, quite vacuous theories of meaning, such as the Augustinian name-object theory.

The message of ordinary language philosophy is made equally clear in respect of inner acts of understanding, of emotions, of sensations etc. It is not denied that some inner events actually do happen, are facts etc. Wittgenstein is not going to deny brain-waves; nor is he inhuman enough ever to deny, in Moore's gnostic terms,²⁹ that we may know certain facts about meaning much more absolutely than we can be sure of the premises, insofar as that, in a proper and trivial sense, may be taken to advert to a large number of cases where a "meaning-feeling" upon use or selection of a word, or a "flash" of understanding is felt etc. These experiences are too common for any to deny. Yet, in contradistinction to that set of inner events, the real, and philosophically unimportant, there is a large class of "inner events", which are fabricated, as by sense-datum theorists, Cartesian dualists etc. etc., purely to provide a foundation for those wild theories that philosophy spuriously produces. It is more than excusable, then, to concentrate, for such compelling reasons of philosophical relevance and with a view to clarifying confusion, upon the nature of language use and spurious inner event theories, at the expense of ignoring the trivial but real instances of pure meanings or real inner events.

Now, it is precisely in the exposition of the latter, the inner events, that Wittgenstein, Ryle etc.

would appear most to insist upon the importance of attending to, or the primacy of, the external expression in 'understanding', 'imagining', 'wishing', or 'intending'; similarly, it would appear that, when spurious "flashes" or "acts" of understanding are dismissed as groundless conjecture, and any genuine sensations seen as quite trivial and philosophically irrelevant, the whole act is collapsed into the mere external show. This appearance is certainly strong but should not frighten one if it is realised that neither Ryle nor Wittgenstein is interested in constructing any phenomenological psychology, or structure of thought in that mould, but doing quite genuine and quite legitimate philosophical analysis. As was made clear with regard to Katz and his critique of ordinary language philosophy, it cannot be reproached, as mistaken or misleading, when it is seen as failing to accomplish what is not its object, but that rather of its critic.

It is furthermore as yet a moot point whether Wittgenstein or Ryle would consider the aims of phenomenology, to identify or analyse or make clear the intentionality of thought, and that via a vastly more subject-orientated analysis of the nature, and "act's" of consciousness, as a valid philosophical endeavour, and not just another instance of the chronic disease of postulating inner events. On this matter it will be here said only that, given a fair community of interest in the diverse and ordinary workings of the mind, via language, in ordinary language philosophy on the one hand, and the same workings of consciousness, via reduction etc. in phenomenology, on the other, it is hard to see how a solution on the lines of the latter

mode of analysis could be anything other than kindred or germane to the themes of Wittgenstein or Ryle.

Doubtless Hems considers, though he never says so explicitly, that Wittgenstein does include, among the class of spurious inner events of philosophical theory's siring, the phenomenologists 'intentionality'. For this suspicion I see no warrant, especially when Austin, in virtue of that very "kindredness of spirit" I have noted above, has with justification, and his characteristic verbal acuity, described himself as "a linguistic phenomenologist." Hems is excessively, but out of an understandable eagerness to vindicate his own cause, needlessly antagonistic to ordinary language philosophy.

To justify, however, the emphasis given by Wittgenstein and others to the outward expression as a valid philosophical strategy, is not totally to exonerate them from the charges here under consideration. For, though the distinction between inner acts (real) and inner acts (spurious) is a valid one, there may be occasions where certain cases are misidentified in perhaps an excess of zeal to scotch philosophical heresies; here it will be instructive to consider certain aspects of Wittgenstein's argument against a private language, particularly those concerning the nature of "pain-language", and the question of whether pain-words actually name sensations. In the handling of these issues, Wittgenstein is involved in those practices of collapsing or denying the "inner", for which Hems and Findlay, respectively, criticise him and which he is, as above explained, so involved with justification.

Wittgenstein's whole argument is designed to show that the phenomena, physical and behavioural, of pain shape the language we use in describing, reporting, or sympathising with etc. pain, in short, our "pain-

language". He argues persuasively and most insightfully that our "pain-language" does not, indeed cannot, arise from a private, inner identification of our own pains. We do not in fact "know" pains from our own experience as we "know" colour, or flowers etc. from our own seeing them for what they are, when pointed out. The sentence, "I know I am in pain", is not of the same grammar as "I know where the ball is", but of use only in a very odd context, as a reply to a silly question, such as "Are you sure you have had toothache?" etc. So too other personal statements of pain, as "I am in pain", do not, as though being a report of an occurrence, advert to a privileged, exclusive knowledge of an inner act, but are in this case mere verbal bits of pain-behaviour. To this extent, then, spurious inner acts are truly identified as what they are. Wittgenstein goes further, however, to assert without prejudice to this inner insight that, since no inner act or sensation underwrites or explains pain-words, and we logically cannot name sensations by a term or terms of a private-language, then we can never under any circumstances name sensations.

This view is perhaps extreme; as Strawson has pointed out³⁰ there are distinct cases where, analogically we can name and characterise certain sensations, such as "burning" pains or "throbbing" toothache. This use is of course analogical and, thereby, in part publicly generated; nevertheless, it does show scope for, indeed gives an instance of that profitable exchange between the outward and inward use of language. Nor is it a possibility that Wittgenstein can rule out by his earlier arguments where he showed rightly that all attempts on the individuals part, without any reliance upon a

common language, to identify a sensation, using his memory or a manometer to measure blood-pressure etc. must logically be futile. For in this case, the analogical use of certain words, as "burning", "throbbing" etc. to describe pains or tastes or other hidden, inner sensations, or thoughts for that matter, is anchored or based upon a use sanctioned and stabilised by common agreement. In this instance, it is perhaps the case that Wittgenstein suffers from the old verificationist horror of the inward, unknowable, and unverifiable. Yet the effect of that "horror" is so marginal, the damage to his overall insight into the problem of sensations etc. so little as a result of this lapse, that, far from totally substantiating what Hems or Findlay say in criticism, it merely turns their criticism into a general caveat against too zealous an ignoring of the possibility of inner acts informing outward expression or, at least, too easily applying a powerful insight to cases or instances it is not directly relevant to. It is further to be noted that the case or example of "pain-language" is a special case, by no means typical, of the class of inner phenomena languages, which are so uniquely and characteristically in need of external criteria. The peculiar quality of pain-language, i.e. our apparent use of a variety of specific words or descriptions for a type of sensation just as we have a similar set of particular descriptions of colours or shapes, or other externally sensible matters, seems to suggest (though on examination wrongly) that it is based on the same principles, i.e. sense-data, or empirical observation of one's own case.

This analogy or seeming parallel does not exist in the case of the language-games of "intention", "understanding", "wishing", "meaning" etc., and Wittgenstein's lapse is thus only in the restricted area of pain-language and its analysis; in no way, for the above reasons is it to be thought of as generalisable throughout all cases of "inner act", to allow after all the existence of private, inner events, i.e. in no way a loophole to allow the criticisms of Hems or Findlay in this regard to convince.

B) I pass on now to consider the allegation that the fundamental ordinary language concepts of 'use' and 'rule' are so imprecisely and misleadingly characterised as to be, in fact, of no real explanatory use.

Now, insofar as this allegation of useless vagueness concerns "use as meaning", I need not repeat other than for form's sake what I have said already in regard to ordinary language philosophy's attitude to denotational or connotational meaning viz. that it does not deny its existence, but considers it philosophically unimportant. What is of genuine philosophic importance is rather the need in examining any concept or word to give an account which comprehends all uses or aspects of that concept. It is necessary, in fact, to combat or restrain a strong "essentialising" instinct, which wants a compact, unique answer to everything, or, in the case of a word, an essential meaning. This is simply, e.g. in the case of games, or the rules of law in Hart's Concept of Law for that matter, etc. not possible; for the purposes of philosophy, a looser meaning-as-use serves us quite adequately both to comprehend the variety of meanings or roles a word may have, and to act as a prophylactic to "essentialising". These two objects are

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sufficient justification for a "family-resemblance" unity among various uses of a word, indeed specifically desiderate or constitute it, and can seem reprehensible as vague only to one, like Findlay, who misunderstands that philosophy's objects or still hankers after an essence, in this case, a pure "kernel" of essential denotational/connotational meaning.

In respect however of the allegation that "rules" as characterised in Wittgenstein are vague and almost mystical etc. like the propositional form of the Tractatus, there lies a different sort of misappreciation. Here, before taking a closer look at what was, in the first chapter of this thesis, admitted a complex and subtle doctrine, i.e. that of rules as a practice, it will be instructive to examine why Hems, the phenomenologist, who shares much with Findlay in criticism, does not advert to rules as an instance on Wittgenstein's part of "collapsing" an act, composed of "inner act" and "outer expression. That is precisely the criticism Findlay puts when he says³¹ "if grasping a rule (i.e. inner act-author's insertion) is a function of following (i.e. outer expression-author's insertion) then the whole activity of following dissolves in mystery." Findlay's use of the term "dissolves" is surely tantamount to Hem's use of the term "collapses".

The reason for this non-parallel between the two critics is that Hems realises that rule-governed behaviour is logically, of its nature, an external phenomenon, one only susceptible and rightly so to a behaviourist analysis of its external manifestations, and to include a concentration upon rules as an error of "collapsing" or "overly scientific behaviourist

malpractice in epistemology is exactly like accusing a spade for being a spade. It is precisely this error that Findlay's criticism discloses. He equates the logical category of a rule with that of "meaning" or "sensation", etc. where a consideration of the role of the subject is an important, almost primary one, albeit likely, if the introspections the subject provides in that role are evaluated, initially to mislead. In contrast with this category of concept, rule-governed behaviour is a public matter, constituted by many subjects and by the synergy of those activities, in agreements of practices and judgments, a thing not reducible to the sum of the individual acts which it comprehends, but the nature of which it transcends in its operation or function on a different, i.e. public, sphere.

Given the importance of the correct appreciation of the nature of rule-governed practices and the central position it occupies in the exposition of important issues in jurisprudence, I shall now consider closely what Wittgenstein says on the matter of rules, by way of showing at length the error Findlay is above shortly described as making. Wittgenstein's treatment of rules is, as indeed of other key concepts, dispersed throughout the Philosophical Investigations. To simplify analysis, I shall firstly assemble en bloc the major elements of his theory of rules there put forward, paraphrasing as convenient:-

Para 201.

"There is a way of grasping a rule which is not an interpretation."³²

Para 202.

Hence "obeying a rule is a practice and to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule privately."

Para 217.

"How am I to obey a rule? - If this is not a question about causes, then it is about the justification for my following the rule the way I do. If I have exhausted the justifications, I have reached bedrock. Then I am inclined to say: 'This is simply what I do.' "

Para 219.

"When I obey a rule, I do not choose. I obey the rule blindly."

Para 208.

"I shall teach him (i.e. the learner of a language and the rules of the use of its words) by examples and practice. And when I do this, I do not communicate less than I know myself."

Para 198.

"I have further indicated that a person goes by a sign-post (an example of non-verbal rule-following) insofar as there exists a regular use of sign-posts, a custom."

Para 199.

"Is what we call 'obey a rule' something that it would be possible for only one man to do, and only once in his life?" (This rhetorical question is obviously to be answered in the negative.)

These excerpted statements are, of course, in their context obviously exemplified, the above being merely the positive conclusions to a general examination of various instances of rule-bound behaviour of which there is no small number. Yet it importantly emerges that there are two dimensions of a rule's being a public thing. Firstly, per paras 198-199, the phenomenon of following rules is explicated by Wittgenstein as not just a sum of similar practices, but something fundamental

to our humanity. Just as lions, tigers etc. are carnivores, or cattle are herbivore, so a trait or part of our humanity is that we use rules, or our behaviour as what we are discloses rules. This rule-dependence is thus as fundamental to all of us as language, in which of course it figures indispensably, and is, in fact, constituted by human behaviour. The truth of this insight is that it is inconceivable that one man could invent a rule, because the purpose, object, etc. of the rule, in fact, that rule's being a rule could not then exist; the realities of a rule are inseparable from shared social behaviour. No act of intentionality or 'meaning' by doing XYZ etc. to establish a rule could ever, logically, create a rule.

Secondly, and in consequence of this first dimension of a rule's being a public, not a private reality, a particular already established rule cannot be appropriated out of that public environment, where it alone is generated and operates, and reserved to any individual's arbitration or deliberation on whether to follow it or not. This is simply a logical impossibility; if he changes it unilaterally, he will when "following" it, not be following it; conversely, if his deliberation or interpretation or choosing or intending to follow does make him, in fact, follow it, then all these processes are shown as quite vacuous as he follows the rule any way. It is this that makes Wittgenstein say, at para 219, that I obey a rule blindly.

The same conclusion is reached by a consideration, at para 208, of how one teaches a rule. Clearly, one

can teach a rule or a word of language and its rules of use only by playing the game, or citing examples of the word's use. It is absurd to imagine that, when one teaches another to play chess, for example, that one proves to him, or reasons with him, or persuades him etc. that a bishop moves in a certain way. Neither do the rules stand in need of the individual's advocacy, nor does the learner in that situation need it to master the rule. Still less is such advocacy needed in the case of learning the use of a word. It is precisely this lack or absence of anything beyond the examples in the teaching, and the practice in the following of a rule, that Wittgenstein notes, at para 217, when he explains talk or debate upon rules as, if anything at all, mere justification which, when exhausted, still does not affect the being or existence of the practice of the rule in question. This is not of course to say that there can be no place for deliberation, debate etc. in cases of prescriptive rules, as of the law or morals, as to how they should be framed, or, more specifically, what goals they should establish, or standards of performance they should prescribe. Nor is it to say that deliberation or doubt about a rule is impossible in dubious marginal cases. Wittgenstein explicitly considers this possibility of doubt,³³ when he admits that a sign-post, for example, may point somewhere not exactly N or NW or NNW etc. but perhaps equivocably and debateably, so allowing scope for difference of opinion etc. i.e. "It sometimes leaves room for doubt and sometimes not." Yet this doubt is not about the nature or the being of the rule as what it is, i.e. not to be reformulated or

reconstituted by the individual who doubts it into a certain rule; it merely represents a practical difficulty about a rule which is vague but nevertheless serviceable as such. Hence, to use Wittgenstein's own words, he concludes with the statement that "...now this (so. that it sometimes leaves room for doubt and sometimes not) is no longer a philosophical proposition, but an empirical one."³³

As for the case of the prescriptive rule where, of course, debate is clearly relevant, not only to clarify vagueness but in the very creation or constitution of the rule, Wittgenstein is not concerned with such rules; clearly, the rules of language, which are what ordinary language is considering or looking at and to for clarification of concepts of philosophical importance, are not prescriptive but a matter of practice. This does not imply, however, that a prescriptive rule does not promote or give rise to, or in fact describe a practice in a certain way, or inflect its existing operation marginally; elsewhere this complex relationship between rules of practice and prescriptive rules is given appropriate and close attention. Further, it should be noted that, in any case, when Findlay wanted or lamented the lack of the "inner" act of "grasping" a rule in Wittgenstein's account, he made no mention of, and we have no reason to imagine he based his strictures on a consideration of, prescriptive rules.

Having thus, by an analysis of Wittgenstein's powerful insight into the nature of rules, at one, articulated or shown the precise nature of the error underlying Findlay's criticism of Wittgenstein, and

given the fuller account earlier promised of Wittgenstein's views on this matter, among the most difficult in the Philosophical Investigations, I propose to consider lastly Hem's final criticism.

C) Hems, it was earlier noted, alleged that Wittgenstein, Ryle and indeed the whole behaviourist and reductionist programme of ordinary language philosophy are misguided. This tendency, to see philosophy as merely a means of putting an end to the tiresome task of inquiry, or, in Wittgenstein's terms, as a therapy, is particularly marked in Wittgenstein, although Ryle states, (and this statement would equally meet the censure of Hems) that his task, in The Concept of Mind is not to state anything new, but only to rechart the logical geography of what we already know. In Wittgenstein's case, the parallel view is given by his "statement of intent" in philosophy as, in very eloquent metaphor, "to show the fly the way out of the fly-bottle."

Now I have already characterised in an earlier chapter of this thesis that author's concept or view of philosophy, and thus Hems' criticism will give us an opportunity to reconsider the validity or utility of such a view, both as generally tenable, and whether attributable, basically, to the horror of the unknowable or unverifiable beyond.

Wittgenstein was fully aware that his "dissolutive" view of philosophy would meet with much disapproval; indeed he anticipates such disapproval when he considers the imaginary rebuke of such a critic:-

"Where does our investigation get its importance from, since it seems only to destroy everything interesting, that is, all that is great and important?"³⁴ By "great" and "important" we are meant to understand all manner

of cherished, but now to be demonstrated as empty, notions in philosophy, such as "meaning", "act of understanding" etc. and all such essences. Not only is philosophy, at least as it is viewed by Wittgenstein, iconoclastic or simply bad-sportmanship, but will become dull, in that, as Wittgenstein says³⁵ "If one tried to advance theses in philosophy (sc. done after the fashion of Wittgenstein - author's insertion) it would never be possible to debate them, because everyone would agree to them."

Clearly, these messages are very bitter pills to swallow, and ironically, it is from that very source of error or philosophical "disease", i.e. a desire to solve at all costs or essentialise etc. that these counsels are designed to cure that these antagonisms against their cure arise. Old habits die exceedingly hard.

The problem is basically, though not purely, a methodological one. As made clear earlier, to see Wittgenstein only as a "therapist" or only modestly as stating the obvious without advancing any theories of his own discerning (which are certainly not obvious, e.g. his theory of rules) is only to see a part of his philosophy. It is a measure of the greatness or the breadth of his thought, however, that Wittgenstein is supreme both as a methodologist and a creative contributor of new insights, to the extent that, in considering one facet, it can so totally occupy our attention as to obscure the other.

Insofar as his work, and indeed that of the whole of ordinary language philosophy, is therapeutic, (and I here make a gratuitous but by no means necessary

concession to its critics in allowing that a view of philosophy as a "therapy" is only of methodological relevance, and not in itself a substantive doctrine) it can be justified as such only by looking to the facts themselves. One must ask what scope or justification there is within philosophy for therapy, what amount of malaise or unrest or disquietude does in fact lie within it, given that this measure of disquietude is directly in proportion to the dissatisfactory doctrines etc. that have produced it.

The answer to such a question must surely be that therapy is needed, and Wittgenstein's works are indeed a description and demolition of those fallacious doctrines, cancerous growths upon the body of a clear and perhaps unsensational view of things thus uncovered. Ryle's project is likewise if characterised in a different metaphor, one of rather boringly unadventurous "recharting" as exciting as any other draughtsmanly pursuit, but nevertheless of extreme importance if it will henceforward spare us the anguish of being lost.

It is of course not to be denied that, as regards the permanence or the continuing nature of the practice of philosophy, merely to give therapy or to rechart etc. cannot be our constant or only aim, and to that extent, we may fix some temporary limit to our seeing philosophical endeavour as primarily therapy, beyond which it would be inaccurate to call the results of our investigation merely "therapeutic". It is precisely this limit that Wittgenstein himself, despite his overt statements to the contrary, transcends when there must be recognised true discovery, not mere therapy. Here we may consider what Ryle says of Wittgenstein.³⁶

It is submitted, then, that the therapeutic role of philosophy as emphasised by Wittgenstein is not yet played out, nor, given the inherent resistance to its curative counsels and the possibility of recidivism of the same errors of thought, is there any reason to presume that repeated doses of the same therapy may not be needed. Besides that, I think that an accurate appreciation of Wittgenstein and ordinary language philosophy discloses a large measure of novel insights which, if only recognised, would dispel any criticism that presents us with a mistakenly unambitious or simply innaccurate view of philosophy as therapeutic.

In regard to Hem's other criticism re this therapeutic role of philosophy, that not only is it untenable in a general sense as defining philosophy, but, in Wittgenstein's case, arises from a horror of the unverifiable, I think that this may now be seen as the result, or a particular manifestation, of that general tendency mistakenly and narrowly to see Wittgenstein as only a methodologist. In certain regards, Wittgenstein's philosophy poses a dilemma for one trying to characterise or categorise it. As we saw above, the choice between "therapeutic" or "creative" as the right term is not easy or certain one. It depends from which angle or with what interest one looks to Wittgenstein for inspiration.

By the same token, when Wittgenstein does offer a reductionist account, a similar dilemma may suggest itself, and the choice made of the characterisation will be informed by the prejudice of the critic. It is therefore open to Hems to say that Wittgenstein is, when reductionist, only in horror of non-verifiable entities. It remains, however, for him to prove

this to us, and it is submitted that, in that account I earlier gave re 'intentionality' etc. neither Hems nor Findlay has shown at all that "acts of meaning" are as important, if they exist in the shape these two propose for their existence, as they suggest. To base upon such flimsy possibilities of 'intentionality' etc. which future generations of phenomenologists have still to reveal, such savage criticism of Wittgenstein as beset with some neurotic fear of the unknown (the phenomenological or existential "angoisse" or "délaissement", we are to suppose), is not at all justified.

This misconstrual, however, does not need but certainly is most clearly shown in a phenomenological setting. It is a measure of the care needed by, and here shown to, the writings of Wittgenstein that such an astute commentator as Strawson can similarly misinterpret as verificationist in its inspiration, a submission on Wittgenstein's part based on entirely different premises. This may be illustrated by considering the Philosophical Investigations³⁷ where Wittgenstein considers the attempt of an imaginary person to identify his own pain, as sensed and then identified with a particular reading on a manometer which measures blood-pressure. As Kenny rightly points out, in Wittgenstein,³⁸ the conclusion to this paragraph, which repays close consideration, i.e. that the ritual of the "scientific" checking of inner sense and objective, but non-linguistic, recording device, is just an empty "show", is not because one cannot trust one's memory - that would indeed be a verificationist's account, and indeed Strawson

so argues, in his interpretation of this paragraph.³⁹

Wittgenstein's conclusion is based upon an examination of what exactly is going on or achieved by the apparently scientific test. On examination, it is a total sham, and one which does not at all depend upon the fallibility or non-verifiable nature of the memory of the would-be scientist. In summary then it may be said that both fail to see to what extent Wittgenstein's philosophy as a whole is therapeutic, and to vindicate it against accusations of errors it still retains from that verificationist background it developed needs only a careful, reasonable and, importantly, non-prejudiced reading or understanding of its real and fundamental submissions, however complex and difficult in analysis these might prove.

3. I now wish finally to consider the third and last major criticism of ordinary language philosophy, as set forth at the beginning of this chapter, namely that it was, in the last analysis, not only vague but of its nature merely the subjective opinionation of the ordinary language philosophers themselves; this entails that their description of any matters under analysis could never profess to be based upon any objective appeal to our beliefs as true and unique statement of reality. I may characterise this allegation, or defect, in perhaps a clearer or more useful way, and at the same time show that ordinary language philosophers are already apprised of this "rift in their lute", by quoting J.L. Austin's own statements in recognition of this hazard inherent in the venture of ordinary language analysis.⁴⁰

He says there, by way of a prelude to an examination

of excuses, voluntary and involuntary, "There are... snags in linguistic philosophy...The first is the snag of the loose (or divergent or alternative) usage: and the second the crux of the Last Word."⁴¹ His own response to these "snags" is briefly to argue that a disagreement over two possible descriptions or analyses of a loose concept, however vexatious in itself, still "can hardly fail to be, on explanation, illuminating", and to assert that, even if ordinary language philosophy cannot ever hope to provide a categorical account of an unequivocal reality, it is, and should always, be the first word. Such a short reply to criticisms does not do anywhere near full justice to them, nor afford other than a pointer to where we may in fact find a satisfactory answer. I do not of course intend by this any serious criticism of Austin for "short-changing", that now very modish philosophical malpractice; for it is his purpose in the article here cited to offer an example or explain the method of ordinary language philosophy, and that too, as applied within the area of moral philosophy. In relation to a consideration of critical values, it may well be said, indeed there may be no more to say than that, if x thinks ABC and y thinks DEF etc., then that "loose usage" or alternative mode of description illumines or discloses a fundamental difference in values; there our analysis ends, at least in so far as it is merely an analysis of different, but applicable or possible, descriptions of the same situation. It is indeed this ethical concern on his part which has led him to select the matter of excuses,

for ways in which the study of excuses may throw light upon ethics. By the same token, once we have exposed underlying value-structures, we may proceed only via their examination some way towards the last word.

For epistemology and other non-primarily evaluative philosophical concerns, a more thorough vindication is needed. The problem of human action, for example, is not purely, or even primarily, one of moral philosophy or jurisprudence; it is not to be elucidated merely by considerations of how we wish in any type situation to apportion responsibility, or otherwise pragmatically to respond to situations where it is importantly in issue whether x or y did ABC etc. On a more general level too, ordinary language philosophy is concerned, as we have seen with the concepts of 'meaning', 'thought', 'rule' etc. in the characterisation of which one surely wants more than the first word, and nowhere pretends to seek an evaluation. One wants to be objectively successful, or, if that goal is possibly too idealist or elusive, at least so to examine one's method to refute any suggestion that ab initio such an ideal is not tenable. I therefore propose now, more closely than Austin, to try to articulate or identify what in fact does emerge from a typical ordinary language analysis scheme, or how rather it so emerges and exerts a legitimate claim upon our belief.

We want, in fact, to see what sort of thing Hart is doing, or how we, his readers are persuaded, when he says, for example, rules are not always imperative; the gunman situation is not that of all laws, and all obedience to them, or rules have an

internal applicability to us, as bound by them, or playing the game in question, not a merely external one, as though we were observers. We want to see why it is or what there is in this explication that we should prefer to accept it, for example, rather than Ross⁴² who says the "internal sense" of a rule is not one of being a part of it as practising it, but feeling literally and imperatively bound by it. Other similar differences of explanation and our preference for one or the other are endemic in ordinary language philosophy - should we see, as Ryle would have it, in The Concept of Mind, that we use the terms voluntary/involuntary only, or most characteristically, when it is a matter of blaming somebody, or Feinberg, in his article "Action and Responsibility"⁴³ where he argues that they are used in "acts of accrediting" (i.e. a praise or blame situation), or Austin, who, in "A Plea for Excuses",⁴⁰ contemplates a much wider frame of reference for the same words.

The explanation of these diverse accounts, and our ultimate preference for one particular as superior or more accurate can only be provided by a consideration, stage by stage, of the construction of such descriptions. In the following suggested schematisation of the "Compare/contrast" method of ordinary language philosophy, I am greatly indebted to E.T. Gendlin's article "What are the grounds of explication,"⁴⁴ which, however tendentious a solution it offers, at least recognises and faces up squarely to, as seldom done, an important problem.

We may see the following stages, or component "elements" in the typical ordinary language analysis:

1. We examine philosophical concepts as used in the world, with no a priori assumptions guiding or constricting our examination.

2. When Wittgenstein etc. describes a situation by showing it as somehow to be contrasted with another, he adverts only by implication to a quality or aspect implicit in the one situation, not the other. No explicit assertions of inner processes etc. are made, nor indeed are they possible.

3. These hidden qualities are not formulated in any precise statement of identification; in fact, the words used to describe a situation are clearly in no "name-object" relationship to the elements of the situation described. Our recognition of them as a true or acceptable account is based on how they appeal to us, whether we "feel" they are right.

4. The descriptions offered are, of course, couched in the words of their author, and in fact, necessarily autobiographic of their author's own "feelings".

5. In having this personal "feeling" of, and recognising by sympathy or coherence with the feeling of 4., we thereby are led on to seeing, via the implicit adverting, what fundamentally is or exists in a situation. It is in this seeing "more" or "more deeply" that ordinary language analysis is genuinely a heuristic device, a device of philosophical explication which operates by rendering us conscious of the full and correct appreciation of philosophical concepts by implicit evocations, in the philosopher's description of them, of a full import which hitherto we did not possess.

Having thus set out the persuasion sequence of the typical ordinary language philosophy analysis, we can see exactly where the allegation of subjectivity threatens the basic validity of the enterprise. It seems to be the case, per 3 and 4 above, that basically it is a question of feeling (subjectivity on our part) and a choice of particular presentation (subjectivity on the philosopher's part), agreement of these is in itself no proof of objectivity, as though mere consensus rendered feelings objective.

At this stage, two solutions may be offered to this dilemma. Much previous mention has been made of the therapeutic role of ordinary language philosophy, and already I have made clear just to what extent this therapeutic role is useful and valid. It might now be suggested, as the solution, that this happy congruence of feeling really is enough to justify ordinary language philosophy. Just as psychoanalysis operates at an implicit level, surmises in very general terms about the particularly coloured or framed neuroses of the patient's disorder etc., so too does philosophy about its concepts etc. It is irrelevant to both, so the argument goes, to unearth exactly or make explicit what that neurosis is, because, the aim being therapy, peace of mind or congruence of feelings about philosophic problems is the object of the exercise. In both cases, we are ridding our subjects of compulsions, whether to wash one's face or seek essentialist solutions etc.

I feel bound, especially in view of what I have already said on this issue of the therapeutic role of philosophy, and no less upon the merits of the matter,

to say that this solution is not the best or fairest solution that can be offered. To provide this, it is necessary to consider again the stages of the explication-schema of ordinary language analysis as set out above, where it is noted that, firstly and foremostly, the examination is an empirical one, with an eye to the facts as they are. It is necessary then, so far from seeing the whole exercise as merely the evocation of "feelings", to see what the relationship of those same feelings is to the world of behaviour and experience, the description of which evoked them, and it is precisely a consideration of this which will show why ordinary language analysis can claim to offer an objective explication of the subject matters.

Firstly, the distinction between philosophical analysis, or rather, the sort of experience or activity that it is, and our experience in the world must be appreciated; here it is perhaps not surprising that the phenomenologist's terminology is most readily suggested, where the former concerns the reflective, orthetic, and the latter, the non-reflective mode of consciousness. In these terms, the genuine conviction of a theory operating via an inexplicit adverting to things in theory, whose reality is explicit in behaviour, is achieved when the two converge and mutually inform towards a more fully experienced and correctly perceived reality. In terms of ordinary language, this conviction is not the product of a logomachy, where real descriptions fight in the "lists" of philosophical journals, but achieved by a comparison and an application of these descriptions to actual experience, a comparison process.

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which must constantly continue and transcend the period of their precise temporal formulation. It is the case, simply, that one believes Wittgenstein etc. to be right, or that one generally recognises Hart's insight, re rules of law, as correct, not because we read it in his book, but in virtue of a continuing application of those suggestions to, and in, our experience.

This relationship of theoretical account or description, and empirical application is a reciprocal or mutually informative one, in much the same way, to cite more mundane example, the theory of accounting, or football "4-2-4" strategy is related to financial or football practices. None would say that the practices awaited a theory—rather they pre-existed it; equally none would deny that the practices as now informed by the theory are what they were.

So too, when philosophers do contribute to the elucidation of a concept, make it more fully appreciable, that insight and its validity consists in extending not just our appreciation-of-the concept, but extending the concept-as-appreciated, which latter extension, it is submitted, cannot be the product, as alleged, of mere subjective opinionation on the part of ordinary language philosophy.

Summary.

It will be useful now to summarise the defence above provided for ordinary language philosophy. That synopsisd apology can then be applied to, and its universaliseable value qua apology assessed against, yet another formulation of these criticisms. As earlier said, with reference to Hems and Findlay,⁴⁵ these are rather the exemplars than the sole proprietors of a set of common criticisms more differentiated by their particular expression than their genuine substantive content; this difference has been seen to spring in the main part from those ulterior motives the critic entertains. Here will be considered the criticism offered by Ernst Gellner in his Words and Things.⁴⁶

In sum then, it has here been argued

1. That structural linguists have misconstrued the course of the linguistic emphasis in modern philosophy; their accusations against it, of being trivial, anti-generalisation prejudiced, and an apparent obstacle to the underlying structural reality of language are thus unfounded.
2. That ordinary language philosophy is not, in fact, simply therapeutic or dissolutive in intent or effect; it is a genuinely heuristic exercise in philosophy, and is a set of substantive doctrines.
3. That it does not deny the inner or private event, or "collapse" the subject etc. as a reductionist behaviourism would do.

4. That it is still less a mere dissolution of philosophical speculation, or, if you like, a "terminal" philosophy. These allegations can be made good neither by an ad hominem attack upon Wittgenstein as neurotically or verificationistically in fear of the new, or discovery, or being misunderstood, etc. or by any accurate consideration of the substance of its doctrines. Neither Wittgenstein nor any fellow linguistic philosopher commits the suicide of philosophy; their findings leave philosophy, if not perfectly well, at least very alive, and it is a suggestion too facile for belief that any philosopher practising the techniques etc. of that philosophy imagines nothing remains to solve.

5. Finally, I exhibited a schematisation of the method or mechanics of the heuresis of the insights of that philosophy which shows these latter as objectively valid and beyond reproaches of subjectivity or fickleness etc.

In considering the work of Gellner, there will be heard a repetition perhaps more polemical and tart in its expression but little different in substance from the criticisms earlier reviewed, and, if the length of the work be any reliable yardstick, certainly as well considered. While it is my general purpose to demonstrate the universality of the defence here offered, it shall be my particular aim to reveal that aspect of criticisms of Wittgenstein earlier noted, that, too prominently, his critics wish not so much to comment upon his views as to use that commentary, suitably coloured, as a vehicle of their own philosophical ideas. It needs no lengthy recital of the earlier caveat, that, like the Greeks and their presents, we should fear philosophers and their critiques of

Wittgenstein.

Gellner's criticisms, briefly lest their repetitious familiarity be tiresome, are as follows;

- Its founder, the later Wittgenstein, "was obsessed by the inevitability of being misunderstood...the good work for such philosophers to do in the future is.... euthanasia of philosophy...or endlessly protracted prophylaxis...this is the Night Watchman theory of philosophy."⁴⁷ cf. Hems.

- "Evasiveness is implicit in the ideas and in the practice of ordinary language philosophy⁴⁸...It reduces communication to a blind ritual..."⁴⁹ cf. Findlay.

- Ordinary language philosophy is the "refusal to grant philosophic licence"⁵⁰ sc.to go beyond the expressions of ordinary linguistic usage in quest, it is easily inferred from the context, of "meanings", "discoveries" etc. Again cf. Findlay's grievances.

- It treats generalisations "with utmost reserve, if not with contempt...generality per se is treated either as an index of falsehood or at least harmful in philosophy."⁵¹

It is an attempt "to undermine and paralyse one of the most important kinds of thinking, namely intellectual advance through consistency and unification..."⁵² One here has a very strong echo both of the complaint and the specious pleading of Katz (q.v.)

- In essence, "it is a naturalism propagated as a mystic revelation."⁵³ This accusation is yet another reference to that pernicious stylistic sophistry that allows Wittgenstein so to beguile us, like some philosophic Scylla on to the shipwreck of our philosophical

endeavours. Again, c.f. Hems and Findlay.

These statements not only make Gellner's low appreciation of ordinary language philosophy obvious but mark it, in substance, as little different from those earlier considered and regarded. To consider now the arguments adduced to mount these criticisms, Gellner tells us this philosophical approach suffers from "disastrous defects"; this may be shown by considering what he calls, with that tartness, or perhaps more accurately, philippic tone of mockery that characterises his work, "the Four Pillars of Ordinary Language Philosophy."⁵⁴ These are:

1. The argument from the paradigm case. (APC is Gellner's own shorthand.)
2. The generalised version of the Naturalistic Fallacy.
3. The contrast theory of meaning.
4. Polymorphism.*

He argues that each of these "pillars" is, in fact, structurally unsound.

Firstly, the APC goes as follows: a word's meaning is its use - we use the word "table" - therefore tables exist or, in the case of free will, since we use terms such as "doing" xyz of one's own choice", therefore free will must exist in those terms. Of this characterisation, or rather caricature, of the "compare-and-contrast" method logical device of ordinary language philosophy it will here merely be said that it is a massively simplistic distortion of that device, as here exemplified. Of Gellner's desire so to characterise it to argue that the APC, as such, is inapplicable

* It is interesting to note the vast difference between his selection of the four cardinal elements of ordinary language philosophy and those four suggested by the writer in Chapter 1 of this thesis.

to "philosophic theories about the nature or very existence of a whole category"⁵⁵ I shall later return.

Secondly, ordinary language philosophers perniciously argue out of usage a norm. Their constant ploy is to say that whatever is the usage must be and should be the usage; all other usages or construals are either wrong or logically impossible. Indeed, if fact and norm are equated, these two terms are anyway indifferentiable. Of this, it is again to be said that, simply, it is not true. There is a clear and by now uncontroversial distinction between a use as competent, and a use as (evaluatively) improper. There can be, in a language, for example, a competent i.e. well-formed sentence, which is nevertheless, in terms of grammar or propriety to the occasion etc. a bad or socially unacceptable use.

Now it is conceded by linguistic philosophers (Gellner quotes Urmsen and Flew)⁵⁶ that this distinction may have been on occasion overlooked, and this concession surely does not invalidate the distinction, but helps, if anything to demarcate it. Of Gellner's rejection of this concession on the basis that "virtually All philosophic problems are problems of value"⁵⁷ I shall say here only that he is quite mistaken, and return later to its further consideration.

In regard to the third "pillar" of ordinary language (wisdom, the sarcasm is intended to suggest), Gellner says that it argues that all terms have meaning insofar as there are some things referred to by the term and, equally indispensable to the meaning, there exist some things which are not referred to by that term. He continues to say that "the model underlying the attraction of the contrast theory of meaning suggests that language falls neatly into games, systems that are fully determinate....

the Wittgensteinian approach (is one of) thought consisting of moves within pre-existing games..."⁵⁸ This is a brutally inadequate and inaccurate account of ordinary language theories of meaning, and in direct contrast to what account has here, in Chapter 1 and elsewhere, been given of the meaning of a word being its use, and the looseness of the boundaries of 'language-games', rules etc; it is further rather suspiciously out of accord with other criticisms of the same critic, under the head of "polymorphism" that linguistic philosophy is evasive and obfuscates the matters of its analysis.

Again, to the reason for this distortion on his part, i.e. to introduce his own submission that, far from neat predetermined linguistic headings, "a far truer picture of the progress of thought associated with Hegelianism (is wanted)",⁵⁹ I shall later return. Finally, on polymorphism Gellner argues that ordinary language philosophy disastrously exaggerates the variegation and diversity of linguistic usage. He does concede that these qualities are in the nature of logical and empirical truths of language which "consists of a variety of activities and contains elements and tools of different types."⁶⁰ Underlying the exaggeration of these truths, Gellner discerns two fallacious ideas, firstly, the possibility of "an idiographic science" and, secondly, the possibility of conceptual neutrality.⁶¹

Of these two alleged fallacies, it may at once be said that Gellner exaggerates the extent or significance of doctrines such as 'family-resemblance' or 'Language-games' etc. as composing some form of 'super-nominalism'. This is not so, as can be seen from the number of commentators who, on the same data, argue

that Wittgenstein etc. is in fact reintroducing the categories or concepts or universals of an orthodox realism. One has even argued that these notions should be seen as, or may usefully be interpreted as, a solution by synthesis of the nominalist-realist debate.⁴⁵

Of the second matter, it is hardly surprising that one who confesses to seeing the problems of philosophy as problems of value must emphasise this particular criticism of polymorphism; it is perhaps convenient, at this juncture, to consider, as promised, that general view of philosophy held by Gellner which so obviously informs and intrudes upon his criticism of ordinary language philosophy.

Basically, Gellner is a philosopher of the traditional or 'grand' school. Philosophy he sees as composed of or concerned with questions "about categories as a whole, about the viability, possibility, desirability of whole species of thinking." He considers that philosophy if it is to be linguistic, is to be concerned "with the valid use of a term. That is what philosophy has always meant and this is precisely why past philosophers were not tempted to be philologists or lexicographers."⁶² (Gellner's stress). It is this grand view that induces in him inevitably an immense contempt for what he calls the apotheosis or idolatry of ordinary usage, too humdrum for this patrician of philosophers. He sees the "cult" of ordinary language as an affront to this exalted pursuit. When linguistic philosophers suggest that ordinary usage be authoritative, they trivialise, they demean, they try to commit the euthanasia of philosophy etc. Gellner sees "the job of philosophy as perhaps to unravel presuppositions of old contrasts, or to discover contrasts where hitherto none had been perceived."⁶³ To such a view, there cannot be countenanced any view of

philosophy as merely dissolutive. More importantly it may be remarked that such a prejudice is responsible in Gellner's case for seeing only, from eyes clouded with the anger of the affronted Hegelian at the lese-majeste of Wittgenstein and his too too ordinary usage, a dissolutive and not the equally prominent innovative role of his philosophy.

Gellner sees philosophy further "as a reassessing of our terms, reassessing the norms built into them.." ⁶⁴ and its discoveries as tending" to be the establishment or discovery of a new kind of more satisfactory, more suggestive or more perceptive language...a discovery or construction which generally follows on criticisms of existing use." ⁶⁵ Doubtless we can be excused from presumptuousness if we infer that he would consider Hegel as an example of orthodox, not only ideal, philosophy. These two tasks, innovation and reassessment of inbuilt norms, he sees no doubt to be effected or effect that "intellectual advance through consistency and unification, through the attainment of coherence and the elimination (by synthesis?) of exceptions." ⁶⁶

Given such a view of philosophy, and one so antithetical to ordinary language philosophy, it is scarcely likely that Gellner could be other than dangerously antipathetic to the doctrines of that philosophy. When he says that that latter is a naturalism propagated as a mystic revelation, he is not making a mere stylistic censure, but almost lamenting the fact that it is not the philosophy it is propagated as. He imagines wrongly that the innovative and evaluative dimensions of philosophy cannot be reached via ordinary language but are along accessible by the old-fashioned approach. That this is not so must surely be apparent from what has been seen of the genuinely

new insights widely recognised as such in the works of Wittgenstein and others, in moral philosophy, e.g. that of Feinberg (q.v.), or Hare, etc.(67) achievable by the devices of ordinary language philosophy.

That Gellner should be so blind to this and in consequence offer so exaggerated, unfair and distorted a criticism is clearly to be accounted to that author's manifest prejudices and preferences in philosophy.* It has here been shown how the bare substance of his criticism i.e. that it is anti-generalisation, merely dissolutive etc. merely echo others from which that philosophy may plausibly be vindicated. It has been shown too how the manner or the styling of these criticisms on the part of Gellner is directly related to his philosophical predilections, and, frankly, on their merits, prejudices apart, cannot persuade anyone who prefers an objective standpoint to sharing the critic's prejudice. Gellner's argument, on a strictly logical assessment, is shallow, simplistic and contrived, qualities which perhaps are inevitably the hallmarks of polemical writings.

That this is so is justification for stressing again that the consideration of criticisms of ordinary language philosophy, a philosophy whose business is so centrally the criticism of past philosophical errors that it necessarily must overturn many cherished idols,

* Those views held by Gellner, that philosophy is about conceptual systems or is a matter of the norms inbuilt in our language etc. cannot here receive any full account or assessment; the criticisms of ordinary language philosophy is anyway, for Gellner as much as for the writer, an unlikely context for such an assessment.

is a task needing careful attention not only to the merits, but also to the provenance of the critique in question. Further, it may likewise be stressed again that, contrary to the submissions of Gellner, inter alios, ordinary language philosophy is no simple, final or unequivocal philosophical statement; in respect of the doctrine of rule-governed behaviour, for example, or meaning-as-use, or the still quite undetermined problem of the relationship of language to the ontology of the world, or the problems of human action etc., the insights presently offered by this philosophy are far from the last word, either in fact or in profession.

In view of this partial indeterminacy and equivocality, there is need of a careful and objective attentiveness in evaluating it both as a method of philosophy and as a set of doctrines formulated by the application of that method. These two qualities could otherwise offer too easy an avenue for the introduction of ulterior and misleading considerations. It would be unfortunate that the services of this method of philosophy, here put forward as genuinely and objectively heuristic as much as therapeutic, should be lost by too tenacious and stubborn retention of those prejudices it was designed if not to remove, at least to mellow.

References - Chapter 3.

1. The Theory of Meaning, editor Parkinson, O.U.P., London, 1973. See Note 20.
2. See infra for bibliographic references.
3. "Discovery procedures" is, in the argot of linguistic science, the technical term used to refer to the phenomena of the learning of and development of the ability to use language.
4. Language and Mind, Enlarged edition, Harcourt, Jovanovich and Brace, New York, 1972.
5. See The Philosophy of Language (see note 6 infra) for an extensive bibliography and review of Carnap's career.
6. The Philosophy of Language, Longmans, London, 1966. The quotation is by way of dedication on the frontispiece of the work.
7. Routledge, Kegan, Paul, London, 1922. See Chapter 1 of this thesis.
8. Op.cit. p.8.
9. Ibid., pp.92-3.
10. Wittgenstein, Allen Lane, The Penguin Press, London, 19

11. Op.cit. p.15.
12. Blackwell, Oxford, 1972, at paras. 90-110 and passim.
13. Op.cit. para. 308.
14. Linguistic Philosophy, the underlying reality of language and its philosophic import, Allen and Unwin, London, 1971.
15. The Philosophy of Language, p.87
16. Ibid., pp.88-94.
17. Ibid., pp.90-92.
18. Ibid.
19. Ibid., p.95.
20. This article, on "Meaning and Use" was originally in the proceedings of the Aristotelian Society, Supp. Vol.35 (1961) at pp.232-242. The essay is reprinted in The Theory of Meaning ed. Parkinson, O.U.P. London, 1968. All page references are to this edition.
21. To this philosopher, the terms "denotation" and "connotation" are attributed in original application to the theory of meaning.

- 22. Op.cit. p.119 .
- 23. Analytic Philosophy and Phenomenology, ed. H.A. Durfee, Martinus Nijhoff, The Hague, 1976. Hems' article is at pp.71-91.
- 24. See note 12.
- 25. Blackwell, Oxford, 1972, para. 160.
- 26. Op.cit.pp.126-7.
- 27. As Ryle says in the Concept of Mind; See Chapter 1 of this thesis.
- 28. Op.cit.
- 29. Moore, the philosopher of "common sense" and with justification seen by many as the herald of ordinary language philosophy, advocated this and similar views in "A defence of common sense" 1925, and "Proof of the external world", 1939.
- 30. In his review of the Philosophical Investigations in Wittgenstein, ed. Pitcher, MacMillan, 1968 at p.42.
- 31. Op.cit., p.122.
- 32. All references in the margin are to the Philosophical Investigations.
- 33. Op.cit. para.85.

34. Ibid. para. 118.
35. Ibid. para. 129.
36. See his reply to the criticisms of O.K. Bowsma, in Studies in Philosophy - a symposium on Ryle ed. K. Kolenda, Rice University Press, Houston Texas.
37. Op.cit., para. 270.
38. Op.cit. pp.194-5.
39. Op.cit. p.42.
40. Found in "A plea for excuses" in Proceedings of the Aristotelian Society, Vol.57 (1956-7) at pp.1-30, reprinted in The Philosophy of Action ed. A.H. White, at pp.19-43. All page references are to this edition.
41. Op.cit. pp.25-26.
42. See Alf Ross, Directives and Norms, Routledge, Kegan Paul, London, 1968, and Chapter 4 of this thesis.
43. See Chapter 2, notes 44.
44. In Analytic Philosophy and Phenomenology (see note 23 supra) at pp.243-268.

45. See Renford Bambrough's article "Universals and Family Resemblances" at pp.186-204 of Wittgenstein edited by Pitcher (see note 30 supra.)
46. Words and Things, a critical account of linguistic philosophy, with an introduction by Bertrand Russell, Victor Gollancz Ltd., London, 1959.
47. Op.cit. pp.1-3.
48. Ibid. p.21.
49. Ibid. p.25.
50. Ibid. p.49.
51. Ibid. p.45.
52. Ibid. p.51.
53. Ibid. p.53.
54. Ibid. pp.29ff.
55. Ibid. p.34.
56. Ibid. p.38, where Gellner provides explicit references to the writings of these philosophers.
57. Ibid. p.38.
58. Ibid. p.43.

59. Ibid. p.43.
60. Ibid. p.44.
61. Ibid. p.51.
62. Ibid. p.39.
63. Ibid. p.43.
64. Ibid. p.44.
65. Ibid. p.44.
66. Ibid. p.51.
67. See Freedom and Reason, R.M. Hare, O.U.P., 1963
In fairness, it must be recognised that Gellner could not, in 1959, have the benefit of this work. It must surely dispel forever any notion that, in moral philosophy, ordinary language philosophers must argue norms from usage. The major purpose of this work is to show precisely that the nature of moral language and argument required, indeed postulates a freedom of ethical commitment quite uncircumscribed by common linguistic usage or any other matter. Nor is this to argue the reality of free will in moral behaviour: Hare's point is rather that all, whether freewill theorists or determinist, must, if they are at all to be moral agents or morally principled, subscribe to standards of rationality i.e. the consistency and coherency of conduct which are implicit in the universalis ability which Hare argues is the logical property of moral judgements and principles.

CHAPTER 4.

JURISPRUDENCE - AN ALTERNATIVE APPROACH.

Up to this point of my investigation of jurisprudence, its problems, and how they may be best approached, I have concentrated on ordinary language techniques, considering in turn,

1. their philosophical foundation, or warrant,
2. their application both as seen in the writings of Hart etc., and as allowing yet further scope of application in correction and extension of that writer's contributions to jurisprudence, and, most lately,
3. considering anew the propriety of such a method in the light of those grave criticisms it has attracted.

It is now proposed, therefore, to relieve this otherwise too exclusive concentration on my part, by considering, by way of contrast and the lessons that may emerge more clearly in the conflict of comparison, an alternative view of the problems of jurisprudence. This will be that, principally, of Olivecrona,¹ who may be introduced shortly as realist; one instantly sees him, thus labelled, as a very different jurisprudential species, insofar as "party" or "school" nomenclatures are significant, from Hart, who has already, in the Concept of Law pronounced strong criticism on doctrines of one type or another loosely grouped together as realist.

It may well be asked, then, why, of alternative "camps" or theories, of jurisprudence, should I select Legal Realism; secondly, of the large and diverse set of views held by many still properly termed Realists, why should I choose Olivecrona? Could not Kelsen,² as an exponent of normative legal science be chosen, or

less esoteric, some American vindicator of modern revived natural law³ doctrine, or the newest of neo-Hegelian³ dialectical state-will theorist?

To the first question, it may be replied that a number of factors make Legal Realism a good choice for my purposes of comparison:-

1. It currently enjoys no little favour within that small community of the public to whom a good, or 'sound' jurisprudential account is, in fact, a desideratum. It is thus well-documented, widely taught, however superficially, perhaps owing this popularity to the basic appeal it makes to common-sense, or 'business-like' attitude; it gets if you like to the medias res in which all good lawyers since Cicero like to see themselves.
2. In terms, too, of its development, the Reālist schools are relatively new arrivals on the stage of jurisprudential debate. From our present position in 1978, we need not strain our eyes in hindsight looking merely to the late 19th century to observe its earliest germination. It thus affords us a 'handy' closed micro-cosmic view of a complete school of thought and its development and adjustment via various trials, criticisms, and refinements, its ramification into various sub-schools, in fine, its consolidation in maturity to a jurisprudence of weighty significance. This admittedly purely contingent virtue, i.e. one that should not, though may well, have eo ipso won anyone's allegiance to it, is not one we can, for obvious reasons, find within the Natural Law School,³ however many other 'virtues' Plato, or Aquinas or Grotius etc. care to discover there; still less can it be found within schools of positive law whose history and documentation are coterminous, and as daunting in

scale, as that of post-renaissance society.

As to the intrinsic merits of a realist account, I shall not adduce these at this stage, hoping that they will, as here examined, speak in their own vindication.

To the second question, my choice of Olivecrona, it is not disputed that others, for reasons just as persuasive, could have been considered; notwithstanding, I consider the following facts sufficient justification:-

1. Bearing in mind that schools of jurisprudence are not like sets of chess-men, etc. where membership is a definite constructive relationship of one to its neighbour, Olivecrona is a member of the "Uppsala group" of Scandinavian Realists.⁴ Without prejudice to fuller explanation at a later stage, it may safely here be said that this branch of Realism represents the most vigorous and well-rooted development of that philosophy: while American Realism⁵ has clearly long descended from its apogee, maybe even burned out into a rather lifeless behaviourism of jurimetrics, and the many doctrines it maintained, and other wilder realist notions, e.g. Nazi doctrines of Free-Law,⁶ have expired or been seen as children only of their times, Scandinavian Realism has survived beyond the teething stage, and its genuine contribution to jurisprudence, far beyond the empty sensationalism of the original realist 'message', is now recognised beyond effacement.

2. Just as a relatively junior school of philosophy proclaims its parentage, or makes it easy to discern its ursprung or philosophical provenance, the works of one of its seminal writers do afford a transparent view

of their sources, and casual, periodic additions culled from various other influences.

Olivecrona's works, dating from 1939-71, allow a commentator to see within them what basic, raw matters he has fashioned into his own submissions. This is no accusation of shallowness, in the perjorative sense of ^{being} transparent or plagiarism - the heritage of jurisprudence is no one person's possession - rather this manner of composition is to be expected in the nature of things. It will be borne in mind that one who tries to establish a new school of thought may amend, try again or retract, and these too with our encouragement rather than censure. In later consideration, then, of Olivecrona's development as a thinker and theorist, and, to some extent, that of Alf Ross,⁷ a fellow realist, a consideration made easier by its youthfulness in terms indicated, there will be seen among other matters, no small alterations in their opinions on vital problems of jurisprudence; it is my point that it is this very growth of ideas albeit erratic or episodic, and the insight we may easily have into them, that justifies hiw now being singled out for examination.

The Writings of Karl Olivecrona.

Olivecrona is readily identified in the popular mind of jurisprudence as a writer belonging to the Scandinavian School of that discipline. It is common, therefore, to see him bracketed in treatment with his fellow members of that school, Alf Ross, Lundstedt,⁷ and their common mentor, Axel Hagerstrom;⁷ so much is this so that until a certain level of jurisprudential research is reached, Olivecrona's individuality, as are the others', is somewhat obscured by the generalised treatment that such a categorisation as a school of thought naturally induces.

We thus have one reason for the determination here made to give him individual attention, but another more complex may be added:- it is that the views of Ross and Olivecrona have each developed, possibly in a meandering fashion away from the source motivations of Hagerstrom, to whom alone Lundstedt remains close. Charting such meanderings in an en bloc manner is not only likely to obscure a correct understanding of the individual's standpoint in a welter of ill-differentiated details, but likely to divert us from a labour of individual analysis which is burdensome enough and rewarding enough for our direct and undeviating attention. To exemplify the shortcomings of an en bloc treatment, one may consider G. MacCormack's not uninformative synopsis of "Scandinavian Realism."⁸ The article, as it stands, is helpful, does apply some cogent, if summary, criticism of the thought of the school, but is marred by the author's desire, doubtless for economic reasons etc., to get from the A-Z of Scandinavian Realism, all ideas and personalities concerned in it in a mere 20 pages.

I will therefore postpone until a later and more strategic stage any comparisons of Olivecrona's work with those of other members of the school, and commence rather by considering another formative influence upon his work, that of the writings of Leon Petrazycki. The name, and the theories of its bearer, are by no means familiar in jurisprudence - in fact, references to his work in the common run of jurisprudence manuals are exceedingly rare, and it is Olivecrona himself⁹ who briefly, in one paragraph, mentions that author "the remarkable Polish-Russian Philosopher", as providing one of the earliest non-voluntaristic accounts of the efficacy and validity etc. of a legal

system. Such short mention is surprising, given that Olivecrona is by his own profession committed to the project of providing such a non-voluntaristic account, and had already in 1947 published¹⁰ a lengthy critique of that philosopher's theory.

One later finds however, from Timasheff, the editor of Petrazycki's major work Law and Morality,¹¹ which provides us with a comprehensive version of his view of a legal system, in the introduction of that work, the following illuminating observation. "...There has arisen a new school of law (sc. Scandinavian), the so-called Uppsala School...(concerned with) the problem of a realistic interpretation of law on a psychological basis. They try to replace the objective "ought to be" (belonging to the realm of ideas) with the subjective experience of right and duty. This is very close to Petrazycki's theory...".¹²

Like Olivecrona, then, Petrazycki, sees as the cardinal problems of the science of law, as a genuine fulfilling academic discipline to replace the jejune strivings of contemporary and earlier jurisprudence,¹³ the discovery of the origins and development of law within society. In an anti-metaphysical manner, with continual emphasis upon the facts, likewise to be shared with Olivecrona, he will clear the table from the outset of all empty notions of natural law, positivist sovereigns, state or general wills, and all such traditional cant and jurisprudential humbug.

Giving himself thus a fresh start, a new "cue for action", he embarks upon the fabrication of a (then) quite innovative theory, which, in its time, caused that rare academic phenomenon of packed lecture-halls as his theories captivated in their novelty and appeal the attention of the whole university of St. Petersburg, not merely its Law Faculty. Among the elements of this

theory, there can be seen many notions of central importance which I think can be seen rehearsed, though re-applied, in Olivecrona's writings. Lest it be thought from the specialised treatment or attitude here shown to Petrazycki, however, that his work repays our attention to it only as an aid to understanding Olivecrona, I should add that Podgorecki in Law and Society,¹⁴ goes so far as to date the beginnings, or at least, the earliest positive prefigurations of a modern sociology of law as apparent within Petrazycki's seminal writings of 1890. We do well here to reflect upon the clear sociological strains in Olivecrona's work to the effect that law and language are tools alike of social utility; this reflection will make it appear less than surprising and much less than fortuitous that there is such close similarity between their respective uses of 'psychological ideas', 'legal imperatives' both of which concepts Olivecrona will utilise in that synthesis of legal causality. This he professes to be his main object in Law as Fact, or in his own terms the "nature of law in the community".¹⁵

The Imperative-Attributive Theory of L. Petrazycki.

It is his aim to replace the inadequate theories of the jurisprudence of his day, which Petrazycki found as dissatisfying as, he says, Kant found that of his times.¹⁶ The following are the major articles of his theory.

1. He laments the lack of a properly scientific method; he remarks that "the principal - though not the only - obstacle to the successful construction of the sciences of law and morality, is the lack of a proper scientific methodology..."¹⁷ These two matters,

law and ethics, he sees as closely comparable, to be distinguished as being respectively, imperative-attributive, i.e. postulating, or dependent upon the postulation of, a reciprocal right-and-duty on a personal level, and, in the case of morals, simply attributive.

2. To provide that scientific method of analysis for these matters, he introduces a scientific theory of the psychology of human action; it is submitted that the operative causes or motivation of human action, as against that of other lesser animals, on the legal, moral and aesthetic value-planes, are 'impulsions'. He defined these¹⁷ as a bilateral blend of passive sensations of lack, and active sensations (adpetitus, urge, aspirations being synonyms) of desire. It is in respect of this bilaterality this between-and-betwixt of control by and control of our desires, that man's unique situation is defined.

In the ethico-legal situation, an appropriate impulsion would consist in its passive aspect of the cognition or appreciation of a situation, comporting its morally or legally exigent phenomena or indices; in its active aspect, it would consist of a sense or image of an action appropriate or possible in those circumstances to fulfil the requirement of the legal or moral duty therein implicit. The resultant actions on the legal plane of the host of an impulsion, are the precipitate then of the store of sensations or impulsions in the mind of the actor himself, not the result of any externally posited commands, of either a natural law, or supreme sovereign "who is habitually obeyed": the reality of law is therefore psychological, not physical or material.

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With this extremely individual and novel concept of human behaviour, which only a Pavlov, and his theory was at this time still to be developed and publicised, could rival, Petrazycki continues

3. To define those categories of law he will establish to facilitate its comprehensive analysis; again, his division stands in total contrast to the existing jurisprudential treatments of the same matters. He will divide law along two axes, the former, the official/unofficial law axis, the latter, that of intuitive/positive law; the four resultant classifications, i.e. official/positive, etc. etc. are in each case shown as basically manifesting the operation of impulses within the individual; e.g. a positive law is re-interpreted as a 'normative fact', which the individual, in virtue of his training to respond to it in a certain dutiful way, perceives in conjunction with the situation it applies to, and accordingly observes. A law proscribes theft, there is an occasion where X has the opportunity to steal or embezzle the moneys of his trust (the want passively felt) but actively honours his stewardship etc.

4. The cogency of this analysis, or its comprehensive-ness in applicability to the very wide varieties of observable legal behaviour is then confirmed by Petrazycki's observation that legal or moral images and impulses necessarily must be shared as a common ethico-legal heritage. Given too that such impulses are of their nature felicifically orientated (i.e. pleasure-maximising in the utilitarian sense) they are universally disseminated and promulgated and reinforced¹⁸, in the behaviourist sense, by their beneficent effect or occasional sanction. Law, therefore, appears to Petrazycki in this teleological sense, a device of social utility.

This whole theory is perhaps more attractive than accurate. Its author shares with Kant, not only a jaundiced opinion of contemporary efforts at jurisprudence, but a similarly categorical concept of morality, by which moral duty is seen as owed to or analytically related to the freedom of the self, not conditioned by the hypothesis of fear or gain or like self-prudential counsels. This Kantian standpoint is not so much beyond criticism that it can be arrogated by Petrazycki, as some unquestioned *donné*, to his own devices and ends.

One might further agree with Podgorecki¹⁹ who, from the viewpoint of the sociologist of the law, and with his interests at heart, considers this theory much too narrow and Pavlovian as dealing only with the individual, to be extended away from that unique environment or "testing-ground" to provide any useful assistance to the examination of complex situations of group-interaction in a multilateral society. It is now a mere truism to note that groups are not just congeries of units, the sum of their parts, and no a priorist assumption that "what's good for one person", *vis-a-vis* psychoanalysis etc., is "good for all", is in ordinary circumstances legitimate.

Further, the ontological status of an 'impulsion' or 'ideal image' of an action is never made clear by Petrazycki. It should be remembered that he lived before that age where 'inner processes', especially cerebral ones, are immediately suspect. On this dubious 'inner process', the impulsion, I shall later enlarge,²⁰ but it may be said here that, if it were conceded that such talk of impulsions etc. is, as it were, a pictorial manner of representation the sense or direction of ethico-legal behaviour and its dynamics, not in truth

intended to pin-point actual mental occurrences, it is undeniably, in an instrumental manner, a useful explanation schema.

Further dissatisfaction with Petrazycki's account might be felt at this extension of the boundaries of legal behaviour to fields of intuitive or unofficial behaviour. This would lead, in easily imagined ways, to a situation where 3 or more 'laws', gotten of various impulses, could in mutual contradiction claim to be law, with no ready method, so far as Petrazycki is our guide, for discerning which is the law. He nowhere pretends to provide or ever even concedes the need for any hierarchic taxonomy of his various laws. These criticisms, however justified, should not be too discouraging; for, like Podgorecki, we hardly look to the late Victorian age for ultimate answers to anything, never minding jurisprudence, but for prefigurations, or early traces, or first attempts along modern lines, of problems that are always with us. Notwithstanding the import of the noted criticisms, then, it must be admitted that the scheme of explanation that Petrazycki offers holds forth certain undeniably attractive insights, which figure largely in later, (sc. Olivecrona's) jurisprudence. These are, in summary form:-

1. He locates the dynamics of legal behaviour firstly on the psychological level - legal facts or acts are the product of imperatives suggested or put to the mind by images or ideas implicit in the physical situation as observed by the actor.
2. The nature of law is imperative, but not in the mode of being a response to externally issued commands of a sovereign or persuasive legal will of the state etc. The command is almost impersonal.

3. Legal behaviour, its uniformity and its development depend on popular consensus upon, or common ownership of, ideas of the 'right' or 'good' action in any situation, and the instruction of society on these common norms of correct conduct.

4. The basic guidance or criterion of framing used in the form of an impulsion, as publicly to be sponsored, on a 'trial-error-reinforcement' basis, is the social and personal utility to be derived from their observance and existence.

5. Given that, by 2 above, the commands are almost impersonal in operation, and by 4 they are in effect self-justifying, the role of the state in the legal cosmos can only be ancillary to it, not responsible for it. It will function as the index and co-ordinator of what is already law in society, a role which Petrazycki considers, on occasion, necessary both to secure the efficacy and ensure the pedagogy of laws, or 'normative facts' but not beyond achieving those ancillary ends, indispensable. (His conviction in this belief is helped by another of his beliefs, i.e. that in intuitive law, which of its nature could not be explained as brought about by state command and sanction).

When I pass on to consider Olivecrona I hope to show how he has engrafted each of these above listed elements into his own theory of law. It will be borne in mind, however, what I earlier said of his writings and, indeed, the whole material of Legal Realism, i.e. that they readily exhibit their sources and past phases of development in their self-presentation at any one time. Olivecrona's theory, as given out fully in Law as Fact is eclectic, not only as offering a modern home to the now orphan ideas of Petrazycki, but accommodates, perhaps not all too easily, other notions culled from

diverse developments in 20th century legal philosophy. These properly ought to be identified or introduced before plunging into our main task; indeed, it is no exaggeration to say that Olivecrona's purpose in Law as Fact, to illumine what really legal acts and facts are in society and how they function, how, in fact, legal language and all manner of words about legal phenomena, "supra-sensible" things in the author's parlance, are related or register on the physical and observable world is a task which only could be seen as to be done, viz. an opus faciendum, in the philosophical climate of the 20th century.

To explain the new exigence of this task, Olivecrona's interrogation of or interrogator's reference to the problems of jurisprudence is of the same type of that of the philosophers of science apply to the matter of the physical sciences in a branch of philosophy which has been a development of modern times. Though Petrazycki has some vague, naive scent of 'the science of the law', and indeed suggests to us some possible experiments we may care to perform on the nature of impulsions, of 'counteraction', 'provocation', and of 'self-observation' etc. in the course of Law and Morality, his empirical counsels such as field-study among primitives, observation of revolutions or children's games etc. are quaintly and quite unscientifically Victorian.

The appreciation of a truly scientific method of analysis of such phenomena awaited the development of a genuine philosophy of science he did not live to witness. The principal problem of that philosophy is met before and apart from the stage of empirical research; it is rather the problem of how to formulate propositions of a true and reliable nature, in language, about one's science, whether it be physics or law.

In physics, then, the critical question is how is a general law related to the phenomena it purports to describe; this question may appear in other modalities as the problem of induction from a general law, or the criterion of 'testability in principle' or the distinction between theoretic and pre-theoretic language etc. Once this question is, if never settled in any determinate categorical fashion, at least faced and the hitherto unsuspectedly tenuous links of language to reality more accurately characterised, only then may an explanation schema or laboratory experiment or a universal law be accepted for what they pretend to be. The target of all this scrutiny will be all those non-testable, metaphysical fabrications of 'phlogiston' or 'corpuscles' or whatever, the expurgation of which will leave us possibly less cosy, but better advised. Scientific theory and explanation will no longer affect a simplistic clarity but rather go so far in conceding the inscrutable distance that separates the language of theory from reality, as on occasion to offer bridging laws to transmute accurate but cryptic explanation schemata into terms of ordinary and empirical understanding.

In like terms, then, a "scientist" of law, or a realist, will interrogate the standard propositions of jurisprudence to chart the relationship of legal language to legal reality. It is clear that the initial shock of such brute analysis upon the traditional terms of jurisprudence was ferocious; terms such as 'right' 'duty', 'obligation' and like members of the Begriffshimmel²¹ of earlier conceptual jurisprudence were quickly seen to be empty of real signification. Whereas it is no real revelation now to be told that no name-object relationship subsists between concept and its name, this revelation came as a shattering insight to the realists,

whose critical "objective" eye was seen as just what was needed to relieve the conservative, myth-ridden edifice of jurisprudence, and make it a habitation fit for modern minds. The problem now facing jurisprudence, thus shown of any objective respectability, is how to account for the existence of concepts, or their employment in propositions of fact about the law or descriptions of its operation which really signify nothing. Posing the dilemma in another way it is how to characterise or account for the relationship of a set of non-tangible norms re duties, obligations, rights, ownerships etc., to those physical dimensions or objective realities obviously but not directly related to them.

Three possible solutions to this impasse of norm-fact present themselves: that of the jettisoning of the norms, exemplified by the American Realists (1); that of concentrating, to an almost exclusive extent upon the norms exemplified by Kelsen (2); and finally, the via media somehow to accommodate both, the solution of Olivecrona and that of Scandinavian Realism, by providing, as G. MacCormack says an explanation of law, both in its normative and factual dimensions, in terms of psychological and other facts. I shall consider each of these solutions in turn.

It will serve as a common preface to each solution that those who provided it felt themselves conscious of the fact (indeed stressed it) that they were adopting a scientific approach to the analysis of the law, and that their work was in the nature of discovery in the typical scientific use of that word; the true nature of legal matter would emerge from such a critique as the realists would subject it to in the same manner as an

Einstein would unearth relativity and its theorems from bruter^o and baser stuffs.

1) The American Realist Movement.²²

It is not unfair to say that, of the three solutions offered, this is the most superficial, and I shall dwell but briefly upon it. In short, when it became apparent that legal concepts were not "real", that the rules of law were not after all founded on objective roots, they became utterly sceptical of rules e.g. Llewellyn, Frank etc. etc. and looked rather to the factual consequences of the courts etc. beyond and in despite of the imagined consequences of rules.

The movement is characterised by an immense cynicism, such as Holmes'²³ dictum "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," and a rather non-progressive and noisy iconoclasm. What is salient, however, and must be observed, is that, contrary to the more mature and level-headed treatment of the Scandinavian Realists, this cynicism and iconoclasm stemmed from the American Realists' misinterpretation or mis-diagnosis of the raison d'être of empty rules i.e. as a "plot" on the part of the establishment, with chief conspirator Langdell, Dean of Harvard, as a myth to keep the legal profession well-fee'd etc; or, as Thurman Arnold²² would have it, a necessary opiate, like religion, to the masses who must have in law an image with no clay anywhere.

In the midst of this cynicism, and "hunch" theories etc., all genuine scientific headway was stifled, and, as Rumble observes, it was left to a successor movement, more behaviourists than realists, to apply scientific methods with any professional competence, and, as yet with little noticeable success.

2) The Jurisprudence of Hans Kelsen.²⁴

Kelsen provides a direct or almost inverse contrast to the American Realists. He equally imagines he is at work in the science of law, but defines that science as a normative science relegating those facts etc. which obsessed the interest of the American Realists to the philosophy or sociology of law; this division is succinctly made when he informs us:-

"(I confine) jurisprudence to a structural analysis of positive law etc. so as to attain to a purity of method."²⁵ This purity, which gives his theory its name "The Pure Theory of Law" means in effect that Kelsen will concentrate on an analysis of norms which are ought-statements not to be governed, as such, by laws of causality, but the relationship of imputation upon which no factual matter can have any bearing. His version, then, or his resolution of the impasse of norms and facts, is then no real solution, merely an averral that the two operate on different levels, bridged only by the grundnorm, the base or pinnacle of all minor norms. This constitutive norm is not like any others which are alike imputed in hierarchic series all the way to the sanction; rather it is uniquely a necessary fact of existence that our very mode of having and needing and using norms is proof of. Its existence is not in virtue of that imputational genesis that other norms and sanctions share. In short, and in non-Kelsenian terms, facts will not, logically cannot explain the nature or operation of normative matters.

3) The Scandinavian Realists.

I have postponed until this stage any lengthy consideration of Olivecrona's fellow-thinkers and hope that this stage will prove a more effective introduction.

In contrast to 1) and 2) above, the Scandinavian

Realists believe, Olivecrona among them, that their explanation of legal phenomena takes account of factual and normative matter. Such a profession or promise is worthy of a more detailed account of the school, and will **moreover** provide further matter which can be seen as an important incorporation into Olivecrona's theory.

The prime power of this realism is agreed by all to be Axel Hagerstrom²⁶. It is significant, in view of what earlier has been said of the close proximity in developments in the philosophy of science and that of law, that Hagerstrom was, both as academic and writer, primarily a general philosopher, and his interest in matters legal was as one philosophical matter among others equally worth his attention. His shibboleth for universal application in philosophy was "praeterea censeo metaphysicam delendam esse",²⁷ and we may render this, anglice and somewhat interpretatively into the following canons of analysis:-

1. All metaphysical terms, those not signifying real, objective facts, must be purged from the law, or at least replaced by an examination and explanation of how those terms actually work.
2. An explanation of a legal system will not be acceptable if it imports or relies upon non-real elements, such as 'general wills', 'sovereigns'; the criterion for acceptance of any term will be that of factual verification, or consistency with the facts.

Further starting theses on Hagerstrom's part are that:

3. After Kant, law and morals alike function empirically in a categorically imperative manner, and

4. The realm of the 'real' will include, for all purposes, explanatory and descriptive, psychological "facts" such as ideas, feelings, instincts, beliefs etc.

It will readily be noticed that 3 and 4 above are nearly identical, equating "impulsion" to "idea" with that Petrazycki premised in his theory. The major difference is the overriding concern shared by the Realist movements to attack metaphysics almost as an evil in itself, not specifically as an obfuscator of a clear legal view. Of 4 above, it may be said further that this arrogation of "existent and real mental processes" is almost indispensable to one wishing, as Hagerstrom does, to give a causal account of the law, and at the same time forswear the temptations and pitfalls of a metaphysical standpoint.

To example, then, the application of these canons to legal analysis, we may consider some views of Hagerstrom. He never, in fact, gave or indeed intended to give a full exhaustive theory of what, or how, a legal system is; his analyses, however partial, are adequately illustrative of his attitude to the law.

He suggested that 'duties', 'rights' etc., being not real terms (i.e. ^{not}signifying objects) operate rather on the level of magic, and sought to prove this by considering the Roman Law institutions of mancipatio, stipulatio etc. There is a plausible case to be made out for seeing such rituals, with their heavy religious overtones, as primitive and magical. Indeed one need not be any lawyer or jurisprudent to see a great number of Roman institutions as thoroughly weird and redolent of a civilisation a thousand years behind that of their Greek neighbours and supposed

forebears Anchises etc. Hagerstrom is no idle antiquarian, however, for he argues that in modern times too, duties and rights are "felt" as forces upon the individual in the forms of powers over or powers upon things and persons.

In a more modern mode of psychology, he attempts to explain the same functions, i.e. duties and rights, as "objectivated" on to the material things they mention. A duty to rear a child, for example, seems observable or objectivated, "reified", to use an easily suggested existential term, in the physical features of that child. This theory is very similar to those of phenomenological gestalt psychology.²⁸ On a more general level, he suggest that we should see law deriving from a survival-instinct, and here, by "instinct" he means an actual matter, alive within society, which from generation to generation teaches its children conventional rights and duties by conditioning their feelings towards articles of legal propriety etc. This repeated conditioning yields a collective instinct towards right conduct, a solid conviction in an almost objectively warranted legal-order, whose rights, rules and duties etc. all commonly, in virtue of the human facility of 'Reification', appear as objectively existent.

This common psychological development to appreciate matters legal as "objects" is at once what really makes a legal order efficacious, not state sanctions, and accounts for the otherwise vacuous myth of meta-physical dissemination that "rights" and "duties" etc. name objects. The ideas of Lundstedt, one of Hagerstrom's protegés are similar; his principal, indeed, almost sole theme is an attack on the popular notion of "equity" or "sense of justice". This is widely supposed, in

solicitors' codes of ethics or advocates' rules of practice and so on, really to rest, pure and invigorating, at the core of the world of law. His message, delivered with characteristic fulminations in Law and Justice,²⁹ is that to see equity as the source of law and the inspirer of legal rules etc. is to get things totally the wrong way round - the rules of law, which are formed only for the ends of social utility or survival of society, themselves produce, in virtue of that same "reificatory" power as Hagerstrom adverted to, a sense of the existence of equity. This is then doubly spurious, as "substantive", and "causative" of the rules of law.

Finally, we shall consider Ross, who, though never in fact a protégé of Hagerstrom, is universally recognised as a leading Scandinavian Realist. Ross sees too that 'rights', 'duties', etc. signify no real matters: he therefore, as in his article "Tû-Tû",³⁰ shows how they are simply shorthand devices for encapsulating an otherwise intractably numerous set of legal rules and inferences in one simple statement. As for the binding force of a legal rule, he sees it as arising from a psychologically experienced compulsion to obey which is triggered by the directive, or prescriptive force implicit though not always apparent in legal language. This sense of obedience and the explanatory reliance Ross places upon it are consistent and enduring throughout his work; it is not here important or relevant to mention that he at one stage saw legal rules operative only upon judges, and now later sees them as universally sensed, though in a fuller sense to the former. Certain secondary rules, as of interpretation,

or recognition are addressed, of their nature, only to judges who will obey them not for reasons of avoiding a sanction etc. but, Ross argues, "out of a pure sense of justice." Primary rules are obeyed for the following reason as said in Directives and Norms. "Rules addressed to citizens are felt psychologically to be entities which are grounds for the reactions of the authorities...applying our definition of the existence of a norm, primary rules must be recognised as actually existing norms, insofar as they are followed with regularity and experienced as being binding"³¹. This psychological feeling Ross terms "the experience of validity".

The pattern, then, of Scandinavian Realist analysis should now be clear. The pattern is a two-step movement: a realisation of the emptiness of the referential meaning of 'right' and 'duty' as real objects prompts a recourse for the entities of legal causation and its analysis to psychological facts or entities; the clue to this psychological world is the fundamentally imperative nature of the legal language of rules. These two elements are conveniently joined by the handy phenomenological device of reification which, as I say, accounts for magical elements in Roman Law, our seeing or sensing rights etc. as things, in metaphysical fashion, and other like consequences of reification.*

* It will do no harm to consider the phenomenon in strictly phenomenological terms, however much these are, on the part of Hagerstrom, only intuitive glimpses of gestalt theories of perception. Reification is of its nature a mode of the non-thetic consciousness, i.e. not self-reflective, and therefore for some time, what is, in Ross's terms, an inner sense of compulsion, will not immediately be distinguished from that aspect of the external world it enables us to conjure up.

If we are to accept their account, that is, simply, agree that their two-step pattern as above set out proves stronger than those criticisms to be levelled at it with especial reference to Olivecrona, it would seem that this school has made good its promise to preserve the unity of jurisprudence, as an explicable or articulated blending of both fact and norm. We will now consider, the groundwork or backdrop of formative influences now sketched, the works of K. Olivecrona. His broad purpose is, as Petrazycki, to provide a non-voluntarist account of the phenomena of legal science, in realist manner he will preserve the ordinary vocabulary or stuff of traditional jurisprudence, and characterise the peculiar and specialised operations of legal reality on a psychological level in virtue of which they are directly to be related to the plane of observable social behaviour.

K. Olivecrona - Law as Fact.¹

He begins this work by exposing the poverty of both natural law and positivist jurisprudence. One cannot disagree with his early exposé of the myths of "general will" or other anthropomorphic states or deities underwriting a legal system, and that, in short, our need is for a non-voluntarist, non-personal explanation, which will at the same time accommodate the necessary imperative dimension of law. He proceeds to seek this in the twin concepts of the rule and the imperative, and it in the analysis of these that the influence of Petrazycki is unmistakable.

To Olivecrona, a rule of law becomes a combination of ideatum and imperantum.³² The ideatum is the content of the rule, and is in its turn composed of an agendum,

the course of action envisaged by the rule, and the re-
quisitum, the presence, that is, of those environmental
or situational elements which constitute the mise-en-
scene, or which make the rule eligible for application.

The imperantum is the force or imperatival tone
which establishes the addressee of the rule, or the
observer, in a specifically imperatival relationship
to the situation "ideated" by the rule; e.g. a rule
of law say, "No parking on double yellow lines" conjures
up images of cars on kerbs, yellow lines, certain times
of the day etc. and its force forbids us from parking
etc., or prescribes other routines for us to follow.
As Olivecrona says, the imperantum is that part of the
legal rule which operates upon the volitional side
of our being. Further, the ideatum and the imperantum
are, singly and jointly, as flexible as necessary
to cover the whole gamut of legal prescription. The
former may vary in content from rules of action to
rules of construction, or rules of interpretation for
judges' use, or that of individuals etc. - indeed the
agendum, or requisitum of one rule may depend upon
a constellation of various other rules. Similarly,
the imperantum, or imperative force, may make itself
manifest in many ways, dependent upon the vehicle
contingently used to convey its force, whether formally,
it is framed in a statute and is explicitly mandatory
or it is implicit merely in a customary rule, or
announced by judges etc. etc.

In sum, then, what we have here is a relocation,
and slight reassortment of Petrazycki's concept of the
impulsion, defined already as the passive observation
or perception of a situation, and the active sense of
actions necessitated or desiderated by that situation in

response to ethico-legal sentiments or sensed obligations. In both cases, correct or appropriate legal behaviour will be seen as the yielding, in Olivecrona's case, to the force of the imperantum, and, in that of Petrazycki to the impulsion.

One sharp difference must be conceded, in that the former locates the operation of legal rules via their imperative force in the realm of positive law; he allows that, of course, popular varieties do exist, but only as parasitic upon or secondary growths upon legal rules proper. By contrast, Petrazycki sees no difference between the rules (impulsions consequent upon the normative facts) of positive law, and those which are intuitively formed by individuals to form unofficial law etc.

Still, importantly in common is the location of the binding force of a legal rule or the efficacy of a legal stipulation in the imperatival force with which it registers upon the mind of the individual; according to this scheme of explanation, one has a perception of a situation, one reads of its legal dimensions, and accords, at once dutifully and cognitively, with the legal prescription relevant to that situation. Unfortunately for this explanation Olivecrona never says whether he intends us to interpret ideata, agenda etc. as images really present, like Berkeley's cat, in the mind's eye, or whether his schematisation of things is intended only as a model to allow for a more articulate or profound analysis of the multi-faceted concept of the rule. It is not possible here to give him the benefit of the doubt and excuse his account as a handy instrumentalist account of legal behaviour. He intends us to accept ideata

etc., as any other Scandinavian Realist would intend, as real inner sensations, as real as Petrazycki unquestioningly believed his "impulsions" to be. This conviction on our part will anyway be reinforced by what Olivecrona has later to say of 'consequential ideas', as causal factors in legal efficacy.

It must now be stated that this artificial fabrication of inner mental events cannot really be acceptable; indeed Olivecrona has spent the first hundred or so pages of his analysis in putting to flight a host of anthropomorphic fictions, sovereigns and the like, in search for a non-voluntarist explication of the nature of law and its binding force; he has had now to indulge in fictions of his own creation to replace the gap. None doubt the dynamic, imperative role of language, but this certainty is not any sure warrant for constructing a mechanistic account of the cerebral processes, etc. involved in or facilitating this dynamic operation of the imperative language of rules of this myth. Of the inner process, I have earlier, re Wittgenstein, made mention and shall not at this stage enlarge further.

Quite apart from this ontological problem, a mechanistic severance of the content and the practice (or observation) of a rule, imperative or otherwise, does not do proper justice to the complexity and subtlety of rule-bound behaviour. What of a rule which itself specifies, or postulates, in its supposedly contentual matter, already a directive to see that content in a certain unequivocal manner? e.g. "women and children first" already assumes or predicates that

women be seen as the weaker sex, and thus worthy of prior consideration, that children be identified by reference to standard or orthodox social practices re schooling, dependence etc. etc. In short, any attempt to analyse a rule by separating brute contentual matter as supposedly unequivocal and unmistakeably described from, on the other hand, prescriptive or imperativial forces, cannot realistically be undertaken. Nor will it help here to say, as Olivecrona does say, that there can be rules upon rules for this would just lead us into an infinite regress with no grounds for hoping ever to find a "non-loaded" unequivocal rule whose contentual matter is purely descriptive.

It may be said in further criticism that, in so exclusively concentrating on the binding force or function only of a rule, Olivecrona overlooks an important distinction between the function as commanding, and the content of a rule; simply, an enumeration or identification of the function of a statement or rule does not exhaust or account for its whole meaning. It is a matter of fact provable by a simple examination of one's own attitude to rules that one may understand XYZ as a rule without needing, with this understanding, to feel personally or psychologically a binding force. It is a failure to make this distinction that leads Olivecrona into trouble when trying to account for the nature, as part or not of law, of a rule which, in virtue of obsolescence or habitual flouting, is no longer obeyed.

Ross,³³ whom I have already mentioned as offering a similar analysis of the binding force of legal rules, i.e. basically in virtue of the psychological feelings induced or provoked by them in the minds of citizens or

judges, the "experience of validity", to some extent offers a less naive and one-eyed analysis of legal rules, in two important respects.

Firstly, he recognises that the nature of a rule as specifically and dynamically a legal rule depends upon its being part of a legal system. This relationship of dependence is, in the logical sense of the term, i.e. not Ross's own sense, an internal one, insofar as each term related conditions or bears upon the being or essence of the other. As Hart has importantly observed,³⁴ the statement that a rule is binding implies a system of rules, among them, doubtless, rules of recognition etc. which underwrite the validity of the primary rule we are concerned with.

Secondly, Ross includes in the psychological force that a rule exerts upon those governed by it not merely the imperative force Olivecrona is alone interested in, but also the regular observance of the rule: he says that "rules are recognised as existing i.e. binding and in force, insofar as they are followed with regularity and experienced as binding."³⁵ This perception that there is in observing a rule, a necessary behavioural element, a practice of its being observed which is logically constitutive of its nature as a rule, is much subtler analysis than Olivecrona offers. In fact, it really could allow Ross to dispense if he were not such a committed or "dyed-in-the-wool" Scandinavian Realist, with his earlier exclusive reliance, in Towards a Realistic Jurisprudence, of 1934, on psychological currents or facts in explanation of the phenomenon of legal rules.³⁶ As we shall see further exemplified later vis-a-vis Olivecrona, old allegiances

and dependences die hard, and the hallowed precepts of Hagerstrom etc. are still exhibited albeit in now redundant juxtaposition or coexistence with far subtler and more advanced analytical shifts. Having made these criticisms, one can therefore treat his account of legal rules as imperatival, and as unrelievedly or unadulteratedly imperatival as Petrazycki saw them, as only in effect capturing a part of the whole truth or complex nature of what a legal rule is, and how such rules are to compose a legal system. Olivecrona seems to imagine that the imperative force of a series of rules, all homogeneous and imperative, is all there is to the binding force of the law, and that whole series is a legal system. This is simply not good enough, and his account, so far, is acceptable and not unilluminating only as a model or graphic and articulate analysis of the never here denied imperative dimension of a rule. This dimension, while importantly to be recognised and explained, is not the only one.

Having dealt then with legal rules, Olivecrona pauses³⁷ again to sketch the nature of jurisprudence's dilemma, and examines the concept of 'right', before fully substantiating his stand upon independent imperatives of psychological force etc. as the lynchpin of legal explanation. He is fully aware of the precepts of the legal scientist-realist-anti-metaphysicists who have seen, as well as the emptiness of the myths of natural law, the emptiness of legal terms such as 'right', 'duty' etc. Olivecrona rehearses his reasons for rejecting such terms, seeing the problem facing him as "the word 'right' lacks semantic reference."³⁸

His solution is not to reject them out of hand, or debunk in the fashion of the American Realists, still less to argue as the more extreme member of Hagerstrom's school, Lundstedt, once did, that the terms be expunged from the vocabulary of jurisprudence. As earlier said, it was the aim of that school, in its non-extreme projects, to effect a compromise explanation which would retain conventional legal language and terminology, but fitted anew and correctly to the facts of the social observance of law. His project is now, having considered the nature of rules, to consider those elements which rules are about i.e. the ordinary stuff of legal rights, duties, ownership etc. To this same question or problem, in the first edition of his book Law as Fact,³⁹ he suggested, which he nowhere here denies, that "right" etc. were hollow words; that, in fact, when he loosely mentions such terms, we really refer shortly to a nexus of legal rules and inferences or implications implicit within them. To say that "x had a right" licenses its hearer to draw appropriate inferences as to past transactions in fact giving the right its existence, and as to the legal consequences or implications for the future etc.

In the later edition of the same book, and indeed in 1962, in Essays in Jurisprudence in Honour of Roscoe Pound,⁴⁰ to which Olivecrona was a contributor, he incorporates a new linguistic dimension into this earlier analysis. This is none other than J.L. Austin's notion of the performative use of language,⁴¹ which, for reasons that will be obvious, has a clear attraction to one who has independently arrived at an appreciation of the value of independent imperatives in legal explanation.

Austin's theory, briefly, is that a sentence, in addition to having a sense as a whole and, in its words,

a reference, has another dimension of meaning, in that it accomplishes an act on the part of the speaker, and, on occasion, brings about an effect upon the hearer. These two forces, or 'speech-acts', he termed illocutionary as "done in speaking", and perlocutionary, "done as a result of speaking." It is no place here to mention that Austin's theory has been widely criticised insofar as these acts (whose reality or actuality none would wish to deny) do not seem capable, at least in Austin's elucidation of them, of being combined into any refined or accurate analytical instrument for the dissection of a sentence. As Strawson points out,⁴² as do Searle and other commentators, illocutionary meaning shades off indistinguishably into perlocutionary etc; nor does speech-act analysis help, indeed it rather complicates, the elucidation of what synonymity or translation of sentences can be and likewise obfuscates rather than clarifies the analysis of the use of words. Olivecrona is intimately aware of these difficulties and flaws in Austin's theory, indeed is quite familiar with them, as references and passages quoted in these pages show.⁴³ He concludes, from a survey of authorities, and in this conclusion I have no criticism validly to make, with an agreement with the consensus prudentium in this case being A. Sesonke, A. Ross and Max Black, that are quoted "(there) are three classes of relationship between persons in which language plays a vital role and in which an utterance can alter the relations. These are psychological, generative and formal. An example of a formal relationship being altered is the marriage ceremony..."⁴⁴ It is thus not fortuitous that

Olivecrona both in Essays in Honour of Roscoe Pound and in Law as Fact uses this as the paradigm case of the performative utterance.

It is significant to notice that he seems unable to shake off the heritage handed down by Hagerstrom of the magical forces implicit within the workings of the law. While he admits that modern law and its observance is not basically an instance of belief in magic, still he sees in speech acts a ready universal explanation of some of the phenomena of modern law and the rituals of more primitive society, such as mancipatio or stipulatio etc.

I cannot understand this double concern on Olivecrona's part, or indeed his denying Hagerstrom's precepts, on magic, and his immediate "rehabilitation" of them sub specie of speech-acts, other than as a disclosure, here quite transparent, of his being subject to such a strong developmental influence that, when given every reason for sloughing off old ideas now obsolete, he still drags them with him. This loyalty we shall now see is to mar even his use and construal of speech act theory in explaining the genesis and effect of the word 'right', or rather 'the idea of right'. He will apply the notion of performatives not to concretise the word 'right', which he has already, since 1939, considered as "hollow" but to prove to us the existence of the "subjective ideas of right" - which he has earlier introduced⁴⁵ as being facts, not to be excised from the law in the sense of law as fact. His full argument may be schematised as follows, and we may assume, as Olivecrona does, that what justification is given to cover 'right' will, mutatis mutandis do

for 'duty', 'tort', 'ownership', 'obligation' etc.

1. The word "right" has no name-object relationship with any sensible matter.
2. We use the word "right", indeed would find life very difficult were we to dispense with the use of that term.
3. Words are "tools" - we use words for their social utility, not because we are fond of or given to applying words or patterned phonemes to non-existent entities.
4. We therefore look not to the word "right", but rather to its use in conjunction with "the idea of"; we do (and here is the hallmark of the Scandinavian Realist approach) have it as a fact that there are ideas of rights.
5. These ideas of rights are common possessions and operate on a psychological level, stimulated by the observation of legal rules and legal acts, in particular, performative acts such as marriage etc., and executory acts of judgement, and legal effects to which these ideas are appropriate.
6. A performative speech-act, for example, represents a use of language which gives rise on a psychological level to ideas of right, i.e. when x says, "I give you this", no physical change is wrought upon the article given, such as a mark of ownership, but the act of giving generates within the mind of those concerned consequential ideas of the rights of possession of the donee, ideas which operate by causing us to see a new set of legal rules applying in virtue of the act of giving.

7. A performative utterance operates just like a rule of law; it addresses itself in the jussive mood of "Let xyz be".

I cannot pretend but that I find this part of his thesis the most obscure and precarious, and am here conscious of having to a considerable extent to straighten out what on his part is a melange of poorly differentiated factors and issues. The above synopsis will suffice as an accurate enough account of Olivecrona's basic propositions from which he draws the following inferences:-

1. There are three levels of legal causality
 - legal effects proper e.g. judgment, imprisonment, diligence etc.
 - psychological effects, e.g. the stimulation of "ideas of rights" insofar as a new thinking-set of ideas is believed to apply to the same actuality.
 - actual effects: on a physical level of causation, they condition contingently or of themselves, the application of legal rules e.g. rei interitus or accretion etc., the physical observable phenomena, the holding of a chattel etc. as against the ownership of it.

Even this three-fold stratification is rendered obscure by Olivecrona's affirmation on that psychological ideas of right actually occur in the minds of people subject to a legal system. Are we to presume that we need only await the technological development of an accurate and explicit encephaloscope to conjoin the second and third strata of those listed above?

2. The mode of operation of a speech-act is supra-sensible. To say that one owns a house is a legal phrase conjuring up assumptions that such is, in fact, the case, and suggesting ideas of rights of ownership and the potential application of appropriate legal rules.

3. In contrast to the supra-sensible non-physical mode of operation of ideas of right is the actual physical world which exists, as a sort of solid but useless backdrop to legal acts and effects in the foreground.

In this handling of the ordinary language techniques of J.L. Austin, I can only suspect a grave misunderstanding on the part of Olivecrona. As earlier remarked, the legal realists noted a non-correspondence or non-immediate connexion between language and the world; a proposition would be true/false only as verifiable or only as having an actual reference; as an antidote to this rigour, it was suggested, by Wittgenstein, and, among others, notably J.L. Austin, that this over-strict demand of an object for every word stemmed from a mistaken view of language. On closer examination it could be seen to function not wholly or indeed primarily on the propositional sense of true/false, but had other diverse uses in various contexts, quite divorced from actuality; as chess-pieces are not signs or references of anything, such as Queen Y, or Bishop B etc., nor are they bits of wood - as their being or use is wholly enclosed by and exhausted in the rules of the game, so too with the words of language.

It is in exactly in that manner that J.L. Austin⁴⁶ suggests we treat the promissory speech act i.e. the speech-act is the promise, the gift-act is the giving,

the married man is such precisely and solely in virtue of the utterance of plighting his troth etc. We stop looking for a shadow inner actuality, behind these external forms, and spare ourselves the frustrations of a proposition populated language, ideal or otherwise, of verifiable matters.

Not so Olivecrona; he seems to see behind legal acts not only inner mental ideas, but a still inscrutable reality, whatever it may be. He sees a legal ownership constituted by rules as applied in and to formal acts, yet looks further to the psychological level for ideas of right generated by these constitutive acts, and still further to the thing "owned" to see whether it is, in fact, owned.

This cannot be acceptable; we cannot accept the ontology of ideas of rights as factual occurrences in the mind, never minding their consequential relationship to legal acts or judgments. We may as easily accept Austin's unnecessary invention of 'acts of will' preceding every movement that is voluntary.⁴⁷ (I refer here to that Austin the follower of Bentham). No more can we accept that legal terms such as 'owning', 'negligence', 'gift', etc. really have any actual physical or contingent dimension of being beyond that, or independent of that, they possess in virtue of their use or contextualisation in legal rules and propositions. I can attribute these errors, or misinterpretation of language-in-use, to the still persisting influence of Hagerstrom and, it may be here added, Petrazycki, which joint influence I think can be made here clearer.

Olivecrona has attempted to fashion out of ideas, legal acts, and physical observable matters a causation

chain to explain how the law registers on the physical world. To example:

x buys ABC from y; the formal acts of offer and acceptance are performed (speech-act); x takes ABC (physical) and believes (idea of right) that ABC is his; others see x hold or in control of ABC, and believe (ideas of right) that x owns, and that certain legal rules etc. will operate to vindicate x in this possession if it is called in question by y or anyone else. Now it does seem plausible to expect that this causation schematisation could well be confessed to by people when it is suggested to them that they hold such ideas and apply them in the above manner. They will admit to holding views or ideas of what legally is or should be the case. Researchers may so question and even find a large ethical or legal agreement of common opinion on matters which are obviously of basic social importance. But to extrapolate such "ideas" acknowledged in such narrow contexts and to fashion of them a universal causation scheme underwriting or implicit in every perception of x as owned, or y as married, or z as negligent is just not a realistic or, for that matter, true explanation of these phenomena.

If Olivecrona's treatment of his world of legal phenomena is not acceptable, no more is that picture he offers us of the actual world, the "backdrop" to matters legal or suprasensible. He seems to be of the opinion that the assumptions of law, e.g. that x owns, or y is the heir etc. are alone precarious as only of an assumed and not more secure nature, whereas all, on the level of actuality, is genuine and real beyond doubt or possibility thereof. This is simply naive realism to imagine the owning of xyz as less certain or uncertain, or category-wise, a differing form of

reality from the matter xyz in itself.

This error on Olivecrona's part is all the more surprising in that he is apprised of, indeed gives a good account of the need to apply to legal language the canons of correct/incorrect, not those of true/false. What he does fail to notice, however, is that the first alone are to be applied; one should not reserve the true/false test for partial use as Olivecrona does in one of his fabricated strata of legal effects, but rather recognise it as wholly inapplicable. There is no coexistence in legal language of these two dimensions of linguistic rectitude; if, for example, the court convicts x of murder, he is therefore a murderer unless the correctness, not the truth, that is, the due formal observation of the rules of evidence, criminal law etc., of that trial is challenged. There is no place for assumptions as to whether x really murdered; no distinction into legal assumption or factual knowledge is here logically possible.

This tenacious retention of ideas of right in the minds of observers of legal acts etc. might be understood by remembering Petrazycki's notion of law, conflating as it did both positive law and intuitive/unofficial law; the latter category reposed in, or sprang from the individual's own mind, untutored and unabettted by state promptings in legislation. To Petrazycki, these were nonetheless law. Now, as seen, Olivecrona has located law solely in the positive domain of courts, statutes, custom etc. thus to secure a definitiveness or certitude, both of legal rules and types of legal act, performative, executory etc.; where, in fact, he renders 'intuitive legal impulses' is in the establishment of these very ideas

of rights, ancillary to and parasitic upon the legal rules of positive law, but of a worth, as a necessary link in a chain of legal causation, quite equal to any statute etc. of positive law. Both authors, in a word, see a large and vital role in the effective existence of legal rules and systems to be played by the popular consciousness of what is right and therefore taken naturally and without further question as being the law.

However this functional similarity may be, despite the dissimilarity of terms used and mode of introduction into their respective syntheses of the articles of the legal world, Olivecrona's conclusion to Law as Fact having completed his examination of legal rules and rights, is certainly a parallel to that of Petrazycki namely that state sanctions are not the ruling "esprit de la loi". He tells us; (speaking of force as necessary for keeping up respect for the rules). "This is not to say, of course, that the threat of force is the sole reason for rule observance." Such a conclusion would be manifestly wrong.⁴⁸ The state is thus, to Olivecrona as much as to Petrazycki, only the reinforcer of legal rules of origins too diverse and of operation too intricate to be seen uniformly and coherently as the commands of a sovereign or state, backed up or indeed constituted as being commands by his or its sanctions. Indeed this conclusion on Olivecrona's part, as the logical precipitate of his prior arguments, is as briefly stated as it is evident to those who have attentively observed the consistent tenor and direction of his treatment of the law.

I think it now appropriate to try to summarise the matters here under discussion. Firstly, an estimation will be attempted of the value of Olivecrona's work as a help or otherwise in the elucidation of the

problems of jurisprudence. Secondly, I shall suggest what conclusions may be drawn from the contrast this essay has, as intended at the outset, enabled us to draw between schools, authors, and results of the Realist tradition in jurisprudence, and those of that methodology argued in earlier parts of this thesis as the ideal. Granted the validity or the relevancy of those criticisms passim addressed to it, we should ask what remains intact and insightful in Olivecrona's work.

As earlier said, his work is not unexpectedly eclectic, a synthesis of insights or inspirations of diverse provenance, and one measure at any rate of any synthesis is how seamlessly or harmoniously it has been accomplished.

Interrogated in this regard, it cannot be conceded that his synthesis is a happy one; it has been shown how he misinterprets, indeed distorts Austin's ideas of performative uses of language, and how, on numerous occasions, his adherence to doctrines of Hagerstrom's propagation, now redundant, is at cost both to the simplicity and clarity of his account, and to its fundamental intrinsic verisimilitude.

I suggest that the following insights yet remain useful from Olivecrona's essay upon his professed task, (and one so grand that to have achieved a less than total success is surely no sort of criticism in itself). It was that of composing an alternative exposition of the law to, on the one hand, "reductionist" theories which would reduce the law from a hybrid of fact and norm to one or the other, and, on the other, theories which would invent or hypostatise state entities or sovereigns or other suitable metaphysical means of explanation.

1. Rules of law, as he suggests, may in one dimension of their operation, be seen as imperatival in function; that is, analytically, what a mandatory directive is. Not all rules may be seen as being of this nature.
2. The analysis of what rules of law are mandatory may well be instrumentally accomplished by an explanation schema of ideatum, composed of agendum and requisitum etc., in the same way as, perhaps more prosaically, contract law is tardily recited as the eight or nine etc. rules of offer and acceptance i.e. Olivecrona offers us a representational device, an analogue but not anything that may seriously be taken as a representation of real mental processes.
3. His analysis of a speech act, albeit adulterated by spurious additions of 'consequential ideas' etc. (which application could only appal Austin as a prostitution of his theory) is a good and pioneering rendering of speech-act theory into the field of legal theory. Given too that the doctrine is not uncomplicated and in many regards downright dubious, the careful sifting by Olivecrona of its hard grains of sense away from the chaff of its controversial and tendentious content is of no little use to jurisprudence.
4. While what he says or believes of ideas of right is unacceptable, I consider that behind or underlying the text or expressa verba of his analysis or heuresis of these entities, he has a sure and correct sense that there reposes in people's behaviour, just as much as that of the courts or the legislative etc. (sources of law too exclusively attended to) a large measure of what indeed is the efficacy of the law. It is this appreciation of the popular (or vulgar in the literal sense of that word) sense of law that leads Olivecrona

to put the same emphasis, and for the same reasons, as Petrazycki on the pedagogic dimension of the law. Both see the need or scope for agreement upon, given the fact that such is possible, witness common 'ideas of right', and uniformisation of certain beneficent rules of legal behaviour. In the authors' own terms, Petrazycki in Law and Morality, says, epitomising his work:

"There were two errors (in jurisprudence) to be corrected by the development of a psychological theory...and the creation of a science of legal policy."⁴⁹ He defines legal policy as being on a national scale, what early moral training etc. is on a child, i.e. "the evolution in the masses of a 'citizen' type...depends on...the direction of legal policy."⁵⁰

Similarly, Olivecrona concludes in a forward looking manner, "respect must be kept up for the rules of law...Many other factors besides the threat of force (upbringing, ethical teachings, habits, propaganda etc.) are required to build up the state of mind conducive to rule observance."⁵¹ Is this not a plea, again, for a science of legal policy, or at least the implementation of its likely precepts? Certainly, it is a recognition that law as a body of rules, is, in one important and necessary dimension, a matter of popular practice. This observation, paradoxically, leads us back finally to adverse criticism of Olivecrona. He has concentrated too exclusively on the imperative nature of rules and too little on the practice which is their observance. Many rules may be imperative; many are simply practice. Some may at an early stage e.g. when fresh on the statute roll, be, or may well need to be stridently imperative e.g. "Don't drop litter", or "pay V.A.T.", but to see such rules as always and monotonously imperative, and ever sensed as sharply as an instant vocal command is just not realistic.

One takes V.A.T., income-tax, court-sentencing etc. not as repeated rounds of orders - responses etc., but simply as facts or practices.

There is a need, in short, to look not only at the structure of legal rules, but at the phenomena or experience of "learning a rule", "desuetude of a rule", in just the same way as, for example, the linguistic scientist would examine these matters. Olivecrona has failed to advance to that stage or maturity in his analysis of legal rules.

2. Stylistic Contrast.

I wish now to present, briefly, an overall comparison of the Realist approach, as here instanced, described and criticised, with that earlier suggested as ideal. Clearly, given those criticisms made above, I cannot pretend, indeed would not want to affect any unprejudiced comparison. Indeed, I have already made such explicit criticism of Olivecrona, Hagerstrom etc. that here it will suffice briefly to describe the flaws implicit in the Realist tradition and method of jurisprudence nakedly in terms of that ordinary language inspired methodology here favoured.

Olivecrona and his fellow-members of the Scandinavian school exhibit, and their explanations are the worse for this exhibition, the very vices that I argued or showed were the linguistic method's targets: his 'ideas of rights', his ideatum are palmary instances of inner processes. His desire to achieve, like a scientist, a universal and mechanistic solution is likewise the very characterisation of that vicious propensity philosophers have towards a monistic solution at whatever cost.

Further, the crucial weight or reliance he places

upon the imperative nature of the rule is again the very exemplification of a "one-sided diet" in philosophy, where we feed too much on only one kind of example,

His approach or method is insufficiently empirical; he takes it as needing no argument, a matter of common knowledge, that rules of law and their observance in every case are always of an unique type and can therefore be submitted to the same pattern of exegesis. He nowhere pauses to examine the phenomena at close quarters, where alone, in particular instances, all manner of particular differences or types of rule-observance could be noted, ranging from the sensately or acutely imperative to the merely regular or automatic.

His work, then, is a very catalogue* of those errors I set out as it were to crusade against at the commencement of this thesis, and it is hoped that Olivecrona's errors, as earlier described and so, in this conclusion merely labelled in terms of my earlier established criteria of philosophic evaluation, are salutary lessons, and as such justify this lengthy analysis.

Nor should this stark opposition to, or grievous discrepancy with, the lessons or precepts of ordinary language methods on Olivecrona's part be greatly surprising. I have spent some considerable pains to show how his theories derive more or less directly from philosophical antecedents now of some antiquity. I think it may be said that such foundations are no longer secure enough to base, in more modern and advanced times,

* The same comment, however, could be made against numerous texts in jurisprudence and in so inveighing against Olivecrona, I mean not to make him the worst, but only one instance among many.

any philosophical theory, be it of law or language or whatever. By looking so far back for one's inspiration, one is precluded from or severely disadvantaged in respect of utilising at least thirty years of philosophical development, particularly ordinary language philosophy. It is thus nearly tragic, but surely not to be unexpected, that Olivecrona should, having received the "message" or seen the light, via J.L. Austin's works, have made such sad use of it.

Sadder still might be that one error in his ways, or, for that matter, the ways of Legal Realism, which so inheres in or permeates their general attitude to the study of law that in my criticism of their particular errors I have not as yet had opportunity or leisure explicitly to characterise it. It is almost as though their aim in the philosophy of law were to solve something, to give a complete "all-purpose" explanation, such that one reading their work might thereby obtain a distinct entire theory of the law, which may or may not be correct, but is undeniably a complete theory. This he can accept and become a Scandinavian Realist too, by accepting "the complete package." They seem, in short, oblivious to any approach to legal philosophy on a broad level where one looks at the phenomena of law to see them clearly if one feels any or many matters obscure, not for a theory.

To express this another way, it is as though they seem unable to distinguish philosophy (of law) from the provision of a solution to its traditional problems, as if these matters were co-extensive. It is submitted that, if one were, as a school or writer of jurisprudence to adopt a broad approach, as above, and were in fact conscious of the above distinction, one would

produce a book which might persuade its reader not to become a Scandinavian or other Realist etc., but rather to do legal philosophy, or set about, with the book's example before him, doing legal philosophy for himself. It is in this important general respect that, more so than in any other merely particular matter, legal realism is wanting, and ordinary language methodology is providing.

References.

Chapter 4.

1. The major work of this writer, and the basis of the critique here offered is Law as Fact, 2nd edition, Stevens, London, 1971. All references, unless specifically noted otherwise, are to this edition.
2. Hans Kelsen: see "The Pure Theory of Law", translated by C.H. Wilson, Law Quarterly Review 50. For a lengthier account, see Kelsen The Pure Theory of Law, translated by M. Knight, University of California Press, 1967.
3. For short synopses of these schools of jurisprudence, see Denis Lloyd Introduction to Jurisprudence, Stevens, London, 1959.
4. This term is applied to Axel Hagerstrom, the teacher of Olivecrona and Lundstedt. Ross, who was not actually his pupil, is sufficiently close in theory to be included in this school. For an extensive bibliography on Hagerstrom, see G. McCormack "Scandinavian Realism" (see note 8 infra) at p.34. Especially useful is the article by Passmore on Hagerstrom in 1961 Philosophy 143.
5. See W.E. Rumble American Legal Realism, Cornell University Press, 1968, for a very readable account of this movement.
6. See Lloyd (note 3. supra)
7. See note 4 supra.
8. At pp.33-55, Juridical Review, 1970.
9. P.82, Law as Fact.
10. Theoria 1947.

11. Translated by H.W. Babb, Harvard University Press, Cambridge, 1955.
12. Op.cit., at pp.XXXIV-XXXV of the introduction.
13. Petrazycki's career spans the period 1880-1920 though the work above cited was published in 1907.
14. Routledge, Kegan, Paul, London, 1974, at pp.221-224.
15. Op.cit.; see the short introduction where the author defines his intent.
16. Law and Morality, at p.1. The author actually begins his work with this adverting to Kant's poor opinion of a jurisprudence unequal to its tasks.
17. Ibid., at pp.21-22.
18. The term is, of course, one now familiar to behavioural science, though Petrazycki could not have known it. It is a measure of how closely his theories anticipate much later developments in that science.
19. Op.cit., pp.220 ff.
20. See infra a full consideration of Olivecrona's writings.
21. Anglice "a heaven of concepts"; the term is an ironic reference to over-conceptualised jurisprudence.
22. See note 5. supra.
23. O.W. Holmes "The Path of the Law" in 10 Harvard Law Review 457-478. See also Rumble, op.cit.
24. See note 2. supra.
25. See his article "The Pure Theory of Law" in Israel Law Review, 1966, at p.4.
26. See note 4 supra.

27. Hagerstrom's message shares the doggedness and perhaps the weariness of its Catonic model.
28. See the Encyclopedia of Philosophy, under 'gestalt' for most useful explanation of this term.
29. See Acta of the University of Uppsala Institute of Comparative Jurisprudence 1952.
30. 1956 Harvard Law Review, at pp.812-852.
31. At p.90 Directives and Norms, Routledge, Kegan, Paul, London, 1968.
32. I use the terms as Olivecrona invented them, however hideous they appear.
33. See also his Law and Justice, translated by Margaret Dutton, Stevens, London, 1958.
34. See Chapter 2 supra.
35. Alf Ross Directives and Norms, at p.92.
36. See his Towards a realistic Jurisprudence, translator A.I. Faus boll, Einar Munksgaard, Copenhagen, 1946.
37. Law as Fact, at p.135.
38. Ibid., at p.184.
39. In 1939.
40. Essays in Honour of Roscoe Pound, edited by R.A. Newman, the Bobbs-Merrill Co., Inc., 1962.
41. See his How to do things with words, O.U.P., 1962., Lecture I., at pp.1-10, where the terms 'performative' 'constative' etc., are introduced.
See also J.L. Austin Philosophical Papers, 2nd Edition O.U.P., 1970.

42. See Essays on J.L. Austin, O.U.P., 1973. Especially Useful are Strawson's "Austin and Locutionary Meaning", and Searle's "Austin on Locutionary and Illocutionary Acts" at pp.46-69 and 141-159 respectively.
43. Op.cit. at pp.236-239.
44. Respectively at p.176 and p.225 of the work cited.
45. Op.cit., at p.185.
46. See note 39 supra.
47. The reference is to John Austin, the Victorian jurispudent. For a criticism of his atomic theory of action, see Hart's essay "Acts of will and responsibility", at pp.97ff of Punishment and Responsibility, O.U.P., 1968.
48. Op.cit., at p.272.
49. Op.cit., at p.247.
50. Op.cit., at p.99.
51. Op.cit., at pp.270-273.

CHAPTER 5.

A SHORT EXERCISE IN JURISPRUDENCE.

It might be said, by way of general comment upon the fore-going arguments and conclusions based upon them, that the prevailing tone of this thesis has been methodological. It has sought, indeed has been intended, to outline a method for the philosophy of law, to show what should be the tools to use or what objectives should be held, and what sort of satisfaction in terms of a realistic approach should be desiderated, given those methods and objectives. In this manner, I have been content to conclude each chapter (I hope without any appearance of presumption or arrogation of illicit pontification on the subject-matter of jurisprudence) with counsels of a "better" philosophy of law, a "more authentic" jurisprudence and a more creative and individually fulfilling approach via the techniques of ordinary language philosophy to the traditional, not to say hackneyed, problems of jurisprudence.

Like the cook, then, whose preachings on the methods and utensils etc. of his culinary art have perhaps tired his audience if at the same time whetted their appetite for a taste rather than a recipe of the productions of his range, it would be as appropriate here now to provide, by way of conclusion, at least a sample or illustration of the application of the counsels here set down. Again like the master-chef, who sends his class away rather with hors d'oeuvres or petit-fours or other appetisers than replete with heavy dishes, I shall consider at this stage not the whole corpus of jurisprudence but select an area which will ideally allow an opportunity to bring together certain matters perhaps too diversely distributed among the foregoing pages; it will be my aim to show how these methodological considerations may be cumulatively and effectively applied, however much their exposition and advocacy necessitated

an individual and separate treatment.

To rehearse these briefly, it has been argued at length and principally:

1. That it is of primary importance in any philosophy that the first examination be that of the language used and the diverse facts reported by that language.

2. That the aim of philosophy is rather to provide a clear view of the facts under observation, to "rechart what we know already", to "show the fly the way out of the fly-bottle", than to make discoveries of the hitherto unseen or, still less, invent the hitherto non-existent. It has, of course, been stressed that, even in recharting along the lines of (1) above, there is inevitably a measure of innovation. This innovation will differ and be preferable, however, to the "essentialising" or "theorising" innovation earlier reprobated by the circumspection that (1) above incorporates into jurisprudential method; it acts as a safeguard against the errors of too precipitates or a prioristic theorisings, and to some extent as a justification in advance of the conclusions it reaches.

3. That, more substantively, the concept of the rule as a practice must be of fundamental, even central importance in the explication of the law.

To exhibit the combined application of these three themes, it is proposed now to examine and compare the rules of municipal law, on the one hand, and, on the other, those of international law. Now it is not unfamiliar, perhaps not unfashionable to conclude an essay upon jurisprudence with a short look at the matters of that area of law, by way of acknowledging its existence. It seems to stand in need of at least some attention, however brief, or, like the poor relation of the family of law, to deserve at least a

formal invitation to legal theory. Such cursory and shabby treatment generally results in the fitting of international law, by analogical devices, into a conceptual garment, whether of tacit commands, or grundnorm theories, fashioned for municipal law;¹ these sit upon it as distortingly and grotesquely as can be imagined, the circumstances being as they are. It is perhaps this sad fact that accounts for the massive divergence between what is written of or seen as important problems in international law in text books of jurisprudence, and what, widely different, are more accurately seen as present vital concerns, both of theory and practice, in the writings of the authors of that discipline itself. Those concerns are naturally in the modern epoch those of a fast changing world, where the realities of international events, practices and patterns of state action are constantly in flux too fast for any traditional or conservative theory of jurisprudence to account for them. At the same time, they are too complex and demanding in analysis or comprehension to allow their commentators to dwell upon the "binding nature" of a rule of that law, or whether pacta sunt servanda is the grundnorm etc.

These current concerns of international law are summarised by W. Friedmann in Changing Patterns of International Law,² where he suggests five major trends in that body of the law:

1. The widening of its scope through the inclusion of new subject-matters formerly outside its sphere.
2. The inclusion, as participants and subjects of international law, of public international corporations.

3. The "horizontal" extension of international law.. through the accession of non-Western groups of states...to the legal family of nations.
4. The impact of political, social and economic principles of organisation on the universality of international law.
5. The role and variety of international organisation in the implementation of the new tasks of international law.

Given notice of these new developments which proclaim ex facie their incompatibility with the analytical categories of conventional legal analysis, it is hoped that it will not be suspected that my present designs upon international law are to fit it to any alien conceptual framework. Rather it will be seen that the schematisation of legal rules here set forth will allow, indeed is itself conditioned by, the comprehension of the present situation and developing issues of international law, as set out above. Having thus scotched this perhaps pardonable suspicion, I propose to commence this exemplary examination by a linguistic consideration of

1. THE CONCEPT OF THE RULE.

Just as it has often proved helpful in non-legal philosophy to commence a short essay upon an aspect of a ramified and important concept by an exposition of the various aspects that concept has, by way of identifying beyond confusion what particular aspects are of instant concern to the author, so now I wish to draw attention to differing usages of the word 'rule' within jurisprudence.

It has been seen how Hart particularly has seen a legal system as a set of rules. It is not material to the present argument to consider, even to reject, his refinement of rules into primary and secondary;

it is pertinent only to remark that, beyond that differentiation, Hart makes no other within the class of rules, nor does Olivecrona whose view of legal rules has already been considered. It is submitted that both these authors neglect the possibility and, of course, fail to derive the utility of the following distinction between.

- a. a rule of law and
- b. a rule of law as a ruling

This distinction is proposed as a necessary one for the purposes of analysis, not as the only one that could be made. One could, for example, further distinguish the 'rule of law' in the sense intended by Austin, or 'judges' rules' as semi-formal, or rules of court as (almost) domestic law, etc. The present distinction is here considered merely as vastly more salient and fundamental.

The distinction between rule (1) and ruling (2) may best be characterised by considering a not dissimilar differentiation made by Searle,³ between statement (1) i.e. used to refer to the content of an utterance or the matter reported by it, and statement (2) used to describe the act of uttering or reporting. The distinction is in both cases complicated firstly by the fact that the same word is used to "label" both meanings. (I have, somewhat contrivedly, tried to avoid this homonym situation by using 'rule' and 'ruling'). Secondly it is further complicated by the fact that there is a functional and sometimes inseparable unity of the two uses. In normal cases, that is, when a sentence is spoken, both statement (1) and statement (2) are encompassed; one could, however, imagine situations, e.g. of statements in Chinese, or statements lacking a main verb etc. which would fail in one or other respect of being both statement (1) and (2).

So too with rule and ruling. By 'rule' is meant, for example, the rule of substantive law that one owes a duty of reasonable care to whoever one has admitted to one's house, or business premises, or that one drives a car with due care and attention for the safety of all concerned, or that one intends, generally, the consequences of one's actions. Or, to give examples in the negative, as I do not intend that rule(1) be seen simply or too facily as only positive practices or patterned behaviours, such rules might be that one should not be cruel to or neglect one's children, or sell off the furniture of a furnished let etc., or open other people's mail.

By ruling (2), I wish to refer to what is conceptually a quite different but often coincident affair i.e. the utterance of a judge or a legislator of such a rule (1). Now it is clear that a judge etc. may well state that "one owes a duty of reasonable care etc." and his words may be an exact echo of the rule (1); this is just that second complication noted above in the case of statement i.e. that in many instances, rules (1) and (2) will go hand-in-hand, albeit different aspects of speech behaviour, just as statements (1) and (2) are often coincident.

Yet this mere temporal or situational coincidence does not affect the logical reality of the distinction. A rule (1) is a formulaic description of a set of behaviours which do or can conceivably conform to or constitute the rule. A ruling (2) is an utterance that the behaviour in question e.g. as disclosed by or instanced by the facts found in a case, falls under that rule (1). A further and equally important distinction is that by ruling (2) a characteristic speech-act is accomplished; a judge, for example, so stating a rule

of law, as appropriate or otherwise to the instant case, is involved in an ascriptive role in that he is characterising the behaviour or facts of the case, which are legally speaking equivocal before judgment, as being of one or another distinct nature, whether negligent or reasonable, or otherwise in default or innocent. This speech-act could be accomplished with or without citation of a particular rule: indeed it is never the case anyway that all the rules of law relevant or material to the judgment are cited; some are perhaps tacitly assumed or too obvious for citation, or not needing in the instant case any explicit verbal characterisation.

Yet the facts that a rule of law need not be verbally rendered in a judgment and that such a lack does not hinder the effective making of an effective judgment does not mean that, when a ruling (2) is made, it has no important consequences. One can here usefully consider certain notable areas of the law where, in fact, such a ruling has been for some time wanted on a matter currently felt to be somewhat obscure or in need of positive elucidation by a "strong bench"; or other cases too which raise such important issues that they are reserved for a full bench, as of the Court of Session, for an authoritative and final ruling. The consequences of such a ruling (2) are that the rule (1) which it embodies will thereafter be considered certain or its terms of reference clearly demarcated, and lawyers and barristers and text books will be able to cite it with confidence and case-authority.

In sum, then, a ruling (2) is logically part of an ascriptive speech-act insofar as its citation, (or, if it is a new ruling of a newly discerned rule (1), its

original verbalisation) is promoted by the exercise on the part of the judge of discretionary and ascriptive function of his office as judge. It is empirically not simply a very useful thing for lawyers etc. to have provided by their courts, but more fundamentally an integral part of the role of the courts in any legal system. A rule (1) is per contra what was earlier argued as the verbal rendering or form of a practice; a rule of law, that one shows reasonable care etc. in terms of an occupier's liability to one's guests or business associates, is not merely the statement or form of that rule, but the myriad practices that concretise that rule sufficiently to allow that description which is the form of the rule (1).

Hoping that this distinction is now clear, it would be useful to consider two other matters in terms of this same distinction, namely the articles of a statute, and the non-forensic, non-authoritative statement of a rule, and consider to which category, rule or ruling, these may be attributed. Now it would be too much of a coincidence and would anyway disclose contrivance, or cause suspicion of the same, on my part if it were now shortly to be said that all articles of every statute are rulings (2) and that all non-authoritative citations were merely observations of practice, i.e. rules (1).

Of the articles or sections of a statute, it is necessary to consider the text in question; clearly, a consolidating act, which unites in expression a body of well-recognised rules of law, will be a mere recitation of rules (1) as facts of ordinary accepted behaviour in that area of law there being consolidated. Equally clearly, at the other extreme, an Act of

Parliament, prompted by the need to overturn some recent and embarrassing decision of a perhaps too courageous court, is clearly a ruling (2).⁴ That this is so, that statutes may be hybrids of rule and ruling, should not be discouraging as it is submitted that the distinction made above provides sufficient criteria, in terms of ascriptivity and expediency, for identifying in each case which, of rule or ruling, it may be.

Of the non-forensic statement of a rule, by the application of the above criteria, it may be said that these cannot hope to have the same practical qualities or efficaciousness which are implicit in the utterance of a judge or the words of a statute, however much they may be logically of an ascriptive nature. A ruling (2) comports a situation of authoritative utterance.

Having made and confirmed the distinction, and provided criteria for its application in abstraction from those examples that served to introduce it, I wish now to consider the relationship of a rule to a ruling. It was earlier remarked that, like statements (1) and (2), these may well coincide, and that this coincidence is a matter of temporal or situational contingency, not one of logical necessity. Given the discrete logical identities of rule (1) and ruling (2), there is no reason why their separate existences should not be acknowledged and indeed confirmed by a practical consideration of the rules of the law and the court's etc. enunciation of them. In Chapter 2 of this thesis, I outlined a relationship of mutual information between the form of a rule, whether this be that of a ruling of a court, or the statement of a rule of

etiquette, and its practical expression or realisation in the conduct of those governed by and exemplifying that rule. In enlargement of this earlier proposition, it is submitted that the relationship of rule and ruling must be, among other things, one of inter-information. It is not the case, in short, that the whole story of, or all there is to the rules of law, is what the courts or the statute-book give them to be. That error comes from a failure to make the distinction between rule and ruling. It may well be the case that a rule of law, as a pattern of conduct manifest among the citizens of a legal system, may exist for a time without being the subject of a ruling of a court. Indeed there are certain areas of the law where the court literally refuses to decide upon or admit to their consideration matters brought before it, leaving the rules of that area of law in the shape in which they have naturally developed unaided by their rulings e.g. pacta illicita, "gaming" contracts, university matters in the field of academic tutelage etc. It may well be the case too that a ruling, as a statement or pronouncement on the part of a judge, mis-states a rule of law and is recognised, as it is, and overturned, reversed or distinguished on some future opportune occasion. That it is "bad law" is perhaps an inaccurate, or at least a rather quaint expression suggesting that pro tempore an area of law has turned sour and languishes in this sour state until sweetened again by a "good" court. In fact, it is merely an instance of a phenomenon that, if the nature of a ruling be appreciated, should not be considered "bad" or aberrant or otherwise difficult to accommodate; it is simply a mistaken appreciation on the part of the judge of the rule or pattern of conduct on which he is erratically making a ruling.

Cases of "bad" law are fortunately rare, and it would be better to consider the ordinary case where an area of law is built up or developed over a series of case decisions and/or statutes; this might be presented not, as suggested by the metaphors of "built up" or "judge-made" law as the unaided fabrication of the courts out of the womb of Justice etc. but as exhibiting, more prosaically, that two-fold interoperation of rule-as-practice and ruling. I propose to consider the history of development of the modern law of occupier's liability in respect of the duty owed to a trespasser; it is hoped that, once exemplified, the analysis or schematisation here suggested may be mutatis mutandis applied to any other span of development of legal rules by the court or statute. There will emerge from this analysis a clearer appreciation of what exactly is the role of these agencies in making a ruling and to what extent a rule of law depends upon these for its existence as a rule of law; once this matter is determined, we may advance to a more informed criticism of international law as a body of rules without a formal mechanism, either authoritative court or legislative body acknowledged by all countries, for making such rulings.

The development of the law in respect of the particular area selected may be briefly recited as follows:

(The cases here selected all relate to child trespassers; as said, it is not vital to my argument that any special set of cases be used to demonstrate the point to be made, but it may be said that these cases on children, and the obvious relevance of "allurement" to the occupier's duty, if any, to protect against unseen or concealed hazards, bring out most clearly the central issues and principles of this area of the law.)

1. ROBERT ADDIE v DUMBRECK 1929.⁵

A child trespassed on to the appellant's land and was killed on being caught up in some machinery. It was ruled by the court that the occupier had no duty to protect a trespasser even from a concealed danger.

2. EDWARDS v RAILWAY EXECUTIVE 1952.⁶

It was ruled that a child who trespassed upon the land of the railway and there was run-down by a train had no claim against the company. Though there had been gaps in the surrounding fence, it was shown that the company had always been quick to repair these.

3. OCCUPIER'S LIABILITY ACT (SC.) 1960⁸

Though Scotland had up to 1960 been obliged to follow the lead of English courts, i.e. that of ADDIE it was ruled by this Act that, consonant with what had been the law of Scotland prior to the influence of the House of Lords, "the duty of care owed to any person is such care as in the circumstances...is needed to protect any person entering that property.." The OCCUPIER'S LIABILITY ACT 1957⁹ made, for England, no similar extension to the duty of care beyond what ADDIE had decided; indeed, it was considered that the wide terms of the Scottish Act would become some "trespassers' charter."

4. COMMISSIONER FOR RAILWAYS v QUINLAN 1964 (Australian)⁷

The rule in ADDIE was approved.

5. VIDEAN v BRITISH TRANSPORT COMMISSIONER 1964¹⁰

A station-master's son was killed when he fell on to the line in front of a train. Lord Denning ruled that the test to apply was one of foresight, that it was not the case, simply, that there was no duty at all

as ruled in ADDIE. Lord Justice Pearson added that, if the presence of a trespasser could be anticipated, then the duty of care was that of common humanity. This duty was of especial importance in the case of child trespassers.

6. BRITISH RAILWAYS BOARD v HERRINGTON 1972¹¹

This case effectively brought English law into line with Scots law as of the 1960 Act (see (4) above). It is, in effect, merely the last stage in what can be seen as a steady convergence of the two laws on this matter. It was here ruled that a duty of care was owed where a trespasser's presence was known or reasonably to be anticipated by the occupier, or where he knew of facts which would lead anyone to conclude a trespasser's presence. This duty was that of "common humanity"; this would entail, in cases similar to those above, no obligation to repair, protect or survey but, within reasonable or practicable limits, to reduce or avert the danger.

ADDIE was, of course, pronounced to be "bad" law.

We have then a series of rulings, both on the part of the courts and parliament, which shows a large measure of progress and refinement from the earliest to the latest state of the development of this area of law. It might be seen as, using the convention of legal scholarship, "judge-made" law, as though the whole law of child trespassers, the whole matter of the practice, morals, customs and habits of children, occupiers, guardians etc. as legal behaviour were encapsulated into these decisions.

It is submitted that, simply, this cannot be a realistic analysis or view of these matters. Law, as a complex or system of rules, is more than a complex

of rulings. It may well facilitate the professional practice or academic study of the law to see wide areas of social behaviour as, in terms of being law, a network or chain of cases and statutes. Indeed, in like manner, a grammarian might see, given his interest the English language as beginning and ending on the first and last pages of the Oxford English Dictionary which is, in the terms here used, an alphabetic series of rulings (2) on word usage. To such a grammarian, the ordinary uses, practices, speech-acts etc., in fact the whole gamut of non-philological linguistic practices would not need, for his purposes, either to be considered or even acknowledged to exist.*

So too with the law; for professional needs, one may well see marriage in terms of statutory provisions re children, divorce, testamentary provisions etc. One may equally see the body of the law as radically altered, for practical purposes, by each instant decision of the courts. Indeed current techniques or conventions of reporting recent decisions which do "alter" the law do actually sponsor the view that new law i.e. new legal rules is made overnight. Now,

* In regard to the academic study or the teaching of the law, it might here be instructive to contrast what is meant by the teaching of law, used most commonly to refer to what goes on within the law faculty of a University, and the teaching of law as the education of children (or others lawless?) in correct legal behaviour. In this secondary sense, the teaching of the precepts or rules of law as forms of acceptable legal behaviour has clearly little to do with what a court has decided; it is instruction by example, by imitation and by practice. Indeed a consideration of how one has arrived at a mature sense of legal behaviour long before if ever law books were looked to must confirm that law is a set of rules of practice learned and exemplified and constituted by human behaviour.

That this is so is not a matter merely of the sociology of law, but one intrinsic to the essence or nature of a rule of law, and of vital importance to seeing how a legal system may be seen, non-mysteriously, as effective insofar as it is the actualisation or operation of these rules.

however convenient such a view of legal rules may be for practical purposes, it cannot be taken at face value for jurisprudential application, where it will inevitably produce a narrow and distorted view of the reality of legal behaviour. By this is meant the traditional view that law, or a legal system, is effective in whole or in part because of the sanctions or authoritative force that a court or other coercive agency may exert to enforce its decisions.

Implicit in this myth is a confusion of rule (1) and ruling (2), or more accurately a confusion of the effectiveness of a rule and a ruling. It is appropriate of the latter only to say that it is effective because of the availability of sanctions. Rulings, such as those considered above, are most certainly efficacious; the judgment, damages or acquittal from negligence etc. is in each case an effectuation of the court's ruling. The rules, however, of human behaviour disclosed by or contemplated by the facts of these same cases surely cannot be the product of mere court decisions. To be asked to believe this is to be invited to believe that none take consideration for children, none repair broken fences, none safeguard machinery, that neither common humanity nor reasonable foresight exist unless it be that a court ordain these practices or qualities for those subject and responsive to its ordinances.

Clearly the above practices, as those of the family, marriage, trade etc. do pre-exist the rulings of a court and their existence is nonetheless that of rules of law. It is their existence, as observed, conformed to, practised and promulgated in ordinary human intercourse that constitutes their effectiveness in quite the same manner as the English language exists

as such without needing the warrant of any dictionary to effectuate its existence.

It is this set of rules of law, a continuum of behaviour and practice, that in fact allows a court to make its ruling and further allows those same rulings to advert to such matters as "common humanity" "reasonable standards of care" etc. When such references are made, it would be an error to assume that the judges are referring to extra-legal matters as though what is reasonable for occupiers or manufacturers or parents etc. are qualities of morality or some other undifferentiated or nameless social practice; what they are referring to is ordinary legal behaviour which their reference may, on the occasion of the case, temporarily hypostatise or apophthegmatise in some handy verbal expression or legal dictum. In no way does this reference transmute, if you like, base (extra-legal) behaviour into pure legal rule.

Having distinguished rule and ruling, and seen how the nature and effectiveness of each must be separately considered, it must be recognised that this logical non-identity does not entail any functional separation. It is clear that a ruling of law is effective not solely in allowing a decree in judgment of a case. As a speech-act, whether one considers the ruling of a court or the act of parliament, there is frequently and can always be the possibility of a manifest perlocutionary force, when, for example, the Health And Safety At Work Act 1974¹² rules that premises should now conform to new standards of reasonable in respect of matters laid down in schedules to that act. Naturally, occupiers will set about directly to ensure their own conformity to those newly established standards. Or, when a court rules that, for the purposes of ensuring

a divorce on the grounds of desertion, a wife must demonstrate her willingness to adhere throughout the triennium by a demonstration by writing to her husband of that continuing willingness on her part, lawyers will sedulously and attentively write those letters. In such cases, especially the former, such perlocutionary effects must be engrafted upon the existing rules (i.e. practices) of the law, whether as substantive elements or evidentiary requirements, and so become in this sense genuine rules of law. Again it must be said that the fact that there can be made no definitive or unvarying separation of what is, on the one hand, a perlocutionary effect of a legal ruling, and on the other, a rule of legal behaviour, does not render the distinction as an analytical device of no value; it rather emphasises or illustrates the functional or dynamic interaction of rule and ruling. To return to that analogy already used to assist in the characterisation of these two concepts, that of the dictionary, I may conclude this analysis by suggesting that the rulings of a legal system be seen as a lexical system of reference, as one should use a dictionary, for determination, arbitration, correction, certification and instant characterisation of the articles of the general corpus of that legal system. Such a lexicon will prove useful in teaching the law to its prospective practitioners in providing an instant reference on any aspect in issue etc. but surely cannot be considered as either the whole extent of what is meant by the law as a system of rules, or what underwrites or explains the effectiveness of that system.

2. International Law.

It is perhaps the most obvious fact or characteristic of international law that, in contrast to municipal law

it lacks an authoritative court and any universally recognised or sovereign legislature. Its lack in these regards has led to widespread doubt as to whether it really is law, whether its rules exist as law or are not rather some kind of international morality or merely politics masquerading under the empty forms of legalistic or pseudo-legal behaviour. It is perhaps to dispel this doubt that so much effort has been expended by Kelsen and others to offer an account of this law on the same lines as municipal law; indeed even beyond such analogical explications, there is another mode of "saving" international law as law which starts by a consideration of the relationship of international to municipal law, particularly in the light of the recognition accorded to each by the other's courts. A plausible argument is then made out for a "monistic" treatment of the phenomena of the law and a grand legal cosmos of laws municipal and international is suggested as a solution which at last gives a secure legal character to the rules of international law.

My present concern is not to examine, still less to disparage such endeavours, but rather to consider international law as a body of rules lacking in either court or legislature any agency capable of making rulings (2). Now it has been explained just how specialised, and relatively small, a part is played by those agencies in the formation and perpetuation of the legal rules and behaviour of municipal law. In fact, by comparison with the traditional and unduly narrow view of the court as the fount of legal rules, a view which exalts the formal statements of the law into its very and only substance, the account offered above considerably

discounts the importance of these agencies as constitutive elements of legal behaviour; this latter has been argued to be a continuum of regular practice on the part of the subjects of a legal system.

It is suggested now that these difficulties that have been seen to beset international law stem from the application or importation to its analysis of that same narrow view of municipal law. Theorists are perplexed by the facts, for example, that the rulings of the International Court are flouted; they worry when the articles of the Geneva Convention on the Law of the Sea 1958 are neither observed by the non-signatories, or signed by enough to make them anyway worth observing by anyone, signatory or no. Further consternation is added when it is seen that certain central concepts such as recognition, de facto or de jure, and their consequences seem confused and contradictory insofar as their formal or academic analysis seems to conflict irresolubly with the practice of states. The United States, for example, did not recognise the U.S.S.R. or, until recently at any rate, China, but covertly conducted trade relations and others more or less diplomatic via a consular office in Warsaw etc.

Nor is there any shortage of such incompatibilities between the theory and the practice of international law. The concept of neutralisation, whereby Switzerland, Belgium etc. are supposed in theory to be forever free of involvement, actively or passively, in any war, is made a nonsense by the realities or possibilities of modern large-scale warfare. Similarly, the key concept of the territorial sovereignty of a state supposedly

in theory inalienable is compromised irreparably by the modern emergence of supranational defence treaties, such as NATO, SEATO and the Warsaw Pact.

These difficulties not only beset the would-be explicators or theorists of international law but are no less irksome to the very judges of the international courts and tribunals. Friedmann has frequent occasion to criticise these for failing to adopt, in various matters, a more realistic attitude towards these new developments he sees as of central importance to any understanding of modern international law. It is to be concluded both from this conflict or apparent non-congruence of the theory and practice of international law and from the advice offered by Friedmann to concentrate upon a realistic appreciation of new developments rather than sterilely to retain old and now redundant conceptualisations that basically the error giving rise to this conflict is that of seeing international law as a union, like municipal law, of rules and rulings, or, if not so explicitly, at least as having somewhere, an agency of determination for its own rules. Although it is recognised that the international court is not, in effect or operation, anyway comparable to a municipal court, still its judgments are seized upon as "declaratory" of international customary law or state-practice etc. So too, the articles of treaties are pressed into similar declaratory service, or argued as manifesting mirabile dictu "international legislation", just as if they were of the same solid stuff as the statutes of a national parliament.

By these and similar shifts, concepts such as recognition, sovereignty, consular immunity etc. are

afforded the same treatment, academically, as the elements of contract, tort, and all the familiar concepts of municipal law. All are formally alike in being conceptualised in a string of cases or statutory provisions as a clear and coherent body of rules, exceptions, principles etc. In this lies the source of that inevitable confusion that must later arise when states, by their very nature, do not behave as the individuals the subjects of private law, and persistently and perversely upset the fond theorisings and conceptualisations that such an academic or formalistic interpretation conveniently provides.

Shortly, it is to be said that rulings, in the sense above defined, do not have a place within international law. It is therefore a futile exercise to build any explanatory scheme upon any ersatz rulings culled from the texts of treaties, or the dicta of judges of international courts. That rulings do not exist, at least in the form and with the perlocutionary and illocutionary force and consequence that characterise those of municipal law does not of course bear materially upon the existence of the rules of international law, which are, as in the case of the rules of municipal law, the actual practice of the states in their interrelations. To characterise these rules as currently enacted and now developing space is to be done as Friedmann advises; one must look to the realities; what principles or patterns of practice or modern concepts of the role and identity etc. of a state are governing or are disclosed by the behaviour of states towards each other? It is neither practicable nor sensible to look for any guidance to

the words or forms of now obsolete decisions of courts or tribunals or arbitrations, still less to the over-formalised views of theorists too eager to define concepts into a form too rigid now to comprehend or explain modern developments.

In the matter, then, of recognition for example, if any rules are thus to be excerpted from or seen as constituted by the practice of states, these must accommodate all manner of recognition, be it effected by trade relations or informal or consular dealings or whatever; such an accommodation and realistic account must not be circumscribed by an a prioristic or ill-founded formalisation of what recognition ought or is theorised to be. Similarly, if the standard or orthodox concept of sovereignty is now seen to be compromised by state practice, it is submitted that the concept, as an element of traditional theory or of some still recurring conservative judgments of the international court, must be jettisoned as no longer affording an adequate account of the real nature of the rules of international law in respect of the character of its personalities.

Of this suggested approach to international law, it might again be said that, contrary to conventional attitudes or those traditional to that area of the law, it somewhat discounts the importance, already diminished, of the "formal" agencies of that law, i.e. the courts and the statutes etc., or in this case, particularly the articles of a convention or treaty. It should be stressed, however, that these, however much they are not rulings, are not for that reason to be scorned as worthy of no serious attention; rather it is the case that they are to be seen accurately

as what they are, namely, part of the practice and intercourse of states on the level of international affairs. As such and as, moreover, an explicit form of that practice, these are an important index or manifestation of what are the rules that practice discloses or constitutes. This importance in no way qualifies the dicta of the courts or the terms of a treaty or a convention to be taken as, in themselves, the exact and truthful statement of what are, or should be, the rules of international law any more than the dicta of domestic courts are per se the rules of municipal law. Nor should it be expected that the relationship of the explicit propositions on international law from these sources to the rules (i.e. practices) of that law should parallel that observed in municipal law and earlier described. Clear differences of immediacy of conformity, of certainty of execution, not to mention the possibility on the part of states of applying all manner of irregular remedies on a diplomatic or political level in any situation, preclude any such easy parallel. In summary answer both to this last matter and to the preceding observations on international law, it is to be said that what is urgently and primarily needed is an examination of the actual behaviour of the states and the facts of their intercourse in the international milieu; this will more readily and accurately disclose the rules and their existence than the fiction or theoretical establishment within international law of concepts and phenomena which are alleged to exist there only because they are so required in the explication of municipal law.

By this concentration on the facts and behaviour of states it is not intended (covertly) to offer a judgment on that perennial question of international law,

that is, whether or not it really is law. It might be thought that international law is thus reduced, in the absence of any agency to pronounce rulings or any method of enforcing sanctions to give these perlocutionary effect, to no more than a body of international morality or state practice.

Now, as for those critics who would term all that does not fit the classic positivist mould of law as command and sanction a mere morality, it will suffice only to repeat what has earlier been said,¹³ that morality is unthinkingly and unprofitably used as a place to off-load theories of law found unsatisfactory in terms above. Morality is moreover a specifically personal matter; any relegation of international law to the moral plane would entail that states, international organisations, governments etc. be treated as individuals, which is as desperate as the only other alternative - the attribution of the traits, concepts, dialectics and rationalisations applicable to the characterisation of individual moral behaviour to a diverse set of international corporate entities.

As to the allegation that international law is here made equal to the sum of state practice, that it is inherently no more law than other more conventional and overt diplomatic practice, it is to be countered by inquiring what purpose is to be served by so positive an identification of international law. It has been the object of this brief foray into the subject, and should be that of any worthwhile examination, not to state categorically what that law is or under what guise it cloaks its real identity. Rather the object has been no further understanding of international law by first dispelling the many misconceptions that obscure

a clear view of these matters.

As part of the functions and international relations of states, there is a resort to courts of a specialised sort, there are treaties of a specialised type; there is a reliance placed upon, a distinct use made of, each of these. Whether these are the "real things" or operational fictions or conventions is a problem of identification which does not bear radically upon their function in and contribution to international affairs. If international law must be (idly) identified as diplomatic practice or state practice, it constitutes such a highly legalised practice that it would serve no useful purpose to study it among diplomats, or, more practically, to instal these as judges and advocates in the international courts and tribunals. It is so highly charged with legalisms, of terminology and procedure that its careful analysis and comprehensive understanding must be tasks for legal understanding, providing that this understanding marks the divide clearly between municipal and international law.

There has been much similar wasted effort of identification in the matter of administrative law; much trouble has been spent, many pages written over the "quasi-judicial" etc. in relation to tribunals etc. It is submitted that these labours of identification, aimed at giving a universal and categorical name to the complete substance of international or administrative law are not only futile, but unlikely even to bear upon the realities and concerns of the parties involved in the relationships of either international or administrative law. This is not to say that it is, in any instant case, vital to assess critically whether a rule of municipal law, or a principle of evidence or natural justice etc. is conceptually and

constitutively common to any body of legal rules, be it civil, administrative or international.

The relationship of international law to municipal law is not to be fathomed by any such simplistic en bloc comparison, as though one were a pound of butter and the other some short-weight. In search of some more subtle characterisation of the relationship, one should hope if any one epithet is to be selected ("parasitic", "imitative" seem somehow unsatisfactory) that it comprehends both those instances where international law (or administrative law) is so much at one with municipal law as to incorporate or be incorporated into it without amendment, and also those instances where what holds for municipal law clearly may not be ingested into its international or administrative counterpart. Obviously in international law the matters of state sovereignty and a sanction-enforcing court are mutually exclusive.

In sum, then, given the dependence of international law upon the forms, procedures and terms fundamental to law, and given too the import and export of each to the other of a vast amount of now common substantive law via that common legal apparatus, it may now be seen that, in counselling an attention to state practice, it is in no way intended to ignore the legal forms of that practice, still less to say they are not law. A concentration upon the facts of state practice reveals not only what is behind the screen or superficialities of the legal forms of international law, but must see as equally significant the very fabric and effect of that screen itself.

In conclusion, then, it has been the object of this closing chapter to illustrate and emphasise those three

"canons" considered as vital to jurisprudential or philosophical inquiry, not, save by way of its instrumental relevance to these three themes, to offer any exhaustive analysis of international law as contrasted with municipal law. It hardly needs saying that much more on both as, one way and another, composed of rules remains to be said. The points here made are anyway of a sufficiently general nature to render repeated exemplification unnecessary for one not directly interested in the matter used as an example. The overriding concern has been to show the utility of a linguistic and empirical examination of the language and reality of the law, by marking the distinction between a rule and a ruling; next to show how a valid distinction so made may afford a better appreciation of matters the existence or knowledge of which was never in doubt; if Ryle may again be quoted, one may usefully make it the aim of philosophy not to discover but rechart the logical geography of what we know already. In terms of the geography, then, of the relationships here considered, of the courts and statutes to the rules of a legal system, and of municipal law to international law, it is submitted that such recharting is abundantly necessary.

References - Chapter 5.

1. Hart, The Concept of Law, O.U.P. 1961 Chapter X at pp.208-226.
2. Stevens, London, 1964, at pp.70-71.
3. In Essays on J.L. Austin, O.U.P. 1973; Searle's essay, at pp.141-159, is on "Austin and Locutionary and Illocutionary Acts". He characterises the distinction he makes succinctly as being between 'statement-acts' and 'statement-objects'. The gerundive quality of the former parallels that of 'ruling' (2).
4. BURMAH OIL CO. v. L. ADVOCATE 1965 A.C. 75;
The decision here was immediately and expressly reversed by the War Damages Act 1965, c.18.
5. ROBT. ADDIE and SONS (COLLIERIES) v DUMBRECK 1929 A.C.35
6. EDWARDS v RAILWAY EXEC. 1952 A.C.737
7. COMMISSIONER for RAILWAYS v QUINLAN 1964 A.C.358
8. Occupiers' Liability Act (Scotland) 1960 8 & 9 Eliz., c.30
9. Occupiers' Liability Act 1957, Eliz.2. c.30.
10. VIDEAN v BRITISH TRANSPORT COMMISSIONER 1963 2 Q.B.650
11. BRITISH RAILWAYS BOARD v HERRINGTON 1972 A.C.877

12. Health And Safety At Work etc. Act 1974 c.37.

13. See Chapter 2.

