THE JURISPRUDENCE
OF "ORDINARY LANGUAGE":
A STUDY OF EPISTEMOLOGY IN
LEGAL THEORY

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Στούς γονείς μου

ABSTRACT OF THESIS

Part 1: The distinction between a social rule and convergence of behaviour does not depict the internal point of view regarding behaviour in traditional rural social groups. Nor does it depict how people actually behave. It is ideological, contingent on the modern era and the emancipation of the individual. It is a matter of the theorist's presuming a logic, a form of life, that stipulates what may count as a reason for action.

Part 2: Linguistic jurisprudence, as ordinary language philosophy that it is, does not expect, regarding the conceptual, to find a reality independent of society and the happenstance of society's language. In a positivist fashion, it merely describes social reality. The distinctions it comes up with (and so the one Part 1 was about) are factual instead, part of the logic/ form of life of modern Western society. - Yet social reality is complex and many sided, not a coherent theory. Existing assumptions/ distinctions in social reality/ language are contradictory and interminable. - Linguistic jurisprudence is not concerned with all assumptions that may exist as possibilities, only with the typical ones that form the network of assumptions, which communication presupposes. - There are many languages not one. Communication exists no more, even if Oxonian armchair philosophy keeps taking it for granted. - Communicating is not *presupposing* rules. It is *changing* them, *adjusting* them to the people we encounter. We are both the same and different, there are both many and one languages. It is all a matter of what we choose to see. The positive reality of any given aggregate will entail an infinite number of communities/ societies, and corresponding

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languages, along with their negations. Uncommitted description cannot take place (is interminable) without the adoption by the theorist of a logic, which cannot be found in the external reality to be described.

Part 3: Language is not a matter of uncommitted observation of social practice, but rules in our minds. The theorist is not reporting social groups' languages, but examining his own. The question is what is law, not what people take 'law' to mean. Linguistic jurisprudence is a sort of Platonic idealism, examining concepts, the words' senses, not references, the *noumena* not the *phenomena*. These exist independently of each particular individual, insofar as common action and common enterprises are required, and insofar as the individual seeks to define itself and construct its logic in accordance with this community. The definition-seeking philosopher is a re-organiser of our common enterprises, and a teacher as to how the individual should think and determine its identity. Family resemblances make no difference to the traditional philosopher. However, linguistic jurisprudence's rejection of strict definitions and the emphasis on open texture entails a certain flexibility and allowance for change. It is to be explained by the condition of the modern world, where the community on which the traditional philosopher's assertions depended has largely been eroded. The method of the attention to language does not depend on a presumption of ordinary language as evidence of correctness, but on the fact that significance may be lost through abstraction. The diversity of semantic structures does not refute linguistic jurisprudence, for the theorist's propositions do not preclude another one proposing different ideas, should they be more sensible.

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The final problem with linguistic jurisprudence is its lack of explicitness and awareness. The need for awareness however, is not absolute, nor is the strict demand thereof wise.

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DECLARATION

This thesis has been written entirely by myself.
It is my own work.

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INTRODUCTION

There was a time when the jurisprudence of ordinary language was firmly established in this country as the incontestable paradigm of legal philosophy. The claim to a description of social facts through attention to ordinary language came close to amounting to a simple statement of what jurisprudence is about. Herbert Hart was widely praised, most particularly for his innovative method in The Concept of Law, that left the rigid, obscure and unrealistic attitude of the past behind. Yet, in more recent times, this very method, that used to be celebrated even when some substantive claim of Hart's was challenged, has become the object of fierce criticism and general doubt. Hart is still much praised, but the once fashionable trend of linguistic jurisprudence has now been abandoned. Nowadays we tend to accuse it of superficiality, conservatism and lack of touch with serious sociology. Yet, just as then, when Hart's sparse methodological remarks were uncritically applauded, now his manner is totally dismissed, with little examination, care or understanding, in arguments hardly ever followed through to enlightenment, but only to pointless *ad hominem* conclusions.

This study is about the jurisprudence of ordinary language and its method. It is about the claims linguistic jurisprudence made to knowledge, and their meaning. It is an excavation, in pursuit of what in them is true.

This work is also then about ordinary language philosophy, those much confused and often misunderstood ideas, linguistic jurisprudence assumed as firm philosophical ground; that frock, once so trendy, linguistic jurisprudence forgot herself in.

This work is also about our incoherent times, the place of the intellectual, communication and lack of it. It is about humans and the groups they make. It is about the concept of rule. It is about language, and it is about logic.

Finally, this study, with its sometimes naive vocabulary and its unassuming fashion, is a work of epistemology, concerned with claims to truth, their meaning and justification. It is a work of philosophy, seeking an account for our logical distinctions, our conceptual truths.

Thus the reader will find many things in this book. What he, or she, will not find, is caricatures of thinkers and their theories, to be subsequently attacked. All that is attacked is ideas this student puts forth for discussion. Authors and other books are fully cited in notes at the end of each Part. No claim to novelty is made, except that this examination and reinterpretation of linguistic jurisprudence is original. This student does not believe that there is anything new under the sun.

This study is not concerned with contradicting anybody. It is a search for truth, i.e. that which deserves to be remembered rather than pass into oblivion.

Some methodological issues

A. "Linguistic jurisprudence"

This term is used to refer to the historical trend of the jurisprudence of ordinary language. It is especially used to denote the method and epistemological stance of this trend. Thus, in Part 2,

it takes the definition of a positivist description of social facts through attention to ordinary language. Should this idea happen to be refuted, "linguistic jurisprudence" will subsequently assume whatever other definition is to be substituted for this one. [1]

Linguistic jurisprudence is an abstraction from particular authors and texts, not always corresponding to any one of them. Nevertheless, it does rely very heavily on Hart and his archetype. In a sense, this work is to some extent about Hart and his undertaking in The Concept of Law.

However, I have generally declined to speak of "Hart" or "Hart's method", in favour of the rather more complicated "linguistic jurisprudence". There are two main reasons for this. First, "linguistic jurisprudence" is more accurate. There are various texts by and ideas of Hart, having no relevance to this study. Hart has written other things besides the idea that we should seek elucidation of legal concepts through attention to ordinary language. His writing does not always exhibit the manner of e.g. the exposition of the distinction between "being obliged" and "having an obligation". In The Concept of Law itself, there are many theses, e.g. on legal reasoning or about the distinction between law and morality, whose truth or falsity is a matter entirely separate from whatever epistemological discussions we make, and which need not even be interpreted in accordance with either "linguistic jurisprudence" or "the method of The Concept of Law", whatever that be. Thus, "linguistic jurisprudence", though not absolutely strict, affords us a useful degree of greater precision.

Second, "linguistic jurisprudence" gives us the freedom to diverge from what Hart happened to argue for (which, after all, need

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not always be consistent or important). Thus we can disregard subsequent renouncements and qualifications, or writings that do not fit what at times we take linguistic jurisprudence to be. Most importantly, there is no solid exposition of the method followed by the trend we are concerned with, or of its philosophical assumptions. There are just scattered remarks here and there, a few arguments that would be totally inadequate for our purposes even if they had been consistent, and the vague debt to the "revolution" of ordinary language philosophy, a movement itself characterized by piecemeal applications and avoidance of general theory. Such theory as there is (e.g. Winch's The Idea of a Social Science) could not be applied to the trend we are concerned with directly, nor could it be attributed to any of its authors anyway. Therefore, in order to give adequate epistemological content to the notion of "linguistic jurisprudence", it has been necessary to attribute to it constructs much more theoretical and of far greater complexity than anything of this sort Hart actually wrote or could have had in mind. This rendered terms like "Hart's method" quite inappropriate and misleading.

I shall finally admit that this is also a matter of my taste for depersonalization. Names of persons are used to refer to them, in their concreteness. In the context of this study such reference is of no use. This is not a biography or a historical study of any sort. It is a study of epistemology.

B. About the assertions of Part 1

Our study of epistemology is preceded by a discussion of the fundamental in The Concept of Law distinction between mere convergence of behaviour and a social rule. Unlike what follows in

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Parts 2 and 3, this discussion is not metatheoretical, but at the same level as linguistic jurisprudence, in many ways a piece of linguistic jurisprudence itself. Without prejudice to the interest this discussion may have in itself, its role within the whole work is to introduce the epistemological analyses, by identifying a problem for linguistic jurisprudence, whose existence gives some substance and significance from the outset to the metatheoretical questions.

In the course of this discussion, many analyses and claims are made from a variety of disciplines. In the context of the whole work, they have the same standing as the ones of The Concept of Law that they seek to challenge. I have proceeded with them, in the same style of and reliance on "common sense", that characterized the jurisprudence of ordinary language, and which I remain, after all, rather fond of.

Taken in themselves however, the account of the notion of the rule in old societies and the one of the change in modern society, still stand in need of clarification of their epistemological status. They might be said to be sociological. Now, under 'sociology', quite diverse claims can be advanced.[2] These accounts are certainly not functionalist; although not incompatible with it, they do not depend on a view of society as an organism, parts of which have functions in its maintenance. They are not materialist or evolutionist either; they are not in general concerned with the material conditions, how or to what extent the physical environment determines the formation and maintenance of social groupings and of the "knowledge" (in the sense of the sociology of knowledge) these groupings construct. They rather come nearer to the sociology of understanding. They are reconstructions of the underlying meanings that support the actor's

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view of the world, "the actor" here being an ideal type, not necessarily corresponding to any particular actors in the particular social groupings that might fall under the terms "old" and "modern society".

They might be said to be historical too. Yet it is important to realize that we do not have here a history of how people happened to think in fact. With respect especially to the ideas and ways of thinking mentioned in connection with the change of the notion of the individual (in "The change in modern society"), such an attribution would be totally absurd. This is rather an account of how language has changed, what ideas stand behind the - mostly unconscious - formation of the modern concept of the rule, in the head of today's man. Both this, and the account of the social rule in older societies (in "Reflections on old societies"), are not descriptions of people's actual thought; they are ideal types of actual thought. They are semiotic analyses, tracing paths of and resulting in patterns of thought. At the end of the day, what I have done here, is to patch together this part of the semiotic universe.

Perhaps this creates more problems than it solves. All the same, I think that it is accurate. If the reader should think that it falls outside what should be understood by "sociology" or "history", then I make no claims to either. [3]

Vocabulary

There are some terms whose meaning evolves in the text. These are the terms 'logic' and 'reality' (and 'fact', 'thing' accordingly).

This evolution is part of the argument at one of the text's levels of interpretation. It should present no problems, despite lack of elucidation at this point.

There are terms that acquire a technical meaning at some point, e.g. 'society', 'community', 'network of assumptions'. I have not used them technically before their stipulation.

There is also the term 'language' which is at times vague and may happen to shift. Its ambiguity we have inherited from ordinary language philosophy (and the post-structuralists), where it is also used to mean "way of thinking", "form of life". I have at times spoken of 'language *stricto sensu*' and 'language *lato sensu*', or 'language as dictionary' and 'language as encyclopedia', in order to resolve this ambiguity, in places where it seemed bothersome rather than illuminating.

I have decided to (re)adopt the word 'lingual' as the general adjective referring to language (stricto sensu). It is to be distinguished from 'linguistic' which is used to refer to the study of language, the discipline studying language.

I have not applied a uniform solution to the problem of the third person singular pronoun in the English language. With respect to it, I am at a loss. I detest morphemes like 's/he'; they smell too much of computer culture, "virtuality" and uneducated technocrats speaking in tasteless plastic abbreviations. Terms like "he or she" on the other hand, do not depersonalize, the way I am used to from languages that have the gender system. So, at times, I have used such terms; at others, where such construction seemed elegant enough, I have used "one" or "they". Sometimes, when I felt a great degree of depersonalization to be necessary, I have used the gender system,

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thus rendering "individual" or "subject" as "it" (as in Latin, Greek, German), and treating '-er' endings as indicating male gender (but I have nowhere rendered "person" as "she" (in accordance with Latin and Latin languages), as this seemed too bizarre).[4] Most of the time I have not bothered to think about it, adopting whatever seemed acceptable at the moment. I did not seek to impose one uniform solution, but let this text be one more indication of the flux the English language (or at any rate my feeling of it) is in at the moment. After all, and despite the ink that has been spilled on the issue, I cannot help feeling that this is just a matter of language (stricto sensu).

I have not used words such as 'chairperson'. Just as with 's/he', I would in general avoid them, even at the cost of being called "sexist", "politically incorrect" and the like. And I have sometimes used 'man' as indicating the species rather than the male of the species. I admit that when it comes to language (stricto sensu) I often tend to be somewhat conservative.

The quotation marks ' ' indicate the morpheme, the lingual expression, regardless of sense. " " are used as general. In Part 1 however, with its borrowed style of a description of language, the former have also been used to indicate an abstraction from actual quoted speech, an idealized version of what speech, thought, etc. is to be encountered, in contrast to the latter which indicate actual speech. The same is true for "Moles", in the "Selective Literature Review". Finally, " " indicate a title. (But titles of books and periodicals are just underlined). Having finished this work, I am uneasily aware that these distinctions are not really necessary in it, and that perhaps they offer nothing more than needless complexity

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most of the time. Hence, the various quotation marks may be treated indiscriminately, if the reader so wishes.

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NOTES

1.   Cf. Wittgenstein <u>Philosophical Investigations</u> §79. Just as 'Moses', which may alternately stand for either "the man who led the Israelites through the wilderness", or "the man who as a child was taken out of the Nile by Pharaoh's daughter", should the conjunction of these propositions for the same figure be denied, so 'linguistic jurisprudence' is a name (or better, an idea) that will not be abandoned so long as we can find a definition worthy of it.

2.   Relate R. Bendix <u>Embattled Reason</u>, p. 116-9, especially p. 118: "Men like Simmel, Durkheim, and Weber define the "social fact" in accord with their orientation to substantive problems. Such definitions generate pseudo-controversies, when differences among theorists are discussed without regard for their different *purposes* of cognition. There is no single sociological theory. There are only schools of sociological theory because the most eminent scholars in the field choose their theoretical orientation in accord with substantive concerns and with their sense of what is real or significant in society."

3.   Compare McIntyre in <u>After Virtue</u> p. 72, who is unhappy with the distinction between philosophy and sociology. He disagrees that he has to choose between the one or the other. He thinks that an adequate philosophical analysis of, in this case emotivism, cannot escape being also a sociological hypothesis and vice versa.

4.   Notice that the feminine gender of *persona* is inherited from a time when this meant a player's mask, προσωπίδαν. On the other hand it is only in English that it feels strange; certainly not in Italian (perhaps because it accords there with the third person of polite address).

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PART 1

DOING SOMETHING AS A RULE

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A rule is one thing, a habit is another

[To say that a rule exists does not mean] only that a group
of people, or most of them, behave 'as a rule' i.e.
generally, in a specified similar way in certain kinds of
circumstances... Mere convergence in behaviour between
members of a social group may exist... and yet there may be
no rule *requiring* it. The difference between the two social
situations of mere convergent behaviour and the existence
of a social rule shows itself often linguistically. In
describing the latter we may... make use of certain words
which would be misleading if we meant only to assert the
former. These are the words 'must', 'should', and 'ought
to', which in spite of differences share certain common
functions in indicating the presence of a rule requiring
certain conduct. '

What a clear distinction. And how fundamental, indeed! How could
anyone forget it. But look at 'rule'; 'as a rule', 'rule requiring a
certain conduct'. Why on earth must there be one word meaning so
different things?[2] Surely it can only cause confusion and
misunderstandings. It makes one wonder whether we should try to make
some other language that could not cause misunderstandings so easily.
In any case, we can at least try to point with precision to the
differences between the two notions and social situations, that is
mere convergence of behaviour, i.e. 'habit' on the one hand, and rule
demanding conformity, i.e. 'rule' on the other.

First, for the group to have a *habit* it is enough that their behaviour in fact converges. Deviation from the regular course need not be a matter for any form of criticism. But... where there is a rule deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity...

Secondly, where there are such rules, not only is such criticism in fact made but deviation from the standard is generally accepted as a *good reason* for making it. Criticism for deviation is regarded as legitimate or justified in this sense, as are demands for compliance with the standard when deviation is threatened.

...[the generality of a habit in a social group] is merely a fact about the observable behaviour of most of the group... [For the existence of such a habit] it is enough that each [individual] for his part behaves in the way that others also in fact do. By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. [3]

These are apparently descriptive propositions. They merely describe how things are, they do not depend on any decision of ours, that sets a rule to be followed. If such a rule is to be derived, this is a simple consequence of the way things are, independently of us as observers. And it looks like we have to follow this rule, that a social rule is one thing and a collective habit is another, because it amounts to a distinction that cannot be manipulated, as it exists in (social) reality, independently of our wishes or imagination. It looks like this distinction imposes itself on us as a necessity, insofar as we do not wish to be saying nonsense, in the same way that even if I wish to jump now out of my window and stay alive, I cannot.

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Is it really so? Is this distinction actually independent of the wishes of the observer who asserts it?

This will be the subject of our study in Part 1.

Reflections on old societies

If we consider older ways of thinking, we shall not find such a clear distinction between the two notions of the rule. In older societies, the existence of an established practice, is a good enough reason for maintaining it. Settled convergence of behaviour is often enough for criticism of the deviant.

Let's start with an example. When new farming technology began to arrive in societies up to then unaware of it, one could observe a very typical reaction. The farmer who had used an animal drawn plough for tilling all his life, would normally show disbelief and unwillingness before the choice of the tractor, and would give as a reason: "I have ploughed this way all my life, and so did my father and my grandfather and his father before him. And so does everyone in my village".[3a] In what way can this count as a reason for not changing from the ox-cart to the tractor?

One could say that the traditional farmer accepted in this case the rule that he must farm the way his progenitors did. It is conceivable, but it was not normally the case. And even if it were, it is not even half the story. For, firstly, this utterance amounts to an assertion of his belonging within a group; a group where people use ox-carts and not tractors. Secondly, but in the same dimension, it is a way of identifying himself; we often identify ourselves

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through our practices. [4,5] And thirdly, it is an indication of doubt and disbelief. It is based on considerations like these: "I have seen many others do it and I have done it myself, and I know, that this way I shall get a good crop. You say your way is faster and I believe you, but how do I know that this smelling stuff won't spoil my crop? It's expensive. What if it runs down?[6] I'm a poor man and my crop is too dear to experiment with". It amounts to saying: *"I have no example to follow".* [7]

This last point takes us to the role imitation has in social practice. Individuals educated in a rural society, are hardly ever educated in a theoretical manner. They are educated through example. The older individuals do something, and the younger ones are expected to imitate. What the young need to acquire is the necessary skills and dexterity in reproducing the same movements that will produce the desired result through a given way, through a given method. The mistakes that the young may make are due to clumsiness. They are typical mistakes that everyone makes in the beginning, and so is expected to make.

This is not only so for the technical part of one's education. It is precisely the same for all kinds of different activities. It applies equally to fishing or shaving, but also to dancing and singing, discussing, approaching the other sex. In short, it applies to living. With the difference that in some activities one is not educated "explicitly", but is expected to imitate without being told. He/she will be told only after having made a mistake. And even then, sometimes, only through being laughed at, or reprimanded, depending on how high the expectation was that he/she should imitate *naturally.*

What about the element of obligation? Must the young try to

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imitate? Don't they need to be convinced that this is the right way?

The youth may indeed ask "why?" and also "why not that instead?", at least - but, anyway, certainly most often - when educated technically. The old one may then be annoyed, for he thinks the youth should have understood; he's not paying enough attention; "can't you see? are you stupid?". Or, the old one may be pleased, if it is the case that the youth is showing intelligence and individuality. He'll then answer: 'In order to X. If you do A, (undesirable) Y will come about, because of C.' Or he may simply say: "Just do it. (And don't ask.)". This reaction may be due to the fact that the teacher does not know why the alternative offered is not a good one. [9]

This last case is of particular interest to us. Because the youth is expected to do what he's been told, apparently with no reason. If he keeps asking why, he is insolent. He is doubting the authority of the older. And this is bad behaviour.

The authority of the old is of particular importance in such societies. A modern mind will attribute these strict limits to the possibility the pupil has of challenging the teacher's authority, to prejudice. The situation will be understood as a game of power. Interesting though these thoughts may be, there is something more to it. [9a]

There always are many ways of doing something. At first they may all look equally good to the thinking individual, and they may be equally good in fact. But one of them is the practice of the community. It is known that this way *will* bring about the result intended. The fact that each individual is expected to abide by the accepted practice is due to two reasons. The first one is for the individual's good. No matter how ingenious one is, one cannot

anticipate everything. The danger of failure is often far more important than the possibility of good from successful novelty. Reflection and theory need time and the possibility of experimentation. These are luxuries. The individual will "do overall better",[9] if he simply follows the traditional ways. At least, he will be more productive, on the whole. And this brings us to the second reason, which is a matter of the community's good. The community's unity is strength. If each one acts out of their own accord, the community will be weakened. Equally so, if many fail in their undertakings, because they tried to do it their way. The first reason accounts for the element of advice and care towards the young one, when he's being told "you must do it, because everyone does it". The second reason accounts for the element of reproof.

As for practical reasoning at the level of the individual's decision for action, this is dominated by a general argument from authority. Before each individual that now starts to take part in an activity (be it common or not) and needs to learn how to succeed in it, there have been myriads of others in the same position. They invented and re-invented a particular way - a particular rule - to carry through the particular undertaking well. Time and again, this way has been chosen among the same range of alternatives that some of the young "invent" again and again as new, only to find subsequently with regret, that the old established rule was best, and that they had better listened to the old ones from the beginning. Each new individual is not in any way different or better from the ones who have preceded. Nor is today's sun or soil different from yesterday's. So what was good, or appropriate, or efficient for everybody else before, is equally so for the individual now. If everyone before, as

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well as everyone around, adopt this pattern of behaviour and say it is good, if every exception is identified as a mistake, this new individual must do the same. If someone does not listen, he acts wrongly.

Consequently, the habit of obedience, especially on the part of the young, is traditionally conceived of as a virtue. The pupil is supposed to do as he is told and suppress his "arrogance", even though he does not see the reason why. With time, reflection and experience, he will perhaps come to see that this was the best thing to do, he will give the answer to his "why"s himself. And then he will be wise. Accordingly, disobedience and the tendency to revolt are conceived of as vices. [10, 11]

This is how having a rule to follow is constructed. This is also how reasons for criticising behaviour are constructed. Now, at the origin of this way of thinking, we can identify a somewhat different social structure.

Think of the wild animals that run around in herds. They all go together. Is it the case for each individual to consider whether there will be less danger from predators in that direction or the other? Certainly not. One strong animal takes a direction and the others follow. Can an individual decide to take another direction? If it did, it would run to its peril. Why is it that the strong ones lead rather than follow? Because it is more important for the weak to be near the strong rather than the inverse.

In the same way, in older communities (e.g. nomadic tribes) there are some who lead and some who follow. The latter have nothing to do with considerations as to what must be done. The reason why they do this (and not that) is that everybody else does this.

But let's return to our main argument. Since convergence of behaviour is not a simple fact but also a reason for the individual to conform, in rural societies the rule is indistinguishable from common practice. They both come to existence together. If an observer were to identify a successful novelty, that is, a new way of behaving, subsequently to be characterized within the community as good, he would simply see other members imitating it, for reasons amounting to the innovator's personality or status, rather than to the new rule's e. g. efficiency. Through imitation a common practice would come into being. At the same time there would be a social rule.

At the point when the novelty is identified, one could say that the normative element has to be distinguished from the practice, because for the innovator, as well as the first imitators perhaps, the novelty depended on a norm; it was what one must do. But this is not a social rule yet. From the internal point of view[12] we should need to take it into account, if the innovator saw this norm as a social rule, as applicable to everyone. However, in this case, from this point of view, we cannot identify a novelty, because the norm would have to be conceived of as the appropriate consequence of a more important norm (which is a common practice). The innovator was simply *following a rule*, according to the correct interpretation.[13,14] Consequently his action cannot be distinguished from the practice which corresponds to the other rule.

But what about pressure for conformity? Surely, there are cases when we meet it and cases where we do not.

I do not think that there is such a clear distinction here either. What are we going to regard as pressure for conformity? Isn't being laughed at a case? Whom do people laugh at? The one who is

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different, the one who is not *normal*. And isn't one who often acts differently conceived of as being *abnormal*? But even if it is only one case of acting *irregularly*, isn't there pressure for conformity? Suppose one of the peasants stops going to the bar in the evening to have a drink, with no apparent reason. Soon, he'll meet with indications of hostility. And what about the overall cultural framework of proper and improper attitudes? Isn't this, as such, pressure for conformity?

What is the role of pressure for conformity? Consider this. Why do people laugh at someone who's made a mistake? Why is it so funny when someone trips and falls? *So that he will be more careful next time.* Both for his own and the community's good.

"Deviation from the regular course need not be a matter for any form of criticism". But this is a contradiction. In traditional societies there is always a right way of doing something and the wrong ways. The regular course is the course one must follow. Regularity - just like normality - is good. Irregularity is bad. Regularity is a characteristic of Nature. And Nature is at the same time the way things are, and the way things must be. [15, 16]

A social rule as a matter of consciousness

We have not considered yet the third aspect of the distinction we are discussing. It is best illustrated by this example:

> ...observation of the movements of motor vehicles at certain crossroads may reveal a significant statistical regularity whereby an extremely high proportion of the vehicles is observed to stop when a red light shines in

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their direction. But no such observed or described regularity is or entails a statement of the existence of a social rule about vehicle driving. To observe or to state that the pattern 'vehicles stopping when facing a red light' occurs in 99 per cent of cases is neither to see nor to say that there is a rule. <u>The same would hold if it were observed that 99 per cent of drivers play car radios when stopped at traffic lights.</u> [17]

In the traditional way of thinking we traced, that has been developed in rural societies, there is always a rule together with each regularity. We may not always know it, that is, we do not always see the reasons behind the facts. But there is always a reason. If 99 per cent of drivers play car radios when stopped at traffic lights, it means that they must do so, even if they do not realize it, in the same way that leaves must fall from the trees in autumn, or people must die, even if they do not see why or don't even realize it. The child did not see why either, when being taught the rule to follow.

Still, even with these presuppositions, a distinction remains to which this example points: there are rules one needs to be taught, and rules one follows anyway. There are cases where we abide by a rule, meaning that we are conscious of its existence as a reason for our action. And, there are cases where we are not aware of any such rule; in this sense we act independently of it. If there is one, it is certainly not a *social* rule. There are rules which an observer can identify and use for prediction; the behaviour of the object of observation is not consciously determined in accordance with them. An individual's *habit* is such a rule. And there are rules which serve for guidance of the actor. In the case of a habit, the object acts as a rule but not according to one. If there is here a normative

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element, it is one for the observer; that the latter must predict this rather than that alternative.

So let us consider this distinction then.

How can people come to have a habit in common? Can they do it independently of the interaction with one another? To some extent, yes. However, although randomness may produce very strange results sometimes, it would not be very convincing to assert that 99 per cent of drivers play car radios when stopped at traffic lights, and that there is no explanation for it, other than that it simply happened for each one to have acquired this habit separately.[18] On the other hand, it would make much more sense if we tried to explain it with imitation and the way fashion works.

Let's take a habit typically acquired through imitation and fashion: that of smoking. Take a non-addicted smoker, e.g. one at the beginning, or one used to smoking only occasionally. Why does he smoke? Possibly out of insecurity; he wants to merge within a group (e.g. that of certain of his classmates). Probably as a habit; with no particular reason. Or, perhaps, for reasons of appearance, in order to convey a "macho" message, or to look cool and enigmatic.[19] Is he conscious of these reasons? Hard to say. We would have to speak of degrees of consciousness depending on the case.

Picture him in front of the bar, having a drink; or, perhaps I should say posing with a drink. He notices a "wild chick" and – automatically – takes his best pose and lights a cigarette. He is certainly following a pattern of behaviour, it is one he has picked from films, photographs, people he's looked at and liked the way they looked. Is he conscious of acting according to a rule? Well, he believes that he is looking good this way. Isn't there a rule here?

Of course there is. And it is not only a rule of prediction for the observer. It *is* a "cut and dried" manner in application of a principle or value (to look good). [20] It has been elaborated and established through fashion; as long as this fashion holds and provided he applies the rules correctly, he will achieve looking good, through an established way, as real as any fact depending on the culture which constitutes him and his environment. - But does he consider this as a standard to be followed by everyone? - I think he does; for everyone under similar circumstances who wishes to look cool and enigmatic (in order to look good). Just like we think of it as a standard for anyone who wishes to make a will to follow the appropriate formalities. - Is there a common practice in application of the rule? - There certainly is; there's a whole bunch of guys around him taking poses with a cigarette. - But there are numerous ways of looking good; there are also others around him trying other ways. - True; there are also numerous ways of making a will. [21]

There are various ways of explaining the fact that someone acts as a rule in a particular way. We mentioned insecurity and habit (i.e. inertia) to account for the fact that someone habitually smokes, even though it does not make him feel well as such (feeling well could be an explanation for the individuals who have become addicted). However, such explanations can only account for a habit at the level of the individual. They are not sufficient when we are concerned with the fact that a habit of this kind can become as widespread as smoking still is. It is only through the cultural investment of the relevant act with value of some kind (e.g. through investing the act with meaning) that a group can come to have a habit in common. [22] And when such an investment of value has taken place,

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since the act is conceived of as an application of the value, there will be a social rule requiring it, as part of a given mannerism in service of this value.

This cultural process is of course largely unconscious, to a bigger or lesser degree, depending on the case and the individual concerned. When one watches Humphrey Bogart in "The Maltese Falcon", one does not normally identify the patterns through which Bogart is constructed as a positive image. Even less is one conscious of reasons why *these* patterns are (re)constructed in one's mind as appropriate and not some others. Accordingly, imitation of manners does not have to take place consciously. But this does not reduce the relevant rule to one of prediction only (besides, this rule as one of prediction does not exist yet). For the rule here is constructed as the reason why the pattern should be adopted.

One might still think that nevertheless there is a difference in the way one regards one's conformity to a rule e. g. of law and to one of fashion, in that when e. g. one stops at a red light, one does so in awareness of the rule as his reason, whereas this is not the case with fashion. But this is not true independently of the pre-established concepts we are considering. We may have all degrees of awareness of our rules as reasons, in abiding by any rule. I am not conscious of abiding by a rule when I stop at a red light. I do it as a habit. We shall concede to this distinction only (because we need not question it here): there are rules concerning what obligations and duties[23] people have, and there are rules concerning e. g. how to fly an airplane. But this does not amount to a distinction between acting according to a rule and doing something as a rule.

We distinguished in the beginning of the section between rules

one needs to be taught and rules one follows anyway. But what one is being taught is not necessarily something one will be subsequently conscious of. Nor does the fact that one is being taught something entail that the "teacher" meant to teach it to one. Education is largely an unconscious activity. [24]

Habits

With what we have said so far, we have not touched upon the distinction at the level of the individual. There it seems, mere regularity of behaviour can exist without being due to a rule which one acts according to.

This is in perfect accordance with the way we understand and speak of habits. There is nothing normative about them. A habit is never a reason for action. It is only a cause. It is a practice an individual has out of inertia. However, there can be nothing common about it, at least not in the way we speak of a common practice. Two or more individuals may have a habit *in common*; but never a common habit. Only an individual can have a habit. To speak of a group having a habit is like making a metaphor, which has the consequence of picturing the group as an individual. (Think of the proposition "the Russian society has the habit of producing every few centuries a leader who struggles to introduce some changes and pull it towards the West").

Still, the habit is not independent of reasons. It has been instituted through them. It has been established for a recurrent set of circumstances, through the adoption of a way of acting in

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application of a principle or value.[25] Through repetition of this pattern of behaviour, the individual ends by acting in the way adopted (the rule) without bringing forth reasons for it (the principles concerned).[26] This is precisely how memory functions in human action, for reasons of economy and efficiency. It means that a man will be faster in acting according to the rule, while at the same time his mind will be concerned with something else.[26a] This is how one will be able to stop at a red light without thinking about it. The pattern here is being followed without a reason, i.e. the fact that one acts according to a pattern does not depend on one's acknowledging a reason for it. Consequently, the pattern of behaviour may continue to be repeated, even when the connection with the principle served has ceased to exist. So, the habit is an explanation how a regularity of behaviour may take place and why it may exist even though there are no reasons for it. It is precisely in this way that the word habit is primarily used, i.e. in order to indicate a case, where one acts independently of one's reason and even contrary to it.

Nevertheless, as long as an adopted pattern of behaviour has not been consciously (and properly)[27] challenged, it will still be coupled with assumptions of value, at some level of consciousness, and will be apt to generate judgements too. This is true even for the lot of movements and gestures we make as part of any activity, with no apparent reason, which we have acquired through seeing and imitating others. I shall make a story to illustrate this.

Whenever James as a child was with his father in their car and they happened to stop at the first red light, if his father was nervous or distressed, he used to say something like "let's see

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what's on the radio", switched it on, played with the buttons for a while, making typical gestures and comments, stopped at some station and then put in gear and moved on, because the light had turned green. At the next red light, he would realize that the radio was actually playing something he didn't like and would repeat the whole thing all over again.

When James grew up, he behaved in the same manner. He manifested his nervousness while driving, in the same way, with the same gestures and the same tone in his voice. He didn't do it deliberately. Though he *was* following a pattern of behaviour, he did not think he was following a rule. Nevertheless, it was part of his conception of a driver, and this might show if he was asked to describe or picture a driver in the way we typically describe in art. He particularly liked driving. It gave him a sense of control. He always drove himself and went everywhere by car. He believed he was an excellent driver. It made him nervous if someone else was driving, so he avoided entering a car as a passenger. At an age when people have for long been accustomed to understand and judge what they see according to what they already know, rather than adjust what they know to what they see, his car broke down and he was given a lift by a stranger. When they were stopped by a red light, the stranger manifested his nervousness by playing with the gear stick and the handbrake. When James related the incident later to a friend, he said that the guy who had given him the lift was a bit weird. He also said that the guy was not a very good driver.

The fact that one behaves in a certain way as a rule is not independent of one's normative assumptions, be they based on authority or on other "proper" reasons, and whether one is conscious

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of them or not. [27*] I think that this is the psychological explanation for the negative connotation in terms like strangeness or peculiarity. It explains why the peasant who would stop going to the bar in the evenings would meet with hostility from the rest of the group.

On the other hand one may be willing to see positively a difference in attitude or behaviour and change one's own. This depends on curiosity and the willingness to learn, which may also be part of one's normative assumptions (coupled with one's accordingly behaving as a rule in favour of change). If it is, it will be largely due to the existence of a rule in one's culture in favour of investigating and learning, and disapproving of pre(-)judice. For this may be a positive image in one's culture. Such a rule will be found to a lesser extent (and with less strength) the more the community resembles a herd and to a bigger extent (and more strength) the more it resembles the society the enlighteners of the 17th and 18th century aspired to. As we shall see later, this and the rule in favour of tolerance, are predominantly to account for the fact that the distinction we have been considering between 'acting as a rule' and 'acting according to a rule' seems so fundamental and necessary.

Conclusions on the necessity of the distinction

The idea in challenging the distinction between the two notions of the rule, i.e. between 'rule' as mere convergence of behaviour and 'rule' as reason explaining the convergence, was not to conclude whether it is valid. The problem is not whether it should be adopted

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or rejected in general. It is a distinction we make in fact. It is largely established in our ways of thinking and understanding. The problem is to see how fundamental or self-evident it is, as well as what it is that makes it fundamental and self-evident.

It is not a distinction to be found in what we might call first-order reality, i.e. what exists independently of an observer. First, if the proposition "mere convergence in behaviour between members of a social group may exist and yet there may be no rule requiring it" is meant to describe this reality, it is false. Rather the contrary is true, unless of course we refer to small scale convergence within a group, which may take place with no explanation other than randomness, [28] especially if it is true that "beaucoup de gens, peu d' idées". [29] And second, the distinction is not necessarily to be found in how people think in fact about their social rules, either. For the largest part of human history, and, I dare assume, for the largest part of today's world too, the most common and from one point of view the most important reason for action is precisely the fact that "this is what everybody does". Conformity as such is understood as a good thing and social rules are constituted by common practice. It is only in situations where no established pattern exists already, that people conceive of different possibilities as serious alternatives and reflect on reasons of other kinds. Only for people whose education entails the self-evidence of the Humean distinction, are the two notions as such so clearly independent (in principle). Finally, even at the level of the individual, it is true that regularities of behaviour, far from being independent of normative assumptions, they also generate normative judgements themselves.

Neither is this distinction a priori embedded in our minds. That

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is, it is not necessarily imposed on the observer qua human intelligence. If it were, it would be impossible to find cases where people don't make it, and yet don't fail to make sense. Furthermore, it would then be very strange indeed for the same word to be applicable in both cases. And we would expect the term 'rule' for 'as a rule' to be a separate entry in the dictionaries, from the term 'rule' for 'according to a rule'. There would be two words, with a similarity due to historical or other chance, e.g. like 'bear' for the animal and 'bear' the verb.

It is a distinction in the ways we speak and think, but only one possible distinction; not one that has to be made, from a point of view that describes language. When to a "why?" one answers "that's the rule", it need not be either descriptive or prescriptive, it need not mean either "that's how people do it in fact" or "that's how you must do it". It may well mean indiscriminately both. It could mean e.g. "this is what everybody does, so this way you can be sure to succeed in the undertaking"; couple this with the speaker's involvement and responsibility and it means "you must do it" (or "do it"). Or, it could mean "this is how people in *our* group behave". The distinction exists in the language for us to be able to make it, depending on the reasons we have for it, or simply because we wish to. In the same way that I may wish to see a triangle in a picture as hanging or standing. [30]

However, the conclusion that the distinction is not necessarily imposed on the observer does not entail that it is wrong, nor that it is not fundamental. It is correct and true, provided it is backed by certain *normative* assumptions as to what may count as a rule for someone to abide by, what may count as a reason for action. It is

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correct from a point of view that distinguishes among the reasons people act for in fact, and prescribes what form such a reason may take, in order to be prima facie admissible for discussion, and what it may not. It stipulates what is a reason "stricto sensu". In modern culture it is true that the fact that everybody does something, is not a reason for the individual to do it too.

The change in modern society

We saw that in more traditional ways of thinking, the relevant normative assumptions are radically different. The fact that everybody else does something, is also a reason for the subject to do it, and so it can constitute the social rule from the internal point of view.

The change in the normative assumptions regarding what may count as a reason for action, is a major characteristic marking the modern era (which can perhaps be placed in time, roughly from the discovery by Europe of the rest of the Earth culminating to the enlightenment, until our days and the radical changes in thinking that begin with Marxism).[30a] This change exists in a dialectical relation with the emancipation of the individual as person and its establishment in the modern way of thinking as the primal autonomous unit. The individual is for the first time conceived of as someone in himself, allowed to have his own wishes and desires, independently of the others.[31] In pre-modern times, what one - truly - wants or feels is constituted by one's status, i.e. by one's belonging to certain groups through one's identification through the appropriate general categories. (To take

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an easy example for today's ways of thinking: mothers love their children. It is not possible for a mother not to love her child, or else there is something wrong/bad with her). It is the groups that constitute the individual. In modern culture, the individual is discovered as an identity behind its status. [32] And since what one wants is not pre-established by one's status any more, since it need not be the same as what everybody in the relevant group wants, since on the contrary, each one has one's own purposes and path in life, which may happen to coincide with but are independent of others', since man is egoistic by nature, it is then obvious that it cannot be a reason for one's action the mere fact that some or even all others follow this pattern of behaviour. Because one need first interrogate what one's own wishes are, for they are in principle independent of the others' even if they are in fact the same.

Now, if the individual is the primal autonomous unit, and it is the group that is defined as an assembly of individuals rather than the individual as part of the group, i.e. if the individual has in principle a separate identity and, from the normative point of view of its constitution as a person, there is no reason why he should be like the others, his factual similarity being a mere contingent fact, then difference as such shall not be understood as an abnormality; nothing has gone wrong. So the individual's possibilities for difference are greater, because, each person being in principle identified separately, each person is therefore allowed to be in fact, through his practices, separately identified. Furthermore, now that the individual is the carrier of value by himself and not because of his ability to serve the community, now that instead the unity of the group is a good thing because - and to the extent that -

it serves the persons who constitute the group for their separate in principle but contingently convergent interests, [33] the desirability of unity has stricter limits and so less things can be threatening to it. If unity is not good as such, conformity is not good as such either, and pressure for conformity becomes irrational and prejudiced. Hence the enlightened rule of tolerance.

But we must not think of this change as if it took place once and for all. This change as a matter of fact depends on security and comfort on the part of the individuals. Curiosity is limited from fear. The will to experiment is limited, if it amounts to great risks. And without them, one will simply do like the others do, because it's safest, and one will demand that the others do the same, because a weakness of the community will expose one to greater threats. Thinking and learning is an expensive activity. The more the ones who can afford it – and the more their possibility to influence or impose their way of thinking on the rest –, the more dominant the image of the clever and radical investigator will be, in contrast to the one of the pious and respectful of authority learner. These two images have existed and fought each other in the modern era of the West, until roughly the mid-twentieth century, when the second one was overwhelmed. The same is true for tolerance vs. demand for conformity. The same is true for convergence as a quasi per se desideratum. Certainly the parents a generation ago used to expect their children to behave "like all children do". The situation in other parts of the world may still be different.

Besides, we may speak of dominance of one of these images rather than its opposite, only at a very high level of generality and abstraction, which enables us to regard a culture or a people as a

unit. At a slightly lower level of generality, we can see that, at any given moment, these opposed images and ideas, these opposed normative assumptions have different strength and degree of acceptance each, depending on the activity or the part of the population concerned, or both. A normative assumption that is dominant in one activity may well be marginal in another. Think for example of the separate and independent constitution of the individual in contrast with its constitution in accordance with its status, on the one part for a male merchant and on the other for a female housewife. Or think how dominant the rule of tolerance is in contrast with the demand for conformity, on the one hand for a group of legal philosophers and on the other for a group of English hooligans.

(It is important to realize that this is true, not only for the modern Western world, but for traditional societies as well. If we should move from plausible accounts of ideas and ways of thinking, to descriptions of actual social groups, we must remember that both ways of regarding reasons for action (just like both the dependence on and independence from the group of the individual) exist at any given moment with varying strength, depending on the particular sub-group and the activity concerned. It would be the silliest mistake to assume that in older societies there was no individuality or experimentation, that the individual was always subordinated to the group. On the contrary, and even for the most primitive nomadic tribes, it is obviously true for instance, that it happened from time to time for an individual to subordinate the group (especially for small groups), precisely after having brought about the breakdown of established common practice, thanks to the success that resulted (or

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even merely happened) after. And individuality is not always looked
upon with reproof in traditional societies, and not in the same
degree from everybody. A father for example, may even feel proud if
his son is a little of a rebel.)

In any case, at least on the level of dominant ideology and with
a strength that varies depending on the type of activity affected, we
may say that, in modern Western culture, there is a rule in favour of
investigating and learning and disapproving of prejudice. We saw that
in traditional culture this kind of attitude is not as favoured,
because of the importance of success in the undertaking. In order to
know, one must experiment and learn from one's mistakes, which may
cost dearly. So it is better for one to imitate, rather than
experiment; if he manages to learn in the end, so much the better.
But even if he does not, success was more important. In modern
culture instead, the importance of success in the undertaking is
moderated by the ideal of knowledge. And the ideal of knowledge is
backed by the belief that there will be greater success in the long
run, in the undertakings the relevant knowledge serves for, in spite
of the mistakes and failures the process of learning will entail.
Now, such a process of knowledge, that is based on free investigation
and experimentation, entails the uncovering of the reasons behind the
"pre-emptive" reasoning through authority; [9] it entails disregarding
authority to a great extent. Consequently, since knowledge is valued
independently to some extent, what is identified as a - true or
proper - reason for an action, is the one behind the *fact* that this
is what the teacher said or that this is what everybody normally
does. What makes an action correct, the requirement that an action be
made, is not any more identified with what the others do, because one

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is not anymore supposed to imitate, in order to succeed, but to learn.

Equally important in the distinction of reasons from practice is the rule of tolerance. It is entailed by the necessity of coexistence of *different persons*. It amounts to that difference is not to be banned, convergence in behaviour is not to be sought after, especially by means of force, unless such action can be ad hoc justified. Before, the justification for conceiving someone else as having an obligation towards conformity with what the others do, was general: others have thought about it and concluded on the right thing to be done; you're not any better or wiser than them; nor are you better than us who conform. Now, this changes: although you're not better, you may well be *different*; what is good for the others is not necessarily good for you. In this way, the general justification (from authority) towards conformity is taken away, and so an ad hoc justification is needed each time. In a way, it amounts to a shift of a "burden of proof". Now that no general rule in favour of conformity exists anymore, difference need not be ad hoc justified; only demanding from someone to conform need be. In short, one is not supposed to do what the others do. One may be supposed to do something, but not because the others do it. So, how people act is one thing, what one must do is another. [34]

Habitual adoption of reasons

The distinction between "mere convergence of behaviour" and a rule requiring it, as a basic, self-evident distinction, is a part of

this change in the semiotic universe, in the second-order reality. It rests upon the assumptions mentioned above, regarding the constitution and identification of the individual as a person and its relation to the group, the ideal of knowledge and the prescription of tolerance.[35] It ultimately rests upon the investment of the individual as person with value. Independently of these normative assumptions, which lead to a logical separation between the convergence in behaviour as such and a reason for action, it is merely a possibility; not a necessity.

Of course, when you come across the proposition "mere convergence in behaviour does not necessarily entail the existence of a rule requiring it", you don't identify it as normative, or as depending on anything having to do with the dominant concept of the person. You understand it as a simple and self-evident truth; there are two things here which, although possibly dependent on each other, are nevertheless separate. One had better keep them this way, or else one shall be *confused*. Furthermore, when this proposition is connected with the use of the terms 'as a rule' and 'according to a rule', you are amused and something seems to light up, just like a fertile metaphor. But there is no connection with the individual as a carrier of value, not even with what you would understand as reason for your action. The distinction is there by itself; nothing to do with you. It is real. You approve of it, but it is true and necessary to make, independently of your approval.

This is precisely what we should expect. For people are rarely aware of the backing assumptions behind the ideas they form and the understandings they take for granted, and even then only to a limited degree. And, to be unaware of such a backing assumption is simply to

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be unaware of the possibility that it might change. It means precisely to conceive of its logical consequences as necessities. The only difference with the way habits are connected to normative assumptions (as we said above) in this respect, is in the possibility that, when someone realizes these assumptions, in some cases they will be able to justify them (to themselves) and approve of them consciously, while in some others they won't.

We are educated to (we are used to) invest value on or to understand as positive e.g. the image of someone who exhibits a free mind, is tolerant and more apt to try to understand than to pass judgement. How does this education take place? To some extent (more for some, less for others), it takes place in the same diffuse and unconscious (both for the teachers and the pupils) ways that e.g. people in India learn to appreciate that language and posture in their popular films that we regard as ridiculously melodramatic. − But no, you might say. We are much more conscious of the image of tolerance being positive; we are aware of alternatives and we advance reasons why the first image must be chosen. − True; to the extent that a culture is in favour of change, originality, experimentation and progress, it is obvious that it will be desirable for stricto sensu (i.e. independent of common practice) reasons to be advanced often, so that people can be aware of alternatives to established practice and rapid change be possible. In such cultures we shall find strong contrary images and ideologies in fight with each other, so that reasons shall be advanced *as a rule*. Yet, it is not everybody's job or interest in fact (though it may be in principle) to take part in this activity. And anyway, every interrogation into reasons has to stop somewhere. In fact, there are particular levels of practical

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reasoning that are rarely, if at all, touched. To the extent that one could reasonably expect that he shall not need to probe into a particular assumption, this assumption will be habitually taken for granted. [36] This does not mean that there are no reasons behind it; only that one is unaware of them.

Now if one is not aware of the reasons that account for a certain idea one accepts, one will think that this idea is self-evident. And if one is not aware of the possibility that it may change, if one is not aware of a possibility of a coherent alternative, the idea will be taken as necessary. So this is how it happens for a distinction like the one between people acting as a rule and people acting according to a rule to appear as logically necessary, independently of any normative presuppositions.

(But if two conceptions or ways of thinking are presented and a choice is going to be made unconsciously, which one shall prevail? The one that fits better with the already established ways of thinking. [37]

The reason why it seems to the reader as an evident truth, the reason why something seems to light up when it is connected with up to then more limited in their uses ways of speaking, is precisely the fact that it fits well with all the rest that the subject has learnt to accept as fundamentally and obviously true. What causes the "lighting up" is the fact that various uses of the item(s) of speech have been connected in a way that explains them – an idea – and which can then serve for the creation of other such uses. The process of semiosis is being carried a step further; this is what the light is.)

To conclude, let me say that yes, it is fundamental that convergence of behaviour does not mean or entail a rule requiring it.

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It is self-evident that convergence of behaviour may exist without a rule. But this "may" is normative. The self-evidence is in the backing assumption the subject makes, that "the fact that everybody behaves so, is not a reason for me to behave so; I don't accept it as a reason; it doesn't count as one". Consequently, to make the distinction as an indispensable one for any man in any time and place (to think of it as universal) is not to describe the way people understand their rules (and reasons) from their - internal - point of view. It is to presume a logic, a way of thinking, a form of life, that lays down what may count as a reason for action, what form a reason may take.

1. H. L. A. Hart, <u>The Concept of Law</u>, p. 9.

2. And this is not exclusive in English. Compare 'règle' (*en règle générale*) in French, 'χανών' in Greek. Also the notion of normality in all Latin and Germanic languages.

3. Hart *ibid.* p. 54.

3a. According to W. D. Lamont (<u>Law and the Moral Order</u> p. 13) "every scientific improver knows how difficult it can be to persuade cultivators in communities with a low level of literacy to adopt more efficient practices; and this is because the old ways are valued... in the context of a whole culture, and so positively chosen in preference to others". (Compare p. 12-3 to this section).

4. Relate the "inspirational conception" of authority, in Raz J., <u>The Morality of Freedom</u>, p. 31f. Unfortunately, the author has not related it to this possibility of identification as a member of a group, although he has mentioned the latter, p. 54.

5. And the things we like or dislike. In older societies novelty is rather disliked, since a man needs rest rather than stimulation. The inverse is true in modern societies. Relate Milan Kundera, <u>L' immortalité</u> p. 123f. (la méthode additive). In modern societies originality is sought after. This is not the case in older ones.

6. These are of course only examples (or should I say parables?) of a general doubt. Even if these particular fears were disproved it would make little difference. This doubt is a matter of the difference between theory and practice. Practice may always bring forth problems one had not anticipated.

7. Compare F. A. Hayek <u>Law, Legislation and Liberty, Vol. 1</u>, p. 18: "'Learning from experience', among men no less than among animals, is a process not primarily of reasoning but of the observance, spreading, transmission and development of practices which have prevailed because they were successful..". He has a Darwinian account of the emergence and evolution of rules in primitive societies.

8. Or, perhaps he does not know how to express it. He himself has not been taught with reasons. He has followed examples. Compare Hayek *ibid.* that with regard to learning rules of conduct by example and imitation, "neither those who

set the examples nor those who learn from them may be consciously aware of the existence of the rules which they nevertheless strictly observe" (p. 19).

8a.   Compare MacIntyre A., After Virtue p. 42: "[The] concept of authority as excluding reason is... itself a peculiarly, even if not exclusively, modern concept, fashioned in a culture to which the notion of authority is alien and repugnant, so that appeals to authority appear irrational".

9.   Relate the analysis of authority in Raz J., The Morality of Freedom, especially his ideas on the justification of authority p. 53f.

10.   And in fact, in older societies, people used to be much more obedient. See L. Stone The Family, Sex and Marriage in England 1500-1800, who says for 16th century England that "...for most people most of the time, obedience came easily, even in so critical a matter as the choice of a life partner for bed and board."

11.   The idea of insolence is very well connected to this way of thinking. Compare the notion of "ὕβρις" in ancient Greek mythology. Notice that it is not simply a vice like arrogance in more modern times, but also a source of "sacred terror" invoking "δέος". This is so, because such an act places the actor beyond the everyday structure of practices that identify him as a member of the community. It is a terror caused by the breakdown of the rules of behaviour that maintain normality and safety.

12.   The internal point of view is not a descriptive one. See N. MacCornick H. L. A. Hart p. 33on. From the "hermeneutic" point of view, which is descriptive, there is a novelty, but there is not a social rule.

13.   Compare Dworkin's interpretivism, The Law's Empire, p. 47on.

14.   Which interpretation will simply be a different rule, from the external - i. e. descriptive - point of view.

15.   See the "teleological view of the world" in Hart op. cit. supra n. 1, p. 184f.

16.   Compare F. A. Hayek's theory of rules op. cit. supra n. 7, p. 17-9, 74-81. See especially his examples about non-articulated rules, p. 79. He thinks that with respect to such rules "the distinction between descriptive rules which assert the regular recurrence of certain sequences of events (including human actions) and the normative rules which state that such sequences 'ought' to take place", "becomes much less clear and perhaps sometimes even impossible to draw".

17.   N. MacCornick, H. L. A. Hart, p. 30. The emphasis is mine.

18.   See the idea of narrative coherence in N. MacCormick's "Coherence in Legal Justification" (in Theorie der Normen, Krawietz *et al* eds, p. 37ff), p. 48ff.

19.   Think of the fashion of the Bogart-figure, the "film-noir". Bogart and Bakall in "The Big Sleep". Robert Mitchum, en face, a cigarette hanging from his mouth. Marlene Dietrich in her old movies, Klint Eastwood in the spaghetti westerns. Nowadays in Britain and USA a smoking figure might look rather tacky, to some people at least, but this was not the case a short time ago.

20.   See N. MacCormick, H.L.A. Hart, p. 41.

21.   There are three main ways of making a will and various exceptional ones in the Greek Civil Code. To the best of my knowledge, it is the same in the German Civil Code.

22.   Compare P. Winch, The Idea of a Social Science, p. 52: "All behaviour which is meaningful (therefore all specifically human behaviour) is *ipso facto* rule governed."

23.   For a distinction between an obligation and a duty, see N. MacCormick H.L.A. Hart p. 59.

24.   Compare Winch *op. cit. supra n. 22*, p. 58: "...the test of whether a man's actions are the application of a rule is not whether he can *formulate* it but whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does. Where that makes sense, then it must also make sense to say that he is applying a criterion in what he does even though he does not, and perhaps cannot, formulate that criterion.". I do not necessarily agree though with the rather reduced conception of a habit he seems to conclude with in p. 60-2 and I don't wish to point to the distinction between a rule and a habit he finally makes, which is based on a naive mechanistic account of how animals function.

25.   Otherwise it would not be possible to adopt any pattern of behaviour through imitation. We do not adopt whatever pattern of behaviour. There are examples we identify as good and examples we identify as bad. Of course, the value connection may be anything, e.g. love of the person we imitate, identification within a group etc, or even trying something new. It need not be conscious either.

26.   It should then be no surprise that repetition had such a major role in traditional education. Those methods of education were formed at a time when change took place slowly, and what was right the day before would be right the

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day after. Revision being relatively uncommon, one needed not be aware of reasons, for one would not need rethink about them. In accordance with this, morality is traditionally a matter of having good habits, as we can see in the history of the word, i.e. the meaning of *mores* and ἤθη.

26a.   Compare Berger & Luckmann The Social Construction of Reality p. 70-1, that habitualization frees man from having to consider each time the infinity of possibilities and take corresponding decisions, thus allowing for concentration of energy on important decisions.

27.   It should e.g. be challenged by the appropriate person. If challenged by a negative figure, the pattern might be kept e.g. as a way of identification. At different times there may be different reasons for the approval of a pattern. That is it may well change meaning.

27a.   Compare what Weber has to say on the type of traditional action: "Strictly traditional behaviour... lies very close to the borderline of what can justifiably be called meaningfullly oriented action, and indeed often on the other side. For it is very often a matter of almost automatic reaction to habitual stimuli which guide behaviour in a course which has been repeatedly followed. The great bulk of all every day action to which people have become habitually accustomed approaches this type. Hence, its place in a systematic classification is not merely that of a limiting case, because... attachment to habitual forms can be upheld with varying degrees of self-consciousness and in a variety of senses. In this case the type may shed over into wertrationalität." (Economy and Society, p. 25).

28.   "Randomness" here means that each incident of convergent behaviour is independent of any other incident of behaviour, within the sequence of people behaving "as a rule". For my use of the term, see the chapter on probability in K. Popper, The Logic of Scientific Discovery.

29.   See M. Kundera, L' immortalité, p. 125.

30.   The example of the triangle is from L. Wittgenstein, Philosophical investigations, p. 200.

30a.   I do feel a little uneasy in speaking of a "modern era". However, McIntyre speaks of "modernity" and "pre-modern" in the same way, in After Virtue. Cf. also the introduction of Lyotard J., La condition postmoderne: "[Le mot «postmodern»] désigne l' état de la culture après les transformations qui ont affecté les régles des jeux de la science, de la littérature et des arts à

partir de la fin du XIX⁻ siècle".

31.   For an assertion of this change from a sociological point of view, see e.g.
L. Stone *op. cit. supra n. 10.* For the situation of the individual before the
change, in 16th century England, he says in p. 4-5 that "This was a society where
neither individual autonomy nor privacy were respected as desirable ideals. It
was generally agreed that the interests of the group, whether that of the kin,
the village or later the state, took priority over the wishes of the individual
and the achievement of his particular ends. 'Life, liberty and the pursuit of
happiness' were personal ideals which the average, educated sixteenth-century
man would certainly have rejected as the prime goals of a good society...
Individual freedom of choice ought at all times and in all respects to be
subordinated to the interests of others, whether lineage, parents, neighbours,
kin, Church or state.". See also pp. 86-87 that in order to understand such a
society we must rid ourselves of the preconception that "personal autonomy, the
pursuit by the individual of his or her own happiness, is paramount, a claim
justified by the theory that it in fact contributes to the well-being of the
group". As for the change, see Ch. 6, especially pp. 229-232. "..there developed a
head-on clash between two systems of values: the one demanded total conformity
in deeds and words and even in secret thoughts to the collective will as
expressed by the state and the official Church; the other insisted on the right
of the individual to a certain freedom of action and inner belief." (p. 229).

For some sociological accounts and explanations, regarding the emergence of
the autonomous individual in modern society, see E. Durkheim, De la division du
travail social, pp. 272-288.

32.   And a certain superficiality is attached to the general categories that
constitute the status of the individual. You must go behind them to find who one
really is.

Compare MacIntyre A., After Virtue, p. 33: "In many pre-modern, traditional
societies it is through his or her membership in a variety of social groups that
the individual identifies himself or herself and is identified by others. I am
brother, cousin and grandson, member of this household, that village, this
tribe. These are not characteristics that belong to human beings accidentally,
to be stripped away in order to discover 'the real me'. They are part of my
substance, defining partially at least and sometimes wholly my obligations and
my duties. Individuals inherit a particular space within an interlocking set of
social relationships; lacking that space, they are nobody, or at best a stranger
or an outcast."

33.   This idea is the most direct presumption of the idea of the social contract.

34.   Many comparisons can be made in general, of my contrast between traditional and modern societies, with various of Weber's writings on authority or the household v. the office. See at least the idea of separation, in Kronman A., Max Weber, p. 64ff. "All legal-rational authority rests upon the principle of positivity... which presupposes - or, more accurately, expresses - a sharp conceptual distinction beween facts and values. Traditional authority, by contrast, identifies 'is' and 'ought'; from a traditionalist point of view, the world is assumed to contain the values that endow human life with whatever meaning and purpose it has." (p. 66).

35.   The inverse is also true. It may, equally to some extent, be said, that each of these assumptions is based, among other things, on the distinction we are discussing.

36.   Not because of an assumed expectation - which in fact does not exist. But simply because one never needed see beyond the assumption. We examine our reasons behind the rules, only when there is a question whether we should perhaps modify these rules, for some - new - application or other.

37.   Relate the regulatory role of the notion of coherence in theories of practical reason.

PART 2

LINGUISTIC JURISPRUDENCE
AND "DESCRIPTIVE SOCIOLOGY"

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The epistemological background of linguistic jurisprudence

The Concept of Law is probably the most eminent work in Anglo-American Jurisprudence of this century. From a certain point of view, its importance is largely due to the fact that it marks a shift in the way theoretical reasoning connected with the law takes place, at least in the awareness henceforth considered necessary of language as a tool for such theorizing. A great deal of its importance that is, lies in its method, in the kind of questions the reader is presented with and the way it sets about answering them.

The method of linguistic jurisprudence is indeed, a significant change in the discipline. It is part of a general philosophic movement that claimed to be clearing philosophy from silly metaphysical constructions, from pseudo-problems caused by certain misunderstandings about language, or, even if not caused by such misunderstandings, pseudo-problems at least, that would be shown clearly as empty of meaning and significance, once these misunderstandings had been cleared. Philosophers should not consume themselves in silly questions having to do with what lies behind words like 'reality' or 'truth', but instead investigate under what circumstances people say that something is real or true in the everyday or common use of the language. Philosophical theories should not be based on abstract definitions of terms in language. One should

instead reflect on how the relevant terms are used in everyday situations, in order to see the social rules and conventions that account for the possibility of the performance of the relevant speech acts. [1]

Of course, the traditional philosophy, primarily against which the revolution was seen to take place, did not regard its abstract definitions as definitions of words in language. These were not definitions of words, which were thought of as appropriate only in teaching a language, e.g. to a foreigner. They were definitions of things. From a lingual point of view, a wrong word might have been chosen to denote the thing defined, but such a mistake would not be a philosophic one. A philosophic definition did not describe how a word is used in the relevant language. It prescribed how the denoted thing is to be understood. As an unintended consequence, it also prescribed how the word is to be used, in accordance with the truth about the thing defined, to the extent that this word denotes this thing, the particular denotation being a contingent fact, irrelevant to philosophy. It was the already established linguistic turn first, that allowed ordinary language philosophy to regard all definitions as definitions of words. And it was the rejection then of the idea of correspondence as a correct account of the process of meaning in language - which was based on the rejection of the idea of the existence of a denoted thing - that allowed ordinary language philosophy to reject them on the ground of insufficient description of lingual communication. [2] In effect, the characteristic change is this: whereas before, philosophy started with reflection on the "self-evident" and the "true", and concluded with a prescription on how social reality must be formed or how people must think, now such

an enterprise seemed meaningless and absurd; instead, the only correct and worthy enterprise would be to see and reflect on social reality and the ways people think in fact, and describe this reality; for this is all the reality or truth there is. It is not this that must be corrected, but the past philosophic theories, as incomplete accounts of it. [3,4]

If we are to understand The Concept of Law in accordance with this movement, it is precisely this change that marks it as a shift in legal philosophy. To begin with, Hart sets about to answer the question "what is the law". There is nothing new or original about this; it is precisely the most traditional and, perhaps, old-fashioned question that has ever tormented legal philosophy. But Hart thinks of the law as inextricably woven with our everyday expressions and ways we speak. "The law" in the question to be answered is, to begin with, a word whose meaning we must search for; not an object which we must reflect on. The object, the reference, is the way we think in fact; if we describe this, then we shall have answered the question. In short, there is a reversal of understanding. The way people think and talk of the law is the reality to be described by the philosopher; not one to be corrected, according to the reality it presumably corresponds to.

Before Hart, the words used in talking about the law were not as such the object under scrutiny in jurisprudence, except in a most instrumental way, in order to clarify communication by determining what the referred to thing is. The notion of an obligation had little to do with the distinction between 'being obliged' and 'having an obligation'. The notion of the rule had little to do with the distinction between 'acting according to a rule' and 'doing something

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as a rule'. If there was a different meaning in a particular use of a word, it was a problem of language, possibly a defect of language, but certainly not something for the legal philosopher to be predominantly concerned with. Because what was searched for was the reality or truth beyond or under the - superficial - level of our existing conventions and understandings. If the latter happened to correspond to this truth, so much the better. Otherwise, we would need to change them.

Do not confuse the kind of difference I am talking about here, with a difference between wild idealism and down to earth realistic thinking. Nothing could be further from the point. This difference exists equally between Hart and Blackstone, and between Hart and Alf Ross. It is what the difference in method amounts to in the end, and what makes The Concept of Law and linguistic jurisprudence in general the shift in jurisprudence I have been talking about. I shall digress to illustrate this difference.

Imagine looking at a primitive tribe and seeing certain religious rituals and feasts. In order to explain them one might say that (the people of the tribe believe that) mighty God Elrond[6] will be benign to them, if they perform these rituals, whereas he will destroy them if they do not. Someone else might say that it has nothing to do with God Elrond in fact; that these rituals serve in maintaining the unity of the tribe, in giving opportunities to its members for diversion and a chance to each to externalize his wrath safely and revel in orgy. (Let's call this the "scientific" type of explanation). And someone else might say that it is not God Elrond; that God Elrond is just one of the many faces God - or the eternal good or whatever - takes, one of the many names men have given to The One and Only, and

that the rituals serve in reinforcing faith and the sense of belonging for each member, suppress the tendency towards insolence and strengthen communion and the bonds of love. (Let's call this the "philosophic" type of explanation).[7] It is common in the last two explanations, in contrast with the first, that a reality beyond what the people of the tribe say and think is claimed to exist, that what these people say and think is trivial and of minor importance; it must be surpassed - and also, it can be disregarded - for one to reach the truth of the matter.

This is what Hart's internal point of view is all about. To see with the eyes of a member of the tribe (but suspend belief or acceptance, since - at this stage at least - we merely try to understand and describe). As far as its method and general stance is concerned, we may think of The Concept of Law as being addressed to legal philosophers, telling them to stop trying to go beyond the everyday conventions and understandings about the law, but instead look into them and take them seriously. All we need to understand is in them, not out of them. To return to my example, think of Hart as someone coming after the "scientific" type of explanation of the tribe's rituals has become largely dominant in contrast to the "philosophic" type, in the activity of observing the rituals of the tribe, and saying to those who have established the "scientific" type and excommunicated the "philosophic" as metaphysical and fictitious: "Wait a minute. We are making the same mistake here. And see, our models and explanations *are* simple and reductive. They do not do justice to the complexity of the tribe's practice. Look at what these people say and think. There are so many things there, that you cannot explain with your "maintenance of the tribe" model. We must take

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seriously what they say about God Elrond, in order to understand their rituals. "

Do not be led by my example to think that this is an outrageous and naive suggestion. You wouldn't, if you were a member of the tribe and happened to believe in God Elrond yourself (and remember that God Elrond can easily be transcribed as, e.g., the rule of law, in our case). Or, if you were concerned with the way political discussion or the regulation of disputes within the tribe is bound with the relevant myths; the fact that, as far as such activities are concerned, the myths cannot be substituted with an explanation of the "scientific" type, would make such a suggestion much more attractive.

In any case, this attitude need not lead to a naive repetition of our everyday fictions apparently, and The Concept of Law is a proof of this. The "internal point of view" can be used in order to further our understanding of the ways we think and even carry them a little further. One will probably end with an *interpretation* of them, that may well be succesful in that it serves well their comprehensibility and so their teaching, or even their function, in, e.g., political discussion. And there will be this crucial difference with the "scientific" type of explanation: no substitution will have taken place, in the sense the "scientific", at least, type of explanation calls for, with its truth claims. Instead, the discussion will have taken place within the framework taken for granted by members of the observed community in normal discussion of the "myths". The interpretation will be one that can be used by these members, and, without their having to change their old truth with a new one.

But it is not such practical thoughts that back the Hartian shift (although they may well have a significant role in its subsequent

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wide acceptance and popularity). Behind it there is an epistemological claim instead, one that is bound with our earlier analysis of ordinary language philosophy, and is well expanded in P. Winch's The Idea of a Social Science; that this attitude is the correct way to describe a society, in contrast to the "scientific" type of explanation (or, indeed, the "philosophic") that ignores the way the object of description thinks of itself, as if it were a predictable object bound by mechanistic laws, in the sense this is true of a stone falling to the earth. The social reality to be understood and described is so bound up with the people's beliefs, attitudes and concepts, that we cannot discard them as superfluous, without ending with a severely distorted view of this reality. Even more, the social reality is primarily made up of the members' concepts and ways of thinking. And if the theorist were to apply his own concepts and ways of thinking to the society he describes, he would be simply bringing in his preconceptions. His language, his logic, is valid only in his own social environment, and is bound to hamper the desired understanding. Can it make sense to wonder whether what the tribe calls marriage is a marriage in fact? So, it is the *members'* concepts and ways of thinking that the theorist must strive to understand, withholding, so far as possible, the concepts he has been brought up to think in terms of. [8]

In accordance then with the above, the task of linguistic jurisprudence is to understand and describe the law as an object made up of our ways of thinking. There is a society, namely our society, and there is accordingly a social reality, fabricated by our rules and conventions. In them lies the answer to what "the law" is. The theorist who, luckily, happens to be a member himself of the social

group concerned, can look into these conventions and find the concept of law - and thanks to his privileged position, there is no need for much empathy and imagination (as would be the case if he were confronting a different culture), indeed there is not even a need that he leave his armchair. There is only the need that he withhold his own political choices, his own opinions on what must be done, on what e.g. constitutes good law. For what the law is, does not depend on any practical answers the theorist need give in advance - on the contrary, such practical deliberation presupposes the knowledge of the facts. What "the law" is, is a matter of existing social convention, the theorist can see and describe.

Indeed, The Concept of Law is, among other things, "an essay in descriptive sociology".[10] And consequently, its accounts of the law, morality, rules etc. are understood to be binding on us, not as a result of practical, but of pure reason.[11]

It is these descriptive claims that I intend to clarify and examine in Part 2.[11a]

Words and things

...the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated.[12]
...there is also great need for a discrimination of the varieties of imperatives by reference to contextual social

situations. To ask in what standard sorts of situation would the use of sentences in the grammatical imperative mood be normally classed as 'orders', 'pleas', 'requests', 'commands', 'directions', 'instructions', &c., is a method of discovering not merely facts about language, but the similarities and differences, recognized in language, between various social situations and relationships. The appreciation of these is of great importance for the study of law, morals, and sociology. [13]

These hints about the use of linguistic analysis for the understanding of social reality do not sound unreasonable. [14] Still, in their original context, they are left unexplained. They are expected to be shown as justified in their application, when some such insights into language seem to actually reveal truths about social reality; they are expected, that is, to be shown as justified by example (as is normally the case with common lawyers' argumentation). [15] Here, I shall try to explain these suggestions. I shall try to give a theoretical account explaining why it is reasonable to say that inquiries into the meanings of words may reveal truths about social reality.

If we examine the language we use normally, in everyday situations without thinking much about it, i.e. not the cases of stipulations in theoretical inquiry for instance, but rather cases like when we speak to each other in the street, we shall see certain distinctions of meaning (either on the level of abstract meanings or senses of different items of speech, or on the level of concrete meanings or different uses of the same item of speech). [16] Unlike the cases where we deliberately use words and expressions, in order to make such distinctions (e.g. with stipulations), the distinctions we

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see when we examine the language as it is, prior to any intervention from us, cannot be said to be based on the will or way of thinking of any particular user of it. They are simply there.

Some of the distinctions we discover in language, e.g. like the one between life and death, could be explained by our knowledge of brute facts, e.g. that men die.[16a] Others though, like the one between being obliged to do something and having an obligation to do it, which are equally obvious and prior to our intervention, present a problem. Having rejected the idea that meaning in language is to be found in an alleged correspondence with some metaphysical reality, we cannot use it to explain this independent existence of these distinctions. In no way are they prior to language itself and its use for communication. But then, since they are prior to each user of language, for otherwise we could not find them by mere examination of language, how come they exist?

This question does not ask for a case by case historical account of the introductions of these distinctions. This would not be an answer at all. When we meet these distinctions, they appear to our minds to be obvious and true by themselves, and not in virtue of their history which we normally ignore anyway. We must assume therefore, that their existence now is independent of the ways of their introduction.

The answer depends on considering that language does not come out of the blue. It is a product of communication and social interaction. Its meanings cannot be abstracted from the existence of a social context; meaning needs such a context, or else it cannot be. And the contexts within which language embodies the distinctions we discover, are constructed on a base that is made up of the everyday realities

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of human life firstly, and of human thought as a by-product of this life secondly. This base contains a) brute facts, e.g. that men die, b) assumptions about the world, e.g. that there is a merciful and just God, c) evaluations people typically make, e.g. that it is bad to sleep with your sister. In accordance with these facts, assumptions, evaluations, a network of social rules and conventions is constructed, which accounts for the social contexts within which meaning can take place. It is in this network that we can find the cause, the correspondence if you wish, of all the distinctions we meet in language. It is this network that makes up the differences between a 'warrior' and a 'murderer', a 'man' and a 'woman', a 'command' and a 'request'. [17, 17a]

Now, obviously, this network is prior to any particular user of language. Each new user is educated, indeed constituted, in accordance with the social rules and conventions - and even fictions if you wish - that form his social environment. In this sense we may speak of a social *reality*.

This network is also real from the social scientist's point of view. Its rules and conventions account for what e.g. baptism, love, the law, robbery or friendship are in a particular society, and vice versa. If you want to describe this society, you must take seriously these notions and interpretations of itself. Ideally, you should understand them just like a member of this society does. [18] Because social relations do not - and cannot - exist independently of the social rules and conventions, within which, e.g. 'marriage', or 'promise', or 'agreement' can have a meaning. What would you be describing if you refused to take into account these rules and conventions? And what else is there, but your own ways of thinking,

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your own language, which is valid in your own social environment only?[19] Indeed, "...the social relations between men and the ideas which men's actions embody are really the same thing considered from different points of view...".[20]

We may therefore say that language reflects social reality. The distinctions language makes are not a product of language itself, but a recognition in language of similarities and differences that exist in fact, at least between social situations and relationships. So, the theorist, having identified a distinction in language, say between 'doing something as a rule' and 'doing something in compliance with a rule', can take it as real and trace it to its source. He can treat it as an indisputable evidence of social reality.

It is of course true that only small parts, indeed hints of social reality can be met in language stricto sensu, where the Japanese learner of English knows what 'elephant' means, once he is told that elephant is a quadruped so and so, or is given the picture of one. Only parts are in this sense reflected in language, conditioned by the way communication depends on an unstated context. The distinctions we meet are an abstraction. But their specific formation is due to the formation of social reality. And their having a meaning, i.e. their existence, depends on the users' - normally implicit or even unconscious - recognition of the unstated context, i.e. the social reality. The more complete the reader's knowledge of this context, the better his interpretation in language (and the broader the conception of language we have in mind, the more we move towards meanings like 'elephant' meaning a huge animal who is - ridiculously - afraid of 'mice').[22] It is the fact that the very

process of interpretation and understanding in language involves the knowledge of and reflection on the contextual social reality, that justifies saying that we can use language to understand social reality. Because reflection on lingual distinctions and explanation of them will involve making explicit the context. [23] In this sense, according to which language is the complete system of meaning, thus including the (necessary for this meaning) context, it is true that "...our language and social relations are just two different sides of the same coin. To give an account of the meaning of a word is to describe how it is used; and to describe how it is used is to describe the social intercourse into which it enters". [24] It is true that language is social reality.

It seems reasonable then to say that through the process of interpretation in language we arrive at a description of social reality. As we have said, social reality is simply the ways the people of the society concerned, typically think of objects and relations with one another; nothing more (as the "philosophic" type of explanation would have it) and nothing less (as would be the understanding of the "scientific" type). And these ways of thinking are imprinted on language. On the one side of the coin, in virtue of language, there are the concepts of law, coercion, morality, and, at the other side of the coin, in virtue of social reality, there are law, coercion and morality as types of social phenomena. Linguistic jurisprudence takes basic typical linguistic distinctions as observed in typical acts of communication (these distinctions are found through revealing the contexts of these acts, which contexts exist in virtue of their being assumed by the communicators). It then proceeds to put them together and relate them coherently, thus resulting in

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general concepts like law, or morality. Or, to describe it from the other side of the coin, it takes the contexts of typical concrete utterances, in virtue of which these utterances have a meaning to be communicated, and proceeds to put them together and relate them coherently, thus arriving at general types of social phenomena like law, or morality. [24*] It answers both the question what 'law' in general, means (without of course prescribing how the word should be used; this is not and cannot be part of the description), and what law, in general, is (without of course prescribing how a system of regulation of social conduct should be constructed; although such prescription may be understood to be jurisprudence's subject matter as well, this method is not enough for it). These answers are descriptions of fact. They are correct if they depict the facts correctly, and wrong if they do not.

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We can now conclude on the ontological status of these distinctions that we can discover in language and use as evidence for distinctions in social reality. They do not have an "a priori" existence for the theorist, they do not correspond to structural categories for the possibility of thought. They are not conclusions of analytic propositions; their truth or accuracy does not depend on the truth or acceptance of axioms which they derive from. Instead, they are contingent upon the social reality they reflect. They are not logical necessities, to the same extent that social reality as we know it is not. This social reality may be contingent upon various evaluations, or historically determined because of or in accordance with them. Still, the distinctions are factual, at least from our

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point of view, because they do not depend on our making the relevant evaluations. They exist in language and we discover them there.

"A rule is not a habit" in this context

In Part 1 we examined one such distinction that is central to The Concept of Law (or, indeed, to Hart's theory in general), namely the distinction between convergence of behaviour in a social group and a social rule requiring conformity of conduct. We examined it in abstraction from the above reasoning that backs the method of linguistic jurisprudence, i.e. the method of using lingual distinctions as evidence for distinctions that exist in fact in our society. We saw that it does not depict how conformity of conduct actually takes place. We also saw that, while some people or societies may think of their social rules in its terms, others do not. We concluded that it is not a necessary distinction, unless a certain way of thinking is postulated or accepted as correct in contrast with others. Only from a certain normative point of view is it imposed on us as a necessary universal distinction.

If we see it within the context of the clarifications we have made here, its status as a logically necessary distinction is irrelevant to linguistic jurisprudence. Indeed, a priori distinctions, axioms and analytic propositions in general are rather foreign to ordinary language philosophy, one of the major insights[25] of which was to see everything as contingent on forms of life and actual practice, while also implying a plurality of forms of life or practices. Accordingly, the distinction between a rule and a habit is

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not to be understood as a logical, but as a factual one; yet not factual as describing how people or societies actually behave, but rather as describing how people think of or understand their reasons and actions. And finally, it is not meant to describe how all people on earth think of their reasons and actions; it refers to the people of a particular society, namely modern Western society, who happen to understand their behaviour and organization of their rules of social conduct in terms of this distinction. No doubt, it would be a grossly inaccurate description of European Medieval societies, or even actual Japanese society.[26] Certainly, in our society, this way of thinking has been produced together with various evaluations - not all of which need we accept today - because of certain historical changes – which some people are naive enough to think they can grasp in a few pages - or/and vice versa. Nevertheless, it is an indisputable truth that today, social reality in the West has been formed in such a way that mere convergence of behaviour is one thing and a rule requiring it is another. As far as a social scientist is concerned, regardless of what other normative or factual assumptions back this distinction in our ways of thinking, it is real and independent of him, as part of the object he tries to comprehend. Especially the understanding of systems for the regulation of social conduct is unthinkable without it, because of its structural character for these institutions of ours. It exists in the same way as these institutions do. *It is independent of the theorist.*

Introduction to the complexity of the concrete

In Part 1, I gave two distinct contrary accounts of the network of social reality (or the semiotic universe), in relation to traditional rural societies on the one hand and modern urban ones on the other. The first one correlates with the assimilation between a rule and convergence of behaviour, whereas the second one with their clear distinction. This would seem to verify the Hartian distinction, as it is understood here.

However, these two accounts do not mean to be exclusive of each other or complete, and certainly not to be descriptions of any particular society. They are semiotic analyses; they trace paths of thought. The first semiotic analysis is meant to demonstrate the *plausibility* of the assimilation of a rule to a habit, whereas the second one to account for the apparent self evidence of the distinction today and to reveal the assumptions this correlates with. It would be wrong to assume that they merely describe how people think or used to think in fact. It would be a mistake to think that only one of them applies to each particular society, depending on its classification, that e. g. there was no individuality or experimentation in actual traditional societies, because our corresponding semiotic analysis is hostile to it. On the contrary, both sets of assumptions, both ways of thinking, can be found, both in old and in modern actual societies. If talking about actual societies, the difference is one of dominance of one set of images rather than its opposite, on a general level.

To put it more precisely and in relation to "our" society, which the Hartian analysis refers to, we have said that, although we may

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take a particular set of images or assumptions, backing the distinction between a social rule and convergence of behaviour, to be dominant in our culture today, they are certainly not the only ones to be found in the ways we think. If we decide to take a close look, we shall see that depending on the part of the population or the activity concerned, different sets of normative assumptions may be dominant. Which means that: a) different people, depending on their economic background, education, job or social role, will make different normative assumptions in general, regarding what counts as a reason for action, and b) the same person, at different times, depending on what he/she is doing and the way he/she structures this action meaningfully by classifying it as part of a recognized activity, will also make different normative assumptions, regarding what counts as a reason for action.

Can we also say, for those cases, where a set of assumptions is presumed, which tends to the identification of a social rule with common practice, that nevertheless the distinction between the two is still assumed or presupposed by the ways the actors think and speak? That this - not analytic, not based on the observer - distinction still describes *their* social reality, *their* social environment? This is illogical. Or is it the case that the method of linguistic jurisprudence only means to understand the ways of thinking that are dominant in our culture? No, it means to understand social reality as contextual to language; there is no enquiry regarding what happens when this reality is in a flux, other than its recognition. [27] Or was it perhaps a mere mistake to take the distinction between a rule and a habit as an accurate description of social reality? But then, what other distinction could we find, more fundamental, more basic in the

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structure of our institutions that actually describe social reality? What distinction could we use language as evidence for, other than distinctions based on brute facts, which we already know?

Were we wrong in our account of the relation between language and social reality? Or are we wrong in concentrating on the "borderline" of social reality, because this, just like language, has an "open texture", because this, just like language is characterized by a "penumbra of doubt"? Is it perhaps true that we should build the model of our social reality first on the central cases, like when intellectuals reflect in their armchairs, and distinguish the borderline cases, like when people identify themselves politically as part of the catholic community, or as vegetarians?[29] I think there is a better answer.

The social reality

As we have seen, the method of description of the social, backing the conceptual claims of linguistic jurisprudence, rests on the existence of a social reality. This amounts to a network of assumptions that the members of a particular society take for granted and on which the contexts of their meaningful utterances are built. It is real for the members, because it forms their social environment, according to which they are constituted (through the processes of learning and socialization in general), and it is also real for the social scientist, because a) it exists independently of him, and b) there is no one reality, truth, Reason, in terms of which this one is to be understood and explained; only various such social

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realities, ways of thinking, rules constitutive of different games.

How did we arrive at this network? By language. Words have meanings. We use words and we communicate. We speak and we understand each other. We asserted the existence of a common network of prefabricated understandings and assumptions, a language as an encyclopedia, in explanation of the fact of *communication*.

But does communication always take place? Does it not happen for people not to understand each other? Can't misunderstandings take place, even though both poles of the attempted communication are members of the same society, have been educated in the same way, speak the same language, and in spite of their both having access to the same external information? But how can this happen?

It's simple. There is not *one* context that corresponds to each utterance, or attempt at communication. There are many and they may contradict each other. The network, social reality, is not a coherent interpretation of the world, it is not a theory, it is not the rules of one game. It is a bunch of contrary assumptions, wishes, evaluations, some of which are more appropriate for some games than for others. Each one of us, depending on class, profession, disposition, picks some of them, normally unconsciously, and rejects others (thus building his/her particular logic and language, which may be more or less coherent). Furthermore, we often pick contradictory ones for different activities or games.[30] I shall try to give an example.

I drove the car to our destination in the centre of Athens and proceeded to park it right there, in front. My friend sitting next to me said "you shouldn't park here" and I understood what he said, not because of some mysterious internal correspondence of his utterance

to the car or my possibilities, or of the words to independent realities, but because I saw the "no parking" sign and I share some knowledge with regards to traffic regulation, and some assumption that one must not park where it is illegal to do so. But then my other friend said from the back of the car that "it's alright; no traffic-policemen ever come here" and *his* utterance had a meaning in virtue of another assumption, that you may park, or that you may take the risk, regardless of traffic signs to the contrary, if there is little danger that you'll be fined, and of some other knowledge regarding the difficulty to find a parking space in the centre of Athens, the unreliability and inconvenience of the public means of transportation and the general tolerance as a consequence and as a part of a general "why bother" attitude. And my first friend replied "I know, but it's a bus turn here" and his utterance had a meaning, in virtue of another assumption that you must not park in places where the inconvenience you'll cause to others will be more extreme than usual. All these assumptions co-exist in the semiotic universe of car drivers in Athens and they are not rationally ordered or exclusive of each other; some people will make one of them most of the time, some people another; most people will make one of them in general, but will make another one ad hoc sometimes, depending on specific disposition. Any one of them may be taken to supersede the others in any concrete exchange. One may mean one assumption to exclude the rest in one discourse or in one particular exchange; the same man may mean another assumption to be the only one important in another discourse, or in another particular exchange. [31]

We were right in assuming a network of assumptions and social rules, constituting our social reality. But we were wrong in tacitly

assuming that it is simple and non-contradictory, that it is something like a theory, and that therefore, we can describe it by making inferences from one assumption to the next. Simplicity and internal agreement is a desideratum. It is an attribute an argument or a theory ought to exhibit (at least insofar as it is to be comprehensible and easy to master). It is not a necessary characteristic of reality. Yet, by starting with communication, we postulated consistency and agreement. We postulated that is, that friendship, love, the law, in our language, each refers to one particular thing, which exists in virtue of our community of assumptions and understandings. We brought conceptualism in by having rejected it. But we make different and even contrary assumptions on different occasions. And some people make some assumptions in general, while others make contrary ones. And all these assumptions pre-exist the individual, for they are all narratives in the semiotic universe.

This gives us the key to the explanation of change and evolution in this social reality, or our ways of thinking. Notice that the epistemology we are examining here, although not only admitting of the fact that ways of thinking, social rules and concepts change, but based on a philosophy that constantly emphasizes the plurality of ways of thinking and "logics", is nevertheless at a loss when it comes to explaining such a change and to understanding the occasional gradual passing from one way of thinking to another.[31] Indeed, all it can say, is that in one society, e.g. puritan England, this social understanding and these social rules obtain, e.g. with regard to relations between the sexes, and elaborately construct a – consistent, of course – context in understanding the relation and the

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concept of say pure spiritual love, which is distinct from indecent physical urges. It can also say that in today's society this distinction does not exist, and in the same way "describe" how we think of love today, what love is today in our society. It would most certainly warn today's social scientist that he should not extend today's measures to puritan English society, that otherwise he would fail to understand that society, which is what a social scientist should aim to do. But it would be incapable to explain how it happened for the one social understanding, relation and concept to be abandoned and for another to emerge; it would be incapable to show this evolution. Its descriptions are totally static. It is unaware of the dimension of time.

But really, how can such a change take place? What happened when D. H. Lawrence rejected the notion of proper spiritual love, in favour of a more humane concept? What happens when anyone challenges given assumptions and social rules? Do they misunderstand the social relations, their social reality? Is it a mistake? Were they not socialized well? And how can they do it, how can they be understood? By divine enlightenment? Well, no. For would it not be absurd to think that in the actual society we refer to as "puritan English" no couple ever managed to enjoy sex, without their thinking at the same time of their act as abominable and of each other as degenerate perverts? It is simply wrong to think that there is only one understanding of e. g. a social situation or relationship, only one concept for it, in the semiotic universe, in the language of any social group. It is simply wrong to think that there is ever one type only of social phenomenon to be perceived. Perhaps it will be the case that one more or less specific concept, one particular

interpretation will be more prominent, in that on most occasions most of the people will be guided by it rather than by any other in their behaviour, will assume this rather than any other in their acts of communication. But it will not be the only one available to them, it will not be their only possibility of thought (for otherwise it would be impossible for them to be conscious of). A semiotic universe always displays this fundamentally contradictory character. That for each idea there is an opposite one; that for each conceptual distinction there is a unity and vice versa (for none would be conceivable without the existence of the other). Often one idea will be taken for granted in a certain communication, which regards something other than this idea; often one idea will be taken for granted in many or most such communications, in a certain time and place. We might deem it to be dominant. But everything can be challenged, everything can change. And the change is always a reversal of dominance, for nothing can come from nothing and, in this sense, there is nothing new under the sun.

Language reflects social reality, our ways of thinking. It is just as many sided.[32] It is not a well ordered game. It is our possibilities. There is not one concept or meaning for each word or sets of words. *There are possibilities of meaning for us to make and concepts for us to choose.*

A preliminary conclusion

We have thus explained the fact that our ways of thinking, our given assumptions can change, by rejecting a "strict" descriptive

model of social reality, according to which there are determined rules and conventions and so, even though this is contingent to the particular social group and its logic, social understandings and relations being concrete and ordered, words have certain references and concepts are real. We adopted a chaotic model instead, where the social understandings and relations are diverse and contradictory and where the words have different meanings, the concepts are results of opposed interpretations, and even though some are more prominent than others, they are all real in the same way as far as the social scientist is concerned, in their being possibilities of thought. According to the first model, A can only be or mean B. According to the second model, for every A there is a -A, and A can be or mean B, C, or D, where B, C and D are not necessarily compatible and where A is not necessarily distinct from B or C or D. In plain words, the ways of thinking, the assumptions each individual is educated and socialized in accordance with, are not simple, but are instead intricate and fundamentally contradictory. [32a] There is not one set of social rules and conventions but many. For each assumption there also is an opposite one. For each utterance there are diverse contexts and so interpretations.

This explains perfectly our account of the ways people think about reasons for action: for any culture at any time, we should expect to find both the distinction between a rule and convergence of behaviour, and its negation, interlocked in a dialectic antagonistic relation (at least if we were to encounter one of the pair). It also fits with our account of the process of meaning: indeed, this does not depend on any correspondence with independent external reality, but on derivation from a constructed social reality. However, it does

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not support the claim that when one takes certain lingual distinctions and constructs a more general account in which the lingual distinctions will fit and so by which they will be explained, one is simply describing the social reality, the ways those people happen to think. Such an account will be an *interpretation*, internal to the social reality "described", which could be defended as correct or attacked as wrong, depending on which - also internal - point of view a participant were to decide to adopt.

The argument from the central cases[33]

However, the strict descriptive model of social reality we have rejected is not necessarily the one assumed or projected by the method of linguistic jurisprudence. Linguistic jurisprudence can deal with the possibility of change,[34] through the distinction between the central cases of meaning in language, where meaning is fairly certain and concrete, and the surrounding open texture, where there are various possibilities of meaning.[35] The social rules and conventions that arise from the base of assumptions are determined only up to an extent. References of utterances in simple relations of straightforward equivalence exist and so do corresponding concepts, but neither for all conceivable applications, nor for all future applications (since our world is too complicated and so are our ways of thinking and our reasons for action, our aims).[36] For every A there may be various interpretations B, C or D in an indefinite amount of applications or contexts, but there also is an equally indefinite amount of applications (the central cases, or the

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paradigms), where no interpretations can be admitted, where A is B. The network of rules and conventions is not contradictory as such, though it can be, depending on the case; it is not the whole of the possibilities of thought.

Naturally, there are contrary ways of thinking, contrary social rules and concepts in any given society, because the education and socialization of the society's members has itself an open texture. Where there is a contradiction of this type, none of the contrary possibilities are included in the network of conventions, for these are understandings that are *common* among the members of the society, and it is their common character that is indispensable for the explanation of *communication* this network is meant to make. Of course, any of them might admit of change sooner or later, which means that indeed there are opposed assumptions as possibilities in the semiotic universe of the members of the society. Which simply means that we must not identify social *reality* and the network of conventions we have been talking about, with the semiotic universe. Social reality consists of the ways the people of the society *typically* think (and not of the ways they are able to think). Not every assumption, rule, possibility in general that can be found in the semiotic universe, is also part in the formation of social reality. Who will distinguish among them? Well, the members of the society do it themselves, when they speak with each other and prima facie, i.e. unless they know differently about how the other party thinks, take some assumptions, some rules for granted and proceed from them, even though they may disagree with them personally, possibly even to reject them in the end. Often it might be impossible to say that one assumption is or is not real as part of the social

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reality, but this is due to the penumbra of doubt of the issue itself which assumptions are and which are not common in this sense. The question what must the percentage of the people of a society who reveal a certain assumption in their conscious behaviour be, in order for this assumption to be included in the network, cannot be answered. But some assumptions that are included can always be identified, like the ones distinguishing in our society regularity of behaviour, from obligation towards a certain conduct.

In conclusion, of course there are different possibilities of meaning for us to make and concepts for us to choose. But certain ones among them are real, in the sense that the people around us take them for granted, behave in terms of them, and communicate in terms of them, although not all naturally of these people, although not all of the times any one among them. The social scientist, par excellence, has to take them as real and describe them, because to discuss, criticize and possibly reject them is a matter of political discussion, which, although by all means at least equally honourable, is not what he does. (And what he does is a prerequisite of and not an obstacle to political discussion, etc. etc.).

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So, we have admitted in connection with the chaotic model of social reality, that in a particular time and place, although various contradictory assumptions and concepts are available to the members of the community through their semiotic universe, some of them are more prominent in that they will normally be taken for granted. According to the above line of reasoning, we may rest on this norm(ality), in order to substitute the picture of a semiotic universe in which some ways of thinking are dominant over others,

with the picture of a social reality and its possibilities of change.

Now, with this substitution, and the corresponding change in the meaning of 'social reality', the descriptive claims we are examining are seriously modified. For we cannot say that the exceptional or not dominant assumptions are less real than the normal ones. Think of it this way: How many Fiats are manufactured every day, and how many Rolls-Royces? Does this make a Rolls-Royce any less real than a Fiat?

In the same way, we have concluded that not only the distinction between a rule and the fact of social conformity, but also the assimilation of the two, can be seen in our ways of thinking, even though the assimilation may be less usual in our modern world. The distinction then alone, cannot be said to depict what a rule actually is, in the sense we have analysed in our exposition of the method of linguistic jurisprudence.

This is enough to undermine any strong claim of linguistic juris- prudence's to a descriptive sociology. If the idea is to be maintained that the method of linguistic jurisprudence serves for a clarification of what, e.g. law, is in fact, then the argument from the central cases cannot be used. Because, if by "the members' ways of thinking" we only mean their most *usual* ways of thinking, we can no longer maintain the claim that in the members' ways of thinking we will also see what their social relations actually are.

However, even with this more restricted object of description, the claim is still maintained that we have a mere description, that linguistic jurisprudence's conclusions do not depend on any evaluations of the theorist's, that they are results of pure reason. Although they cannot really be seen as sociological assertions, they are seen to be descriptions of what might be called the content of

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our existing agreement within language, as this agreement is presupposed for the possibility of communication.

And this is what makes the argument of the central cases, more attractive as a model of language, than the chaotic model: the actual and expectable occurrence of lingual communication is rendered easily explicable, through its placement within pre-established rules. [36a]

Cultural fragmentation

One possible reply to the argument from the central cases (and one I have heard often being advanced against theories of agreement) is that it disregards the actual situation of the (post)-modern world. It may be true that there is a coherent and common network of assumptions, such as is described in the previous section, in smaller and simpler societies. However, this is not the case in our society, because of the phenomenon of cultural fragmentation.

A. Exposition

In any of today's big cities - and in contrast with small traditional villages - we can experience a radical plurality of ways of thinking, styles and attitudes. There is an immense differentiation between people today. Doctors speak and think differently from lawyers; both speak and think differently from unskilled workers. Or take teenage gangs in the streets. Athletes. Lesbian feminists. Reporters. Computer buffs. Politicians. Pakistani immigrants. Loaded pop singers. Conservative heirs of the old nobility of the land. Inhabitants of shanty-towns around the big

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city. A network of common assumptions you said?

Maybe, the reason is the extreme division of labour. Maybe it is the lack of interaction between people. Maybe extreme material inequality. Maybe the profusion of means of communication or the lack of time for it. Maybe it is the great numbers of people, the motley masses of today's societies. Maybe it is the primacy of the individual, the freedom of choice and self-constitution it entails. The fact remains that the common ideology and way (or form) of life that existed in traditional close-knit communities, the coherent social reality linguistic jurisprudence assumes, has disintegrated. It is now fragmented in many social realities, constituted in accordance with different social environments. People in our society lead diverse lives. To postulate a common network of assumptions in modern western society, is to assume that both the philosopher in his Oxonian armchair and the Puerto-Rican teenager in the slums of New York have been brought up in the same environment and have been educated in the same way. And this is patently absurd. The social reality of the law - as well as the concept of law - is quite different for the two of them, and you don't need elaborate philosophic and conceptual theories to see this. What you are doing in assuming common languages and central cases - *in your image* - in modern western society, is hiding away the diversity, behind a veil of white middle-class Englishmen (for the benefit naturally of the better off).

Explanation of communication through a common language? What communication, what common language? There is no communication any more. This is the tower of Babel.

And how curious, that at the end of modernity, at the last stage

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of the extinction of communication (and any remaining general political participation), all these theories should arise pointing to a common language, communication, a common social reality, and even objectivity in practical reasoning. Secluded intellectuals stand on common language as dictionary, and point to a common language as encyclopedia, which in fact has disintegrated. [36b] They use the possibility of communication as a means of persuasion - of themselves - while communication is actually missing. But this is precisely the point. When widespread communication actually existed, there was no need for its possibility to be taken into account. There was no need for one to base one's theory of agreement and stability on common language. Language and communication were taken for granted. There were no elaborate philosophies about the meaning in language. Why should there be? Meaning was a simple matter and abstract concepts were fairly certain. It is in this century, when our disagreements have reached the utmost common basis of language, that we have so much theory on it. (At least now there is still enough agreement for us to be able to disagree - on a superficial level; for in order to disagree, one must understand first. Next, there won't be even this.)[37]

B. Assessment

According to the above line of reasoning, we must accept the chaotic model of social reality as a correct description of modern western society. The chaotic model is not shown to be correct analytically, as an account of meaning and language. It happens to be accurate, insofar as we are speaking of the method of linguistic jurisprudence and its claim that there is one central case of e.g.

"law" in virtue of our common language, because, the otherwise acceptable distinction between the semiotic universe and the social reality, has no effect for our pluralistic society. In modern western society there are many incompatible such social realities, with the consequence that merging them in order to produce one body of assumptions in which to search for the concept of e.g. law, would result in something corresponding to the picture presented by the chaotic model.

Consequently, this argument does not examine the epistemological assumptions of linguistic jurisprudence, that we are interested in. Despite the rhetoric, the method of linguistic jurisprudence is not shown to be wrong, only inappropriate for an object like modern western society. The existence of sets of central cases per language is not refuted; it is merely asserted that there are more than one language in our society. We might as well say for instance that The Concept of Law is contingent on the community of lawyers within modern western society, rather than on modern western society in general. The conclusions of linguistic jurisprudence are equally binding as results of pure reason, insofar as we are lawyers, rather than insofar as we are - say - Europeans.

Cultural fragmentation is a sociological conclusion. Even though we may agree with it, sociological observations cannot refute conceptual philosophic analyses (although they can "show the emperor to be naked"). They themselves are based on and presuppose such conceptual analyses. The whole argument is based on the rejection of one factual premise, namely communication. In order for the assertion that there is no communication to make a difference for the method itself of linguistic jurisprudence, rather than for its application

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to modern western society (or its allure for a modern western reader), it would have to be meant in a different sense; it would have to be asserted either that communication is impossible (which is a pragmatically self refuting proposition),[38] or, that it is actually a random event that e.g. the newsagent – whose social reality is different from mine – happens to give me a packet of cigarettes when I ask for one (which proposition is plainly wrong). As things stand, the sociological observation we have presented is itself in need of a theoretical analysis of communication, regulating when it is correct to say that there is no communication and what is meant by this.[39]

Analytically, the model of social reality that is based on the distinction between the central cases and the penumbra, still seems to be superior to the chaotic model, in that, by retaining the simple character of the network of social rules and conventions, it can account for and explain the fact, that lingual communication not only occurs, but can be certain to occur, even across different social backgrounds. It looks then that everything is turning around communication. So, it is with communication that we shall now concern ourselves, having assumed the chaotic model for social reality.

Communication

A. Communication in general

"There is not one concept or meaning for each utterance. There are possibilities of meaning for us to make and concepts for us to choose." Is then communication an event that may happen or not at random?

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Consider these examples. There is the communication I can have with anyone who speaks French, and there is the communication I can have with whomever speaks my mother tongue. There is the communication I can have with a 60 year old peasant who has never left his village, and the communication I can have with someone my age who's lived all his life in the city. There is the communication I can have with someone I meet for the first time, and the communication I can have with someone I've lived all my life with.

So far, we have been talking about communication as a simple event that either takes place or doesn't. Communication in general is a matter of degree, though. There are various factors on which the degree of communication between any two people will depend, like common age or background, the existence of previous attempts at communication etc. And there will always be some degree of communication, in at least that both poles will (happen to) exclude certain meanings, even if only by simply not considering them. If we disregard each communicator's situation, regarding the factors on which the degree of communication depends, if, that is, with respect to these factors we pick people at random, the degree of communication among them - as far as their first attempts are concerned - will be random. But the degree of communication is not of course random with respect to these factors. How is this dependence to be explained?

By a network of rules, by a base of common assumptions, indeed. The more the assumptions we happen to make in common, the higher the degree of communication. Whether we make common assumptions depends on how similar the lives we've led are and on the extent to which we (have to) interact, both factors being interdependent. The more we

play our games together, the more we shall have a common language; the more I communicate with my computer, the more I shall have a personal language. Which games we happen to play, how they are constituted, depends on the requirements the environment places on us. And our environment not only forms but is also formed by our communication, our interaction, in that it also consists in pre-existing games, in our social reality. [39a]

However, the specific community of assumptions guaranteeing some possibilities of communication will not be the same for any two individuals living permanently e. g. in Britain. People lead different lives, people are brought up in and construct different social environments. How much do I, a Greek bourgeois intellectual, have in common with Mr Auld who came today to fix my roof that's been leaking? Should it appear strange that I find it difficult to understand, when he is talking about slates and copper ties (even though I (think I) know what a slate is; - from pictures)? And what if I started to speak of semiotic analyses, or "Le Chien Andalou" that I watched the other day?

Should we say then that in our society there are many social realities, e. g. the social reality of the working class and that of the bourgeoisie, the social reality of the young and that of the old, just as the sociologist asserts when speaking of cultural fragmentation? Consider another example.

Mr Yamamoto, an old Japanese tourist in Italy, is walking around in Palermo. He gets thirsty. He enters a "gelateria" and, a little in his totally incomprehensible native language, a little in his equally incomprehensible few words of English, and a little in desperate puzzling gestures, he attempts to ask Giuseppe, the waiter, who

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understands neither Japanese nor English, for a glass of water.
Giuseppe gives him a glass of water, Mr Yamamoto says "arigatò" and
Giuseppe says "prego".

For each factor on which the degree of communication among any
two individuals will depend, we may speak of another semiotic
universe, another language, another logic, that guarantees certain
possibilities of communication. Indeed, I have a common language with
people my age who have lived all their lives in the city, which I
don't share with old peasants who have never left their small
villages. I have a common language with someone I've lived all my
life with, which I don't share with someone I meet for the first
time. However, I also have a common language with all humans who,
like me, need to eat and drink from time to time (and cannot drink
petroleum for instance), who need to socialize somewhat, who may be
sad or happy, etc., which I don't share with - say - Martians.

Should we say that in "our society" there is not one social
reality but many? Well, we might. But this would not be true in
virtue of the external facts, but in virtue of how we wished to see
them. From one point of view it is true that each person has his/her
personal language. [39b] From another point of view, all humans (at
least) share the same language. *And this is not independent of the
theorist.*

B. Communication in concreto

Before going on, we must safeguard ourselves from the critique
that we have taken 'communication' in a sense different from the one
assumed in the exposition of the method of linguistic jurisprudence.
It is in a sense admitting of no degrees that we spoke earlier of a

certainty that lingual communication will occur.

Indeed, we also speak of communication as a result, as a success or a failure. This depends on the fact that there may be some degree of communication which will be necessary for a certain purpose. From the point of view of him who - or the game that - poses the purpose, communication - in concreto - may take place or fail. When I ask the newsagent for a packet of cigarettes, it is irrelevant with regard to my or our purpose(s) whether we assume the same views in connection with the idea and the role of cigarettes in fashion, the danger they pose for health, or the rights of the non smoker. [40] How does it happen that we can achieve the degree of communication we need each time, despite the fact that we (may) have different backgrounds leading to the formation of different networks of assumptions, of personal languages?

Well, some of it just happens. But, depending on our anticipation that the other party may assume or fail to assume certain things wrongly, depending on our expectations regarding the probable formation of the other party's language, game, logic, and also depending on the occasional manifestation of a misunderstanding, we make explanations, definitions, stipulations, thus excluding or specifying certain assumptions, and thus making our utterances relatively more rigid, in order to achieve this success in communication. We also *change* our assumptions, by adjusting through this activity, depending on the degree of communication needed, or our need for communication in general. Language is not a system of interconnected boxes, not anymore than it is flowing water. [41] We expand and restrict our ways of speaking all the time, depending on whom with and what about we are talking.

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Communication in concreto is not pre-established within language. We use language, in order to achieve the communication we need.

The social group

The idea of a social group has a very important though unapparent role in the method and claims of linguistic jurisprudence. This is the point where the search for the concept of law is understood to have its strong hold on palpable reality, this is where the claim of uncommitted positivistic analysis and description of the law is based. The theorist studies the social reality, which is independent of him, because it is constructed by the ways of thinking relative to a particular social group. At the end of the day, it is the independent existence of the social group, that is assumed to validate the claim, that the results of linguistic jurisprudence have nothing to do with political argument, but are results of pure reason. The social group is understood to be a simple safe thing, which one is ultimately referring to. [41a,b]

We have been speaking quite often of a social group or a society, as the point to which the arguments were anchored. And so far, we have taken this notion for granted, as if it were safe ground. Yet the analysis of communication must have led us to suspect, that this is not exactly the case.

"The social reality that the theorist studies is independent of him, because constructed by the ways of thinking relative to a particular social group". For the purposes of the examination of this claim, 'social group' may mean different things. On the one hand, it

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may merely denote an aggregation, a bunch of people, in certain spatiotemporal coordinates. This we shall call "aggregate" (of people). On the other hand, it may mean a union of people, where the people are members of a group (this we shall call "society"); or, it may mean a community, where people can understand each other, they speak the same language (this we shall call "community"). By contrast, it cannot be a type of social group, in the sense of ideal type.

A. Ideal type (distinguishing the Weberian method of sociology)

Having concluded in Part 1 that the distinction between convergence of behaviour and a social rule is not in any way universal or analytically necessary (unless normatively presupposed), we started our examination of the descriptive claims of linguistic jurisprudence, on the basis of the recognition, that linguistic jurisprudence does not understand this distinction to be universally true, but simply contingently accurate as corresponding to the ways people of modern Western society happen to think. Take this term, 'modern Western society'. Often, when we use it, we do not have in mind geographical and temporal borders and the actual people within them. Instead we understand it as referring to general conditions that we think obtain in these borders, like relative abundance of food, the primacy of the individual, traffic jams, specialization in work, etc., in contrast with the conditions that we think obtain elsewhere, e. g. in traditional societies or in the third world. Thus we may say "France is a modern Western society" to indicate what *type* of society France is.

Yet, we completely disregarded this possibility throughout this

Part. We have assumed modern Western society to be a particular society and not a type of society. We have said that the social reality linguistic jurisprudence speaks of, is constructed by the ways of thinking relative to a *particular* social group, rather than a *type* of social group. I shall give my reasons for this here. In so doing, I mean to distinguish the Weberian method of sociological analysis, from the method of linguistic jurisprudence. For, although the Weberian method has been related to the latter through its prescription of "understanding" as the approach of sociology, [42] and to Hart's notion of the internal point of view, [43] it is not actually part of the epistemological background of linguistic jurisprudence. The philosophy prior to Weber's method has nothing to do with ordinary language philosophy.

The Weberian method is the method of understanding and describing social change, through the use of ideal types. [44] These are abstractions from reality (meaning what can be seen, in contrast to what can be deduced on the base of axiomatic transcendental suppositions) constructed by the theorist as tools for analysis and description on an abstract level. As such, although they are quite elaborate and detailed, i.e. they are not abstract in the sense that they achieve a wide applicability through discarding unnecessary detail, they are purified from those details that exist in fact in any concrete instance - according to Hegel's dialectic [45] - and which tend to contradict what the theorist wants to point at. Nevertheless, they may be applied to the facts, depending on the theorist's line of reasoning, and the way this line of reasoning is meant to apply. Although an ideal type may refer to particular instances, it does not have to correspond to them; the particular instances will generally

contain elements that contradict the type, should the type be - wrongly - taken to be a description of some instance(s).

> An example: It might be appropriate within some theoretical framework to classify Margaret's buying a Christmas present for her husband as a traditional (or perhaps value-rational) action, even though at the same time a) she has a related expectation regarding what her husband will buy for her, b) she thinks she should not be so good to him, for he is still seeing that young bitch with the big boobs, c) she generally hates Christmas presents altogether, because of the hassle they entail each time (but, "in fact", because when she was a kid she felt neglected and jealous, when her younger brother got better (or better in her eyes) presents from her parents than she did), d) she actually wants to be noticed and have her ego confirmed by the young clerk who is serving her. To point out all these contradictions in the actual instance would mean nothing, either for the classification of Margaret's action (unless some implication to the contrary were entailed by the theoretical framework), or for the ideal types of value-rational and traditional action.

Modern Western society as such a type, need not correspond to actual e. g. Edinburgh society, even though it might be correct to characterize this particular society as modern Western, in a line of reasoning that contrasted it with e. g. Marakesh. And so, it might well be said, for instance, that modern Western society is characterized by a strict distinction between a social rule and general regularity of behaviour, even though this distinction does not apply to the actual behaviour or way of thinking of people in Britain sometimes, or some people in Britain most of the time. One might say this in order to point to or try to explain certain differences from what the case was in older times, even though it would be wrong to assume that in actual traditional societies the distinction between a social rule and general regularity of behaviour never applies to anyone's behaviour or way of thinking.

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The epistemological background of Weber's sociology is not ordinary language philosophy. The traditional claims to knowledge of the truth about the reality or the world as a whole rather than the reality according to this social group, this social group's world, have not been discarded. [46] This method of sociology does not expect to get any results from observation of and reflection on social reality, that are independent of some frame of thought, some logic, that stems from the theorist as (cognising) subject. [47,48] A priori distinctions, axioms and analytic propositions are not foreign to it. On the contrary it abounds with stipulations, and definitions that presuppose a certain logic, a Reason. [48a] The concepts are not taken by the theorist from the reality he observes, they are not posterior to the understanding of social reality. They are constructed and controlled by the theorist. [48b] There is a difference between what the theorist calls, or refers to as e.g. legal, and what the members of the society understand as legal (actually or according to their conventions). We are expected to accept the concept not as part of an observed social reality, but because based on a certain presupposed logic. In Gellner's terminology, this method assumes the First Person approach. [49]

By contrast, the epistemological claims we examine in this Part are based on ordinary language philosophy, which tends to reject as metaphysical any claims to universal truth, based on a logic that is presupposed independently of its actual participation in and derivation from a form of life. Social reality then, is here prior to logic (and tends to become the only reality as far as the social scientist is concerned). There are as many logics as there are forms of life and there is no instrument to distinguish one among them as

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correct; there isn't one Reason. There is only the form of life we happen to participate in, the game we happen to play, our language. Obviously then, the social scientist is expected to take as prior the social reality he wants to describe. It is through it that any logic can be reached; not vice versa. To presuppose a Reason would be to impose on the people one observes a different logic from their own; to fail to understand the "tribe's" language; to severely distort the social reality in one's account of it. [50, 51]

The correct attitude here is to examine *actual* communication in order to reach the rules and conventions it presupposes, if meaning is to take place through/in actual utterances. The logic is not prior to it, in the sense that the theorist already masters it and applies it in the process of understanding social reality; it is contingent to social reality, it is part of it. Understanding this social reality involves understanding this logic or language. Therefore, the concepts are not prefabricated by the theorist. Indeed, how could they be? Where would they be based? If they are to have a meaning they will need each time a context of assumptions and conventions, which will be either the one presupposed by the members of the society observed and - therefore - contingent on the social reality to be understood, in which case the concepts will be the ones the people to be described generally use, or some other, contingent on some other game, in which case the concepts will hamper the desired "understanding" of this game. What the law is, is how the people of the society think about it; there is no truth or reality beyond this.

Ideal types have no place in this epistemology. For ideal types are nothing but a particular category of concepts constructed by the theorist and based on him as cognising subject, as the Weberian

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epistemology allows. In the Third Person approach, there is no base for such abstractions from the social reality, because there is no logic that is independent of it. The abstractions which are allowed for, are abstractions that exist independently of the theorist within the social reality already, as part of the way the members of the social group concerned think.[52] Modern Western society cannot therefore be an ideal type here. It can only refer to an abstraction that is contingent on some game, language, social reality, presumably the one we expect to understand. It therefore rests on and is part of the way the members of the observed social group think, the assumptions they actually take for granted in their processes of communication. So linguistic jurisprudence is correctly assumed to refer to a particular social group and not an (ideal) type of social group.[53]

(What if we discarded the background of ordinary language philosophy, and understood the social group referred to, as the base of linguistic jurisprudence's method, to be an ideal type? Then everything we said on social reality and its chaotic character, on actual communication etc. would be beside the point. Indeed, the distinction between a rule and a habit could well be assumed to be included in the type, which means that, in spite of what we derived from our exposition of the method of linguistic jurisprudence, it would be analytic for The Concept of Law. However, in a context such as Weber's sociology, it would make little sense to begin a search for the concept of law such as Hart does, in the first place. One would probably just stipulate what 'law' denotes in one's work. One might well (need) give reasons too (in terms of the purposes of the work concerned), why this definition and not some other, rather than

assume that one is merely describing what the law is in point of contingent fact. (This should not be taken to mean that Hart in particular gives no such reasons). Because then, *looking for the right concept would mean looking for one's reasons rather than trying to match the group's practice.*)[53a]

B1. Community[54]

Insofar as we are together, we have things in common. We have common interests and aims. We have common problems, which we need to solve in common. We must communicate, reach agreement, in order to take common decisions. Pre-existing agreements entail common assumptions, serving for further communication. Thus, we play the same games, we speak the same language, we understand each other, we have a community.

However, not everything we have, must we have in common; we may well have divergent interests and aims. Not every decision has to be a common one. In a given aggregate of people, some decisions will be taken by all together, some by particular groupings, some by individuals.[55] Different degrees of communication shall one need, with different people, at different times, for different matters. And in any case, we do not have to agree, we don't have to stay together; we may choose to go away. To the extent that we need not, or choose not to, try to agree, we may play different games, speak different languages, have no community.

Once a community has been the starting point of the theorist's investigation, the assertion, that there are central cases of certainty, based on communication, follows with no problems. Not even the argument, that we are dissimilar and may disagree, can be

advanced; because it has been postulated that we are the same: the theorist is looking at agreement.

The existence of a penumbra of uncertainty also follows. Although we, as members of a community, agree on what is good, what we want, for every given set of external circumstances, nevertheless, future circumstances are never predetermined, with the consequence that for a new set of circumstances, for a new problem, we will not know what we want. [56] A new problem calls for new discussion, communication, re-establishment of agreement, decision. And anyway, we may not know what we want, simply because we want things that appear contradictory in given applications.

In short, contingent to a community, there will be a simple reality, a coherent view of the world, a logic, that can be stated with a claim to accurate exposition. And this reality will change with time, through new common discussion and re-establishment of agreement, to the extent that, the environment, the problems and each individual member, change and change each other.

So, when is there a community around us, that the theorist can start from, to analyse its language, and "describe" accordingly the "social phenomena" he is after? Well, always and never. This is not prior to the viewer. It should be obvious by our discussion of communication that whether we shall see one community, as well as whether we shall see only one community, for a given aggregate of people, is not decided by the external facts. It's like looking at a triangle on a piece of paper; you can see it either hanging or standing. [57]

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- But isn't this taking the point too far? Surely there are aggregates that constitute communities and where it would be a violation of the term 'community' to say otherwise. If you were to deny the application of 'community' to a small primitive tribe for example, where would you use it?[58] How much communication do you need or expect? Isn't this relevant?

No, it is not taking the point too far. One might well think and say that there is no community in this world at all, without violating the term (or the facts). This would simply be a result of one's requiring an extreme degree of togetherness and communication, which is of course relevant. Which brings us precisely to the point.

There may be a rule setting standards (either in terms of paradigms or in terms of abstract categories) as to when an aggregate of people shall constitute one community. This will amount e.g. to a stipulation, that an aggregate of small size, with a certain type of proximity of its members, created by co-existence and where the members participate in common rather than separate activities, shall be characterized as a community. We might think that such a rule - i.e. the predetermined deduction of the members' agreement from the listed facts - might be reasonable; i.e. that there are reasons for it. For in asserting this, we would be probably presuming certain (normative) ideas about human nature, regarding what kind of communication we generally need or achieve, what kind of agreements we normally require, what degree of communion we seek by and large, thus making the rule in effect amount to a directive of recognition of agreement, every time that there is the degree of agreement that we (think we must) generally need or achieve, or that we (think we) would normally like.

Such rules, such assumptions is what a logic, or a language, amounts to. And indeed, there are such rules, [59] that we generally follow, there are such rules in our language(s). Yet their mere external existence cannot be an argument against someone else's assuming otherwise. One may have different ideas about the human nature; or one may simply make different choices regarding the degree of communication assumed to be appropriate or desirable. And it makes no sense to argue that he is not applying the term 'community' (or 'communication') correctly, because this term simply has a different meaning for him, in accordance with his different wants of communion. (In this respect, he follows a different logic, he has a different language).

Now, such assumptions might indeed be taken to constitute an argument against somebody's assuming otherwise, regarding the degree of communication needed. Because we might think that he is misled; that he thinks that he needs/ wants a highest degree of communication, but that this is not so in fact, because every man needs X degree of communication. But in resorting to such a rule in this way, we do not analyse a logic or describe a social reality. We follow a Logic, which we understand to be correct, a Logic that is not contingent on the fact that the members of a social group follow it. We postulate a Reality, rather than describe the reality of or according to the social group. And this is of course incompatible with ordinary language philosophy as our epistemological background..

Naturally, the fact that somebody else might make different assumptions, does not mean that we cannot use the assumptions we make as a base, as our reasons for recognising agreement in cases where X degree of communication is found, or simply as our rules stating when

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we are going to speak of existence of agreement, even though we acknowledge that there is no reason why this somebody should agree with our ideas of normality. Yet again, we do not merely analyse an external logic, i.e. a logic that exists independently of us. We constitute our language, our game, explicitly, thus bringing out in the open our assumptions, our choices, which - the external facts remaining the same - entail our conclusions. As far as he who declines from making the same assumptions is concerned, we are simply using the term 'agreement', or 'communication' in a different way. This term is then a piece in our game; a game he might decide or not to play with us.

Finally, if we were to decline from constituting a language or anyway presupposing a Logic, and instead we sought to apply the rule(s) included in the language of a given aggregate regarding when there is a community, the chaotic character of this language would entail that we would be unable to pinpoint a single coherent set of criteria that would be independent of us. (And of course, if we sought to apply the rules included in the language of the community, we would be trapped in a vicious circle).

B2. Society[60]

We are not in fact separate individuals, we are social beings. People feel generally quite insecure by themselves. They feel miserable if they feel alone. They like to feel part of something bigger and stronger than their tiny selves. They want to be something; they want their actions to have a meaning. They like to unite under a flag. They unite under symbols which are understood to group them together, which structure their possibilities of and attempts at communication, and which determine their perceived

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similarities and differences. They create societies, and they identify themselves and the others by the group (society) to which they are viewed to belong.

(On the other hand, we are non-social too. We hate public relations and keeping the appearances. We suffocate in constant company, small talk and gossip. People like to reserve a space to their single selves and they get upset and react if this space is trespassed upon. They like to imagine themselves free, survivors and masters of their selves. They admire independence and scorn the masses and their need for security and a sense of belonging. They despise conformity and rebel against old rules and dictates. They keep a distinct personal identity and resent being looked at as mere group members.)

Such groupings are a matter of personal identification. An identification – just like any classification – involves a contrast (since it follows from it). One cannot be "white" unless there are "blacks" or "yellows". One cannot be "liberal" unless there are "conservatives". One cannot be "Arab" unless there are "Jews" or "Westerners". A society is a matter of us being X (and not Y). Every X is a symbol, under which the members are understood to be united (and so make a society). The existence of a society depends on the regular repetition of activities, wherein X is projected and whereby the members are identified[61] as belonging to the society. (Such activities may be anything, from fights (or mock fights), to outwardly purposeless customs, or simple acts, like wearing badges, speaking with a particular accent, or simply using a certain language or idiom).

Such groupings have a polarizing effect. They establish

boundaries between "us" and "them". Think of the Christians and the Muslims in the crusades, the Mods and the Rockers in the sixties, Protestants and Catholics in today's Ireland, the Hearts and the Hibs in Edinburgh. Insofar as insecurity is at the base of their mechanism of creation, the perceived existence of an at least potentially hostile grouping is essential to their maintenance. Think of the capitalist world for communist Russia and the communist threat for the United States of the fifties.

Societies being unions, they manifest themselves in symbols (e. g. flags, badges, clothing fashion), under which the union is understood to take place. Societies being a matter of the individual's identity and sense of belonging, as well as a matter of the distinction between "us" and "them", they entail rules for the conduct of the members. [62] A member is one who a) displays the symbols, i. e. looks like X, and b) behaves as Xs - unlike Ys - do. [63] Thus, the society entails a logic, which structures the individual's thoughts, beliefs, who he understands himself to be. This logic will be more or less strict, depending on the strength of the society's hold on its members, the room that is left for difference and individuality. The more the insecurity and the stronger the perceived threat from outside, the less this room will be and the stricter the logic. [64]

Once a society has been the starting point of the theorist's investigation, the existence of central cases of certainty in its language/ logic follows easily. Because then, the possibilities of the semiotic universe which we found to be contradictory and chaotic, will be filtered through the function of identifying "us" as a unit and of distinguishing us from "them". The possibilities in the semiotic universe will be normatively structured as right/wrong,

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valid/invalid, in accordance with the symbols under which we group; there will be assumptions you have to and assumptions you cannot make, insofar as you are a member of this society.

However, the content of the semiotic universe being infinite and indeterminate, not every semiotic possibility can be structured like this in advance. Often, some such possibility will be admitted in the society's language as right or valid, in contrast to its opposite, simply because it has been proposed in invocation of the unity, as following from the symbols or rules. [65] In other cases, to the extent that the society can accommodate internal differences, to the extent that it leaves space to individuality, it may be a matter of argument, whether one possibility or another must be admitted. Though the symbol is given, the reasons individual X understands to have for uniting under it with individual Y, will not be exactly the same with the reasons Y understands to have; though the rule is given, its point according to X will not be exactly the same with its point according to Y. Thus the context, that surrounds the symbols and rules and determines their specific meaning for particular applications, will differ depending on individual member - or indeed "sub-societies" of members (think for example of the Communist Party of Great Britain divided in "Eurocommunists" and "hard-liners"). [65a] In either case, we speak of *interpretation* of the pre-existing symbols and rules. Which is how the society's language may change with time. Accordingly, interpretation, as an activity that creates explanations or readings, is naturally dynamic; but each interpretation, as reading, will be static; for it will be an act of allocation of a set of reasons, that render previous practice or pre-existing rules/ symbols meaningful. [65b]

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This is where the theorist may see the open texture of the society's language, the penumbra of uncertainty.

So, when is there a society out there, that the theorist can start from, to analyse its language, and describe accordingly the social phenomena he is after? Well, it is a matter of degree. For a given aggregate, to the extent that people conform, to the extent that they follow, there is society; to the extent that they rebel, there are individual persons.

What if we disregard the fact that people rebel and rely on the fact that they understand themselves to be united?

Well, as we have already said, the existence of a society depends on people's using some notion as a means of identification of the members. A member of a society is a member *belonging* to it. The society is part of the member's identity. This identity may be either the identity according to the member (e.g. I am Greek), or the identity according to someone else (e.g. my son is Greek, or, my neighbour - who happens to think of himself as Scottish rather - is British).[66] In every social environment there are given ways of such an identification which one applies to oneself and to others. They are part of the social reality. These types of identification are not necessarily coherent though and do not serve for uniform classification. The way an individual A classifies himself is generally different from the way an individual B classifies A; the way B classifies A will be different from the way C classifies A; and each act of classification may have a different result at different times. The same classifications will be thought to be sometimes complementary and sometimes contradictory (in abstract - in concreto this would follow anyway from the open texture). Let me give some

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examples.

Take the aggregation of people currently living in Edinburgh. Forget what linguistic jurisprudence would understand to be the penumbra (e.g. immigrants from South Asia) and stick to the central cases. Are they British or Scots? (That is, the existence of which society would be crucial for the claim of the social reality's independence from the theorist here? the British or the Scottish?). Or take Louise, who, when asked the other day in the bar, said that she's not English but Northern English, or rather from Newcastle (would she think the same in a bar in London, where there would not be the same underlying context of "hostility" towards being English?). People in the South East of this island will tend to say that there is one society in Britain and another in Germany, whereas people in the North will exhibit a different tendency; and many, especially young relatively better cultured people in the North, like to place wider boundaries nowadays and think of themselves as Europeans rather (the cosmopolitan ideal; the culture of the tourist), thus distinguishing themselves rather than rejecting the narrower boundaries.

For a given aggregate of people there will not be only one society, insofar as those people's ways of grouping under symbols are concerned. People's ways of thinking, the semiotic universe, are too complex for there to be a uniform classification in them. If the theorist were to take this aggregate as a society, he could probably find this identification in their ways of thinking. However, he would be unable to use it, unless he also were to abandon the claim to uncommitted description; because in choosing this identification rather than another (also existing in the people's ways of thinking)

he would be taking sides. He would be adopting an internal point of view (as distinct from the hermeneutic one). The difference here is that once I have an internal point of view, I can reject all interpretations in language as mistakes except the one that I adopt (and have my doubts about incompatible interpretations of the adopted interpretation), presumably for certain reasons. But if I take a hermeneutic point of view, there will be many internal points of view to analyse, each one of which will result in different "descriptions". [66a]

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- But surely there are aggregates that constitute societies...

Mutatis mutandis, what has been said on community applies here too.

C. Aggregate

An aggregate is simply a bunch of people in certain spatiotemporal coordinates, e.g. all those living in Edinburgh today. This need not mean the exclusion of a community or a society, any more than it entails their inclusion.

In a sense, the existence of an aggregate of people is obviously not independent of the theorist; it depends on little else in fact, than the definition of the coordinates, which is not of course to be found in the facts. This is not the sense of 'independence' we are interested in though. What matters is that only the notion of an aggregate can provide the palpable reality, the positivist needs to hold on to.

The "social reality", as operative notion for the method of linguistic jurisprudence, is prior to language. It is the source of

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the lingual distinctions. It consists in the assumptions people actually make in their social interaction. As such it refers to actual people, whose ways of thinking it is based on (and on whom it is contingent, just like the concomitant language). So, for its base, linguistic jurisprudence assumes an aggregate of people. [67]

If we were to start from a community (i.e. a common understanding), or a society (i.e. a union around symbols), which the theorist chooses to speak of and which is not understood to correspond to an aggregate, we would not be based on actual social interaction, but deriving it, as structured in accordance with certain rules. We would be simply starting from some network of assumptions, which would entail how social interaction is expected and assumed to take place. Which is fine, except that then:

a) Social reality would be posterior to language and therefore, we would have to discard the explanation of the prior existence of the lingual distinctions that we started with

b) Social reality could not be called a *reality*, the way it was in our exposition of the method of linguistic jurisprudence. Accordingly, everything said on the epistemological background of linguistic jurisprudence about it, as well as the claim to a description of the law as an object made up of our ways of thinking, would be inapplicable. Instead, only one possible concept of law would one be "describing" from within our ways of thinking, "our" here meaning us as people rather, than us as idea, as grouped under a symbol, or round a table of the theorist's imagination.

It is for these reasons that we have denied the independent existence of a "social group" as community or society, by reference

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to aggregate. It is for these reasons that we have denied in effect the theorist's possibility to define the community or the society he is referring to, and expect instead that he should be referring to an aggregate of people – which, after all, he will also have to define. If the "social group" – whose social reality is the base of the existence of law as a type of social phenomenon – corresponds to an aggregate of people, then we can indeed speak of a description of its social reality. And in accordance with this, I have assumed the existence of an aggregate, rather than a society or a community, as the referred to basis, throughout Part 2.

Which is precisely what enabled us to see social reality as chaotic and reject the idea that there are central cases of certainty of meaning corresponding to types of social phenomena, which the theorist can describe. To put it in a summary form: We take "modern Western society", as the social group, contingent to which, the type of social phenomenon we would like to describe exists. We do not understand "modern Western society" to be abstractions, like Western rationality or relative abundance of food (in which case we would be referring to an ideal type). We do not understand it to be our agreement, i.e. the extent to which the people of modern Western society (can) agree, understand each other, communicate (in which case we would be referring to a community). We do not understand it to be ideals like freedom of speech and tolerance (in which case we would be referring to a society). We just speak instead of the actual people within the boundaries we have defined in some way or other, and of their actual ways of thinking and relating with one another; we are referring to an aggregate of people. What we shall see then is a community (corresponding to a – rather low incidentally – lowest

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common denominator) along with its negation, and an infinite number of various internal communities (e.g. the community of some friends at school, the community of Edinburgh, the community of the lawyers) along with their negations. What we shall see then is (perhaps) a society, grouped e.g. under "freedom of speech" or "democracy" and contrasted to at least one other hostile/bad society (this used to be the communists, now it is perhaps becoming the Islam), together with an infinite number of societies corresponding to an equal number of opposed interpretations (and interpretations of interpretations) of e.g. "democracy", along with its and their negation(s) (see for example the communists and the Muslims within modern Western society), as well as a chaos naturally of smaller - always contrasted - internal societies (e.g. the French society and the German, the right and the left wing, the fans of Liverpool and those of Everton). All these things together rather than one of them are what constitutes the language and social reality of modern Western society, with the consequence that there is not one coherent network of common assumptions, and so there is never only one concept of law or corresponding "type of social phenomenon".

If we had presumed the independent existence of a social group, and had included with it all the ideas that we generally associate of a union of people, with no further scrutiny, like linguistic jurisprudence does, we would have never been able to see this. Thus, I would like to consider the notion, of a social group as an independent entity, as the ultimate basis of the descriptive epistemological claims we have examined.

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Conclusion

There is no reason to repeat what has been said in our preliminary conclusion. I shall simply add that things would be different with a more traditional epistemological approach. If one were to presuppose a Logic, independently of actual practice or forms of life, thus transcending observed debates and interpretations, the choices would be part of it, and the claim to uncommitted description could be upheld, with the correctness of the results partly depending on this Logic, on the constitution of the theorist's game - insofar as we could say that the adoption of this Logic would not be obligatory. If one were also to believe the validity of this Logic to be universal and its adoption obligatory, the results would be part of Reality (rather than the reality according to this individual subject or this social group) - and then, the search for the concept of law would not assume that this should be an account of how people in our society happen to think, but of what the law actually is; it would be an account understood to go beyond people's trivial fictions (or to verify them). On the other hand one could choose a certain point of view, a certain interpretation among the ones existing within the social reality concerned; but then, no claim to uncommitted description could be made. For one would be a political participant, arguing from practical reason for the choices one was making. [67a, b]

Insofar as the presupposition of a Logic, independently of actual practice or forms of life, has been excluded, and if the adoption of a certain point of view among the ones that have been constructed within the social reality observed is rejected for the preservation

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of detachment and objectivity in the descriptive process, one will see chaos. [68] It would then be wrong to take any lingual distinctions as granted and proceed to coherently fit them together, expecting the result to be the one correct description/ analysis of e.g. law as a type of social phenomenon, because despite the fact that these distinctions are indeed real and granted, their negations are equally real and granted (even if less prominent), which means that the correct description in this sense would consist of an infinite amount of contradictory such results, such concepts, chaotically intermingled and interrelated.

1.   Although the connection with the later Wittgenstein cannot be exaggerated, I mostly refer here to the Oxford circle, especially J.L. Austin and generally the trend subsequent to Wittgenstein, that merged concentration on language and an orientation towards "common sense" (following G. E. Moore in this respect). It is with primary reference to this trend rather than to Wittgenstein that I shall often speak of ordinary language philosophy.

2.   The general substitution of the account of meaning as correspondence, with the account of meaning as use can be attributed primarily to the later Wittgenstein. On the linguistic turn, cf. Rorty (ed.) The Linguistic Turn; see especially the introduction for a very good account of both ideal language and ordinary language philosophy as one movement, and for an examination of their assumptions and disagreements (though an account of the debate on meaning is missing unfortunately). I have eschewed mention here of ideal language philosophy, which did regard its abstract definitions as ones of words, of course, as it was she that started the linguistic turn; on the other hand, it came equally (or even primarily if we should have the later Wittgenstein in mind) under attack by ordinary language philosophy, for misunderstanding what meaning is.

3.   It should be no wonder then that often, the proponents of ordinary language philosophy claimed to be abolishing philosophy altogether, to be demonstrating that philosophy as such is a meaningless enterprise. Philosophy is not normally understood as having anything to do with the description of social reality or how people think in fact.

4.   If we should leave semiotics apart to see what this means in traditional philosophic vocabulary, the rejection of the notion of the denoted and independent of language thing, amounts to the denial that there is one universal Reason, or Reality, whose validity or existence is independent of social conventions. Reason and Reality are the same here, except that empiricist philosophic systems have Reality at their - axiomatic - base, whereas rationalist ones have Reason. Truth for an empiricist is truth in accordance with Reality and for a rationalist in accordance with Reason. Ordinary language philosophy rejects both attitudes as one (often without realizing it), with what Gellner calls the shift from the First to the Third Person point of view (cf. Words & Things, p.120f.). (I do not agree with him though that this as such is

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cheating - it is just scepticism; the claim that philosophy is a sickness to be cured from though, is, indeed, ridiculous).

6.   I took the name of Elrond from J.R.R. Tolkien's The Lord of the Rings.

7.   I do not mean that these types of explanation *are* respectively scientific and philosophical. The example is meant neither to illustrate the use of these terms, nor to reveal any main features of science or philosophy.

8.   Notice that the very use of the notion of a 'social reality' is an indication both of the difference of this attitude, and of the shift in what is now identified as 'real', in accordance with the trend of ordinary language philosophy. In the term itself, the idea can be seen that we are talking of something different from e.g. the reality of physics. Because the *social* reality can be contrasted to - let's say - basic reality. Thus the social reality is a reality constructed from and within society. But it is of course very real. If sociology is supposed to understand and describe the society, this is the reality it is meant to understand, and this reality is, of course, made up by ways of thinking and common beliefs. In a sense that is, the claim that the social scientist cannot disregard the "fictions" of the society he observes, because it is these that constitute the social reality, is a tautology. While on the other hand, when the "scientific" attitude makes the claim that sociology is meant to discover what is real, behind the fictions the members of the observed society adhere to, it is not the reality that is constructed within society which is searched for (which we presumably already know), but the reality to which society - as a unit, as an instance among many societies that presumably (and to a certain extent) follow the same pattern - is bound; i.e. it searches for a reality that is not in this respect dissimilar from the one of physics. (This is the case for all great systems of sociological thought, be it Marx's materialism, or Durkheim's functionalism, or even Weber's thought).

The idea of the "social reality" *is* similar to those of "institutional facts", "semiotic universe", "second-order reality". These ideas are all similar, except for the contexts they have been constructed in, and, consequently, their connotations.

For a general sociological analysis of social reality in the above sense (which is there spoken of also as "knowledge"), without abandonment of the claim to a reality to which social realities are bound, cf. Berger P.L. and Luckmann T., The Social Construction of Reality.

10.   Hart's Preface to The Concept of Law.

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11.   This needs a qualification, at least as far as the distinction of law from morality is concerned. The ultimate reasons Hart offers for it are indeed practical (*ibid.* p. 203f.).

11a.   Hart has been criticized before on issues of methodology, and most particularly for his descriptive sociological claims. See Brendan Edgeworth "Legal positivism and the philosophy of language" (in Legal Studies 6/2), who makes some of the points I also make in this Part (even if in a somewhat crude and simplified form). Also Michael Martin The Legal Philosophy of H.L.A. Hart, for whom Hart's sociology is inadequate and naive (p. 27-8), and Roger Cotterrell The Politics of Jurisprudence, for whom Hart is a bad sociologist (p. 104 and 106). See also Mario Jori Saggi di Metagiurisprudenza (especially "Hart e l' analisi del linguaggio"), who distinguishes in many ways the language that describes from the language that is being described; see also what he has to say on Winch and Hart, pp. 62-74.

12.   Hart *loc.cit. supra n. 10.*

13.   *Ibid.* p. 235.

14.   And they certainly did not in the days when ordinary language philosophy was most in fashion. In fact, they were rather taken for granted. Such claims about the usefulness of linguistic analysis are typical of the trend of ordinary language philosophy.

15.   It is true in general that "Hart has performed... more by example than by precept" (W. Twining "Academic Law and Legal Philosophy: the Significance of Herbert Hart" in Law Quarterly Review 95 (1979), p. 577). Nevertheless, it is the norm for theorists from the Continent to be annoyed by such lack of methodological clarity and explicitness. Thus, Jori often complains about Hart's methodological ambiguity, in his Saggi di Metagiurisprudenza. See also p. 218-9 on the difference in theorizing between Britain and America on the one hand, and Continental Europe on the other. On this see also what Cotterrell has to say about diverse cultural tendencies (in The Politics of Jurisprudence, p. 106).

16.   In contrast with ordinary language philosophy, I do not mean to be sceptical with abstract meanings, I do not even mean to distinguish between abstract and concrete meanings in this methodological analysis. Of course, and in accordance with ordinary language philosophy's distrust for abstract language, Hart believes that concentrating on abstract distinctions is misleading, and that one ought to see the particular uses of the words. In his Essays on Bentham (p. 10-1) he uses the distinction between comparing words on one hand and comparing small

typical phrases where the same word is used on the other, as a distinction between what is abstract and what is concrete (and indeed, the linguistic comparisons he makes are generally concrete, by relevance to this criterion). I think that in any case (even if we were to compare chapters for instance) we shall have items of speech, which can be considered to be abstract, since they can always be placed in a wider context, or to be concrete, since there will always be a more general utterance. The distinction is therefore one of degree and makes no difference in the theoretical account I give in this section of the relation between language and social reality. Naturally, it can be a qualitative one in other more practical contexts, when the actual tendencies people have to generalize or distinguish, depending on particular degrees of generality of utterance, make the difference.

16a.   The notion of a 'brute fact', was introduced by G. E. M. Anscombe in "On Brute Facts" (Analysis 18), and thereafter used by Searle in his Speech Acts, and for MacCormick's institutional theory of law. (But see also Nietzsche using 'factum brutum' in Genealogy of the Morals 3. 24). In its original context, "brute fact" is defined negatively, as a fact in virtue of which what Searle will first call institutional fact holds. Thus the same fact can be brute or institutional, depending on whether it is compared with the fact under or above it, so to speak. However, when I speak of brute facts here, I do not really mean to refer to this relationship between brute and institutional fact. For my more limited use here, a brute fact is a fact whose truth is independent of social convention or human wish. (The acknowledgement of such facts of course, presupposes the acceptance that there is one Reason or Reality, a proposition that is not at home with ordinary language philosophy (see above n. 4). However we needn't concern ourselves with this here, especially since no ordinary language philosopher would deny such facts. And in any case, denial of brute facts would simply mean that no lingual distinction can be explained in any other way than the one I set out later.)

17.   I don't in fact mean to distinguish though, between the base of facts and assumptions, and the network of rules and conventions. There is only a distinction of form, which is useful here for reasons of clear presentation. What is an assumption or a fact, e. g. "people turn their heads in the direction towards which someone points", in contrast to what is a convention, e. g. "in order to make someone notice something you may point at it", depends only on the form in which it is seen. And we cannot say that the rules and conventions result from the facts and assumptions, anymore than the inverse. Equally, there

is no difference between facts, assumptions and evaluations, except from our point of view, who describe this network, and, (in our language or logic) would understand some of them to be objective and some others subjective (and perhaps some "intersubjective"). Here I shall use the term 'assumptions' to include everything, from rules to evaluations, and 'social reality' indiscriminately, for the network and the base, except if otherwise indicated. I am justified in doing this, at least insofar as the epistemological background of linguistic jurisprudence can be said to reject the existence of a prior Reason.

17a. Compare what John Searle says about a "network of intentional states" and a "background of capacities and social practices", in his analysis of language and thought from the point of view of the individual mind (Intentionality p. 141f.).

18. And this is where Hart's internal point of view fits in.

19. You might of course universalize this language of yours, and on it base the possibility of the existence of social relations, the possibility of meaning of e.g. 'promise'. But this would amount to describing not this society, but how this society is pictured in your social reality. Every language is contingent on a particular form of life, and just like there are many forms of life, so are there many languages.

20. Winch P., The Idea of a Social Science, p. 121.

22. The distinction I make here between language stricto and lato sensu is related to the distinction between language as a dictionary and language as an encyclopaedia (on which cf. Eco U. Semiotics and the Philosophy of Language p. 46ff, where also further bibliography) - which is a traditional problem in semiotics - and to the distinction between the sign as equivalence ($p \equiv q$) and the sign as implication ($p \supset q$) (cf. ibid. p. 14ff). It should be clear that I do not mean to deny the idea in modern semiotics that language is not distinct from knowledge or thought, that language is a process of interpretation (and so an encyclopaedia rather than a dictionary). At the same time however, this should not be taken to deny the distinction between language and knowledge as this is seen in the proposition "my knowledge of the Pythagorean theorem is independent of the fact that I can speak French" (it should not be taken to deny the existence of the dictionary). There are two meanings of 'language' here. When we say that language is not distinct from knowledge (that language is an encyclopaedia), by language we mean speech as logic. When we say that it is (that language is a dictionary), we mean words.

23. Obviously then, this method for the clarification of social reality is mainly

useful to a member of the relevant society. Its purpose is not to help us understand something foreign, but to help us realize especially those truths about the social reality around us, which we failed to see because they were too obvious.

24.   Winch P. *op. cit. supra n. 20*, p. 123.

24a.   See Hart *op. cit. n. 10*, p. 17, that he expects to provide "a better understanding of the resemblances and differences between law, coercion and morality, as types of social phenomena".

25.   Or defects for some; see for example E. Gellner, <u>Words and Things</u>.

26.   For the current situation in Japan see Deborah Fallows "Japanese women" in <u>National Geographic</u>, 177. 4. I quote: "...a basic truth about Japanese life: the unquestioned and unquestionable duty to do what is expected of you..." (p. 58), "The force behind the women's movement in the West - the search for self-expression and satisfaction - doesn't appeal much to Japanese women; in their country every man, woman, and child is expected to consider the well-being of the group before his or her own self-interest" (p. 74).

27.   See Wittgenstein L. <u>Philosophical Investigations</u> 1 §77. See also Hart's discussion of international law (*op. cit. supra n. 10*, p. 208f.), where he simply finds analogies and differences with the central case of law he has defined. On the other hand, one could understand this method as sketching sharply defined pictures "corresponding" to blurred ones. This would amount to the argument from the central cases, on which more later. In any case, once we admit that there are two opposite sets of assumptions, one of which can be said to be generally dominant, but not even for every activity or sub-group, it becomes problematic to maintain that this is the (socially) real one. It would be a bit like saying that, since the number of Fiats on the streets is overwhelmingly greater than the corresponding number of Rolls-Royces, a Rolls-Royce is less real than a Fiat.

29.   I have in mind Northern Irish politics and the current trend of vegetarianism among British teenagers respectively.

30.   Which activities or games are different insofar as we understand and constitute them as different. This understanding of ours on the other hand will most often be causally dependent on their having been constituted in this way.

31.   Imagine a man assuming that one may park if there is little danger of getting fined, when he actually needs to park near the ministry of transport, while a

minute later he assumes that one may not park if there are traffic signs to the contrary, when discussing in some committee for the revision of the traffic code. Imagine someone giving excuses to the traffic policeman, in hope that he might get away without a fine, while a minute later he says to someone else who's attempting to park in front of his shop: "Hey, haven't you seen the no parking sign?"

31a.   See also Edgeworth *op. cit. supra n. 11a*, p. 137-8.

32.   If I may quote Vaclav Havel (President of Czechoslovakia and speaking about the lessons to be drawn from the Soviet invasion of '68) here, "...society is a very mysterious animal with many faces and hidden potentialities, and... it is extremely shortsighted to believe that the face society happens to be presenting to you at a given moment is its only true face. None of us knows all the potentialities that slumber in the spirit of the population, or all the ways in which that population can surprise us when there is the right interplay of events, both visible and invisible" (as quoted by Andrew Gimson in "Beware the technocrats boring us into Europe" in the Independent of 16/12/1990).

32a.   Contradictory in the descriptive sense that for each A there is a -A; not incoherent; one can see either coherence or incoherence in them.

33.   The distinctions that I rejected at note 17 above, are preserved in this section.

34.   Yet it cannot adequately describe any such specific change, because of its acceptance of a central case - unless it should happen for this change to consist of a conscious departure from one central case and creation of another, which is not of course how language evolves. Linguistic jurisprudence merely admits of the possibility of change.

35.   See Hart *op. cit. supra n. 10*, p. 4 and 121f. See also Waismann F. "Verifiability" (in Essays on Logic and Language, Flew eds), pp. 119-25.

36.   See Hart *ibid.* p. 125. He does not speak of complexity of ways of thinking though.

36a.   Another advantage of this model is that it does not entail and need not postulate any - dangerous - generalization of the dialectic opposition. For one "socially real" A there may be a -A as possibility, for some other no.

36b.   For the distinction between the dictionary and the encyclopedia, see above note 22.

37. "Too strange to each other for misunderstanding". (T.S. Eliot, Quartets, "Little Gidding" v. 104).

38. On "pragmatic self-refutation", cf. Finnis J. Natural Law and Natural Rights p. 74, and J. L. Mackie "Self-refutation - a formal analysis" in Philosophical Quarterly 14 (1964).

39. It is also in need of a methodology of sociology, regulating when it can be said that this is one social reality and it is different from that one.

39a. In our "social construction of reality" (Berger & Luckmann op. cit.).

39b. Relate in linguistics the "idiolect", i.e. the personal dialect each individual has to some extent. (Cf. K. M. Petyt The Study of Dialect, p. 12, 32).

40. Yet all these issues are part of the concept(s) of a cigarette in our semiotic universe, in our social reality. From the point of view of someone whose purpose is to describe the concept(s) of a cigarette as part of our social reality, it makes no sense to stand on my successful communication with the newsagent and proceed to assert that cigarettes are harmless. From the theorist's point of view, the degree to which there is communication between two or more people, the sense in which they share a common language will depend on - and show - the degree to which they agree.

41. And the same is true for the human mind as such.

41a. Notice that this does not exhaust the importance the notion of the social group has for Hart's positivism, nor does it explain its overwhelming frequency in the vocabulary of The Concept of Law. This notion is a supertramp in argument against the image of the natural lawyer, as a certain prestige from sociology is borrowed through it and since it connotes in a unique way the separation of fact from value. "We don't speak of divine laws and moral truths; we speak of social groups [i.e. empirical facts] and how they are bound together. Anthropology shows us how different the standards of different social groups can be; while sociology shows us that (regardless of their diversity of standards) social groups have structures performing functions (see e.g. Durkheim's work). Law is such a structure; not a matter of what is right - and these are the facts." Linguistic jurisprudence maintains the aura and vocabulary of positivism, even while (and as a necessary part of the process of) transcending the distinction between positivism and natural law.

41b. See MacCormick N., H. L. A. Hart p. 35 that the notion of the social group is crucial for Hart, yet not examined (of course; it is ideological). See Honoré

T., "Groups, laws and obedience" and "What is a group?" (both in Making law bind) for an examination of this notion with the tools of linguistic jurisprudence, and an attempt to formally base the theory on such an examination, rather than on an examination of the less simple terms of 'obligation' or 'command'. Notice that in both MacCormick's and Honoré's analyses, the group ends being defined by its rules rather than vice versa.

42. See Winch P. *op.cit. supra n.20*, pp. 45-51 and 111-20.

43. See MacCormick N., Weinberger O., An Institutional Theory of Law, p. 14-5.

44. For Weber's method in general, see the first chapter of Economy and Society, as well as The Methodology of the Social Sciences. For ideal type in particular cf. "Objectivity in Social Science and Social Policy" (in The Methodology of the Social Sciences) p. 89f. See also Talcott Parsons The Structure of Social Action p. 601-7 (notice the distinction on p. 604f between generalizing and individualizing concepts; by ideal type I refer here to individualizing concepts - with generalizing concepts, the grounds I advance for my claim that Weber's method is not compatible with the method of linguistic jurisprudence, are even more prominent), J.W.N. Watkins "Ideal Types and Historical Explanation" in The Philosophy of Social Explanation (Ryan eds) (who uses Weber eclectically in defending methodological individualism), Carl Hempel "Typological Methods in the Natural and Social Sciences" in his Aspects of Scientific Explanation and other Essays (who equates the use of types in both natural and social sciences), and W.G. Runciman A Critique of Max Weber's Philosophy of Social Science (according to whom ideal types are not peculiar to the social sciences (p.33f.)). My account of Weber's thought is not indisputable, and one could find grounds to doubt it, even in the above bibliography. However my account of the ideal type is simple, coherent and fruitful as a base for a generalization beyond the context of sociology (such that almost every commentator has been tempted to make), without necessitating a rejection of Weber's general epistemological stance or of the distinction between the natural and the social sciences.

45. Cf. Hegel's Encyclopaedia part 1, §§79-82 (I used Wallace's translation of The Logic of Hegel). The point is highly problematic however and in need of much more analysis (which unfortunately I cannot undertake here), because in Hegel himself, the dialectic is tightly connected to an idealism that I cannot postulate. There is always dialectical materialism of course, yet it is hard to disentangle from the marxist view of history (see however Marx's introduction to the Grundrisse, pp. 23ff, on the identity of consumption and production and

especially pp. 33ff, on abstractions and the concrete, as well as his "Critique of the Hegelian dialectic and philosophy as a whole" (from the Paris Manuscripts, in Collected Works vol. 3) p. 326ff). And besides, as Sartre put it, "on ne trouve dans la Nature que la dialectique qu'on y a mise" (see his interesting statement of the problem in his introduction to the Critique de la raison dialectique, pp. 115-28).

46.   On the contrary, there remains here the assumption that we try to see and describe the reality to which social reality is bound. (See above, note 8). Thus, in contrast to linguistic jurisprudence, there can be an account here of the change of the social, of the gradual passing from one type of society to another and from one characteristic way of thinking to another.

47.   Subjectum/ ὑποκείμενον: ὁ ὑπό τόν λόγον κείμενος, ὁ περί οὗ ὁ λόγος, ὁ τόν λόγον ἐκφέρων. Also, ὁ κείμενος ὑπό τήν πράξιν (περί ἧς ὁ λόγος), i.e. its author. Notice that here the adoption or presupposition of a logic is an act of the speaker, which act is equivalent to and indistinguishable from the speech. (See Goethe's Faust (verses 1224-37), where Faust wonders what comes first, the word or the act. Compare E. Gellner, who thinks unwisely that the equation of the act to the word is a silly move (Words and Things, p. 21-2).) Compare Luhmann, for whom the subject, traditionally, underlies and thus carries the world ("The Individuality of the Individual", p. 319, in Reconstructing Individualism, T. Heller et al eds).

48.   Now, this logic (this λόγος), is generally understood to be universal, i.e. to be obligatory for the listener, either because it is entailed by man's make, or by God's will, or because it corresponds to Reality (notice that none of these assumptions excludes another). Perhaps there can be other solutions too. The point here is not to choose any such solution (nor is it of course to attribute any one of these solutions in particular to Weber's sociology). What is important to understand, is that in any such case, even what is pictured as a choice of the speaker's is understood to be the correct one (according to practical reasoning - in an Aristotelian rather than a Kantian sense), for both him and the listener. The latter cannot just reply that the speaker's logic (λόγος) does not correspond to those people's or his (indeed, if it did, why should the speaker speak?). To just relate someone else's logic cannot be an end in itself (cannot that someone speak for himself?). So actual ways of thinking and their description are not the point. They are seen and assessed from within logic; they are not logic.

48a.   Also, they are understood to correspond to a Reality. From here onwards, I speak only of a Reason, instead of a Reason and a Reality, mainly for reasons of ease of exposition (since concepts are more easily correlated to Reason than to Reality) and not to make the main text too awkward. Besides, this way we are in tune with Weber's early methodological writings, and with the fact that it is Reason that ordinary language philosophy banned as metaphysics, and only consequently (and most often unintentionally) Reality. However, if we want to have the complete picture, every time I speak of a (presupposed) Reason (or logic), we must understand both a Reason and a Reality, that are not contingent on actual social practice and understandings. Furthermore, Reason is not necessarily prior to Reality; it can equally well be the other way around, in one's philosophical assumptions. The relation between Reason and Reality is the same with that of language and social reality. See above note 4.

48b.   See Weber's vivid defence of the construction of clear-cut concepts in "Objectivity in Social Science..." (cit. supra n. 44) on pp. 106-10. Notice how everything is ultimately based for him on the subject (although there is much less emphasis on this in his later thought): "The *objective* validity of all empirical knowledge rests exclusively upon the ordering of the given reality according to categories which are *subjective*... in that they present the *presuppositions* of our knowledge and are based on the presupposition of the *value* of those *truths*, which empirical knowledge alone is able to give us" (p. 110). Thus, without the careful construction of clear concepts "the attainment of a level of explicit awareness of the viewpoint from which the events in question get their significance remains highly accidental".

49.   Gellner E. Words and Things, p. 120ff.

50.   It could perhaps be argued that this does not apply to the later Wittgenstein, who simply pointed to the possibility of different logics, following logical positivism's rejection of transcendental ideas as metaphysical. (See at any rate op. cit. supra n. 27, §§109-124, as well as what he says of forms of life, e.g. §241, p. 226e). It does apply however to ordinary language philosophy and certainly to Winch (see his rejection of Pareto's method in The Idea of a Social Science, pp. 95-111, and especially 107ff.).

51.   It is not difficult to identify decolonization as the historical cause behind this attitude. And it is not accidental that Winch - the theory not the person - is British rather than German.

52.   And "law, coercion and morality as types of social phenomena" (H. L. A. Hart

op. cit. supra n. 10, p. 17) are such abstractions. (But see Part 3).

53.   Naturally, 'modern Western society', or the social group in general referred to in linguistic jurisprudence, could be taken as a type, i.e. a contingent on the social reality abstraction, a part of the language we try to understand. In this case, everything that is said later under society applies, mutatis mutandis (and with the addition that you could well get a type, where there would be no core of certainty in the corresponding language(s), e.g. a type like the one assumed and projected by the theory of cultural fragmentation). Segmentation in societies is (from another point of view) classification according to types (there will be an immaterial difference though, if we make the distinction between uncommitted observation and political participation and apply it to: 'type' (descriptive content) ≠ 'society' (normative content)).

53a.   See Part 3.

54.   Notice in Latin *communis* (common), *communicare* (to share, to communicate, to unite, to participate in), *communitas* (community), etc. This family of derivatives, with the semiotic connections we are interested in, is rare in classic Latin except for Cicero who is probably influenced by Greek, where κοινός, κοινωνῶ, ἐπικοινωνῶ, κοινωνία, κοινότης and many more.

55.   All together in the village, we shall decide on the methods and times of allocation of water for irrigation of various crops. In my family we shall decide on where to place the new big mirror in the house. I shall decide alone whether to shave or not tomorrow morning.

56.   See Hart, *op. cit. supra n. 10,* p. 125-6.

57.   Wittgenstein, *op. cit. supra n. 27,* p. 200.

58.   This has been called the "argument from the paradigm case" (cf. Gellner Words and Things p. 30 (and notes therein) and J. W. N. Watkins, "Farewell to the Paradigm-Case Argument", in Analysis 18, 1957-8, who refers to A. Flew's "Philosophy and language" in Essays in Conceptual Analysis Flew eds). The paradigm case is not of course different from the central case. Yet the distinction between the central case and the penumbra, both as we find it in Hart and as we presented it earlier, has never been used in this way, as far as I know.

59.   In both the senses of the word that we showed in Part 1.

60.   Think of society in the sense of club or association, e.g. "the school-debating society". See in Latin *societas* fellowship, association, union

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(implying union for a common purpose and not a mere assembly), *sociare* to join or unite together, to associate, etc. The route is from *sequor* / (*sequo*) (Sanscr. *sak-*: to follow, *sakis* friend - cf. Lat. *socius* partner - Gr. ἔπομαι/(ἔπω)): to follow. Notice that the emphasis here is to "those who follow (each other (and from each other, in the sense of "it follows that")), who go together", whereas in 'community' it is to "us who share and participate".

61.   There are three aspects of the members' identification: a) each member identifies himself, b) the members identify each other, c) the members project their identity to non-members.

62.   No factual distinction is entailed here between a symbol and a rule. What is a symbol may be a rule and vice versa.

63.   So to breach a social rule, is to place oneself outside the group. "We are those who act like this; if you do not, you are not one of us, you are one of them". See Part 1 note 11.

64.   Notice that this logic becomes strictest - *ossified* - once it has stopped evolving, when the hold on the members will be very weak apparently; see for example the symbols, rules and activities of identification of groups of immigrants, when these have stayed in the host country for generations. The contradiction is only apparent though, because it is not the individual's point of view that matters for the crucial strength of the hold that determines the strictness of the logic, but the society's; the issue is not whether the individual can actually differ, but whether he can differ as a member; and the point is not how insecure and threatened the individual feels, which simply determines whether and the extent to which the individual will participate, but how insecure and threatened the society feels. (Compare autopoietic theory).

65.   This will happen most often, when there is a higher degree of insecurity (at the level both of the individual and the society), amounting to a stricter language.

65a.   Cf. Dworkin's example of the tree in Law's Empire p. 70.

65b.   Relate to Dworkin's theory of interpretation *ibid.* p. 46-73.

66.   If it is the identity according to the theorist, we go back to what we said on ideal type.

Compare what Berger & Luckmann have to say about the typifications through which the other is apprehended (*op. cit.* p. 45f) and about types of people (p. 194-6).

66a. For the distinction between the internal and the hermeneutic points of view, cf. MacCormick N., H. L. A. Hart p. 33f.

67. Even if not any aggregate; because obviously, if we took one person from each country on earth and put them together in a room, we would have an unsuitable aggregate rather than a problematic epistemology.

67a. See Dworkin Law's Empire p. 64, that the theorist must "*join* the practice he proposes to understand; his conclusions are then not neutral reports about what the citizens... think but claims about [the practice] *competitive* with theirs".

67b. Notice the distinction between social science (stricto sensu) on the one hand where the descriptive claims are upheld (and a subdivision here between subjective irrationalism - of which Weber would be an example - and, say, realism - see Durkheim here), and political argumentation on the other.

68. Chaos in a descriptive sense; see above n. 32a.

PART 3

LINGUISTIC JURISPRUDENCE

AS PHILOSOPHY

Introduction

In our age of empiricism and positivistic distrust towards methods other than observation of empirical facts, we are often quite ready to assume language as such a fact. Thus, language is seen to be a matter of people's practice of communication through verbal utterances. Facts about language are facts that the theorist will not ideally derive from rules, but will observe in the practice of the people whose language it is. The rules do not exist because they are (assumed to be) correct - what could this correctness be? - but insofar as they can be seen in the behaviour of these people. So, the ideal way to report language would be to collect and statistically list the facts about people's actual practice of language, together probably, with what they have to say on correct and wrong utterances, slips of the tongue, etc. - fortunately, this cannot (yet) be conceived to be practical. [o]

It was in this way roughly, that we regarded language in our examination of linguistic jurisprudence's quasi-sociological descriptive claims. We regarded language as a matter of the behaviour of the people in the social group that the theorist observes. The expressions the theorist starts from (e.g. "I am obliged" and "I have an obligation"), were understood to be expressions *others* utter, that the theorist uncommittedly reports. Hence, the existence of the relevant distinctions was seen to be a matter of external empirical fact, a fact which the theorist could have reported wrongly, but which did not in principle depend on his own practice of language and assumptions regarding this practice (except of course insofar as these happened to coincide with the group's practice and

assumptions). Thus, with this concept of language in mind, we could have objected for instance, that this is not what they mean by "law", but not that this is not what "law" means (unless of course we were to accept Winch's equation of the two issues). And, accordingly, the central issue of our Part 2, can be put as "how can linguistic jurisprudence cope with the fact, that people sometimes speak in one way and sometimes in another".

However, this is not the only concept of language we have available. There is on the contrary a rather more traditional concept, less tuned to scientific description and more central to philosophy, that allows us to forget actual happenstance and frees us from the claim of a description of people's lingual practice. This is a concept that allows us to see, that what the theorist of linguistic jurisprudence does, is not so much reporting other people's language, as examining his own.

> ..Speaking a language is engaging in a (highly complex) rule-governed form of behavior. To learn and master a language is (inter alia) to learn and to have mastered these rules. ...when I, speaking as a native speaker, make linguistic characterizations.., I am not reporting the behavior of a group but describing aspects of my mastery of a rule-governed skill.
>
> ...It is possible.. that other people in what I suppose to be my dialect group have internalized different rules and consequently my linguistic characterizations would not match theirs. But it is not possible that my linguistic characterizations of my own speech.. are false statistical generalizations from insufficient empirical data, for they are not statistical, nor other kinds of empirical generalizations, at all. ..
>
> ...The mistakes we make and the mistakes I shall make in

linguistic characterizations in the course of this work
will be due to such things as not considering enough
examples or misdescribing the examples considered, not to
mention carelessness, insensitivity, and obtuseness; but,
to repeat, they will not be due to over-hasty
generalization from insufficient empirical data concerning
the verbal behavior of groups, for there will be no such
generalization nor such data. '

This is much nearer to the way we think of language when we
ordinarily argue about meanings of words and expressions. When we
debate about the meaning of law, we do not bring statistics of the
term's use as evidence; what matters is how we - the debaters -
understand law, and what we think it is appropriate and correct for
the term to denote, given certain rules for its use, and
considerations we think relevant. Even if it is about a word we are
not familiar with, again we do not look for empirical data, but in
the dictionary. If in a student's essay I find the term 'vernacular'
instead of say 'linguistic', I correct it; I do not record it as a
new use of the term 'vernacular', even if I find it in half the
class's essays, and even though I am not a native speaker of English
in fact.

And this is how we must understand <u>The Concept of Law</u>. The
expressions linguistic jurisprudence starts with, expecting therein
to see actual differences between social relations, are not
expressions found in the actual speech of the members of any observed
social group. They are expressions the theorist puts forth, in
accordance with the rules of the language he uses; they are
expressions he has come across before, and has internalised, along
with specific uses, in the process of learning his language. When we

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come across the distinction between doing something "as a rule" and "in accordance with a rule", it is not a distinction in the language the social group we observe happens to have; it is a distinction in the language *we use in speaking of* this group. And when we point to the distinction between a rule and a habit, it is not a distinction that others happen to make; it is a distinction that *we* make, a distinction derived from our logic. If someone came and told us that this distinction is not true, we might try to persuade him that it is; but not that people make it.

Thus, since it is not the observed language of some social group that matters here, it is not *other* people's assumptions that are crucial, but *our* assumptions. It is we who assert or deny that the law is X, who draw upon our ways of thinking, and arrive at what law means in our language, at what law is in our logic. And so, it is not a social reality contingent on some group that we understand and describe. It is propositions about reality that we assert. The distinction between law and morality is asserted to be real, regardless of whether the people of that tribe make it or not, regardless of what kind of regulation of social conduct they have. It does not follow that their system of social regulation must be either law or morality. It may be neither. But this has no bearing whatsoever on what law or morality are, on what I have named law or morality. When I ask myself "what is law", it is my thought that I try to clarify, it is my assumptions that I seek to examine; not that tribe's system of social regulation over there. Which means that I am doing philosophy and not empirical science (even though each may depend on the other). And I do not report facts about language either. I use language to understand myself (and in the process I

modify, both my language and myself).

- "But wait a minute", I can hear you react. "You have moved from
a moderate and reasonable account of language as a matter of
presupposed rules, to wild statements about reality, philosophy and
knowledge of oneself. We'll be climbing the Himalayas with the
Buddhist monks next. And anyway, this cannot have anything to do with
Hart's concept of law in fact, which was precisely a reaction of
common sense, both to obscure metaphysics and to the solipsism of
definitions (in accordance with ordinary language philosophy)."

Indeed, that is what we are told. Every philosophical
"revolution", condemns its predecessors for obscurity and building
castles in the air. In the old times, intellectuals had blind
reverence for scriptures they did not understand; in modern times,
they condemn authorities they do not have enough patience to
understand. But both then and now, instead of using words, people
allow them to frighten them into intellectual conformity, in
following after some banner.

However, we may have rushed a little too much. And perhaps we
have put a little too much weight on the subject's use and control of
language. Is it really the case that the theorist decides and names
what law is? Is it really the case that he looks into his
assumptions, examines them rationally, chooses some among them,
discards others, and arrives at clear definitions and strict
statements of what he believes? Well, no, certainly not in linguistic
jurisprudence. On the contrary, there, the subject does not try to
control its language at all. The theorist lets language take the
lead, and follows where it takes him (or, at any rate, this is what
he tries to do). There are no attempts at strict definitions, that

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would clarify what the writer thinks, and allow him to get rid of unwanted connotations which might mislead the reader and prevent him from the exact understanding of the writer's thought. Ideally, there is *no* thought of the writer that is distinct from language. The theorist lets language take all its connotations and ambiguities with it; he actually loves using them to make his point, rather than forcing language and putting its words within strictly defined boundaries of his own.

Is this method appropriate?

This is the question we'll be trying to answer.

A. AN EPISTEMOLOGICAL GROUND
FOR CONCEPTUAL QUESTIONS

Clarifications on our change of viewpoint

But first things first. We have let too many threads loose, and it is time we picked them up. What does it mean exactly a) that the expressions (and corresponding distinctions) linguistic jurisprudence starts with, are now seen to arise from the *theorist's* language, rather than the language of an observed social group, and b) that language is a matter of assumed rules rather than observable behaviour? Which, among the analyses and conclusions of Part 2, can be retained, and which must we discard? In general, how does our understanding of linguistic jurisprudence now change?

A. From the group's language, to the theorist's language.
(Or, out with descriptive sociology).

In the terms of our analysis in Part 2, the move from the language of the group, to the language of the theorist, as the base of discussion about what the meaning of e.g. 'law' is, means that we drop all descriptive sociological claims, in this sense: That, having decided to try and answer "what is law", our conclusion that 'law' means X (e.g. the union of primary and secondary rules) and/or that law is X, will not be understood to be a matter of what the people in any social group (be it the theorist's or not) happen to think and understand by 'law'. Insofar as actual ways of thinking go, existing

prior to and independently of our particular discussion, these are, from our point of view, liable to be affected by, and change in accordance with, our conclusion; they are not understood to be described in it. They might happen to fit with this conclusion of ours, or not; this agreement as such, is irrelevant. Our conclusion as to what law is, will not be assumed to be contingent on any particular social group existing independently of us. If contingent, it will be contingent on us, who ask the question and seek to answer it, on our speech, reasons, logic. Contingent on and part of our way(s) of thinking if you wish, yes, but this is not a way of thinking we merely happen to have (that one could reject on the basis of "but other people think differently"), but a logic we have so far adopted and that we put forth as correct (with more or less arrogance or humility, i.e. with a greater or lesser degree of acceptance that it might have to change, after we've listened to what others have to say). X will be understood to be *really/ truly* what law is, or at least so shall we be claiming. If somebody thinks differently, if somebody disagrees with us, it is up to them to try to persuade us — if they so wish — that their view is correct; but not that what we say does not fit with what the people of the tribe say about God Elrond. We might disagree, and one might be right, or we might both be (partly) right, or we might both be wrong; this does not depend on the move, from the language of the group, to the language of the theorist.

So, we are also dropping quite a lot of baggage from ordinary language philosophy as the relevant epistemological background. First and foremost, we are dropping the scorn for "traditional" philosophy. Accordingly, we abandon the idea, that questions like "what is law?",

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or "what is truth?", are senseless, unless understood to refer to how 'law' or 'truth' are used in people's actual games, how 'law' or 'truth' enable the performance of particular speech acts. (But notice, that the idea that interrogation into particular speech acts or actual games, might be useful, even in answering questions like "what is law", is a different idea, and may be retained).

Finally, we are dropping of course, what Gellner called the "Third Person point of view". Which incidentally means that the Weberian epistemology is no longer incompatible with Hart's allusions to an investigation of types of social phenomena, in the sense I seemed to say it is in Part 2. Our analysis of the ideal type *can* now apply to Hart's concept of law (or morality), insofar at least as this concept does not equal "what the judge must do", but amounts to a certain method of regulation of social conduct, and *is* thus applicable to empirical reality. Curiously enough, thanks to the abandonment of the claims to a sociological description, a "type of social phenomenon" is no longer understood to be a social phenomenon, but an ideal type, i.e. a concept, and so, Weber's methodology of sociology becomes compatible in this respect with linguistic jurisprudence.

B. Language as a matter of rules

We now turn to look at the move from the idea of language as a matter of people's observable practice, to the idea of language as a matter of assumed rules. This first of all means that, as we have already said, the lingual expressions linguistic jurisprudence uses as evidence for logical distinctions, are not observed, but produced by the theorist, in accordance with the rules he has internalised in

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the process of learning his language. These rules, generally *constitute* language, in phrases like "investigation of similarities and differences, recognized in language, between social situations and relationships". [2]

Thus, it is not a matter of whether people actually say "as a rule" in contradistinction to "in accordance with a rule", or whether they happen to speak of an "obligation" as distinct from "compulsion". So neither is it at issue whether they might sometimes happen not to make these distinctions. It is rather the case that in putting forth these expressions, the theorist applies certain rules of language and/or logic, according to which people *must* make these distinctions, and if they happen not to, they may be corrected. [3, 4] (Consequently, the expressions are presented not so much as evidence, but rather as a way of presentation and illustration of the rules).

So the disregard for the lack of consistency in actual ways of thinking and practice of language, the disregard for the fact that sometimes people make these distinctions and sometimes they do not, is not the deplorable outcome of armchair speculation. For it is not the rules (and concepts) that are expected to fit this practice, but rather the practice that is judged (and/or constituted) in accordance with them. The assumption of coherence in language and/or logic, ceases to be problematic. If the distinctions are ones people must make, there is no arbitrariness in drawing further results from their coherent relation. In fact, since the theorist is not describing other people's actual ways of thinking, but investigating and exemplifying his own language, incoherence cannot be allowed to obtain. If he should discover incoherence, he discovers a defect to instantly remedy. Thus, incoherence in the result sought, is by

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definition excluded; if an interpretation is seen not to fit, it is automatically rejected, and so never forms part of the language.

C. From social reality to reality

And now, what about "reality"?

We have let this troublesome little word creep in our discussions about language, meaning and logic, often enough, without much analysis. And just a minute ago, we seemed to make such preposterous claims as that there is a reality of what law is, independently of what other people think about it; that distinctions (like the one between law and morality) are real and not contingent on groups' games and speech acts. And, as if that were not enough, we laid these claims at the door of poor old Hart, whose conceptual work we insinuated is not an attempt for a clarification of what 'law' happens to mean in language, but a claim to what the law really is, regardless of people's actual use of the term.

The thing is quite simple really. We have already spoken of a "social reality", and a relation between it and language. There are distinctions we see in language, which correspond to concomitant distinctions in the network of assumptions, that constitutes our social reality.[4a] But this is so, so long as we maintain the *Third Person* point of view, so long, that is, as we see others speaking, using language, making claims and interpretations of terms, analyse this process and describe how language works, internalises and recreates ways of thinking, *without* taking a stance ourselves regarding the speech and the claims of these people, i.e. without judging these claims as right or wrong (and how could we, in the process of such a description). We see for example some people

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"trying to win the favour of God Elrond", or "punishing a girl, for having slept with her brother". We analyse these propositions and explanations of theirs, by saying that there is in their network of assumptions, among other things, a certain "God Elrond", and a certain conviction that "incest is bad and must be punished". In making this analysis, we make propositions about their social reality, their way of thinking, what they believe to be true (so as to understand how such "realities" come about or how this language has evolved, etc). From our point of view, there is a certain correspondence between what they say and what they believe to be true. Now, if we go on to say (either to them or not) that "there is no God in fact", or that "there is nothing wrong with incest; people should be let alone, to sleep with whomever they please", we are leaving the *Third Person* point of view, the descriptions of their language and social reality, and move to the *First Person* point of view, which allows us to judge and make statements that we assume are true, and not "true", in quotation marks. Once this move is made, social reality is substituted with Reality (and language or form of life, with Logic if you wish), and the correspondence between what *they* say and what they *think* is real/ true, is transformed into a correspondence between what *we* say and what *is* real/ true (according to us in both cases). [5]

So, from the point of view of this methodological analysis, reality (and correspondence with it) amounts to the speaker's claim that his speech/ assertion is correct. [6] And this brings us to a big problem.

So long as we maintained the Third Person point of view and the claims to a descriptive sociology, we could regard the distinctions

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linguistic jurisprudence starts with, as real, i.e. *independent of the theorist*. They were seen to exist in social groups' languages, and the theorist was understood to describe them, as an external reality. The distinctions existed as such a reality; what mattered was whether in some social group law was e.g. the union of primary and secondary rules, in virtue of the relevant conventions and common understandings that accounted for language and the meaning of 'law' therein. Now that we drop these assumptions, and shift to the First Person point of view and to language as a matter of rules in the speaking subject's mind, what sense can the claim make that a certain concept is correct? What kind of a reality is this the theorist is assumed to refer to? A reality within his own mind? It is alright to claim that God does not *really* exist. It is - perhaps - alright to claim that *in fact*, people should be allowed to sleep with whomever they please. But to claim that the law is a system of regulation of social conduct characterised by the union of primary and secondary rules, and not e.g. a rational enterprise of resolution of disputes, to claim that this is *the correct* concept of law *in fact*, what can it mean? Surely "a system of regulation of social conduct, etc." is one thing, and "a rational enterprise" and so on, another; and whether a certain word like 'law' will be used to refer to one thing or to another (given our need to distinguish between them), is a matter of pure convention, or of one's organization of one's own thought. One cannot claim that it is true or real, because such a claim presupposes a common ground (reality) existing independently of any particular person's recognition. And here it seems, we have no claims about reality at all; only claims about *names.*

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Nominalism

The idea that general terms of language, like 'law', have no corresponding reality but are mere names, is called (or rather, will be called by us here) nominalism. [7] This idea is very easy to understand, and has a certain plausibility, now that we have come in so many ways to see the distinction between observed and observing language, i. e. between – say – the tribe's language and the theorist's meta-language. Given the fact that the theorist's concept under word X may be different from either the described group's or some other theorist's correlative concept, to treat word X as a mere name that may be referring to different things depending on the speaker, facilitates the transitions between different observed and/or observing languages. Take this example.

Suppose that theorist A, having finished with his investigation as to what is law, speaks of "law" meaning the system of regulation of social behaviour, characterised by the union of primary and secondary rules; this is distinct from "(positive) morality", which is such a system having primary rules only. [8] Theorist B on the other hand, speaks of "law", meaning a rational enterprise of resolution of disputes, aspiring to the common good; this is distinct from "(personal) morality", which means those rules of conduct, conformity to which will secure one's personal achievement of the ideal. A can of course analyse, appreciate and explain to his students B's concepts; but this as such, need not have any effect on his own. [9] Furthermore, at a certain place and time, some social group happens to have some system of regulation of social conduct, which they call their "law" (or the word which they use for which, is to be

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translated as 'law'); this, partly conforms to either A's or B's definition, and partly doesn't. Obviously, nothing here need have any effect on what A or B have *named* 'law' or 'morality', that is, nothing changes for the idea of the union of primary and secondary rules, or for that of a rational enterprise of resolution of disputes.[10] And, furthermore, there is nothing apparently, tying the word 'law' to one definition rather than the other, to one idea or thing rather than the other. The phenomenon is in fact the same to the case where 'jurisprudence' in French means decisions of courts, while in English it means, well, jurisprudence. And it is the reverse to that one, where in different languages different words are applied to, say, the same animal.[10a]

Should we then laugh at A's and B's debate on the concept of law? Should we say that it is mere stupidity and misunderstanding that makes them go on stressing, the one that "law is not rationality, but actual – and sometimes quite absurd – regulations of social behaviour", and the other that "law *must* be rational – absurd regulations are not law"?

Well, not necessarily. Their debate might be for instance a debate on what it is that jurisprudence and/or legal dogmatics are about (they are about law – what does "law" mean?), or on how involved or detached the legal scholar must be, what it is the jurist should be expected to assert when asserting "the law".[11] Hence, as an answer to such questions, the assertion (or denial) that law is a system of regulation of social conduct with X characteristics (and not necessarily the way one must behave), can make sense. And we do have a claim to truth, in the same way that we had such a claim when it was said earlier that people should be at liberty to sleep with

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whomever they please.

(Okay, but again, even so, the problem remains. How can we make *any* such claim, at all? There can be no empirical verification of evaluative propositions; different people will simply have different opinions. The situation is exactly the same as when different people use the same name for different ideas. And indeed, it is because of this that nominalism is correct; if people did not have different ideas, i.e. different interpretations of general terms in language, they would not be different. A and B have different concepts, precisely because they disagree on such evaluative questions. Insofar as people disagree, they will give different answers to what the law is. – True, but we should bring something more in the picture: Most people will have no answer to give, because they will have never posed the question to themselves. Before one can say what one's opinion is, before one's difference or similarity is asserted, reflection is required. For any evaluative issue, I can pose the question to myself, asking what it is I really want; should I choose this idea or that one?[12] So the subject, the theorist, can be seen to be asking himself what the law is, what jurisprudence is about.[13] But most importantly, by posing the question to myself, I can change my mind. People change their minds this way, even after they have furnished an answer. People *become* different or similar, depending on what they learn, on what ideas they receive from their environment. Hence we can make evaluative claims, because we can expect people to (come to) agree with us, after they have reflected on them, even if they happened to assert different opinions before. Their happening to be different and disagree – or to be the same and agree – at a given moment, does not compel them to stay thus; it does not oblige them to

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stop listening and thinking.)

But then, aren't the arguments that the theorists advance, as well as the whole language of the debate, entirely unsuitable for an answer to these questions? Should we not expect political arguments on the appropriate role of academia and of the courts, instead of this sterile conceptualism? Should we not at least try to clarify the language of the debate, to make it strict and stable, even if artificial, so that confusion at least be avoided and communication be easy?

The answers here will have to wait. For after all, it is true that linguistic jurisprudence does not believe in nominalism at all. On the contrary, for linguistic jurisprudence, there *is* a reality of what law is, and law is what it is, regardless of the role of jurisprudence or of the jurist.

So where shall we look for this reality? But of course, and in accordance with the name that we've given to linguistic jurisprudence, in language. It is time we took another close look at it.

Our language, and its rules

To say that language is a matter of rules, and not of people's empirically observable practice, does not mean that it is a matter of the theorist's rules. And even to say that these are rules the theorist does not observe in – or otherwise obtain from – others, every time he presents an example of typical speech from which to generalise, but has in his mind, does not mean that they are

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exclusive to his own mind. (Language might become a matter of the theorist's rules - the rules might become exclusive to his own mind - precisely through the attitude we depicted in the examples under nominalism). Furthermore, although this understanding of language does mean that the theorist will pay little or no attention to people's actual utterances in the course of his investigation (but will furnish himself with hypothetical typical utterances instead, as these emanate from his mastery of the skill of language), it does not mean that other people's practice has no role to play. On the contrary, such practice has been of utmost importance in the theorist's learning language - and it still is.

A. Introduction

When I was a kid, and while growing up, I was taught (or anyway I learnt), through people's practice, or at school, or wherever, to use words to convey meaning. I learnt to distinguish between different words, and thereby between different things. And vice versa. A chair was a chair, and I called it "chair"; a table was a table, and I called it "table". Just as everybody else around me did. Various words meant various things, and if I, or somebody else, happened to mix them up, we were corrected - or we corrected ourselves. As time passed, I was less and less corrected. I began to correct others. I had mastered the skill of language; I had learnt its rules. What rules? Well, rules like a chair is one thing, and is called "chair"; not "house". Yesterday is one thing and is not tomorrow; and that I cannot "want to do something yesterday" - that this is *illogical*, that it makes no sense.[14] Now I hardly ever need be corrected on my speech. And I do not pay attention any more to other people's speech,

so as to learn to speak accordingly. I teach my children how to speak instead. How do I know what to teach? I have it in my mind. It is the rules I've learnt to follow, so as to produce meaningful sentences, so as to communicate. But they are not my own rules. They are everybody's rules. They are the rules of the language. What good would they be otherwise? So it is not a question of my personal choices. It is a matter of right and wrong. I may still, on occasion, be wrong about a certain rule (e.g. I might think that 'myxomatosis' means a brain disease), and I may still learn from others who are better educated than me. And I may still happen to make a mistake through inattention, like a slip of the tongue, that I know to be a mistake, thanks to my knowledge of the rules.

B. The rules of language

From the point of view of each individual user of language, and so of the theorist, we may distinguish in the following way. Having in mind the observable, i.e. actual utterances or scripts produced in the external world, there is, on the one hand the instances of language I produce, and on the other the instances of language other people produce. Having in mind the rules that distinguish right instances and wrong ones, there is on the one hand the rules I observe, the rules I form, and on the other the rules other people put forth. [15]

In either the rules or the observable, the differences between me and the others may be immense or minute, or anything between the two. [17]

My attitude towards these differences in general may range from correcting the others, thus trying to bring about uniformity in

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accordance with my rules (and practice), to following them, thus adjusting my practice (and rules) to theirs. [18]

What generally happens however, is that people live in lingually settled social environments (and even an unsettled social environment will tend to settle with time), [19] where every new individual (typically an infant) starts by following and adjusting itself to the others' practice/ rules (in the process of forming itself), and with time (once formed and orderly rather than unformed and flexible) comes to adjust less and less, but to judge and correct more instead. Thus, at any given moment there will be a certain uniform practice of observable lingual instances and a more or less accordant uniform set of rules, [20] that certain formulations are right and certain others are wrong. Each individual will understand the rules it follows to exist independently of itself; each individual will understand its own standard practice as conforming to and being the practice of everybody or of the group. [21] Consequently, each individual speaking to people of its own lingual group, understandably assumes that they share the same rules with it, the same standard practice, in such a way, that if discrepancies were to occur, these would be due to somebody's (perhaps the speaker's, perhaps the listener's) not following the rules, not speaking correctly. And should there occur a disagreement, i.e. should it happen for a certain problematic lingual instance (or type of it) not to be understood by its producer to have been defective right away, either the producer has mistakenly learnt the relevant rules and should if necessary be instructed accordingly, or he is more advanced in the relevant learning than the others (who happen conversely to be mistaken) and can instruct them. At any rate, each one speaks, and expects, if one should be mistaken, to be

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corrected. One does not rely on any statistical evidence, but on one's (so far assumed to be accurate) knowledge of the rules (i.e./or ability to act upon them). *The theorist is one such individual.* Nothing more, i.e. he may be mistaken and corrected just like everybody else, and nothing less, i.e. he is not to be considered any less an authority as far as knowledge of his language is concerned, he is not expected to base the utterances he puts forth on anybody else's practice.

Thus, the theorist is not referring to a reality in *his* mind. He is not referring to a reality of some social group he observes either: he is not referring to a reality in *their* minds. He is referring to the reality in *our* minds. [21a,b]

What does linguistic jurisprudence believe in?

In our introduction of nominalism earlier, we mentioned different definitions of the word 'law' and said that there is nothing tying this word to one definition rather than the other. For linguistic jurisprudence, this is probably correct, provided we understand it to mean that there is nothing tying this word to one *definition* rather than the other. Yet it is wrong to think that there is nothing tying this word to anything. On the contrary, there are the rules of language, tying it to certain uses, certain typical utterances if nothing more, which will probably display a certain family resemblance at least.

Let's start with an example. Suppose somebody said "I'll use 'law' to denote a heap of dirty socks". Is this possible? Yes it is,

I do not want to say it isn't. Still, my reaction that this is not what law is, that a heap of dirty socks is one kind of thing and law another (even if there might appear someone to whom the latter seemed to resemble the former), is not any less reasonable.

It is possible for people to take the attitude of using general words like 'law' as abbreviations for the stipulations they have attached to them. It is possible to look at such words as mere names. It may on occasion be desirable too. Yet this does not - and must not - make them mere names, it does not make them like 'Johnny', a word that can be attached to various people regardless of whether they display any "Johnniness". Words, no matter how general, no matter how abstract, always have a certain meaning in our common language, and this is how they can manage to convey ideas, and not just sounds.

This meaning is something everybody has to rely on. Even a nominalist. After all, each definition - even *each explanation* - will contain words or signs of some other sort, for which another explanation can be demanded. As Wittgenstein has so many times and in so much detail shewn, there is no escaping from having to rely on existing practice of communication, there is no escaping from having to take for granted at some stage, as does the reader, that a certain sign is clear enough - clear in virtue of certain rules, rules in fact quite inarticulate, that you never even think about, but merely act upon, with the greatest precision and certainty too.

Furthermore, this meaning does not depend on anybody's political ideas, arguments, or choices. It is already established before any related thought takes place. It is the means in fact, whereby any such thought is formed. We do have a reality here; and it *is* independent of the theorist. Not because it is not in his mind, but

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because it is in our minds, or rather what our minds and our communication stand on.

Thanks to this reality we can know what it is other people are saying. Thanks to this reality we can speak about things. And although naturally, what things one is talking about, does depend on one's own speech, thoughts and volition, what these things are does not. Law is what it is, and this in no way decides or is decided by what scholars in legal dogmatics say or should be doing - one may perfectly well say "law is what it is; and jurists should be abolishing it"; or that "today's legal scholars have very mistaken ideas about (the nature of) their object of study"; there is no mistake in grammar or difficulty in understanding these statements. Every thing is what it is, and its nature should be determining which discipline studies it and how; not the other way round. It is this nature that linguistic jurisprudence seeks to determine in the end, with regard to the law.

Different languages, different concepts

- But isn't standing on this reality - the reality of meaning in common language - a little dated? Although people have for ages believed it to be quite firm, today's linguistics and awareness of the existence of different languages has revealed this reality to be rather shaky and ambiguous.

Indeed, it is a well established conclusion in modern linguistics that different languages make different divisions in the outside world. The example of the different basic colours in different

languages has been cited all too often to make the point. We are well aware today - or so we should be - of the fact that different languages may have different and also incompatible semantic structures, and that between our different ways of speaking about things, translation can be a very difficult matter. [22,22a]

Still, the variety of semantic structures does not make much difference to the argument on the relation between words and things. It simply means that words of different languages, which words may happen on occasion to be equivalent, may denote different things. A grandfather is one thing apparently, and a 'maili' (in Njamal, some Australian language), another (any relative it seems, away by two generations). [23,24] In the same way, law may be one thing, and Recht (in German) another: thus law might be distinct from morality, but Recht not so; or they might both be distinct from and related to morality at the same time, but in different ways (and the same goes for morality/ Sittlichkeit obviously). [24a]

Naturally, this might seem an important difference for anyone concerned with jurisprudence, especially since it is true that linguistic jurisprudence does not take it into account, but is instead allowed by the English language's imperialism, to forget, that distinctions different from those, one is accustomed to, can always be drawn. However, in any case, the theorist follows the rules of his language and makes conceptual claims from within this language's semantic structure. What else can he do? [25] If he is aware of this possibility of difference, he will assume this practice, these rules, to be the ones of the group rather than everybody. If, on the other hand, the actual audience, the other individuals within the group, should have different lingual backgrounds (as they

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certainly do in discussions of jurisprudence today), they may respond by introducing different distinctions and concepts, i.e. by speaking about different things (if they think this to be relevant or interesting). I could say for instance that "yes, what you have just said about the law is correct, but it does not apply to the Recht" (in either language). And we can of course use definitions, stipulations or whatever, to make ourselves understood. After all, I could do the same thing, even if I knew of no language with the distinction I wanted to draw already established. Nothing changes for the idea that the theorist stands on a certain established practice of communication, a language, a certain set of rules, providing for what is right and what is wrong. Besides, do not forget that these facts about language do not only apply to the English language as distinct from the French, but also to the language of the jurists as distinct from the one of the doctors. And there are rules even for making stipulations and the like.

It is true however, that these considerations result in watering down the possible claims of linguistic jurisprudence's, as of any idealism's. They make it very difficult to speak of Plato's truth in the ideas. And, together with the Wittgensteinian emphasis on the underlying rules as presuppositions for thought and communication, they also undermine any strong abstract contrast between these two attitudes of the theorist's towards his language: a) using the language as the theorist finds it, with no attempt to control it (descriptive attitude), b) deliberately constructing the language he uses through stipulations, in an effort to make what he thinks and says absolutely clear and unambiguous (prescriptive attitude). Because it has to be acknowledged that the two attitudes may have to

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be accepted both, and that each one may have something to offer that the other one does not.

As for <u>The Concept of Law</u> and the considerations of linguistic jurisprudence in particular, one might argue that, even if it does not destroy the method and its conclusions, the existence of a variety of relevant concepts (law, Recht, droit, δίκαιον), seriously reduces linguistic jurisprudence's importance and relevance. Yet Hart could reasonably argue, that the idea of the different semantic structures is somewhat misleading here, insofar as it might be understood to imply something different in effect from the idea of the open texture of language. That despite the possible differences between our various languages, the central cases as regards notions like law or morality are roughly the same throughout the modern Western world, in virtue of the strong political and other similarities, which are more important as a contextual background than the lingual differences. [26] (Hence the idea that linguistic jurisprudence tries to understand types of social phenomena). And that finally, insofar as differences remain in the penumbra of our different terms among languages, his conceptual analyses, if assumed to be correct for the English language but not for some other, do not preclude anybody from pointing this out, if he should think a different concept (e.g. Recht rather than law) to be more enlightening for our social condition. The conceptual analyses the method of linguistic jurisprudence results in, do not pre-judge but clarify our political issues and discussions, by helping to clarify the language, in which political issues are formulated and debates are carried.

Linguistic jurisprudence is a conceptualism[27]

But let us forget for the time being the above arguments on linguistic jurisprudence's importance and relevance, as well as the problem of the possibility of many similar concepts. For we have yet to clarify what exactly we understand linguistic jurisprudence and its claims to be.

We may start by saying that in this Part, linguistic jurisprudence is generally understood to be a *conceptualism*, viz. to be posing and trying to answer philosophical questions of the old fashioned type "what is (the concept/idea of) law?", "what is beauty?", "what is a straight line?". For truly, it seems to me that, despite all the rhetoric against "traditional" philosophy's "metaphysics", that was so characteristic of analytic philosophy, the basic ideas underlying the method and enterprise of linguistic jurisprudence, are those of any good old Platonic idealism. Linguistic jurisprudence is basically a conceptualist school, as − I would like to add − is ordinary language philosophy, for the most part. [27*] And the vocabulary of "social groups" and "types of (social) phenomena", rather than "natures of things" or "essences" or "ideas", is largely there as decoration, to gloss (over), in a manner appropriate to our modern age of science, our need for the persist− ence of our derided philosophical past.

− Then what about the idea of a family resemblance? Of the variety of possible uses of terms in language? The rejection of a definition as an attainable goal? Or indeed, the open texture?

These are all tied up with the descriptive rather than prescriptive attitude of linguistic jurisprudence (and ordinary

language philosophy) towards actual lingual practice, and to the related attention to detail. Linguistic jurisprudence is extremely reluctant to condemn actual practice as irrational or incoherent. It is reluctant even to treat it as trivial, or irrelevant to the philosopher's effort to pinpoint and understand the things he wants. It has instead the wisdom to try to learn from it, and, most importantly, to teach from within it.

This attention to the details of ordinary lingual practice is something of a contradiction to the basic conceptualist enterprise. It amounts to an introduction within conceptualist thought of some sense of its own limits and relativity. And, this descriptive attitude has the effect of rendering the philosophical conclusions, both easier for diffusion, and capable to survive longer, in our times of rapid change and relative instability, even at the most basic institutional foundations of the social, like language; but, at the cost of making them less clear and less deep. (Like the cheap plastic that has today replaced stronger and more reliable, but less versatile and functional materials). Before we see their role within linguistic jurisprudence as a conceptualism, we shall have to return to our analyses of language, in order to understand more precisely what a concept is, and what conceptualism tries to do.

Concepts

Unless uninfected by ordinary language philosophy's slogan that the meaning is the use of language and not correspondence with reality, the careful reader will have perceived a sophism. He will be

thinking, that - perhaps in my rush to see linguistic jurisprudence as a conceptualism - I passed a little too fast, from the uniform set of rules we find at a given stable social environment and the basic meaning utterances have in virtue of those rules, to natures of specific things, corresponding to specific words. At one moment we were speaking of the fact that even very general words like 'law' are not mere names but have some meaning in ordinary language, and at the other we were assuming them to be referring to specific things. Are we entitled to make this move and how is it made? Besides, given the fact that we have taken reality, and hence these things, to refer not to what is empirically verifiable, but to amount simply to the speaker's claim that his assertion is correct, what are these things? Where did the speaker find them?

My answer in short is this. These things are the concepts, in the speaker's mind, which he has (re)constructed, as a necessary part of the process of thought and of learning and developing (his) language and logic.

We were left with the idea of a lingually settled social environment, where there was a uniform set of rules, in accordance with which each individual's attempts at communication took place. Thanks to these rules, we could say that, regardless of how vague the word 'law', or any item of speech, regardless of how varied the lingual instances it can be put into and the attempts at communication it can be used for, regardless even of an absolute liberty of stipulation, there is a limitless range of attempts at communication for which it is not suitable. (Thus, I could not say "law" instead of "heap of dirty socks", or "law to these rules" instead of "thanks to these rules", insofar as I wanted some other

speaker of English to understand what the second propositions mean).
Take the legitimate lingual instances. We know that their number is
not closed, but infinite. We know that is, that an item of speech can
be used successfully (in terms of the aforementioned rules/ practice)
in an infinite number of utterances, in an infinite number of
contexts, that cannot be specified in advance. To keep it within
words for simplicity: We know that a word can be placed among other
words to form an infinity of lingually correct phrases; and that we
cannot give in advance a list of these phrases, but only with such a
phrase given, to recognise that it is okay. The same is true, mutatis
mutandis, for the range of illegitimate placements and uses of the
word. [28]

Now let's go back to our individuals. Obviously, each individual,
will, at any given moment, have encountered already, a finite number
only, of correct phrases including this word. The question is, how
can this individual construct a phrase it has not heard before, in
such a way too, that there is no guessing involved, but merely the
individual's certainty, that the word has been used correctly (or
not), and that the listener, if paying attention, will receive the
information he is supposed to?

I think that the answer has to be in terms of generalisations
from the concrete situation, phrase, or use of the item of speech,
i.e. in terms of items of apprehension and thought, i.e. in terms of
concepts. [29]

Assume a subject confronted by a range of legitimate meaningful
utterances, containing the same recognised repeated item, e.g. the
same word. In order for the subject to be able to place this item in
a legitimate meaningful utterance it has not encountered before, the

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item, the sound, must be abstracted from its context in the given concrete utterances, linked in the subject's mind with an item of thought, an idea, a concept, which is then related to other such items logically, before the new utterance can be produced.

This is the model I have in mind. The subject, insofar as thinking, abstracts, [29a] from the concrete situation it experiences, important (i.e. *meaningful, significant*)[30] features, which are put together as an idea, a concept (and distinguished from other such ideas), so that generalisation (a rule) can take place. The subject, when attempting to understand other subjects and communicate with them, seeks and furnishes suitable explanations of the other subjects' behaviour, by matching its own ideas/ abstractions with the ones of the others', altering its own if it has to. The subject, when confronted with communication structured through signs, insofar as it recognises the repeated use of signs A, B, C, etc. in various concrete situations, seeks and furnishes suitable explanations for these signs, tying certain significant features together under sign A, under concept A, and distinguishing them from other such features, under sign and concept B. Finally, these received concepts structure the subject's thought, and are applied in the subject's perceiving certain features of its concrete experience as significant, in the subject's realising that these features of its concrete experience are important/ meaningful. In this way the subject learns, by (re)creating and maintaining order in (its) language and reason (i.e. in (its) logic).

This is the way (or one of the ways) we learn language. I detect that this object is the same as that one, through detecting that my parents use the same word for both - they are both chairs; it doesn't

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matter that they are of different height for instance. And, I also detect that this utterance is the same as that one - both 'chair' - through detecting that they have the same meaning (in both cases *this* kind of object was asked for); it doesn't matter that they were uttered by different persons, that one voice was shrill and the other coarse, or things like loudness, intonation, urgency etc. Naturally, these detections of mine will need be confirmed, or disconfirmed subsequently by further experience, and most importantly in practice.

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So, we can understand the rules and standard lingual practice of each individual user of language to depend on concepts and be partly composed of them. These concepts are first of all abstractions from experience, depending on and including, the element of (perceived) importance/ meaning from the individual's point of view. At the same time, insofar as the individual, in the process of understanding and communicating with others, receives language from them and adjusts to their practice, they are categories for experience, on which the individual's perception of importance/ meaning in the concrete experience will depend.

To the extent that the individual wants to talk or has been talking to others, these concepts are linked to communicable signs. These correlations are the semantic rules of its language. Or of everybody's language (in the group). Because, we can pass from the individual to the group here too, in the same way that we did so for language in general. Part of the uniform rules of language are the concepts, and part of the standard practice is uniform thought. [30a]

These concepts, these abstractions of important, of meaningful features from experience, these categories providing how to

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experience what, are the things making up the reality in our minds we have been talking about. These are what conceptualism investigates, and these are what linguistic jurisprudence's types of social phenomena are.

The indeterminacy of concepts

But if at the end of the day the concepts are a matter of our common language, if language provides us with them, if they are part of its uniform rules, what do people disagree about, when they disagree on the concept of law? What is there for conceptualism to investigate?

A. Detour: More on the one uniform language

First of all, do not be tempted by this question to think that either concepts are provided by the uniform rules and practice of language, therefore there is nothing for conceptualism to investigate, or that concepts constitute language, therefore, to the extent that they diverge, there are different languages. I explain.

We spoke of uniform rules of language, standing on the fact that the rules are perceived by the speakers of the language to be uniform, in such a way, that if discrepancies were to occur, these would not be seen as a matter of different people speaking different languages, but rather as a matter of the diverging subject's making a mistake (or an innovation from which to learn). Here we need not, and will not, take any decision on which degree of difference is needed for a linguist to speak of a different language. Let us remind

ourselves, that, as uninterested observers, we could equally well decide to see, either merely lingual instances, which have to be different from one another, as different events, or, the act of communication among people, which is the same, for everybody at all times and places. In what we called uniform rules and standard lingual practice, many differences in fact, among the individuals or even for the same individual at different times, might one detect - like varying pitches of voice, different intonation and prosody, or uses of different words and characterisations, in front of the same event; a bathroom I call "dirty", my offended flatmate might call "reasonably clean (for a student flat)". Hence, uniform rules and uniform practice, means simply this: that the differences one could ordinarily perceive, are not overall significant from the perspective of the specific speakers and participants. Thus, there is one language, and the people disagree about which the rules of their language are. Since we understand each other to be speaking the same language - or, which is the same, to be able to communicate - we may disagree over what "law" means (especially in a phrase like "the judge must apply the law"), just like we might disagree over 'law''s spelling, or about standards of house-keeping.

Indeed, the above is true not only for words, but for things as well. And this is why. If we understand "language" in the traditional way, just as we do in our ordinary speech, i.e. as distinct from thought, it is true that concepts as such are a matter of thought (and reality) rather than language, which is a matter of statable signs (the "vehicle of thought"). Assuming then that language is less important than thought, and that therefore, as far as language is concerned, ease and certainty of communication is relatively more

important than fidelity to one's own intuitions (regardless of one's pride or humility, i.e. tendency to imitate or depart), there is greater allowance for our disagreeing over what law is (i.e. over the concept of law), than over 'law''s spelling. This however does not mean that our putting forth different concepts merely amounts to our thinking differently, in contrast to what the case is with language and its rules. On the contrary, just as we said earlier when we were speaking of language, actual difference may (be seen to) depend on someone's having made a mistake. Not only how one speaks or writes, but also what one thinks and what one says may be wrong. And where before we spoke of rules of language providing that 'lor' is not how to spell "law", here we shall speak of Logic, or Reason, providing that law is not morality, and hence the judge need not bother with the rule about turning the other cheek (even if there is no question on this rule's validity).

Are you still tempted to speak of merely different languages and ways of thinking or forms of life? What if two people were present at the same car accident, but disagreed over what happened? This would not make you say that in fact they were not present at the same accident, but different ones. And yet, what counts as the same event, is not any less dependent on one's definitions, than is what counts as the same language or logic.

B. A way in which concepts may (have to) differ, even though they are the same

So we return to our original assumption that the concepts are provided by our common language (logic) and are part of its uniform rules. We also return to our original question, what it is that

people disagree about when they disagree over a concept.

Concepts we said are abstractions of meaningful features from experience, and at the same time categories providing how to experience what. Let's take one aspect at a time.

A concept is an abstraction, from the concrete experience of the subject's, a recognition of certain characteristics. These characteristics then form the concept, the idea, which is detached from the concrete case, generalised and applied to other concrete cases, in such a way that all these cases are seen to be instances of the concept, and as such are named from it. Which features of the concrete case will be paid attention to and abstracted, this will decide and depend on what generalisation is taking place. I see for example a certain object, a chair, and I notice e. g. that it has four legs and a back and people use it to sit on; this is an abstraction from the concrete object, which happens to have a back decorated with flower patterns, is made of beech wood, has certain particular nicks and marks on its body, etc. From this abstraction I generalise and assimilate this particular object with other objects, which are all seen to be and named chairs, regardless of the fact that they are not in the same place, that not all of them have these flower patterns, or those marks and scratches. I even see them to be nothing but chairs, paying no attention to their specific constitution. And I contrast them to other objects, which I see to be and name tables, on account of certain differences like the one that at a table I sit to eat. On the other hand, a different abstraction and generalisation is also possible, which assimilates all the above objects as furniture, and contrasts them to another kind of objects, say people. Or, to give a less obvious abstraction, I could stick to the flower pattern

of our original chair, and assimilate all objects presenting this rococo style; I could even stick to the scratch on its front right leg, and create the concept of "artifact-with-scratch-on-front-right-leg", equally applicable to chairs, tables and buildings on pillars.

The above example must have made obvious what any good lawyer steeped in judge-made law will tell you, namely that for every given concrete event or specimen, you may have a range of levels and possibilities of abstraction, each one allowing for a different characterisation of it. Confronted in law with a decided case, a possible precedent, one may have a range of relevant or irrelevant features, a range of possibilities of abstraction, each one allowing for a different pronouncement on what the decided issues were, and amounting to a range of rules, each one entailing a different decision for the case to be resolved. Thus, from the much referred to in books on legal reasoning case of *Donoghue v. Stevenson*, we can draw a bewildering variety of descriptions of the facts, at various levels of generality: Did it matter, and is it relevant, that there was present in the bottle, a) a dead snail, b) a snail, c) an unpleasant foreign body, d) a foreign body, or e) an unexpected quality? Or perhaps the presence of f) a hairless recoiled object? Did it matter and is it relevant that the above presence was caused by the negligence of, a) the defendant who was a manufacturer whose goods are distributed to a wide and dispersed public by retailers, b) a manufacturer, c) a person working on the object for reward, d) a person working on the object, or e) someone dealing with the object? Or is it perhaps the negligence of f) a red-haired long-nosed individual?[31]

So just as there is not only one description of the facts of a

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decided case that one could possibly make, so is there not only one abstraction that one could make from a concrete experience. Yet possible abstractions are one thing, *meaningful* abstractions are another; possible characterisations are one thing, *sensible* characterisations are another. Although one might speak of *Donoghue v. Stevenson* as a case about dead snails in soft drinks, and although such characterisations and groupings of precedents are not entirely uncommon among common law lawyers, this case is not about snails; it is irrelevant whether it was a snail or a cockroach, dead or alive, in beer or tomato juice. How do I know this? Because these differences would make no difference *to me*, had I been in Mrs Donoghue's shoes; because such differences make no difference *to man*. In the same way, I am not interested in distinguishing between different rococo patterns in furniture; all I care is that I don't like them. And I have no reason to distinguish between pieces of furniture with scratches on this leg, and ones with marks on another; (I see no meaning in/ have no use for these distinctions - so far as I am no carpenter repairing furniture); whereas it makes some difference to me whether I can use a certain object and how.

This does not mean that noone might happen to pay attention to and abstract from such an unimportant feature; one might indeed happen to think of *Donoghue v. Stevenson* as a case about corpses in drinks. It means that we might help them come to see that this abstraction, this characterisation is unreasonable; that there is no sense in this naming.

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- And why does it matter what my interests are? Why does it matter what makes a difference to me?

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What else could matter more? I am the one making the abstractions and the generalisations; I am the subject making the concepts, as a part of my thought, in accordance with my purposes and/or condition; *for me, not for the objects.* I am the one distinguishing what is material from what is irrelevant, I am the one understanding certain things to have a meaning, and others to be of no significance.

The subject abstracts from the concrete experience and generalises in accordance with what it understands to be significant, what it understands to be relevant to its own self. The subject's concepts depend on and include an estimate of the subject's condition.

(So, of course, man is the measure of all things. (Πάντων χρημάτων μέτρον ἄνθρωπος).)

(The subject's condition as the *context*: Notice that this condition is naturally nothing other than the context, which is so often spoken of in modern theories of meaning[31a] as the creator of meaning. We too have said that there is no meaning independently of a context; now we can see why this must be so. Whether an abstraction is meaningful or not to the subject, whether a characterisation looks sensible or not, this is a matter of the underlying understanding of the subject's situation. The recognition of certain features in the concrete as significant, and their abstraction from others that are irrelevant, is a matter of what the subject is doing, what its place is, and therefore of the use it has for the generalisation being made. If I were a carpenter, different scratches on pieces of furniture might be quite significant; the same goes for the variety of rococo flower patterns, had I been studying them.)[32]

It is important however to realise that the subject's condition may include and even be determined by the subject's membership in a group, working for a common purpose, or generally being active together. This membership will often entail the abstraction from the

details of the specific individual, in exactly the way we spoke of above (it is irrelevant whether my hair is blonde; what matters is how strong I am, etc., and so what job I can do better in the building of the house). These details are generally abstracted from, in speech tending to a community. [32a] So what matters in the end, is not my own interests, or what makes a difference to me personally here and now. What matters is my nature as a human being, in accordance with the understanding of which nature I understand and construct myself, thus achieving harmony.

(Hence the ultimate question of philosophy's "what is a human being?"). [32b]

It is for this in the end that we have a common ground existing independently of any particular person's recognition. It is because of this that we can speak about reality, in the sense of independence from the theorist (though not necessarily in the sense of independence from our community). [33]

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But let's not rush. "The subject's concepts depend on and include an estimate of the subject's condition", we said. How then does the subject construct and realise its condition? How does the subject understand who he/she is and what he/she wants?

Through the concepts it has received from others in the process of learning language and accordingly understanding and forming itself.

Concepts are categories, received with language during the subject's interaction and communication with others. They are established abstractions and generalisations, allowing the subject to order its experience through their distinctions, allowing it that is,

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to perceive similarities and differences. They are ideas, structuring the subject's thought, providing the subject with an identity, a sense of who he/she is and of its place in the surrounding environment; this sense is the subject's perception of its condition, in accordance with which the subject understands what it wants. They are names, what the subject understands to be meaningful, what the subject understands to have a sense. They are the glasses, or rather the mind, through which the subject sees the world and itself in it.

Thus the fact that I see this object as a chair, the fact that I contrast it to tables or to people, is a matter of my having learnt what it is, while learning language. The fact that I see certain abstractions to make sense and certain others to be of no significance, is a matter of my having, in the same way, realised who I am and what makes a difference to me. The fact that I understand the presence of a dead snail in Mrs Donoghue's beer as contrasted to the presence of a live cockroach to be irrelevant, is a matter of my having realised who I am (a judge, not a biologist) and what I am doing (trying to resolve a case in court, not studying the decomposition of snails). And it is also a matter of the existence already in (what I understand to be) the law of certain rules, relating ideas like the ones of a judge and of resolving a case in court, or those of a purchaser, a contract, negligence etc., and so prescribing what to pay attention to, what makes a difference, and what is on the other hand, irrelevant.

Yet although many possible abstractions and characterisations are clearly senseless, there may remain a number of mutually incompatible ones - given the specific context and demand for action -, all, seemingly at least, sensible. Thus, to pick again from *Donoghue v.*

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Stevenson and its snail, it was not so clear whether we should speak of a case about the presence of an unpleasant foreign body in a chattel for human consumption, or the presence of an unexpected quality in some object.

This brings us to something any good Continental lawyer knows, namely that existing categories and the rules made of them, may afford divergent interpretations, when the subject is confronted with a concrete case, a concrete object to which the category is supposed either to apply or not. Thus, it was not apparently clear, when the United Kingdom's Race Relations Act 1968 prohibited discrimination, with regard to the disposal of housing accommodation, "on the grounds of colour, race, or ethnic or national origin", whether it prohibited discrimination on the grounds of legal nationality or not. It is not clear, assuming a rule "no vehicles in the park", whether an electrically propelled toy car is such a vehicle. [34]

It is not accidental that lawyers perceive such problems and speak of them as ones of unclarity in the pre-established rules, in the law, and especially in the language of the law. It is not accidental that we complain about the unclarity of language, when we find in front of a particular situation that our categories do not clearly distinguish what we have to. The subject, used as it is (or to the extent that it is so used) to have its surroundings, its world, orderly structured and its place and actions in it predetermined through the categories in its mind, feels it should have been provided by these categories, i.e. by (its) language, with a structure that can be applied here too, and tell it which difference is important and which one is irrelevant. Why? Because it has to distinguish here and now, and act. Thus the subject re-exam-

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ines its concepts, what the relevant names mean or must mean, so as to find and recreate the needed order.

Should we approve of this attitude? Shouldn't the subject just go on and act, in accordance with what it feels it should do? I don't know. We cannot however condemn this attitude as unreasonable right away, and this for two reasons, besides the fact that the subject cannot just ask itself what it wants to do, since it is precisely the categories in its mind that provide it with a sense of its place, what it wants, what it is supposed to want. First and foremost, insofar as all this concerns the way the subject must in the end act, this is an action, often a common action, that is supposed to be seen as the correct one, not just by the acting subject, but by an often indeterminate number of other subjects as well. Insofar as they see themselves as acting or supposed to be acting in accordance with common standards of rightness, it is to these standards that they have to turn. If I am a judge trying to solve a case, I am expected, and I expect myself, to do, not what I want or feel like doing, but what my and everybody else's idea of a judge requires, what the others expect of me, and what I would be expecting of them, had they been in my shoes: namely what the law says; I am just (hopefully temporarily) bewildered as to what it is the law says. Hence, I try to clarify it. Secondly, the subject has happened in the past to abstract and generalise in accordance with what seemed sensible at the time, but found later that it was not sensible in fact, through learning from the common practice and language (i.e. through growing and adjusting to its social environment). This may well happen again. But if the subject pays more attention to the existing categories, it may see the truth - in the past the established categories seemed

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again unclear, but then it understood them better. Previous experience of the community is bound to be wiser than the one individual. (Besides, what the subject wants, who the subject is, is this fixed and unshakeable? Certainly not. It changes and evolves with time, through the subject's learning. [35]) - In short, what is meaningful, what is reasonable, is commonly so; only what seems meaningful is confined to the individual's thought and decision. It is the common standards, the common truth, that have to be resorted to; they cannot be bypassed.

Regardless however of whether we shall approve of this attitude or not, regardless that is of whether we shall opt for careful thought and planning or for instinct and spontaneity, we can now resolve the paradox how it can be that concepts are a matter of the rules of language and yet people can disagree about them. In the same way that people can disagree about the meaning of a certain word in language, or the meaning of a legal rule, they can also disagree over reality and truth: They advance different interpretations of them. [36]

We can also understand what investigation into concepts is about. Just as the lawyers perceive the rules to be unclear, when these allow for more than one decision, but still assume that if they look more carefully - perhaps in what has not become explicit yet - they will find one right answer, so the philosopher speaks of a haziness of the concept and attempts to clarify what e.g. the law is; and, when they give up, they escape, saying, the lawyers that there isn't one right answer or that the rules are indeterminate, the philosopher that ordinary language is inherently vague and ambiguous or that meaning is not correspondence with reality. Just as the lawyer tries and makes elaborate and attentive distinctions in his speech, in such

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a way that past decisions be grouped under rules that re-establish the order and determinacy of the law while providing him and his fellow lawyers with justified solutions for the disputes in view, so the philosopher, when asking what is time or what is law, tries to order and clarify (his perception of) the world, so that he understand his place in it, himself, his role and needs as a human being, and teach his fellow human beings accordingly, what they can and what they must do with their knowledge skills and experience. And, just as the lawyer seeks the rule, so the philosopher looks for a definition.

We can also understand what disagreement and argument regarding concepts is about. It is about different orderings, different views and explanations of the world, different instructions as to what one should specifically do; just as the lawyers' dispute is about divergent views of what the law values more, divergent interpretations of what action the law requires of them. And yet the concepts are still a matter of a common language, a language that evolves with us and our debate. For ask yourself this: When we are confronted with many interpretations of the statute do we have many statutes? When we have many views on the bearing of a precedent do we have many precedents? You might say that we do, one in each speaker's mind, but neither would this clarify anything, nor would it help towards the solution sought. It would only make us see less of a group seeking a common direction, and more of individuals each going its own way. Indeed, one of the roles of our asking questions like what is the law, on the assumption that it is not different things in our different minds but one thing for all, is to emphasise our similarities as human beings (or as lawyers, or whatever: in the same

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condition contextually underlying our speech) and to (re)produce

agreement and community. [36a] You might work on an opposite assumption,

but not in a common enterprise.

Family resemblances and old fashioned conceptualism

I have spoken so much about concepts, so that, by substantiating

their existence and role in language, thought and (philosophical)

argument, we could come to realise the role and usefulness - or even

necessity from a certain point of view - of questions like "what is

the law?", understand what the conceptualist's work is about, what

conceptualism tries to do, and so retrieve "traditional" philosophy

from analytic philosophy's proscriptions - the idea finally being

that we be able to see linguistic jurisprudence positively as a

conceptualism itself. [37]

This does not mean that we shall disregard what differentiates

linguistic jurisprudence from traditional conceptualism, or that we

shall throw away ordinary language philosophy in toto. Nor does it

mean that we shall (have to) reject the description of the operation

of language, that is so central in it.

Indeed, it is a truth about language, that the uses of a word

that conform to its rules, need not all be alike in conforming to one

and the same definition. The things a word is made in language to

refer to, need not all share the same characteristics, which

characteristics we might put in a definition thus giving the answer

to what it is the word signifies, what the concept is that

corresponds to the word. The instances where a word applies, might be

linked together in various different ways, where certain features in the concrete experience are important for some instances, and certain others for other instances. And, we can have expansions of a word's applicability in cases where previously central denoted features do not obtain, extensions that is through metaphor. Thus, to take an example from Hart, we may have the "foot" of a person, and the "foot" of a mountain. [38] Or, to pick from a page in the dictionary at random, a "hero" can be "a man of distinguished bravery", "any illustrious person", "the principal male figure, or the one whose career is the thread of the story", "a man of superhuman powers, a demigod".

Ordinary language philosophy was very well aware of these properties of language. And in its days, a change was effected in the main paradigm of how expressions work. Whereas before the paradigm of a word's meaning was in terms of concepts, now we have the idea of an often indefinite range of possible applications of a word, characterised by a *family resemblance*. This is the situation, where there is a variety of features, some of which obtain in some applications and some others in other applications of the word, in such a way that some applications resemble each other more, some others less, and that there may even be applications at the distant ends of the range of applications, having nothing in common (except of course the applicability of the same word). [39]

There is a certain understanding of the idea of the family resemblance - probably the most fruitful one in fact - that we shall not be dealing with, as it is not even remotely entertained by linguistic jurisprudence. This understanding dispenses with denotations of the sign itself completely, in favour of a total dependence on the concrete lingual instance and its context, for a

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determination of the sign's meaning, which meaning is therefore (potentially) different from the one the sign has in any other concrete lingual instance; the idea is that there is a family resemblance among such instances, i.e. among the utterances of the sign. With this understanding we are not speaking then about types/ kinds of use or application of the sign, but about its specific use here and now. [40] Notice that in a sense, one cannot but accept this idea, in the same way that one has to agree that this thing here (say a chair) is not the same as that one over there (another chair). [41] The idea of the concept does not entail that there will not be any difference among instances; only that these "differences" make no difference, i.e. that they are unimportant, insignificant, irrelevant. Equally it does not mean that the complete - if you wish - meaning does not depend on the specific context, the pragmatics of the utterance and whatever; it is *an abstraction* from and of significance, and an explanation of it. But I am not saying this in order to make this understanding of family resemblance and the rejection of the denoted thing, i.e. the concept, sound trivial. For it may amount to the statement that everything is significant, that everything is relevant (related, relative), that one must look at the complete picture, that ultimately one should not judge. Hegel's instruction that we must look at the concrete and Lao Tzŭ's advice that we dispense with concepts, knowledge and judgements, are here relevant. [42] - Anyway, by the idea of family resemblance among the uses of a word, we shall understand here the idea that the same word may have a variety of types of use and accordingly a variety of denotations and corresponding concepts; we shall not be identifying the denotation with the lingual instance.

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Our acceptance now that the possible denotations of a word may present a family resemblance rather than conformity to one and the same concept, raises two questions. The first one is, how, if at all, this idea can be accommodated in the descriptive theory of language and thought that I introduced as a part of the explanation of what a concept is and what conceptualism tries to do. We shall deal with this question elsewhere, as this is a rather complex issue, elaboration on which is of little relevance to our main concerns. (Let's just notice here that the adoption of more than one possible denotations per sign, cannot mean that we are no longer justified in assuming the existence of concepts, from a descriptive point of view. After all, a concept is nothing other than a category, a perception, an idea; so to say that it does not exist, would amount to saying that thought at least does not exist, that there are no thinking subjects. We do not *always* think before we act or speak, but sometimes we do.) The second question is what difference this acceptance makes to the "traditional" philosophical attitude we have retrieved. And the answer here is simple: None whatsoever.

We have an item of speech. Either it will correspond in all its possible uses with one and the same concept, i.e. one and the same idea, or it will not. (Obviously, sameness amounts to the differences being in-significant, to the differences making no difference). If the subject sees it not to so correspond in all its uses, it will distinguish the uses that correspond to one concept from the uses that correspond to another one. After all, each use cannot but be identical with itself. If needed, the subject will also use definitions, stipulations, or whatever other explanatory comments, in the process of expressing itself, of saying with words what it has to

say.

In the same way, the philosopher is concerned with the things, not with the words. So it is the things that must be expressed; not the signs that need denote one and only thing in abstract each. If a sign, an item of speech can be used in different ways, if it may on other occasions convey different meanings too, this might at worst entail that our philosopher might have to be more careful in his attempts at communication. It is of no consequence to what he has to say. Both the foot of a human being and the foot of the mountain are 'foots'. Granted that the foot of a human being is the thing I want to talk about, and not the foot of a mountain, the other uses of 'foot' in the English language are at worst a slight annoyance. At any rate, the uses of 'foot' in the English language are no concern of mine.

Our old fashioned conceptualist is not trying to describe language. Nor is he learning a foreign language, thus having problems with distinguishing between words and their uses. Instead, with one eye towards the established practice, language, categories, and another towards his own experience and thought, our philosopher seeks to perceive what exactly the things are in fact, i.e. which features are meaningful, which abstractions order thought and the world best, in view of man's place, needs, aspirations.

The traditional conceptualist seeks definitions. Yet these are not definitions of words. They are definitions of things. Not what 'law' in the English language (or the lawyers' language if you prefer) means, but what law is, this is what is asked. It is irrelevant whether a word's entire function in language might be impossible to encompass in a definition. What is looked for is the

abstraction one should make, the category one should use, the appropriate understanding of the instance and generalisation from it. The definition is needed in order to provide precisely which features are significant. The definition is needed not in teaching a foreign language, but in teaching one to reason. [42a]

The definition sought, will have to be clear, precise and strict - by definition. Otherwise it will be unsuccessful in *fixing the limits* that distinguish one kind of thing from another, it will be unsuccessful in *determining* what e.g. law is. [43] Lack of clarity and precision will mean that one has not yet clarified the concept, that one does not yet know what matters, what is significant. It will mean that the subject is still (to some extent) confused, that the subject does not know who he or she is and what he or she wants. (Notice that a definition need not then take the form of abstract terms in a proposition. The definition sought is the determination of the (significance of the) thing, which can be made in many ways, even through examples.)[44, 44a]

It should be obvious then by now that our traditional philosopher, once he believes he has seen the truth, will have a prescriptive attitude towards people's practice. Actual speech and thought (λόγος) of others - as well as previous speech of his own probably - if incompatible with what he sees to be the case, will be errors. Even hitherto standard and established usage. After all, people do happen to make senseless abstractions and generalisations, people do happen to talk nonsense. (The philosopher himself has happened to do so in the past, before learning better. Perhaps what he says now is also incorrect. Then, let whomever knows better stand up and speak.) As regards actual common practice, the philosopher

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tries to improve it, by teaching the others.

However, the philosopher is concerned with the way people think, as well as with what people say. He is not primarily concerned with rearranging language, i. e. the words and their uses. He distinguishes between things and uses words to do so. If these words are otherwise often used without such discrimination, this is unfortunate to the extent that these distinctions are needed and that their lack is a sign of confusion - but generally this aspect is not important. Still, as a result of the philosopher's seeing and distinguishing clearly, his standard lingual practice, his language, will probably change - for the better. The same might happen to everybody's standard lingual practice, to everybody's language, as a result of his saying what he has to say. Philosophy does rearrange language too, just as every activity involving thought and communication does, without that is its being directly concerned with it. [45, 45a]

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Linguistic jurisprudence is a philosophy (rather than a sociology) and a conceptualism (rather than linguistics). Thus it too, seeks to perceive what exactly the law, morality, obligation etc. are in fact, not just what the words mean in language (or in some group's social reality). It too will adopt a prescriptive attitude once it has reached its conclusions, and so maintain that law is distinct from morality despite the fact that others happen to make contrary assertions. However, with this conceptualism, there is a considerable departure from the basic understandings of philosophy that we have depicted. Linguistic jurisprudence understands the fact that a word may not always conform to one and the same definition in its actual uses, to be of some relevance. It does not apparently look

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for a definition - for a strict one at any rate. It does not try to control language, to make it express the things it should; it tries to describe it, to be taught of the things by it. For linguistic jurisprudence, what the words mean in language is identical to what the corresponding things are in fact.

We shall now go on to see what this divergence means.

The paradoxes of linguistic jurisprudence

A. The limits of the definition

> ...The supposition that a general expression can be
> defined in this way rests on the tacit assumption that all
> the instances of what is to be defined... have common
> characteristics which are signified by the expression
> defined. [46]

For linguistic jurisprudence, this "tacit assumption" is unreasonable. For linguistic jurisprudence, it is possible that all the instances of what is to be defined, do not have common characteristics signified by the relevant expression. All the instances of what is to be defined as e.g. law, and thus distinguished from e.g. morality, need not have common characteristics, such as are signified by the term 'law'.

Does this make sense? No. It is of course true that it fits with family resemblance as a possible property of the uses of lingual expressions. An expression may have a variety of uses that display no common characteristics. Yet we saw, that from the viewpoint of what conceptualism tries to do, uses of lingual expressions, and their family resemblance rather than conformity to a definition, are

irrelevant. The philosopher does not really care to have all these uses fit in his definition. The philosopher will discover the characteristics that are significant (by examining both language, i.e. the pre-established categories, and his own perceptions of significance). If the expression does not appear to signify them, and if it also appears to signify other insignificant characteristics too, the philosopher will either use another expression, or make this one signify what it should, i.e. what in the given context it is needed to signify.

- But according to linguistic jurisprudence, all the instances of what is to be defined, need not have common characteristics - regardless of the expression being used. [47]

But this makes even less sense. Any given instances can be seen to be the same; they can be seen to be different too. It all depends on whether the characteristics that they share (e.g. all events took place in the same millenium)[48] will be seen to be significant or not. If the shared characteristics are significant - given the context, our condition - the instances will be grouped under the same category. Otherwise they will not; they will be distinguished, i.e. placed in different groups under different generalisations. [49] What matters are not the instances. We are not trying to describe *them*. We can see them; they are right in front of us. What matters is the characteristics and their significance: the abstractions, the concepts. After all, we *are* concerned with the *concept* of law, aren't we? Not with any specific collection of statutes.

Of course, the collection of instances linguistic jurisprudence is concerned with, is provided by ordinary language. Linguistic jurisprudence takes an expression and notices that it applies to a

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variety of instances (or, more accurately, types of instances). These instances are then seen not to contain any common set of significant characteristics. And linguistic jurisprudence assumes that it should not try to alter language, but be taught by it. So it says that the instances of what is to be defined share no common characteristics.

We cannot disapprove of this humble attitude towards established common language. We have seen that the subject is typically taught through language. It is through the already established categories and generalisations that the subject perceives similarities and differences, understands what is significant, what its condition and identity is. Yet what this means is that the subject, when faced with this collection of instances that is provided by the application of the same expression for all of them, may come to understand that they are the same, that the characteristics they have in common are in fact significant. That the instances may seem at first sight not to contain any common significant characteristics, does not mean that there aren't any. Perhaps, if one looked more carefully, one would find them. Thus the philosopher can indeed let language teach him, rather than try to control it. Nevertheless, the fact does not change that in the end, the instances will either share the same significant characteristics and be ones of the same concept, or they will not, and be instances of different concepts. The only situation where this is not necessarily seen to obtain, is when one has not yet examined and clarified one's thought and categories, i.e. when one has not done what the philosopher is supposed to be doing.

Nevertheless, linguistic jurisprudence has an explanation for this paradox. It is another paradox, that of the central and the borderline cases. We have finally arrived to what was perhaps the

most important insight of ordinary language philosophy, that is, the open texture.

B. The open texture

Linguistic jurisprudence does not really believe in the family resemblance as the paradigm of how language works, any more than it does in the strict definition. It prefers a paradigm combining somewhat the two: There *will* normally be a definition, corresponding to an abstraction, a concept. This can fully depict only some of the relevant instances though; the central ones. For there will also be instances only partly fitting the definition, only partly corresponding to the concept. There will also be instances on the borders of our categories; the borderline cases. Thus, there are instances in between the ones that our categories classify, displaying some of the properties that are significant for classification under one category, and some of the ones that are relevant under another category. It is because of this that all the instances of what is to be defined do not share exactly the same significant characteristics.

Again, we may ask: If we must classify these instances that do not fit our established definitions too, can we not create new categories? Surely we can make new abstractions of significance. All we have to do is look at these instances, rather than the established categories in ordinary language, abstract the characteristics that are significant, and place the instances in their own genus.

Well, we could of course, except there are also characteristics that cannot easily be said to be either relevant or irrelevant, but are rather of some importance, and some unimportance. Because our

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categories that provide for what is significant, i.e. what is to be abstracted from the concrete case, do not distinguish between the characteristics the way we find them in the concrete cases.

- What does this mean? You have got in a vicious circle: Our perception is unclear and does not allow for a complete classification of the instances we are confronted with, because our categories that provide for what is significant do not classify them; and our categories do not classify them, because our perception does not allow for the instances' classification. But obviously this must change. And surely it is for the provision of further clarity, and so *change* of our categories and perception where needed, that we enter into philosophical reflection. If all were clear already, we would not be reflecting over it. You speak of degrees of importance and unimportance. Well, at the end of the day, isn't precisely this the issue over which we must decide? Who we are, what we want, and so what degree of importance of the characteristics is needed in order for them to be relevant?

- This means that we have not decided over them yet; probably because we have had no need for it so far. And we do not know how to. For we cannot exactly tell, who we are and what we want. (And because not only are we, but we become too; we grow). We are ambivalent, we have doubts. (We change). Our world is not in perfect order. There is some disorder too. (And change). It is for this that our ordinary language, that is ordinary logic or common sense, has to be unclear and imprecise to some extent, is bound to display family resemblances too and not only conformity to strict definitions. Only artificial languages dispense with this phenomenon, by eliminating, not our doubts, but our perception of them. Only the logic of the fanatic's

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is clear and strict, because the fanatic,[49a] has no doubts; and doesn't allow himself to change.

Hence our concepts will always be - to some extent and some more so than others - open textured. But this is not necessarily a defect. Because the open texture of our language matches the change and unpredictability of the world. It matches our restricted knowledge of it. We cannot be aware of every possibility in advance. We may be surprised. So our allowing for some ambivalence and disorder, allows for some applicability of our concepts, of our language, in unpredicted circumstances. The introduction of some degree of open texture in the theorist's language, amounts to the introduction of some flexibility in them. And the theory of the open texture of language is an allowance for the idea and possibility that everything is in a flux, that everything flees.

In the end, we cannot reject this description of our established language and concepts. We must in fact acknowledge linguistic jurisprudence's wisdom, in the understanding of its own relativity. From the point of view of "old fashioned" conceptualism, we can only restate the contradiction.

C. The contradiction, its role and its usefulness

If investigation into our concepts is about clarifying our perception and knowledge of who we are, what we want to be, and finally what is reasonable and what we must do. If the definition sought, in being a distinction between kinds of things, is also an interpretation of what law is, and therefore of what it is the jurist is expected to pronounce, or what legal dogmatics is about. Then, shall we not say that the theory of the open texture, interesting and

illuminating though it be, and also correct as a description of the language of our community, is nevertheless irrelevant to the conceptualist's work? That the conceptualist is not just relating what we know anyway our words happen to mean, but what, according to him, we must understand them to mean (in view of our common activities and decisions)?

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Okay, the world changes and it may surprise us. Okay, we have doubts. Is then surprise something bad, to be avoided? Is it good to have our doubts - perhaps also our (potential) disagreement - hidden behind fuzzy concepts and hazy language? And if the circumstances should change, why have the same old concepts applied in the new circumstances, which they were not made for? Are we not supposed to reflect on them anew instead, and evolve our language, in consciousness of our choices, of what we understand our condition to be? (So, in general, should we not each time try to render our concepts as strict and unambiguous as possible? Should we not aspire to an ideal language, rather than fall back on the haziness of ordinary language and be content with it?)

The answer here depends on how much need we have for specific reflection on the new conditions and for consciousness of our choices regarding them. We may not always have the time needed for reflection before action. We may not always have the patience needed to listen to the philosopher who has provided the strict definitions, and related clarification, of an already past condition. The concepts *will* be applied to the new circumstances they were not made for, because these are the concepts we've got, when the new circumstances come about.

(So, in what regards the issue of the ideal language, and its lack of haziness, well, you can't be serious. Why learn a language I shall need to change tomorrow?[50] Of course, haziness and ambiguity can be a defect, and depending on how much the clarity is needed in the specific context or enterprise, how much time we have, what our general predisposition towards careful thought and planning before action is, and how much effort we are willing to undertake in view of what it is about, we may try and approach higher standards of clarity. So we shall have more clarity the more we find the underlying issues to be e. g. important, limited and stable, and the more we who speak are fond of careful thought before or rather than action. Indeed, this is I think a property of language as it stands, 'triangle' for example displaying less haziness than 'art', at the moment.)

As for our doubts and disagreement now, isn't it time somebody paid attention to the fact that there is also something we believe in, that there is also something we agree on, still?

This brings us to our social condition in our modern times, as the most interesting explanation behind the paradoxes and the contradiction of the conceptualism of linguistic jurisprudence. Indeed, behind the introduction of the idea of the open texture in conceptualism and the related descriptive attitude towards established language, behind the abandonment of the ideal of the strict definition, lies the present condition of our world. Because today, the world is changing too fast, for us to have the time to reflect on our condition; too fast for us to aspire to have our (perception of) reality and our actions orderly structured and predetermined. Because today, the world is *perceived* to change too

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fast, and we do not have the patience for it; we do not have the patience to listen to the theorist, consider his proposals for our common understandings and advance our own. And how could we listen anyway? There are much too many theorists, with much too many and (apparently) incompatible viewpoints, speaking past each other. Because today, we are too diverse and too apt to perceive our difference and to disagree; we are too reluctant to learn from each other and alter our personal concepts, our personal languages, for them to come to match each other closely.

Thus, the abandonment of the search for the strict definition, corresponds to an emphasis on agreement and its reproduction. It tailors the necessity of accommodation to some extent, rather than rejection of contradictory viewpoints. Because the speaker cannot hope to influence and alter those who hold them, as his voice is lost in the noise - and is part of it. The descriptive attitude towards language and the identity of the ordinary meanings with the things sought, is, besides its reasonableness and relative advisability, a matter of the theorist's having to stand on language now, and say "but we do have a common language; we *can* communicate". Otherwise his saying (even to himself) that "we can agree and move on to do what is right", will not sound convincing.

I am not saying all this, in order to scorn this modern conceptualism though. For, I don't know, but perhaps we've had too much disagreement, too much diversity, too much of the individual asserting its difference on the one hand, and pulling for the others to conform with it on the other, for the philosopher to do it too. Perhaps we've had too much contempt for obedience and too much praise for originality, for common enterprises, i.e. for politics, to have

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any remaining sense of purpose and direction. Too much of the individual thinker perceiving, abstracting and generalising for himself, and too little of his ruminating the established and adjusting himself and his concepts to the others around him. Too much of the individual being, and too little of it becoming.

At any rate, the attitude of linguistic jurisprudence, precisely because of its paradoxes, is wise. Because this way, instead of forcing the reader to exchange his language and conform with yours — which he will hardly do; you cannot control him today, if you ever could — you let him evolve his own language, the way yours has.

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These paradoxes are missing from old fashioned conceptualism. The old fashioned conceptualist is indeed (by definition) expected to try to provide strict definitions and classifications, that leave nothing (significant) unaccounted for, in penumbrae or borderlines.[50a] The old fashioned conceptualist gives interpretations of what our reality is, bearing on what action is therefore sensible. If, besides intelligence, he also has the wisdom to have doubts (to see that he knows not), he says so;[50b] he doesn't say that language must be unclear.

Yet the old fashioned conceptualist had the luxury of the assumption of a group, where each one speaks and expects, if one should be mistaken, to be corrected. The old fashioned conceptualist spoke on the assumption "if what I am saying is incorrect, let whomever knows better stand up and speak". This is a luxury linguistic jurisprudence cannot afford, because already these assumptions are utopian. For, where do you think you are? Walking the streets of Athens next to Socrates? Today in New York, nobody is

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going to reply, and if somebody tries to, they'll only be imagining they heard you.

The old fashioned conceptualist did not have the burden of having to reassert the existing agreement all the time. The existence of agreement and common understandings was too obvious, too evident, for people to even notice it, let alone threaten it. Hence he could offer strict definitions and interpretations, of what he thought is correct, regarding the borderline cases, without thereby contradicting - or rather being seen to contradict - his assertion that we agree, that things are what they are because we are the same. He had never had to make this assertion in the first place. By contrast, ordinary language philosophy is, when it starts, confronted with the opposite assumption: that we are different, and so our judgements diverge; things do not look the same, if they ever were. And so, before it can give its definitions and interpretations, it has to convince, itself first of all, that they correspond to everybody's ideas, that they fit everybody's perceptions. It has to rediscover and assert our agreement. Yet we assert our disagreement too often for ordinary language philosophy to be able to put it in relief. It has to accommodate it within our agreement, to hide it in the latter's penumbra. So, from the viewpoint of the traditional conceptualist enterprise, the picture will have to look somewhat hazy in the end, and shallow; because from this viewpoint it was precisely the penumbra that needed to be carefully lit, and it was the borderlines that should be sharp and in focus, for the accuracy of the picture to be easy to check and for the resulting design to bring an improvement when put to use in the organisation of our community and common enterprises. But now that the very existence of our

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community is in doubt, now that its degree is so low and our enterprises are full of organisers talking past each other, the question is not so much one of improvement of organisation and achievement of greater order, but rather one of maintenance and preservation of their remains.

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So finally, the open texture is not that irrelevant to the work of this conceptualist here. Because, unlike traditional conceptualism perhaps, linguistic jurisprudence is much more concerned to relate what we (should) already know our words happen to mean. And the accusation that linguistic jurisprudence hides our disagreement behind hazy language is not very well placed. Because, as our common language is not so obvious anymore, linguistic jurisprudence is rather more involved in (re)establishing and clarifying that background of rules, that we (may) use in forming and discussing our disagreements too, and less concerned with offering complete and consistent views regarding the latter.

A summary comparison of linguistic jurisprudence with traditional conceptualism

One difference between linguistic jurisprudence and traditional conceptualism is first of all, that traditional conceptualism was clearer in its assumptions and position. Traditional conceptualism thought that each word refers to one thing, and did not speak of uses of language or family resemblances and the rest. In fact, it spoke very little of language; it spoke right away of concepts (or *ideas*)

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instead. If a certain concept was unclear, traditional conceptualism did not go into the actual uses in language (except of course in illustration), which were assumed to be trivial; because if a certain use were to diverge from the concept, the utterance was defective, illogical, unclear, i.e. to be corrected (unless of course there was no reason to bother).

Linguistic jurisprudence on the contrary, as ordinary language philosophy that it is, maintains both the conceptualist assumptions (thus law is one thing, morality is another, regardless of each person's choices and volition), and a non-rational view of language with attention to uses and maintenance of inconsistencies between them, as this is seen in the idea of the family resemblance. There is a certain incongruity between the two, which is accommodated thanks to the idea of the open texture. This last idea allows for some change in language and ways of thinking, because of which change there is a constant gap between the logic conceptualism aspires to on the one hand, and actual practice and ways of thinking on the other.

Insofar as the idea of conceptualist reflection is to effect a service in actual ways of thinking and alter them if found to be defective, i.e. unclear and illogical, insofar as the idea is to improve common language and thought towards the ideal of logic and limpid clarity, and so to improve ourselves towards self-consciousness, awareness and order (i.e. towards knowledge of what we are saying and doing), traditional conceptualism is better. The maintenance of borderline cases and the attention to the specific uses in language as paradigms to be followed, even if they seem contradictory, has the effect of retaining a measure of irrationality and lack of awareness. And insofar as the philosopher is expected to

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deliver an interpretation towards a greater order of our common activities, talking of borderline cases and open textured concepts, is of little relevance.

On the other hand, linguistic jurisprudence's departure from the understandings of traditional conceptualism, brings with it a greater flexibility. Also a certain wisdom, in that this conceptualist here does not overlook his own limitations and his small size, in front of history and actuality. Thus, his more modest thought and conclusions will be easier communicated and accepted. And, they will keep longer and have deeper effects, given the same social conditions.

It is interesting to notice that the traditional conceptualist is more at home in older times, with smaller communities, where each subject can respond to a greater percentage of the whole, and with a slower pace of change, where it will take longer before a conceptualist service of language will be dated. But I won't rush to say that linguistic jurisprudence is perfectly suited for our times either. Its results are indeed more flexible and persistent, and so more difficult to overturn, because they are less prone to look, not only dated, but also hostile. This endurance however, is only in principle certain. From the point of view of today's actual social facts, I suspect that nothing can really surpass the obstacle of cultural fragmentation, or survive our age's frenetic change.

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Intermission: Retargetting.

It has been a long and difficult discussion. At the end of it, we find that we have given a decent epistemological ground, to the undertaking of linguistic jurisprudence, and a meaning to its research. We have now substantiated the idea Part 3 is based on, that linguistic jurisprudence's distinctions and results are not descriptions of how people happen to think, but indications as to how we must reason. Paradoxes and the rejection of strict definitions apart, we have given a sense to the search for what law (or morality or whatever) is, what it is in fact not words, for we are no longer afraid of using words like 'fact', 'truth', 'reality', when speaking of concepts.

A part of our work here is thus ended; a part which began with our passing from "social reality" to "reality", and which was meant precisely to resolve the problems this passing created. We have now completely clarified - I hope - what we said in the introduction on how we must understand The Concept of Law, as well as our departure from our understanding of it in Part 2. And there is nothing looking fishy anymore about the theorist's relying on presupposed rules, which are in his mind, yet do not thereby preclude the possibility of objectivity in his pronouncement that "law is X, not Y".

We shall now forget our recent quasi-sociological analyses, as well as the idea that linguistic jurisprudence is not searching for a strict definition. We shall especially forget the conclusion, that linguistic jurisprudence is more concerned with relating and reproducing our agreement, and not so much with offering complete and consistent views regarding the ambiguous and problematic issues.

[The purpose of <u>The Concept of Law</u>] is to advance legal theory by providing... a better understanding of the resemblances and differences between law, coercion and morality, as types of social phenomena. [51]

We are now clear on what we are looking for. Our concept of law will be an ideal type, an abstraction from the concrete of what is important and significant, not according to some observed social group, but according to us, and for us to use as a category in our organisation of thought and perception. [51a]

But how do we go about it? How do we determine, how do we see that concept X is the correct one? How do we produce it? By looking in ordinary language we are told. There can the resemblances and differences that we want to understand be found. We should not try to control and correct it; we should not try to eliminate its ambiguities. We should use them instead, to help us see more clearly. Thus linguistic jurisprudence is not very keen on the theorist's distinguishing and naming things in accordance with his perception. The theorist will see more clearly, if instead he adjusts his perception to the names and the distinctions already before him.

These ideas are neither obvious, nor without problems. It is to these problems we shall now turn, for an examination and assessment of the method of linguistic jurisprudence.

B. THE METHOD OF THE ATTENTION
TO LANGUAGE AND ITS PROBLEMS

The search into language and the distrust of abstraction

One of these problems is linguistic jurisprudence's attention to details of language, and its concomitant partiality to picturing diversity rather than unity. The discussion thereof, will help us form a clearer view of the method of linguistic jurisprudence, and of what it means to search in the language to find our concepts.

Let's see the problem in detail. We have already seen, that, in a certain sense, the idea that we may look into our language and so understand the similarities and differences between things, is obviously true. Everyone receives concepts and ways of thinking from organised communication, from pre-established language, in the process of learning. The subject, when faced with various lingual instances it perceives to contain the same unit, abstracts from them and comes to understand the unit to denote a concept (and so can then use the unit in new instances). Hence, in applying the idea that we must search into language in order to find what law is, we can look into the apparently diverse cases where the given unit 'law' (or 'rule' - or 'as a rule') is typically encountered, and proceed to try to understand it, i.e. to generalise from these cases, to form a concept that explain the various uses, and a theory that unify them.

Yet, linguistic jurisprudence follows precisely the inverse procedure. It does not strive towards further abstraction,

generalisation and unification, starting from apparently diverse cases. On the contrary, it looks for differences and distinctions behind the apparent uniformity of the same lingual unit. Thus it starts with 'rule' for instance, and then goes on to assert that there are two distinct concepts behind it, not one - which concepts it correlates to lingual units that are larger than the original, namely 'as a rule' and 'a rule requiring certain conduct'. Indeed, we are told that one should be suspicious of small one-word units, and prefer looking at bigger ones, which are less prone to mislead(52) We are told in ordinary language philosophy to avoid abstract meanings (even sometimes that there are no such meanings) and keep to the concrete use. Yet it is precisely an abstraction (a concept) we are after.

Furthermore, linguistic jurisprudence does not stick to the one crucial term. Hardly ever does it take instances of it into account. If its method were simply to abstract from lingual instances containing the same unit, we should expect lists of such instances and abstractions, followed by propositions of the type "abstraction A is incorrect, because inapplicable to instance q". But nothing like that happens. Instead, it looks at other words. In order to understand 'command' it looks at 'order', 'request', etc.; in order to understand 'rule', it looks at 'standard', 'principle' etc.(53) It constantly points to differences between similar words and ideas. It looks as if the point were to diversify as much as possible; not to unify at all.

So we can easily see that the search into language means something other than what one does when merely learning language. The instruction to look into language, has the meaning to look into the

richness and diversity of language.

We do not look into language just for the sake of abstracting. Language is not used as a pool of permissible generalisations. After all, people do not use language only to generalise. We do not always speak in the manner of science, e. g. of "bodies" related to each other by "forces". We use language to describe the concrete too, to convey the impression of a specific historical instance: Instead of saying that "every body is subjected to the force of gravity", I might be speaking of my son who is falling from the roof! We also speak in the manner of literature, viz. of the specific case, without equating it with any other case. There is an infinity of degrees of abstraction or detail, and language possesses an immense richness to afford our coping with either. Besides its general terms that abstract more and can be more widely applied, there are special terms too, that transmit greater detail and are applicable to more limited ranges of cases, regarding which however they convey greater information. Still, this does not mean that the more specific terms do not denote concepts, that they are not abstractions. On the contrary, "my son" in the above description for instance is an abstraction, for it is equally applicable whether he cut his nails before starting to fall or not. Language as such is abstraction,[53] thought as such, perception as such is abstraction. *Abstraction of significance. Abstraction of what matters.* Which brings us to the point that not only the great all-encompassing concepts deserve our attention, but also the smaller ones. And that when we are asking big questions, like "what is law?", when, that is, we are trying to define great concepts, it pays to look into the smaller ones first, to see there what is significant, so as not to forget it in our more

aloof definition. Because significance can be lost in abstraction, [54] just as it may be lost in details and trivialities. [55]

For the same reason, it may be useful to look into various similar concepts, to see what distinguishes them from the one we are mainly concerned with and are trying to define, so as to see what is most peculiar and characteristic of the latter, and so what is most important about it. Significance is a matter of contrast. It is a matter of what makes a certain type of thing different from another. So it is easier to see the precise meaning of a certain term, when it is compared with various other similar terms. The corresponding ideas will then look clearer.

The meaning of the search into language is to look into language in order to take into account the various aspects of significance that we might overlook if we kept our eyes on the general concept only. It is to try to perceive the specific conditions and situations, the context, that create significance. So, of course, we must pay attention to the concrete uses of the words. And naturally, in our doing this, both aspects of the model of thought that we presented in the analysis of what a concept is, are included. We do not just look at the established categories that provide us with a sense of what matters, but abstract also and understand them in accordance with our own perception of it.

The reason behind the instruction for a search into language, is that perception of significance will be easier for the theorist who looks into his ordinary practice and reactions to varieties of situations (which practice and reactions is what language here amounts to in the end). Because this practice and these reactions are wider and more complex, than what his perception affords when he is

looking exclusively at his big abstraction.

(- But isn't the very meaning of abstraction to discard specifics? To forget the details of the concrete?

Yes. However, an abstraction is the right one, only if it can be applied to each and every concrete case it purports to cover, and only if it is enlightening with respect to these cases, as depicting what is important in them. Thus everything of relevance in the concrete cases, must be covered in the generalisation. Or else, the latter is wrong. To say that something is to be abstracted from, is to say that it is irrelevant, i.e. insignificant. Yet how can you notice that something is significant, if you do not see it? To put it in other words. The definition we are looking for, is supposed to include, what is important and so groups certain cases together despite their unimportant differences. This is at the same time what makes a difference, and so distinguishes these cases from other cases that are grouped in the same way. But how can we then see what is important if we do not look at the cases?

And how can we see that something is insignificant, if we keep our eyes on it? For truly, if the theorist does not look around at the variety of cases, that the as yet undefined and so vague idea purports to (or should) cover, chances are he will just furnish himself with one or two paradigmatic cases (the current paradigms of the idea's application), and generalise what at first sight appears striking about them. (To illustrate. There once was a very bright boy, who, upon the visit of his uncle, the mathematician, at home, was asked what he had learnt at school a triangle to be. The boy did not remember much at that time, but he did remember a picture on the blackboard, of a closed figure with three equal lines. So he answered

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right away (cause bright boys are ready to answer): "A triangle is a figure in Geometry with three equal lines".) Only after we have looked at many instances, and so put the most obvious ones, those that first come to mind, in their proper perspective, does it make sense to proceed with generalising. Only after we have finished our work, only after we have reached the correct definition (i.e. determination of the until then vague idea), can we dispense with the details of the concrete cases (and thereafter treat these cases as mere instances, unimportant in themselves and only useful as examples, viz. useful in exemplifying and illustrating, for the purposes of teaching, the concepts and distinctions we have created/discovered).)

This paradox then is resolved. It is precisely in order to be more exact and to provide a most accurate and strict definition, that we must look at the concrete cases and applications that provide the context for our seeing the significance of what we want to define. It is precisely when we are trying to form a concept that unifies the apparently diverse cases of application of the same lingual unit, that we must search not only into those typical lingual instances that carry the crucial term, but also into such instances of other similar and/or more specific terms, that will afford us an insight into what is important at the level and type of abstraction we are interested in. After all, it is obvious that when trying to define the law, we should look into ideas like duty, obligation, authority, wrong, justice, judge, morality, as well. Because the concept of law will need fit with, and probably explain in part, these other ideas too.

The search into language does not have the meaning of a check,

whether language possesses a way of unifying two cases, or a way of distinguishing them. (In fact, it will generally possess both). We look into language in order to see the significance of either unifying or distinguishing. We look into language in order to see when it makes sense to unify and when to distinguish.

The method of linguistic jurisprudence is not just to look for diversity behind the apparent uniformity. Linguistic jurisprudence looks in the diversity, before it can perceive the uniformity. It most certainly searches for a unification. But it is careful not to hurry into the latter, and so to manage to achieve greater clarity and perception through it; not less. [56]

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As ordinary language philosophy, linguistic jurisprudence has been accused of an obsession with detail and distinctions and of an obstinate refusal to abstract. [57] This accusation is not very correct, if addressed to the method that we analysed above. Although it is not entirely unjustified either, even in this respect. Because it is a defect of this method that one may get lost in the detail and become unable to notice the similarities. Especially the practice of bringing in many similar terms, like 'command' and 'order' for example, and pointing to what is peculiar to each, does not help abstraction and unification. So significance may be lost in trivialities here. But it does not have to. In fact, the problem is more a matter of the times and fashion on the one hand, and the speaker's own competence to apply the method successfully on the other. (After all, there is only one method in the end: the move from the most concrete to the most abstract and vice versa).

It just so happens that historically, there was in ordinary

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language philosophy an actual tendency to diversification rather than unification, in comparison to more traditional philosophy. [57a] This has a series of explanations. One explanation is of course that the English language and corresponding style and tradition of education, does not help one abstract and unify, but breeds a certain tendency towards useless details and trivialities. [58] Another one is the historical contrast with ideal language philosophy, which tended to accuse ordinary language of mixing different cases; [59] ordinary language philosophy was trying to show that ordinary language can distinguish as much as any notation, and even more. A third one finally is the breakdown of agreement and its general perception: By emphasizing diversity rather than uniformity, the provocative appearance of flattening abstraction and generalisation is avoided; diversity (plurality) and complexity is asserted too often in our times, to be passed over as insignificant.

The search into ordinary language
and my favourite understanding of linguistic jurisprudence

Yet why should we look into language at all? Why should we trust the words to show us what is significant? Why not look directly at the things?

Naturally, the expectation to find the concept we seek, by looking in language, does not refer to the words in the language, meaning its morphemes. By "language" here is meant received ways of thinking, received perceptions and judgements of what matters. Whereas to "look directly at the things" would mean to trust one's

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own perceptions and to disregard received judgements. Furthermore, by ordinary language is meant ordinary logic, speech, ways of thinking, i.e. not those of the scholars in their work.

We keep speaking of "language", in accordance with linguistic jurisprudence and ordinary language philosophy in general. The fact that ordinary language philosophers spoke of language in this respect, was largely due to the contrast of ordinary language philosophy, with ideal language philosophy. Under ideal language is meant (or this is what we shall understand it to mean here) use of notation and/or strict stipulations, i.e. attempt to control and put into strict boundaries one's speech, logic, way of thinking. By insistence on ordinary language is meant rejection of this tendency to strict control, and maintenance of everyday language for the theorist's expression.

So we can see that we have three problems here. The first one is whether it is reasonable to look at language, i.e. received perceptions of significance. The second one is whether it is reasonable to investigate ordinary speech, logic, ways of thinking, in particular. And the third one is whether we should abstain from deliberate efforts to control our philosophical speech and make it strict and by definition unambiguous. Our concern now is with the first two problems. Our discussion will generally bear on the third one as well, which however will not be treated extensively in itself.

A. General reasons for the search into ordinary language

A certain justification for the attention to received ways of thinking, can be drawn directly from our epistemological ground. What matters depends on my condition, i.e. who I am. Who I am depends on

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the community in which I have been formed. (Who I am depends on the society to which I belong). This is where my condition has been and is being determined. And, insofar at least as the research is one for a common problem, insofar as its results are meant to improve common activities, my condition in accordance with which, significance is determined, is a matter of abstraction from those particular details of mine, that are irrelevant to these activities. I thus have to look at our agreement, our common ways of thinking, to find it. Furthermore, insofar as what I say, I say to others, as correct, that is as something to which they *must* agree (and not choose to agree by adjusting themselves to me and my logic), the standard of correctness, reality, is our pre-established rules of language, our uniform practice - not my decisions and stipulations.

A further justification can also be drawn from what we have already said; this is also a justification for the subject's general adoption of the attitude of looking at the community to find itself and the answers to its problems. Even in my particular details, and the points where I tend to dissent and feel unsatisfied with the established, I am not exactly unique. On the contrary, countless individuals, with my passions, dilemmas and hopes, have lived and spoken and disagreed before. Our common standards today have evolved and have been formed in accordance with their successes and failures. It is silly to imagine that what I think or hope for now, noone has thought of before. And on the other hand, there will be a good deal in people's past experience (and also in other people's experience today), that I may learn from. In short, previous experience of the whole community is bound to be wiser than the one individual.

The above justifications however do not address directly the

specific issue of why we must look in ordinary ways of thinking, in the sense of a contrast with the ones of the scholars and philosophers. Why should the unsophisticated everyday speech, which one would probably expect to be characterised by ignorance, have such a privileged position, in contrast to the erudite speech of our more reflective moments?

One answer follows from the above. There is more agreement and community in ordinary speech than in scholarly speech. Reflection and intelligence breed diversity and disagreement. Thought and critique as such, lead to individuality; for when we do not think we imitate more (and vice versa). So the certainty of communication, the uniformity of our rules of language and ways of thinking, are in principle to be encountered at the lower level of normal everyday speech rather than the upper level of careful reflection and great knowledge. Intellectuals tend to differentiate themselves, because in their arrogance they tend to assert their individuality more. [60]

(Before moving on, it is interesting to notice that the above considerations do not exclude their opposites, and so the opposite conclusion. For one might choose spontaneity and individuality. One might prefer to bring in new concepts, one's own logic, and disagreement with the established uniformity. Insofar as addressing others, one might hope that they would choose to follow, [61] that they would see themselves as disagreeing in the same way. As for the wisdom of the past, new conditions may sometimes be seen to render it useless. And of course it is not true that there is no disagreement at the low level of everyday attitudes, and no agreement at the high level of intellectual talk. (After all, is it not said that *great minds think alike?*). So the above considerations are a matter of more

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or less, rather than yes or no. And accordingly, for what concerns our more specific problem here, a theorist would probably (need) display a little of the opposite attitude as well, and it is true that linguistic jurisprudence is not entirely free from attention to and use of philosophical rather than ordinary speech. (After all, as we have already seen, in the existing ways of thinking it is always possible for one to see either the one answer or its opposite. Which is a way of restating the obvious, that, at the end of the day, the subject will have to trust its own judgement.))

B. Regarding linguistic jurisprudence in particular

The above considerations however are all of little relevance to the method of linguistic jurisprudence in particular. If we forget the general idea that we should look into and allow ourselves to be taught by language, and stick instead to linguistic jurisprudence's search into language, as was understood in the previous section, the only reason that we need take into account is that significance depends on context and may be lost from view through abstraction. Let us remind ourselves that language is a matter of rules in the speaker's mind, which rules are (assumed to be) the same with everybody else's. The theorist is not learning language; he (assumes he) knows it. In the idea then that the theorist must look at ordinary rather than scholarly speech, ordinary speech is not others' speech, as far as linguistic jurisprudence is concerned, but the one of the same theorist, in moments when he is not specifically concerned with the abstraction he is now after. In everyday speech, one has greater awareness of the specific situations one is addressing, and of one's hopes, wishes and general position with

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regard to them; speech is adjusted to the specific problems and to what is significant at the particular moment. When trying to answer a question like what is law, i.e. when seeking a concept, an abstraction that unifies, explains and justifies a series of particular applications and ideas, it is good to look at these applications and ideas, because otherwise you might forget to include in your abstraction something of significance from them.

Thus, in looking at ordinary language in order to see the similarities and differences he is after, the theorist ruminates his own logic and ways of thinking, before further rationalising them at a more abstract level.

(To give a model of the process of the search into language: "In my (our) ordinary speech, I (we) make a distinction here (e.g. between a rule and a habit). Why? Because there is a significant difference in this respect; which difference therefore I (we) must not forget in the account of what e.g. law is."

Let me remind you that the above proposition "I (we) make a distinction here" is identical to the one "I (we) must make a distinction here" (or the one "I (we) *normally* make a distinction here"). It is an assertion following from the rules, rather than observation.)

Notice one thing. The theorist *looks* at everyday speech, i.e. his ordinary reaction to everyday situations. He does not necessarily *follow* it in his generalisation. He may perceive his ordinary reaction at a certain point to have been wrong. (After all it may well be found to be contradictory). He simply looks at his unreflective speech, because it is easier this way, at the more concrete level, to perceive significance. It is in accordance with

this perception that he shall form his theory in the end. And he may well perceive his ordinary ways of thinking to have been wrong in some cases. There is a sense of course in which his ordinary logic is followed in his abstraction, and this is in the sense that this logic is the normal practice, the rule, which, as we have seen, generally constitutes correctness. Not everything in it can be seen to be wrong (not at the same time anyway) - otherwise one would end without language. However, certain more or less limited *habits* may be seen to be mistakes, if noticed, typically because they do not accord with the rest of the practice, the whole, or more accurately, one's perception of it.

Therefore, when the theory is presented, the examples from ordinary speech are from the reader's point of view, exactly this: examples. They mainly help the understanding of the theory; they simply promote a certain "reader friendliness". For they are backed by the assertion of the writer's that "this distinction here is important". As arguments themselves, they have a very weak role. They merely pose a presumption in favour of the distinction they exemplify; for if the reader can see in this example an apparently significant distinction, is it not reasonable to keep it in mind, in case it is needed for the abstraction? And of course they help one remember the complexity and diversity of our world, thus guarding against hasty reductions.

The search into language, as understood and practised by linguistic jurisprudence, is not meant to offer any guarantee of correctness, in the sense of an obligation of the reader's to accept the conclusions because warranted by language. [61a,b] The examples from ordinary language are mere indications of significance. And this is

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only natural, because, even if we should assume that it is reasonable to expect language as such to authorise one only abstraction in the end, regarding what law is, the theorist could not possibly take the whole of language into account in order to find it. He could never produce a list of all possible related lingual instances.

About the accusation of conservatism

We can now see a certain discussion and accusation of the method of linguistic jurisprudence to have been somewhat misplaced.

The instruction that we look at ordinary language, has been discussed on the basis of whether the established distinctions and ways of thinking are good to keep. On the one hand is considered the evolutionist argument that ordinary language embodies "the inherited experience and acumen of many generations of men", and on the other the progressive one that ordinary language embodies "superstition and error and fantasy of all kinds", as it pictures the mistaken and unscientific beliefs of more primitive and ignorant men. [62] The fashion in the days of ordinary language philosophy was – naturally – favourable to the first "conservative" tendency; or perhaps we should simply say that arguments in favour of "ordinary language" were not questioned very much. Nowadays fashion seems once again rather more favourable to the opposite "progressive" tendency. And linguistic jurisprudence is accordingly accused of an inherent conservatism, and a tendency to maintain the established views of the world and reject new and challenging ones, which tendency it covers under a façade of objectivity, woven by "the power of language to confuse and mislead",

and maintained by a blindness to the change of language. [63]

We have seen quite extensively that linguistic jurisprudence is indeed incapable of perceiving and explaining the change of our ways of thinking. However this is irrelevant, once we picture linguistic jurisprudence correctly, as a philosophy rather than a sociology. Perception of change is missing from every conceptualism - indeed more so from the more traditional type - and this is not a defect; it is a consequence of the very posing of its questions. When I am asking or relating what the law is, and not what people think the law to be, I am not concerned with conceptions and how they change; neither am I concerned with social reality, viz. others' equivalent names, anymore than I am concerned with fellow philosophers' mistaken answers. The issue is what I (we) must understand law to be, here and now, according to (my/our) logic, in virtue that is of who I am (we are) and what I (we) (must) want. The correctness or wrongness of a definition in my (our) Reason, does not in principle depend on the actual change of definitions. (Once I have finished my conceptual interrogations, I may then use my definitions for perceiving social change - if I am interested in sociological research. Or I may go on to instruct the people in my community what e. g. they should pronounce as law, or in general how to understand, promote and improve our common enterprises, our politics.)[63a]

As for the method of the search into language now. There is truth in both the evolutionist and the progressive arguments, which to me sound equal in principle. Nevertheless, they are largely irrelevant to the instruction that we search ordinary language, in order to find the answers to our conceptual(ist) questions therein. It is irrelevant whether old distinctions and ways of thinking are in

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general good to keep. Because in searching ordinary ways of thinking, the theorist searches his own ways of thinking. He looks into the rules in his mind, perceiving significance that unifies and binds them. If a certain perception/ interpretation is outdated, or in general does not accord with the theorist's perception of what is important, it will be rejected - if noticed at all. Thus 'healthy', in the examples of a "healthy complexion" and "healthy morning exercise" will be understood to apply to the *different* cases of a cause and a sign of health[64] (and so to denote two concepts - two kinds of things, linked in a family resemblance way); it will not be seen to apply to the one and the same case of what goes with, accompanies, or anyway is seen together with health (one concept - one kind of thing). Because the theorist, in accordance with his times and social environment, will make the current typical assumptions with respect to the issue, which difference makes a difference. He will make his normal and usual judgements on what difference carries significance. In doing this, he is applying the main categories and distinctions that order his logic and way of thinking. Obviously then, if his way of thinking is conservative, he will make conservative assumptions with respect to the issue which difference makes a difference; if his way of thinking is progressive, he will make progressive assumptions. And accordingly, through the search in language, he will procure older or newer concepts and ideas, by promoting the ones he sees to be correct, and discarding those he thinks are wrong. (In fact it is true that through attention to language, both "old" ways of thinking can be recovered and "new" ones arise).

- But isn't it true that with the attention to language the

established and dominant distinctions and concepts will be easier to see than peripheral and less commonsensical ones?

Of course it is true. It will be rather difficult obviously to notice distinctions and concepts that are very different from the dominant assumptions of the times and social environment. For this, unusual imagination and discernment is needed, as well as more search. But this is not due to the search in the language. It is the case regardless. What matters to us in the end, is that the theorist asserts concept or distinction X to be correct. It may be an established distinction or a challenging one. This makes no difference. It means neither that X is correct nor that it isn't.

We can now see in fact, that the idea that attention to ordinary language will tend to a maintenance of old and incorrect ways of thinking, is, with respect to the instruction that we search in our everyday speech in order to perceive the similarities and differences between the phenomena, entirely unjustified. If in fact we bear in mind that in comparison to older ways of thinking, modern ones are generally characterised by more distinctions and differentiations, we shall see that, as regards linguistic jurisprudence, the opposite idea is more true. Because, by paying attention not only to the big abstraction, i.e. the general word (e.g. 'rule') which may well have remained the same despite historical change, but also and more so to its more concrete applications and the differences therein (e.g. 'as a rule' - 'rule of obligation'), one avoids precisely the maintenance of dated views and ways of thinking. One avoids precisely the "superstition and error" of older times.

Notice here one more thing (which is of great relevance to the issue of the ideal language). One *avoids*. One does not *confront*. [65]

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Confrontation would equally cloud your thought, by forcing you to extinguish, to ban, what you perceived to be wrong.[66] Thus your logic would become more rigid and less capable of adaptation, once history and change had made *your* ways of thinking look "superstition and error".[67]

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(And a final note. Language in itself has no power to confuse or otherwise. A speaker may use language in order to confuse or to teach. And his speech will reflect his confusion or wisdom or both.)

About the diversity of semantic structures

We have already said that the investigation by linguistic jurisprudence of ordinary language is not by itself a guarantee of correctness. The fact that a way can be found in language to express an idea, even the fact that this way is encountered all the time in everyday speech, is not obviously a proof that the idea is correct.

So the fact that the languages of the world have different and often incompatible semantic structures, does not as such entail a rejection of the method of linguistic jurisprudence. The fact that the concepts of law, rule, morality, obligation etc., in the semantic structure of the English language, may be quite different from their rough equivalents in Russian, Iranian and Chinese, is no reason for us to condemn the theorist's search into his language in principle. Because the claim is not that "this is the correct concept according to language" (you've only struggled with (some) English; at best this would have been the concept the English language happens to have).

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The claim remains that "this is the correct concept according to me".

However, we cannot say that the variety of semantic structures and concepts is of no consequence to linguistic jurisprudence or conceptualism in general. First of all, it conditions the theorist's attitude, through its implication that there might be an infinity of real (i.e. potentially sensible)[67*] distinctions and concepts. Should we then insist on the descriptive attitude towards language - in the sense of the subject's refusing to name things in accordance with its understanding of its condition, but leaving itself evolve instead, in accordance with the categories it encounters - we should forever hold our peace. We should forever withhold judgement (which may in fact amount to wisdom (it amounts to the Tao)). If then it is assumed that we have to judge at some point, because e.g. we have to act,[68] a compromise is needed. There will be some naming in accordance with our understanding of who we are (some pride, some order), and some evolution of this understanding (some humility, some flexibility).[69]

Secondly, at any rate (viz. regardless of the infinity or not of real concepts), if human languages are not for the purposes of our conceptual research interchangeable, and given especially linguistic jurisprudence's method, then there is not one, but many ordinary languages we might profit by looking into, and neglect of the concrete uses in which, might make us overlook what matters. This makes the theorist look very small and incompetent in front of the actual diversity (which - what an irony - was precisely what ordinary language philosophy was so much in pain to point at). Yet curiously enough, the friendliness of presentation and lack of strict control, most of all the lack of clear and absolute definitions as to how things are, that characterise linguistic jurisprudence, become a most

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important asset therefore, and one we should perhaps admire rather than scorn. Because what is, is then rendered unimportant, in favour of what it becomes. And the reader is by the theorist's attitude invited more easily, and helped, regardless of his background, to adjust and adopt the pertinent (and from the point of view of being, questionable) suggestions. [70]

Naturally, in response to the problem of his small size, the theorist might decide to reinforce the authority of his claims, i.e. their alleged property of being true regardless of what anyone else may think, by reducing their range of alleged applicability, and so his field of research. He might decide for instance to say that he is speaking not of (and to) humanity, but of, say, the people in modern Western society (or Britain, or the Oxford law school). In doing this, he understands and decides who he and his group and their logic is, rather than leaving this to be determined and evolve in accordance with the categories to be encountered. The possibility of those outside the pronounced group, identifying with and adjusting to his suggestions, is thus in principle reduced, in exchange for his claims being (rather than becoming) more correct, viz. in exchange for a reduction in the possibility of a need of change in his conclusions. The theorist (in opposition to the Tao) closes himself up in his group and reduces the relevance and possibility of outside intervention. Becoming is suppressed in favour of being. (Still, the theorist is supposed to see and say how things are; if he were following the Tao he would not be one; he would have dropped all concepts and ideas).

Anyway, modern Western society is a rather big and elusive group, as we have already seen, and of course comprises quite a number of

languages on its own. If we are to determine here a position for linguistic jurisprudence (and to the extent that we have), it should be this middle and simple position, I think. The theorist - small and incompetent though he may seem - looks at what he can, at the diversity he is capable of noticing, and makes suggestions on what he thinks is the case regarding what he can speak of, i.e. first and foremost himself, without presuming to represent anyone else (if they disagree, let them speak for themselves; he will (try to) listen). He speaks about the law, not das Recht, hoping that what he says might be of some relevance to those who can speak of the latter. He would love to be able to look further, and does not in principle reject contrary suggestions from those who can, nor does he generally disqualify their speech if they do not belong to a particular group. However, he will assess these suggestions in accordance with who he understands himself to be, and who he understands we ought to be, and reply accordingly, yet without having his condition and understanding strictly predetermined and irreversible.

Perhaps this position is naive, given today's world. All the same, it is one I feel comfortable with. And besides, should we reject it, we should stop talking (as Lao Tzŭ advises).

Introduction to the problem of awareness

With respect to the methodological analysis of linguistic jurisprudence, we could finish here. We have furnished an adequate and reasonable, even if somewhat more traditional, interpretation of the search into language, which avoids the trap of taking language to

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be something like a proof of reasonableness, and keeps the reader's eye on the substantive rather than methodological claims. If it is true that the best method is one that noone notices, then this is I think the best interpretation of the idea that we should search ordinary language for an answer to our conceptual questions. At any rate, it is the one I feel most comfortable with. [71]

However, this reading seriously underrates ordinary language philosophy's anxiety to follow common, i.e. shared, sense, and to see our conceptual problems as a matter of our established and uniform rules of language, rather than one's normative assumptions. Consequently, it is not very faithful to the background assertion that there is common language and agreement. Hence our use of it to discard as irrelevant the accusations, regarding a tendency to maintain established views of the world rather than offer new and challenging ones, was perhaps somewhat unfair to those who made these accusations (except of course for the fact that there is nothing wrong in principle with a view's being established rather than challenging). But what's most important, in our analysis so far, we have not paid any attention to the fact, that the theorist does not examine the assumptions he makes, but takes them for granted. The implications remain to be clarified, of the theorist's understanding the distinctions he discovers and bases his conclusions on, to be obvious and necessary requirements of correctness, independently of any normative decisions he takes.

It is these issues that we shall go on to discuss now, through a rather more simplified picture of the search into language (but one that pays more attention to its common character). This discussion will bring us back to a problem, that has been lurking in the

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background, ever since the end of our discussion about the rule and the habit in Part 1: The lack of an explicit awareness of the theorist's choices and of his reasons for them.

Rules of language, rules of logic

Earlier on in Part 3, we began a descriptive analysis of the existence of a common language and its rules, on which the speaker is based when making claims to truth with respect to assertions of the type "law is X (and not Y)". We shall remind ourselves of that elementary analytical scheme, and take it from there.

From the point of view of each individual user of language, we may distinguish in the following way. Having in mind the observable, i.e. actual utterances or scripts produced in the external world, there is, on the one hand the instances of language I produce, and on the other the instances of language other people produce. Having in mind the rules that distinguish right instances and wrong ones, there is on the one hand the rules I observe, the rules I form, and on the other the rules other people put forth.

In either the rules or the observable, the differences between me and the others may be immense or minute, or anything between the two.

My attitude towards these differences in general may range from correcting the others, thus trying to bring about uniformity in accordance with my rules, to following them, thus adjusting my practice to theirs.

What generally happens however, is that people live in lingually settled social environments, where every new individual (typically an infant) starts by following and adjusting itself to the others' practice/ rules (in the process of forming itself), and with time (once formed and orderly rather than unformed and flexible) comes to adjust less and less, but to judge and correct more instead. (Thus, at any given moment there will be a certain uniform practice of observable lingual instances and a more or less accordant uniform set of rules, that certain formulations are right and certain others are wrong and so the speaker can rely on his general knowledge of the rules, without having to abandon his idea that they are independent of his person - okay).

Accordingly, for each and every individual, the relation between what it observes on the one hand, and the rules it follows on the other, is typically neither that the observable always accords or has to accord with the rules, nor that the rules are a mere description of the observable to be adjusted if the latter is found to depart. There is an interplay instead between rules and actuality, typically progressing through an idea of correctness and/or a feeling for things like ease, symmetry and elegance.[72] Thus, an individual may find, either its own and/or others' practice, or its own and/or others' established rules, to have been defective, to be in need of a change (without of course a related realisation being a prerequisite for the change), typically through education; this is largely what learning is.[73] And backing this idea of a need for change, there will be some consideration of correctness, or a feeling for elegance, etc.

Now, feelings for ease, or elegance, etc., as such, are none of

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our concern here. It is the idea of correctness we are interested in, for it is on this idea that linguistic jurisprudence's distinctions are seen to be based, insofar as they are assumed to be correct rather than nice. It is here that the claims to truth or reality are based. This idea is logic; a standard both instantiated within language, and to which language and/or one's speech is expected to conform. [74]

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'Yesterday' is different from 'tomorrow'. It is incorrect to say "I shall go to the cinema yesterday". This is a rule of language. Why is this so? Because the past and the future are two different things. What happened yesterday cannot change. It is impossible to do something in the past; it is possible to do something in the future. This is a rule of logic.

The rule of logic explains the rule of language. It furnishes the reason (the logic behind the fact) why one must distinguish between yesterday and tomorrow, and why in language 'yesterday' must be different from 'tomorrow'. In saying so, I am not making propositions about my personal language or choices. I am speaking of Logic. And insofar as I (think I) am correct, I expect everybody to agree (or to show me that I am wrong); not to say "this is *your* way of thinking, this is *your* language".

In the same way, I have in front of me 'doing something as a rule', and 'doing something in accordance with a rule'. And, the distinction between regularity of behaviour, and a rule/reason for it, is presented in explanation, as a rule of logic, which can be seen in language, in our ways of speaking.

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We are back again to our favourite distinction. This is, indeed, a logical distinction in Hart's theory. It is characteristically analytic for his concept of law, in contrast to the way we tried to see it in the second Part. It is a proposition of the theorist's logic, part and parcel of the categories that regulate his perception of the world. [74a]

- Need we reconsider its necessity? Or are you implying that logic is deceptive in general, and that e. g. the distinction between yesterday and tomorrow need not be true after all?

Neither. (Only our example above is a little deceptive). But let me explain. We start with the rules of language. What are they? Mostly conventions of course, habits. Yet some of them, some distinctions for instance, are indeed backed by logic, our standard of correctness, in the above manner. These distinctions are established perceptions of significant differences - and logic provides for their significance. Thus, the difference between yesterday and tomorrow, is - say - a matter of man's general incapability of acting yesterday, in contrast to tomorrow. This is the reason why this difference is significant, this is the logic behind its making a difference. This reason does not obtain for, and this significance is not shared by, e. g. the difference between time-before-three-days-from-now and time-after-three-days-from-now. Yet imagine an important occasion, which you must prepare for, three days from now, and this last difference becomes significant, in a manner equivalent to the one between yesterday and tomorrow (and the logic is that only before-three-days-from-now can you make your preparations, and not after).

Without an insight into the reasons why a difference is

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significant, this difference will either appear insignificant, or self-evident, a matter of fact. In the second case, it is an established perception of significance, in one's rules - viz. habits - of language, in one's rules of logic, viz. habits of thought. [74b] It is a perception one has often, as a rule. To merely present it, in language, i.e. to put it in words, is not to present its logic, i.e. the reasons behind it.

(Everything is different from everything else. All you need do is conceptualize something as X, and something else as Y, and they are different. Yet if then you conceptualize them both as Z, they are the same.

Without, either a reason, or a habit, (i.e. without a rule), behind the subject's seeing them, they are both and neither. [75])

About the analyticity of logical truths: Logical rules and distinctions are often said to be analytically, or conceptually, and therefore absolutely, true. Do not let this confuse you. Analytical truth (of a proposition) is truth that follows from (the analysis of) the concepts related (in the proposition). Insofar as the concepts are given, their logical relations are also given. Once I have determined (i.e. defined) the abstractions that have significance (in view of our place, who we are), the propositions in which I relate them will be right or wrong by themselves, viz. without my having to look elsewhere for knowing this, viz. in abstraction from any wider context. My logic/ language makes and is made by my concepts, and my concepts are thus made, that logical rules are analytically correct. Yet these concepts are not finite, at least to the extent that perceptions of significance may shift, in accordance with the change in the environment and ourselves. What (I thought) mattered for me yesterday, may not matter for me tomorrow. [76]

Accordingly, the distinction between regularity and a rule requiring it, is certainly correct, and indeed absolute, insofar as regularity is one concept and a rule another. Yet this does not exclude the possibility of a third concept, that is their synthesis. In order to find reasons and

construct a logic (λόγο) that determine the correct choice between the distinction and its negation, we must look outside the propositions asserting the distinction and the negation. (We must look at what we need the distinction or its negation for).[76a]

The lack of awareness

So we shall merely repeat the conclusions we drew about our precious distinction in Part 1. Far from being the only possibility for coherence, far from being necessarily imposed on the observer as human intelligence, far from reflecting the way all people think or understand their actions, the distinction between a social rule and convergence of behaviour, depends on, and is part of, a way of thinking, a form of life, by no means universal or necessary, but instead one depending on our acceptance and allegiance, or rejection, on each one's decision towards humility, stability, peace and uniformity, or towards pride, change, fight and variety.

Furthermore, what's most important, no such decision is normally explicitly taken by the subject - certainly not by the theorist in linguistic jurisprudence. Instead, this distinction depends on assumptions the subject habitually takes for granted; it is in fact itself one such assumption among the rest.

And indeed, it is this habitualness that is put forth by linguistic jurisprudence's insistence on language. Looking at the rules of language to see true distinctions, the theorist looks at his habitual practice of making them - for if there is something that is taken for granted as existing independently of the theorist, this has to be the rules of language. And how funny, that one is standing on

the identity of the rule with the habit, in order to assert their separation. For certainly, if there is a level of consciousness where the rule is indistinct from the habit, this must be the level of the rules of language.

And of course, the language the theorist looks at, is not his own personal language. It is the language he has received from others, it is everybody's language. So are the distinctions and his habitual practice of making them; it is everybody's habitual practice.

Searching through ordinary language, the theorist ruminates our habitual ways of thinking. His various detailed perceptions of significance - which are to be unified in the concept he seeks - are ones we make habitually. Without thinking about it.

And this is precisely what it means to take a descriptive attitude towards language. It is this that is entailed by the decision not to try to name things in accordance with your perception, but to adjust your perception to the names already before you.

Follow your habits. Don't think too much about them. [77]

The theorist is not aware of the choices he makes. He does not make any choices strictly speaking. Because he does not stop to realise that there may be other ones possible, among which he need decide. He just takes things for granted, just as everyone else would.

Not exactly the most typical image we have of the philosopher, is it? Not exactly our most central conception of knowledge, either. Or of Logic. For it is the observer's (e.g. of social groups) or the actor's (e.g. the judge's when deciding what the law says) Logic, that is being here determined, according to the answer to "what is

law".

It is probably this that made so many critics of linguistic jurisprudence complain about a tendency in it to retain and ratify our established ways of thinking. That, contrary to the way we are used to think of the philosopher, instead of questioning our habits and our fictions to lead us to knowledge and truth, the attitude of linguistic jurisprudence is to ruminate, what we should expect a philosophy to examine and offer rational grounds for or against.

And it is this that poses again an early question, the answer to which we had postponed: Should we not expect political arguments, instead of this sterile conceptualism? Should we not expect reasons, instead of a mere presentation of taken for granted distinctions?

A brief comment on the demand for awareness and control

Well, we do. We do expect reasons, logic, justifications. Mere regularities, existing habits, are not enough. We want to see reasons, that provide us with the knowledge whether and why our existing patterns of action (and thought) are correct, or whether perhaps we must change them.

What is a reason then? Let's see. There is a significant difference between time-before-Sunday and time-after-Sunday, because Sunday is Easter Sunday and I must fast, etc. Sunday is Easter, this is the reason for this difference.

But what makes this an Easter Sunday? Why not some other Sunday? Why not second Tuesday from now? Why have Easter at all?

Well, it is a habit of course; a social convention.

So I have not offered logic in fact, justifying the difference between time-before-Sunday and time-after-Sunday. I made an assumption, unaware of it. I took it for granted, just as everybody else does.

But of course there are reasons why we should (or should not) have Easter and why it must (or need not) be this Sunday. If I am a good philosopher I must exhibit an explicit awareness of them; not stand on my habits.

So I ponder upon them. And so Sunday has passed, and I have wasted my time.

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Why should we expect one not to stand on conventions and habits? Why should we want to be aware of and question them instead?

One answer could be that there are always reasons and choices behind our habits, whether we are aware of them or not. When we take our truths for granted, without examination, even if they *are* true, even if they *are* correct, we do not notice the reasons behind them, that account for the correctness of our choices. So when the times, and we, and so our – conscious or not – reasons for these choices have changed, it is more difficult for the discourse over them to take place. Because they appear to be self-evident; they have become ideology.

Yet a reply would be here due, that it is awareness in fact and conscious decision regarding what reasons we have and what choices to make, that result in inflexibility and obstacles to smooth transition in the end. To make a conscious choice, for reasons we are aware of, is to ban the alternative (from the habit we thereby institute). It is to render it difficult for the change to have a voice when its

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time is near. To make its expression senseless, illogical, in exchange for a clear and strict establishment, which in its turn need be demolished rather than adapt. Whereas, when the old does not impose itself as decided truth, the new is its mirror and takes its place with just a laugh, at the old's foolishness and blindness, which it shares. No. It is awareness and true knowledge that becomes ideology.

And besides, what an unreasonable expectation, that we be aware of our habits and know our reasons for them. Why, there is no end here. Everything can be questioned, everything can be placed before the arrogant demands of logic. But nothing can be done, and nothing can be said, without assumptions. Every interrogation into reasons has to stop somewhere. Or have I, who dare accuse others of a lack of awareness of their choices, not made assumptions in the course of this work, without interrogation, in accordance with the dominant trends of my time? Have I not made the assumption of a circular pattern in history? Or indeed, that everything changes? They do not even *look* correct once you notice them.

And yet, despite all this, the lack of awareness, the ignorance of one's reasons behind one's proposals, still sound grave defects of one's speech. It still seems impossible to come to terms with the idea, that "you don't know what you're talking about", that "you don't know what you're doing". It is probably man's intimate need for rational control, for the feeling that he knows what he is doing, that makes the theorist's realisation so vexing, when he sees that what he took to be rock bottom unquestionable truths, were nothing other than his habits.

We want our logical rules to precede the ones of language; we

cannot bear the idea that our logic is just language, i.e. convention. We want mind's control over and determination of action and habits.[78] (We want freedom).[79] In the end, we want to shape our world, not be shaped by it. We want to shape the times, not adapt to them.

Is this noble aspiration, or is it immaturity? (Or is it both)?[80]

Yet, have we, who want to control and shape the world, been shaped according to Reason? Are we not constituted by habits and conventions?

We want control and order, yet we are children of randomness.

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(In the end, is this rational control to be valued? Must we demand it?

To the extent that we value the individual subject's knowledge and awareness, progress, innovation, choice, freedom, yes. To the extent that we value its happiness, community and peace in it, friendliness, stability, security, no.)

Concluding remarks

- Okay. In the end then, assuming we want knowledge, awareness and rational control (as much as possible at any rate), assuming in other words that we are doing philosophy,[81] we must be suspicious of our habits, and avoid their mere invocation. We must be sceptical with the distinctions and concepts we encounter in ordinary language (the province of habit), and far from looking at them as indications of truth, we must always try to control them, and provide reasons for

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our use of them. And linguistic jurisprudence is to be condemned, for its failure to do this.

- Well no, not necessarily. It may be quite useful, to reflect on the concepts we receive in language, and so grasp perceptions of significance that already exist and hence are common, even on the assumption that we must be sceptical with established distinctions and ways of thinking. For, besides the fact that at some point we shall want to speak to and teach others and so need retain the communicability the established offers, we need be taught too, who we are and what reasons we have. We need learn the habits and conventions that constitute us, and our contexts. Of course, we can assume, that the concepts and distinctions we receive, were originally made for certain reasons, even though we are not necessarily conscious of them now. Whether they are still valid, i.e. whether it can be said that a particular conceptual distinction is obligatory for the thinker and user of language, this depends on whether one still has these reasons - or, perhaps, others - in the particular context. But it is generally much easier - and even more enlightening perhaps - to try to find how a concept has already been constructed in the language, instead of trying in abstract to find what kind of reasons there are for this or that construction. After all, what construction will you start with, to investigate? The possibilities, in abstract, will be infinite. (And you will notice none, unless you receive it with language. At any rate, there will be many more for you to see in language, more than you can imagine, even if you think you already know language.) And how will you identify your reasons for the construction? Do you know beforehand what you want? Or the reasons you have for wanting this or that? Our reasons,

what we want, who we are, change too, along with our concepts and distinctions (our perceptions of significance). Which is only natural, since our reasons (i.e. our logic, our speech) are nothing other in fact, than perceptions of significance (i.e. concepts and distinctions).

And truly, if our reason for wanting knowledge and awareness is that we want control of who we are, that we want to shape our times and environment rather than be shaped by it, does it make any sense to close ourselves into our personal "ideal" languages? This way, all we can achieve is to end communication, to avoid people hearing what we have to say.

No, I do not think we must condemn linguistic jurisprudence on the basis of methodology, or lack of awareness. If there is something I might be tempted to condemn, this would be the expectation and attitude, that in order for one to speak, one must be based on absolute, obligatory, unquestionable, necessary truths, that the listener, willy nilly, has to accept.[82] It is better to try to tempt the listener and draw him towards you. For in the end, all you can do, is present your propositions, i.e. proposals, and hope that the tide will move your way.

NOTES

0.   But perhaps, even this qualified sigh of relief is too hasty. For see Martin
M., _The Legal Philosophy of H.L.A. Hart_ p.134: "My general point is that,
although the empirical investigation of the sorts of claims about legal language
that Hart has made would not be easy, it would be well within the scope of
present empirical science."

1.   See Searle J.R., _Speech Acts,_ p.12ff. I should probably point to the fact,
that in its original context, "linguistic characterisation" is not primarily -
if at all - meant to apply to the kind of distinctions linguistic jurisprudence
starts with. However, I do think that Searle would not object to this
understanding of his text, and anyway, the rationale (which is what matters for
us) is the same.

        Relate also Stanley Cavell's "Must we mean what we say?" (in _Ordinary_
language ed. Chappell) pp.85-9.

2.   Hart H.L.A., _The Concept of Law,_ p.235.

3.   There is a difference however between language and logic here, as we shall
see later. To illustrate: There are certain rules of language, according to
which, 'obligation' may be used differently from 'compulsion'. There are also
certain rules of logic, that explain and justify this difference, and, according
to which, one must make the distinction.

4.   Or, if they happen not to make these distinctions, they have another
language/ logic, different from the one within which the question is being put.
(They are not like us, they do not belong where we belong).

4a.   Our "knowledge", in Berger's and Luckmann's terms (as well as "reality").
Compare their _Social Construction of Reality_ for my use of the term 'reality'.

5.   - Are we then saying that meaning in language is not a matter of its use, but
correspondence with reality?

        The place is not suitable to make either this claim or the opposite. Let's
just say for the time being, that we are taking up the idea of correspondence,
for the purposes of our discussion, insofar as it fits with the above
explanations. Notice that in these, language is equivalent to a specific speech
and logic, i.e. to particular statements asserted to be true, and to a
particular system of interpretation and organization of information from the
external world; language is simply the speaker's ideas. The idea of language as

a matter of communication between possibly *conflicting* speeches and *different* logics/ ways of thinking, is not relevant to the above explanations. Besides, we concerned ourselves only with statements; we have not gone into declarations, promises, jokes, commands, and the like. And correspondence with reality for us, is correspondence between what I state, and what I believe to be true; this is not necessarily correspondence with anything empirically verifiable (or falsifiable). (But I cannot keep myself from saying that meaning as correspondence is indispensable for the possibility of change of both language and ways of thinking).

It is worth noticing however, that my use of 'reality' and 'true' is, indeed, heretical, in view of the fact that today, only empirical verification is normally accepted as the base of truth claims and that expressions like 'it is true' or 'in fact' are accordingly assumed, either to apply figuratively only to evaluations and the like, or to have a different use in such cases. I hope that by the end of Part 3 my use of these terms will seem less arbitrary. But for the time being, we can simply take their meaning to have been stipulated in the main text.

6.   Compare Raz J., <u>Practical Reason and Norms</u> p. 17-8. "By fact is meant simply that which can be designated by the use of the operator 'the fact that...'". Also Waismann F., "Verifiability" (in <u>Essays on Logic and Language</u> ed. Flew) pp. 134-7 that words like 'real', 'fact', 'event', are like pegs; you can put anything on them. (I do not agree with him however that the notion of reality is hazy, containing different types of 'facts', and so affords no consistent definition or uniform analysis).

7.   The term 'nominalism' is not here meant to be used in strict accordance with the established Anglo-American philosophical vocabulary. Neither do I intend to refer specifically to the much misunderstood today medieval debate on the existence of universals. Although this ontological debate and its vocabulary (which I take certain liberties with, especially regarding 'conceptualism' later) is not unrelated to this epistemological study of our Part 3, it cannot be discussed here.

8.   On primary and secondary rules, cf. Hart *op. cit. supra n. 2*, p. 77f. Cf. further MacCormick N. <u>H. L. A. Hart</u> p. 20f., Raz J. <u>The Concept of a Legal System</u> p. 147-67, Tapper C. F. H. "Powers and Secondary Rules of Change" (in <u>Oxford Essays in Jurisprudence sec. ser.</u> ed. Simpson), for the relation between this

distinction and the Hohfeldian conceptual system, and Martin M. *op.cit. supra n.0*, p.28-32 (for a not very constructive critique of Hart's distinction(s)).

9.   I.e. A can utter in Raz's terms, statements from B's point of view. (Raz J., The Authority of Law p. 153f (and 137f.)).

10.   Cf. autopoiesis; with this naming, self-referential closure has been achieved.

10a.   See Glanville Williams "The Controversy concerning the Word 'Law'" (in Philosophy, Politics and Society ed. Laslett). "The word 'law' is simply a symbol for an idea. This idea may vary with the person who uses the word" (p.136). Therefore, the problem of what law is, "is an unreal one:... it appears to be insoluble because it is verbal" (p.134). See also the account of "conventionalism" in Beyleveld & Brownsword *op.cit. infra n.42a*, p.83f. The conventionalist believes that the concept of law can only be a stipulation for the use of the word. "Stipulations, however, cannot be correct or incorrect, and so no genuinely rational criteria can be presented for preferences between them... Controversies concerning the concept of law are pseudo-debates, and the vast volumes of ink which have been spilt pursuing them are just so much useless verbiage."

11.   So in this sense, Dworkin is of course right, that the debate on what law is, is not merely about the meaning of the word 'law' in some established language whose rules and criteria we share. Relate his Law's Empire p. 31ff. Notice especially the argument he calls 'the semantic sting', p. 43-4, which is equivalent to the picture we gave above of A's and B's debate. Notice further his replies to the critiques by Soper and Lyons, in "A reply by Ronald Dworkin", in Ronald Dworkin and Contemporary Jurisprudence (ed. M. Cohen). See p.256: "Law is a political concept... It takes its sense from its use: from the contexts of debates about what the law is, and from what turns on which view is accepted. And all this is deeply, densely political. ...we would do well to look for the deep sources of important theories of law in some assumptions of political morality, about how judges should in general or in principle decide cases for example, or about what social functions we should call upon our legal institutions to perform."

12.   Relate Raz's saying that what goals and desires we have, we often have for reasons. And that if these reasons did not obtain, we'ld stop wanting the things we happen to want. (The Morality of Freedom pp. 140-3, 300f.)

13.   Therefore we *are* speaking of a reality within the subject's mind. This fits with and requires the old postulate of rationalism that the world is in me.

14.   Notice that logic is λόγος is speech.

15.   Do not be led by the distinction between rules and lingual instances to think that by rules of language we mean something very elaborate, or clearly formulated. Normally these rules are not even explicit. Most of the time, they are simply paradigms, (from) my and others' practice, utterances coupled with a certain use in communication. A rule of language is, for example, that tree is meant by 'tree' (and not by 'trii'; such an instance of language would be identified as a typing error); or that if 'I promise to pay you £50', I have promised to pay you £50. So, - and in accordance with our analysis in Part 1 - a rule of language is not normally distinct from the standard practice of the (individual or collective) subject, the habit.

A rule of language *can* be distinct from the standard practice however, if we are thinking of e.g. elaborate rules of grammar in the mind of highly educated individuals, for whom the rule might well be completely independent of anybody's practice. (As was the case for instance with the Alexandrian grammarians, in the Hellenistic times, who regarded the common Greek, people spoke around them as mistaken and to be corrected, insofar as it diverged from the standard lingual practice of well educated Athenians in classical times. (See John Lyons Introduction to Theoretical Linguistics p.8f. Further on the Alexandrian grammarians, cf. R.H. Robins A short History of Linguistics p.30f.))

Insofar as we distinguish here between rules (i.e. the reasons and rationalisations in the mind) and actual practice, the relation between the two may range between a) the rules (the mind) are totally passive and so shift with the practice - in other words prescription does not exist, and the limiting case is where each lingual instance is okay/ acceptable ('x' meant y in that lingual instance; it means z in this one) (assuming this extreme, I should never correct my students' grammar), and, b) the rules regulate each observable instance and the standard practice, and remain unaffected by it; each instance, as well as the whole practice, is judged as right or wrong depending on its conformity to the pre-established rules (in this case, assuming among other things the accuracy of the distinction between the nominative and the accusative cases in English, the answer "it is me" is to be banned, in favour of the answer "it is I", or rather, "this am I" - unless of course an ad hoc rule (an exception) to the contrary is understood to exist).

17.	Such a range can also exist between the rules and the observable, of the same individual's; in cases of dissonance here, we shall speak of a mistake in the observable most of the time - or, occasionally, of innovation. Also, such a range can exist between the rules in the mind (i.e. the reasons and rationalisations as above), and the actual standard practice; in cases of conflict here, we shall speak of a mistake in the rules or in the practice, depending on whether and the extent to which a descriptive or a prescriptive attitude in grammar is assumed.

18.	This, given of course communication or attempt at communication. Otherwise, one may simply go away, or stay mute. (Relate the phenomenon of autism).

19.	For the tendency of an unsettled social environment to settle, a tendency to communication/ community is required, that is stronger than its opposite. In the inverse case, a settled social environment will tend to become unsettled.

	Relate the well studied phenomena of speech convergence and speech divergence, depending on social and psychological conditions. See Crystal D., The Cambridge Encyclopedia of Language p.51: "When two people with different social backgrounds meet, there is a tendency for their speech to alter, so that they become more alike... [This happens] in order to reduce the differences between participants, thus facilitating interaction, and obtaining social approval." On the other hand, when people want to emphasize their different allegiances and identity, speech divergence takes place. Cf. further Giles & Smith "Accommodation Theory: Optimal Levels of Convergence" in Language and Social Psychology (Giles & St Clair ed.), where also extensive bibliography.

20.	Or, more accurately, a practice and a set of rules that are perceived to be uniform. This is enough, viz. the observer needn't judge how much difference is needed, in order to speak of difference. It means that there is no difference that matters.

21.	Depending on its awareness of diverse lingual environments; this is very high today, but was often very limited in traditional societies.

21a.	Relate Stanley Cavell's tentative remarks on the distinctiveness of the first person plural statements, in "Must we mean what we say?" (Ordinary language ed. Chappell) p.87. Relate the whole essay to this section in general, especially pp.85-9.

21b.	Cf. Paul Amselek's, "Le droit dans les esprits" (in Controverses autour de l'ontologie du droit).

22.   Cf. Lyons J., <u>Semantics</u> V.1 p.235-8 (and p.250f.). Further on the idea that different languages make different divisions in the outside world and for many examples, regarding differences among languages, in basic colours etc., cf. Hjelmslev L., <u>Prolegomena to a theory of language</u> p.47-60, Lyons J., <u>Introduction to theoretical lingustics</u> p.429f., Ullmann S., <u>Semantics: An Introduction to the Science of Meaning</u> p.246f.

22a.   The argument from the different semantic structures has been advanced before against the presumptions of ordinary language philosophy. Cf. Jerry Fodor & Jerrold Katz "The availability of what we say" (in <u>Philosophical Review</u> 72 (1963)) pp.68-9: Since other natural languages code distinctions not coded in English, English would have to be a privileged language, for the ordinary language philosopher's claims to begin to sound sensible.

23.   The "things" here are of course concepts, ideas (in accordance with our understanding of "reality"); not empirical bodies. (More on this later). In linguistics a distinction between "sense" and "reference" exists, dividing what a word means (e.g. in terms of its relation with other words) from the empirical reality it may refer to. (Cf. Lyons <u>Semantics</u> V.1 p.177f. and 197f., or his <u>Introduction to theoretical Linguistics</u> p.424f., or Crystal D. *op.cit. supra n.19,* p.102, or Hurford J. & Heasley B., <u>Semantics: a coursebook</u> p.25f.). We might say that our things are the senses of the words; not their references. They are (in the old Platonic distinction) the *noumena,* not the *phenomena.*

        Robinson speaks also of "things" in the same way, in his <u>Definition.</u> See p.30: "The word 'thing' is here used in a very broad sense to cover anything... at all that can possibly be symbolized by a single word".

24.   This example has been taken from Crystal *op.cit. supra n.19,* p.106.

24a.   See Finnis J., <u>Natural Law and Natural Rights</u> p.4 that "the conceptions of law (and of *jus, lex, droit, nomos, ...*) which people have entertained, and have used to shape their own conduct, are quite varied. ...social life and practice bears labels in many languages. The languages can be learned by speakers of other languages, but the principles on which labels are adopted and applied... are not uniform."

25.   He can stay silent. "He who knows doesn't speak. He who speaks doesn't know." (Lao Tzü <u>Tao Tê Ching,</u> 56 (trans. Wu)).

26. Because it is these, rather than the different lingual histories, that provide for importance and significance, with respect to the abstractions we (should) make. (More on this later).

27. In the traditional vocabulary of the ontological debate, "conceptualism" stands for the idea that universals (i.e. abstractions, categories, ideas) are concepts, and is (seen to be) a middle position between "realism" (the idea that universals exist in reality) and "nominalism" (the idea that universals do not exist in reality). Although there is here a strong connection with our discussion, and although I would rather keep this idea of conceptualism as a middle position in the debate (unlike C.S. Peirce for instance, for whom – not without good reason – conceptualism is the same as nominalism (in his Collected Papers Vol. 1 p. 8-9)), I use 'conceptualism' in a manner quite separate from this debate, and to include (even sometimes to primarily denote) what, in the terms of this debate, is understood by 'realism'. The reason I do this is mainly the fact that 'realism' has today entirely different meanings, and its use in the medieval ontological debate is entirely forgotten (except for dictionaries of English and scholars of philosophy in the Anglo-American tradition (it also maintains this (or a similar) use in the philosophy of mathematics)). Today, "realism" and "realistic" normally mean down to earth (relate "realistic depiction" in art or "Italian neo-realism"), especially in the Latin languages. Even in philosophy "realism" is normally contrasted to idealism and stands closely to materialism. "Realism" that is, has today exactly the opposite aura and connotations from the idea that Plato's ideas exist in reality, and it is this last idea's aura of absurdity, in our modern semiotic universe, that I want to maintain by the use of 'conceptualism' in this Part. Besides, 'conceptualism' has often been used in studies of legal reasoning to translate "Beggriffsjurisprudenz" from German, and is generally equivalent and has the same "bad" aura as "mechanical jurisprudence". In the context of the study of the law, it is easy to identify with attention to and reasoning from abstract concepts in general, as opposed to "attention to the facts (of the case)". I want to keep all these uses and connections of 'conceptualism'.

But we need not really puzzle ourselves with this maze. We can simply say that 'conceptualism' here stands for the attitude of asking and trying to answer questions like "what is law?" ("what is justice?" "what is truth?" "what is a straight line?"), regardless of the ontological debate. (Thanks to the fact that "reality" for us is simply what corresponds to language/ logic/ speech, I could technically be a conceptualist in this sense, even with a nominalist answer to

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the ontological problem, to the extent that I have my personal logic, i.e. my personal decisions on what matters and what does not as far as I am concerned).

'Idealism' is another good term to use, quite appropriate insofar as the aura of absurdity goes, and rather more suitable for maintenance of vocabular compatibility with general philosophy, although it is particularly ambivalent there too (almost as much as 'realism'). It would have been the best term in Greek (and perhaps in the Latin languages too). I have opted in English for 'conceptualism' nevertheless, as rather more apt for a technical use, and also in view of the distinction between the "conceptual" and the "empirical". Our "conceptualism" advances claims regarding the former, not the latter. It is in view of this that the above definition becomes apposite from a strictly lingual point of view too. (With 'idealism' the definition would instead rely on the contrast between the *idea* of - say - the straight line (or the *ideal* straight line (relate "abstraction as idealization" in Davis *op.cit. infra n.29a*, p.126f.)) on the one hand, and any particular straight line on the other).

27a.   See Gilbert Ryle "Ordinary language" (in <u>Ordinary language</u> ed. Chappell) pp.28-9. Although I would generally distinguish the use of a word from its concept(s), his saying that the idiom chosen was a matter of vogue rather than any difference of sense, is here instructive.

28.   And there is also a range in between, where we cannot say that the word has been used correctly or incorrectly; but we need not concern ourselves with this just now.

29.   From the point of view of a general theory of language and thought, the term 'concept' is an unfortunate choice as the general term, since, at least because of etymology, it implies a gathering of elements into a whole. There are no elements within the generalisation we speak of; it is the element itself (not because it is not divisible - it may well be - but because it happens not to have been divided in the subject's apprehension, and because it could equally well have been fused itself into a larger, element again). Thus, and also according to basic lingual intuition, this term is adequate only so far as we have in mind ideas like the law for instance; it becomes inadequate, if we move to e.g. the "ab-" in "abnormal", "not", "I", "and" etc. 'Notion' is more successful, and 'sense' - although less neutral than 'notion' - could be a possibility (especially in view of the distinction between sense and reference in semantics (see *supra* n.23)). ''Εννοια' in Greek is ideal. Nevertheless, I shall stick to 'concept'. Otherwise, this text would become much more

complicated, and without any reason, given our main concern and the fact that for the most part we'll be having in mind concepts anyway and not other notions.

29a.   See the chapters on abstraction and generalisation at Davis P. & Hersh R., The Mathematical Experience, p. 126-36; see especially p. 129-33. See also Buyssens E., La communication et l' articulation linguistique p. 29-36, and relate here and to the second part of the following section on the indeterminacy of concepts.

30.   One of the older meanings of the verb 'import' is *carry as its purport, signify, imply; be of significance or importance* (according to the Oxford dictionary of English etymology). The "double meaning" of 'significance' ('signify' (from the 'sign', L. 'signum' Gr. 'σημεῖον')), is even more evident at its Greek equivalent of 'σημασία' and its family ('σημαντικός', 'σημαίνω', etc. (relate also its "third" meaning of "sound", in e.g. σημαίνουν οι καμπάνες, τά σήμαντρα)).

30a.   Relate Wittgenstein's conclusion that "if language is to be a means of communication there must be agreement not only in definitions (by 'definition' he means "nominal definition" or, better, stipulation (see n. 44a)) but also... in judgments" (*op. cit. infra n. 39*, §242).

31.   Donoghue v. Stevenson (1932) A.C. 562, S.C. (H.L.) 31. Cf. J. Stone, The Province and Function of Law p. 187-8 (or his Legal System and Lawyers' Reasoning p. 269-70, or MacCormick N., Legal Reasoning and Legal Theory p. 117-8).

31a.   Starting with Hjelmslev (see what he says about "the so-called lexical meanings" in the Prolegomena p. 45) and Buyssens (see his early Les langages et le discours, or better the more recent La communication et l' articulation linguistique e.g. at p. 61), through to the post-structuralists (Barthes, Derrida, Kristeva) on the one hand, and on the other Wittgenstein, J.L. Austin (with his speech acts) and the ordinary language philosophers. Cf. Eco U., Semiotics and the Philosophy of Language 1.5.2. and 1.5.5. See also his work at ch. 2, especially 2.3. on the encyclopedia.

32.   One might like to distinguish meaning of a situation or meaning to somebody, from meaning in a text. To speak specifically of the latter then, the context (i.e. surrounding text) provides for an abstraction of the meaningful aspects of the item's sense - or, the context amounts to a pointing to these aspects. This, in accordance of course with the reader's (or writer's) condition - but not

necessarily the specific reader's, who may be abstracted from, in exactly the way I indicate in the next paragraph.

32a.   Relate the author's "we". Also the traditional instruction (especially in languages where the subject is indicated by the verb-ending) that one must not say "I", because it is arrogant.

32b.   According to Kant, this is the question that sums up in the end the whole of the field of philosophy. Cf. his Introduction to Logic, s. 3. (I have consulted the translation by Hartman & Schwarz (cf. p. 29) and the one by Abbott (cf. p. 15)).

33.   If we will postulate independence from our community too, i. e. will say that things (and man) are what they are e. g. in virtue of God's creation, we shall have what in the terms of the medieval ontological debate is called realism. Without this postulate, but only the one of independence from the particular speaker, we have conceptualism. Were dependence on the particular speaker to be assumed, we would have nominalism. (This however is not necessarily faithful to the medieval distinctions. It is perhaps arguable that originally nominalism included conceptualism (in the above senses), and that William of Ockham might agree with this conceptualism here.)

34.   The example from the prohibition of discrimination refers to Ealing London Borough Council v. Race Relations Board (1972) A. C. 342. Cf. N. MacCormick Legal Reasoning and Legal Theory p. 66. The notorious example of the vehicles in the park is from Hart *op. cit. supra n. 2*, p. 125.

35.   Learning of course may take place after the action: learning from one's mistakes, but also rationalisation of the successful move, ex post.

36.   Relate Dworkin's theory of the interpretive attitude. (Law's Empire ch. 2). Relate also the view of Beyleveld & Brownsword (*op. cit. infra n. 42a*, especially p. 86; they refer to Dworkin "A Reply to Critics" (in R. Dworkin and contemporary Jurisprudence) p. 351-3 (which points of Dworkin were it seems the basis for his subsequent theory of the interpretive attitude)) that the philosopher, when designating the concept of law, presents a conception of the concept of law which is picked out by an established "word-connotation".

36a.   Relate A. W. B. Simpson on the achievement of cohesion in a customary system. ("The Common Law and Legal Theory", in Oxford Essays in Jurisprudence sec. ser. p. 95f.)

37. What we have said about concepts is obviously relevant to a lot of other discredited in ordinary language philosophy assumptions, like the correspondence theory of meaning and truth, the vocabulary of natures and ideas, or even ideal languages. It is also useful for a vindication of "traditional" philosophy against some of analytic philosophy's most hollow reproofs, like "obscure metaphysics".

38. Hart *op. cit. supra n. 2*, p. 15.

39. For the idea of the family resemblance cf. Wittgenstein L. <u>Philosophical Investigations</u> §67.

40. This is perhaps the best way to understand Wittgenstein's proposition that the meaning is the use. (Though this is perhaps not what Wittgenstein himself had in mind - but this is irrelevant).

41. "Everything is what it is and not another thing" (Bishop Butler).

42. Cf. Wallace's Prolegomena to <u>The Logic of Hegel</u> ch. X, esp. from p. lxxvii, and the <u>Tao</u>, esp. 20, 47, 48, 71.

42a. Compare Beyleveld and Brownsword <u>Law as a Moral Judgment</u> p. 93-8, for a very good exposition why actual usage of a word like 'law' is of little relevance to the philosopher's effort to designate the concept of law. See generally Ch. 3 for their statement of the epistemological problems with respect to the advance of conceptual preferences about law. But beware of the transcendental method that they finally advance against nominalism ("conventionalism" in their terms). For, in the words of Michel Villey, "cette voie est stérile et logomachique. Il ne faut pas trop demander à la raison pure" ("Le droit dans les choses", in <u>Controverses autour de l'ontologie du droit,</u> p. 23).

43. Define: de+finis. Determine: de+terminus. Definition of something is to place its ends, to determine its boundaries. (Notice also 'term' (terminus) and όρος, its Greek equivalent (ορίζω, ορισμός). 'Term' used to mean limit, end, as well. (Relate "come to terms").)

44. The preference for the economical means of what is more commonly understood by 'definition' is due, partly to the requirements of precision and strictness, and partly to the general reasons why we like economy in speech, not the least important among which is the indication by the fluency/ smoothness of communication that the subject is not alone, that there is somebody (a brother) thinking, understanding and perceiving in the same way.

44a.   With regard to the definition the traditional philosopher is after, and for a
further study of the process, and improvement on my work at this point, cf. the
chapter on "real definition", in Richard Robinson's <u>Definition,</u> esp. pp. 170f.
The "abstraction" at §9 is obviously the concept, and the "analysis" at §10 is
the definition, as well as the "synthesis" at §11 and the "improvement of
concepts" at §12 (relate to the "improvement of concepts", what Hempel says
about explication, in <u>Fundamentals of Concept Formation in Empirical Science</u>
p. 663-4); I do not think that there is any reason to distinguish among them,
here at least. Notice further that the search for the definition also involves
the activities described (or misdescribed) at §§ 1(search for identity of
meaning), 2(search for the essence), 7(search for the key) and 8(adoption and
recommendation of ideals). Naturally, I do not agree with Robinson that the
question-form "what is X?" is particularly vague in the context of philosophy,
nor that the related concept of definition is confused - although the uses of
the term 'definition' may well be confusing, especially in the traditionally
nominalist English-language-culture. I also disagree that we should abandon this
term here and reserve it for definition of words ("nominal definition") - after
all, if it is true that learning a language has little to do with learning
definitions of words, the concept of nominal definition becomes much less
useful, except in what regards stipulative definition, for which 'stipulation'
is of course available.

45.   The most obvious such rearrangement of language happens, because, as Robinson
put it (*ibid.* p. 187) "Every improvement of a concept carries along with it a
stipulative redefinition of the word expressing the concept... Changes in
insight lead to changes in nomenclature".

45a.   A good illustration, for jurists, of the meaning and claims of traditional
conceptualism (especially as contrasted later in the text with linguistic
jurisprudence), might be the Hohfeldian conceptual system and the claims it puts
forth. (Cf. Hohfeld W.N., <u>Fundamental Legal Conceptions,</u> and Kocourek A., <u>Jural
Relations</u>). It is claimed that the units "right", "duty", "liability", etc.,
exist in fact, regardless of the fact that the words have been used in various
other manners, regardless of the fact that noone before noticed and understood
these units. They are the abstractions and distinctions jurists must make - if
they happen to make different ones, even as a rule, they are mistaken. (They
exist in the same way that numbers exist, or a point in Geometry. Relate how
Kocourek speaks *ibid.* in the preface p. iii-iv.) And of course adopting them will
improve our common enterprise of judging. The philosopher does not describe

already commonly held convictions. He discovers ways in which we should reorganise our common activity. (See also Singer's argument on what a legal power is in his "Hart's Concept of Law" in Journal of Philosophy 60 (1963) p. 204f. Notice further White's "Rights and Claims" (in Law, Morality and Rights ed. Stewart) and his subsequent Rights, as an excellent indication of how much conceptualist the proponents of "ordinary language" can be, even while rejecting (or claiming to be rejecting) the idea of denotation and correspondence. (On the substantive issue incidentally, we do not have to say that either White is right or Hohfeld. I agree with what MacCormick says in pp. 170-3 of the above Law, Morality and Rights - and not on the basis of what I take to be ordinary language.))

Notice that the Hohfeldian claims could easily be understood as realist, in the vocabulary of the ontological debate, in the sense that we distinguished earlier realism from conceptualism and nominalism. However, the contrast with linguistic jurisprudence does not depend on such a difference, i. e. on Hart's not being a realist, and "old-fashioned" or "traditional" conceptualism must not be understood as presupposing the realist answer in the ontological debate. The basic understandings of "traditional philosophy", that I depict here, are the same, regardless of the answer to the ontological debate (and even for nominalism, thanks to my early definition of 'reality').

46.   Hart *op. cit. supra n. 2*, p. 15.

47.   We must take notice here of the fact that Hart's views regarding the problem of the definition are somewhat ambivalent in The Concept of Law. Notice his restrictive use of 'definition' which only refers to words (in accordance with Robinson's advice, see above n. 44a), and, when available, regulates their use, rather than determines the concept; see especially p. 208: "It is because we make no... claim to identify or regulate... the use of words like 'law' or 'legal', that this book is offered as an elucidation of the *concept* of law, rather than a definition of 'law' which might naturally be expected to provide a rule or rules for the use of these expressions." And see p. 210 that "whereas the allotment of proper names rests *only* on an *ad hoc* convention, the extension of the general terms of any serious discipline [and therefore the extension of "law"] is never without its principle or rationale, though it may not be obvious what that is. " In view of these passages, we could assume the ideas on the limits of the definition to be peripheral rather than central to linguistic jurisprudence, simple mistakes Hart happened to make in his earlier writings that should not be included in the idea of (the method of) linguistic jurisprudence, oversights due

to received slogans and standard at the time ways of speaking. However, proceeding the way we do is much more fruitful as we shall see. As regards Hart's views for their own sake, see further his earlier "Definition and Theory in Jurisprudence" (republished in his Essays in Jurisprudence and Philosophy) where his distinction between "definition" and "elucidation" is introduced, and his reply to Cohen in "Theory and Definition in Jurisprudence" (Proceedings of the Aristotelian Society supp. vol. 29 (1955)). See finally Martin *op. cit. supra* *n. 0*, Ch. 4, for an analysis and critique of Hart's views on definition and elucidation, and for further bibliography.

48.   Or those that they do not share - e. g. each event began at a different milli-second.

49.   If both the shared and the non-shared characteristics are significant, then the instances will be both grouped together and distinguished, e. g. in different sub-groups. For example, there is a significant difference between a table and a chair, and a significant similarity: they are both furniture.

49a.   Like the robots, and the dogmatics, with their artificial languages.

50.   This is the explanation behind dogmatism; the reluctance to drop the clarity and certainty one worked so hard for, or rather, gave so much for (the psychology of the forced pupil).

50a.   This is the explanation behind the rigidity of scholasticism. Yet even in so much more recent writers as Bentham and Austin, we find the same understanding of a demand for strict classifications, even at the cost of a strangeness and artificiality of language.

50b.   "᾿Εν οἶδα, ὅτι οὐδέν οἶδα".

51.   Hart *op. cit. supra n. 2*, p. 17.

51a.   Notice Marcus Singer ("Hart's concept of law" in Journal of philosophy 60 (1963)) for whom there is "nothing wrong with the conclusion that Hart has provided a definition of law" (p. 200). See also Rolf Sartorius "Hart's concept of law" (in More essays in legal philosophy ed. Summers) and Michael Martin *op. cit. supra n. 0*, p. 39ff., for an attempt to pinpoint a definition by Hart. (But I do not think that Sartorius' suggestion that law is a cluster concept is here relevant; because the correct abstraction, does not amount to the essence in his sense of the one most important feature, the key to the science of jurisprudence. (Although it does amount to the essence or nature of law, under realist, i. e. Platonic, ontological assumptions, in the sense of what the

underlying principle is (what matters, what is of essence, in the context of a philosophical discussion), or in the sense of what law is by its nature, i.e. by its make, i.e. before (the word or the idea is) put to work, in a context (φύσει ≠ θέσει)). And I do not wholly agree with Martin's critiques of the definitions he extracts: he forgets that, like "law" or "legal system", "morality" or "moral" would also - in Hart's vocabulary - have central cases and penumbra, and that therefore, when employed in a definition of the (central case of the) former, they should be understood in terms of their central cases. (In our traditional vocabulary, the concept of morality in Hart's definition of the concept of law, need not cover every case for which one might happen to use the term "morality").)

52.   Hart, Essays on Bentham p.10-1.

53.   Cf. Hart op.cit. supra n.2, p. 18f., and MacCormick N. H.L.A. Hart, pp. 40f., 50f., respectively.

53a.   See Buyssens' conclusion that "la signification est, par définition, abstraite" (op.cit. supra n.29a, p.36).

54.   Relate the section on the Chinese remainder theorem, in Davis & Hersh op.cit. supra n.29a, p. 187f. See also p. 204: "As abstraction is piled upon abstraction, meaning recedes and becomes remote".

55.   In order to perceive the correct abstraction, we must first look carefully into the concrete (and vice versa).

56.   I think therefore that Moles' critique of Hart is in this respect wrong. (Cf. Robert Moles Definition and Rule in Legal Theory p.21-6, where he points that Austin was not trying to describe any particular thing (e.g. a legal system), and that precisely for this Austin proceeds to abstract, in contrast to Hart, who imagines Austin to be engaged in a description of empirical reality when defining law as a command, and so proceeds to correct Austin for having disregarded some elements of this empirical reality). It is not a matter of having misunderstood Austin's concept (or its place in Austin's model) and having mistaken it for a description whereas it is a definition viz. an abstraction (the very idea of which is indeed "that certain aspects of the available material have been left out, and that we are utilizing a criterion of demarcation, explicitly or implicitly, to indicate, in the light of the question we are concerned to answer, what aspects of the phenomena we are concerned to explain" (p.26) - notice that this "criterion of demarcation" is, in our vocabulary here, the perception of significance (but also that it is not only a

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matter of what aspects one chooses to explain; it is also a matter of what aspects are worth explaining, what aspects we (in the common enterprise, the community) need to take into account)). Both concepts are abstractions (and descriptions at the same time in precisely the sense of Moles' "descriptions of concepts"), even though only Austin's concept is put forth as a stipulation. Hart is saying that something important, namely the difference of a social rule from a command based on political power, is missing from Austin's definition. You might say that he is wrong, viz. that this "difference" is insignificant, that this "difference" makes no difference (arguing for example, that the jurist's subject matter is such commands only and not other social rules, or that Austin, when using 'law', had *lex* in mind, not *jus*, or that today such commands have entirely displaced the sense of rightness on which obligation used to depend). You cannot say that he is refusing to abstract, for he is not. He is abstracting from what he takes to be unimportant, e.g. the fact that in English law, the passage of time with regard to a debt, has the effect of divesting the debtee of the right to have his claim enforced through the judicial apparatus (limitation of action), whereas in German law, it has the effect that the debtor acquires the liberty to refuse payment (*Verjährung*); and he is trying to relate everything he takes to be important, e.g. that international law lacks courts with compulsory jurisdiction.

In view of Moles' style of scholarship and his beliefs regarding "fresh starts", notice, that the truth or falsity of the above point is not so much to be determined by a careful psychohistorical investigation of what Hart, Moles or Austin actually believe(d). For I am ready to concede, if you want me to, that Hart (or anybody) did not know what he was saying (although I would be somewhat reluctant to press such a point, and even more reluctant to boast, that I in contrast do). But this is not the point. I am not interested in Hart, or Moles as such, nor in recounting what they say. I am interested in learning, what is true, what matters, and I try to say what I think - for noone in the end can speak, except according to himself. Naturally, in order to learn and to speak, I start from what others have said, and I try to listen to it, as carefully as I can possibly manage. It would indeed be stupid, and arrogant, not to do that. But it is also insolence, to stand yourself in order to judge, not a proposition (which you yourself utter anyway), but an actual human being, whom, after all, you've never even laid eyes on.

57.   According to Edgeworth op. cit. infra n.63 p.117, in ordinary language philosophy (and so linguistic jurisprudence) "...the suspicion of abstraction,

theorisation and conceptualisation becomes enshrined as a methodological principle"; see also p.120-1. This is a standard to some extent reproach of ordinary language philosophy, first appearing (insofar as I can tell) in Gellner's Words and Things; see what he says about Polymorphism on p.44-5, 50-1.

57a.   Relate Honoré's assumptions and how he speaks of the balmy days of linguistic philosophy in his "Real Laws" (in Law, Morality and Society ed. Hacker & Raz).

58.   Chiefly because of spelling and diverse origins of words, on the one hand, if we are talking of the language in abstract. Regarding education, notice the tradition of nominalism and empiricism, and the style of legal thinking. One further partial explanation can perhaps be found in the tradition of individualism.

59.   This complaint is of course characteristic of earlier modern thought too, which emerged characteristically with distinctions anyway. (Take for example the is and ought distinction).

60.   In accordance with this reasoning we should form two distinct instructions: a) to attend to common people's speech (and so for example to folk tales etc.), b) to attend to unreflective speech, i.e. the way we speak when we are not making theory. Only the second instruction bears on linguistic jurisprudence's search in the language.

61.   In a society (see Part 2).

61a.   After all, see J.L. Austin's "A Plea for Excuses" (in Ordinary Language ed. Chappell), probably the most authoritative text with respect to the program of ordinary language philosophy, at p.49: "Certainly, then, ordinary language is *not* the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word".

61b.   So we are not in accord here with Edgeworth's otherwise very good paper (*cit. infra n.63*), or with Martin *op.cit. supra n.0.* I do not necessarily mean to assert, that they are unjustified, in understanding Hart's (and especially the ordinary language philosophers') methodological claim, to have been, that ordinary language provides a warrant, through the distinctions enshrined in it, for the substantive claims. All the same, even if this be the claim that Hart (and the ordinary language philosophers) really made as a matter of historical fact, this is not the way I understand linguistic jurisprudence.

62.   Cf. J.L. Austin *loc.cit. supra n.61a.*

63.   Cf. Edgeworth B., "Legal Positivism and the Philosophy of Language" (in Legal Studies 6/2) p.121. Relate also Donald C. Galloway "The Axiology of Analytical Jurisprudence: A Study of the Underlying Sociological Assumptions and Ideological Predilections" (in Law in a Social Context ed. Bechtler), especially for the accusation of conservatism, e.g. at p.54,73.

63a.   Or does it? For can we deny that the actual is rational and the rational is actual? I do not know. But anyway, this discussion cannot be made here. A qualification however must be made, that this defence of linguistic jurisprudence, is valid only under the specific understanding of philosophy that we have put forth. And that only given this conception of philosophy (which fits Plato fine, but not Hegel) is it true that it is understandable for historical insight to be missing from conceptual questions. For, at least after Hegel, the distinction between philosophy and history, even if it be true, can no longer be taken for granted.

64.   Cf. Hart op.cit. supra n.2, p.15.

65.   Cf. the Tao.

66.   Think of this. At the time of the Russian revolution, the bolsheviks were putting to fire paintings, books and the old nobility, as symbols of capitalist exploitation and corruption that they were (seen to be), in a noble effort to extinguish the false ideologies, the errors of the past, and clear the road to a bright future for humanity. Today, the nationalists are bringing down the statues and the names of the "dictatorship of the proletariat", in a corresponding effort to erase the past of an oppressive inefficient bureaucracy, and clear the road to freedom.

67.   On the other hand, don't we also need breaks with the past? Death and birth? Cleansing fire? For don't we need - in contrast to the Tao (see infra n.68) - to act too?

67a.   Depending on the other concepts surrounding them. Given concepts A, B, C, concept X may be senseless, but not so given concepts A', -B, C'.

68.   Notice that according to the Tao, we need not, and in fact, should not act: the principle of inaction. (Cf. Giles' arrangement, ch.3).

69.   So, we reach again the conclusion that it is impossible to merely describe our actual ways of thinking (except in a formal way of course, viz. in the sense that my chaotic model can be said to be a description). (This impossibility was also asserted in Part 2, where the infinity of concepts was also assumed). And

accordingly, there is no escape from the speaker's having to assert that "this is what - I think - is correct; this is what we must do".

70.   Cf. the Tao.

71.   It is also probably the one that is most faithful to Hart's substantive writings - but I am not interested in defending (or attacking) this claim.

72.   This interplay is determined by the subject's degree of humility or arrogance, openness or closure, to which also corresponds the subject's general or specific (i.e. regarding the specific rule) tendency to imitate or depart. (It may be assumed/ felt to be correct, easy, symmetrical, elegant (or their opposites) to do like the others do).

73.   If we want to be precise, "education" and "learning" must be understood in a strictly descriptive technical sense here: whenever the individual changes its assumptions and practice in response to the environment, we have learning. Thus, I can learn to use "sex neutral terminology", after being exposed to it in America, or I can learn to avoid it, after getting sick of the related ideological brainwash.

Relate the understanding of "knowledge" in the "sociology of knowledge". (Cf. the introduction at Berger & Luckmann *op. cit. supra n. 4a.*)

74.   In many languages today, but especially in English (largely because of an opposition to French (or "Continental") tradition and influence), the terms 'logic' and 'logical' are often used rather restrictively, referring to formal and strict, necessary relations of propositions. Also, they are often contrasted, in English, to notions like reasonableness and sense ("it makes sense"), as they tend to connote a forcible exclusion of difference in points of view and a certain inflexibility and mathematical unfriendliness. Here "logic" will be understood in a much broader sense, closer to its Greek meaning and origin, and equivalent to "reason" (especially in phrases like "this is the reason why"). The reason why I speak here of logic rather than reason (which is a more general term in English), is because of logic's archaic and intriguing connection with speech, which is evidently quite important to this analysis (λόγος: speech/ reason ("the reason why"), λογικ(ή/ό): logic/ reason ("man's reason"), λογικ(ός/ή/ό)/ εύλογ(ος/η/o): reasonable/ (rational)).

Relate to my understanding of "logic" Toulmin's claims regarding what logic (the discipline of correct argumentation) should be about, in The Uses of Argument (see the introduction p. 1-8 and the summation at p. 187-8 (where his understanding of "ἐπιστήμη" however is much too restrictive - "ἐπιστήμη" is in

fact much closer to "Wissenschaft" than to "science")). But see also Stone's contrary advice regarding the use of 'logic', in Legal system and lawyers' reasonings ch. 8 §1.

74a.   So Moles is correct in saying that the "disjunction between merely convergent and ruled behaviour", "is not merely frequent... but necessary. It is not a matter of observation... but a *necessary* consequence of the definitions of 'convergent' and 'ruled' which Hart accepts... The statement is in brief conceptual not empirical, analytic not synthetic". (*op. cit. supra n. 56*, p. 83-4).

74b.   Compare C. S. Peirce's discussion of "leading principles" of inference, as habits of the mind, in Collected Papers V. 3 §154-64. See also V. 5 §367: "That which determines us, from given premisses, to draw one inference rather than another, is some habit of mind, whether it be constitutional or acquired...". See also Dewey's formulation at p. 13 of his Logic: the Theory of Inquiry: "Any habit is a way or manner of action, not a particular act or deed. When it is formulated it becomes, as far as it is accepted, a rule, or more generally, a principle or "law" of action. It can hardly be denied that there are habits of inference and that they may be formulated as rules or principles."

    Notice that for both of these authors, "logic" is the science which seeks to distinguish and determine the correct habits of inference; only the correct rules are "logical". This as such, makes no difference to what we have said here of course. From within logic in this sense, there will be a theorist, a subject, asserting that these are the correct habits, that this is what logic says: these assertions are the rules of logic, his habits of thought (which the theorist may have acquired through his study indeed - no problem here). However, there is this important difference, that what Peirce calls leading principles, i.e. rules of logic, what he mostly has in mind as "habits of inference" in this context, are not primarily the perceptions of significance. His "leading principles" are not determinations of what counts as different or the same. They are rather what connects the perceptions of significance. They regard the mode of inference from a given concept. They regard what this concept analytically entails, and so they correspond to what has traditionally been understood as rules of logic, i.e. to rules like the law of identity. I would be quite reluctant to speak of relativity with respect to these rules, i.e. to say that they are contingent (although I would be also reluctant to assert strongly the opposite; we have not corroborated them with - say - the Alpha-Centaurians yet). Peirce is quite definite that they are not, and although he does put them down to habits along with the perceptions of significance, he does not take the further step to

dispense with the western - and for me (and Toulmin) rather useless - narrow concept of logic (see supra n. 74), probably because of the fact that he does not notice, that, those habits determining in fact the inferences we draw, are not so much the modes of analytical inference, as the abstractions (our names) that these modes connect.

75.   This proposition is not accurate, unless within reason and habit, we include feelings, e. g. of elegance.

76.   However, some perceptions of significance will be more central than others, in that they depend on less specific conditions. They will shift less easily therefore, and will be more deeply engrained in our habits of thought and language. Thus the distinction between the past and the future is more central to our condition than the one between before and after next Sunday: the conditions for the significance of the first distinction are merely that there be an acting or sensing subject in time; whereas the conditions for the significance of the second one are many more besides. And naturally, as regards very central distinctions, it is not very accurate to say that their significance depends on e. g. who the subject is and what it wants, to the extent that this question will be more properly seen to arise on their basis, rather than the inverse.

76a.   This has been the standard solution of pragmatism. There is however a defect here, if this solution is understood, as is sometimes in pragmatism, to be the rock-solid base on which everything else is ultimately founded. For it is not rock-solid at all. It is seen to be solid, because of the modern Western underlying assumption, of the independent and free individual, who has chosen what it wants, what needs it has. It is accordingly, as such, one-sided. What we need (the distinction or its negation for), is not necessarily a given, beyond discussion. (It may happen to be given, i. e. we may happen to take it for granted, on occasion). It is in its turn dependent on these very ideas (distinctions, concepts - the logic, the language) we investigate, that form our identity, who we are and what we want (what we are supposed to want). The process is circular, *dialectical.*

77.   "Be philosophical. Don't think about it." (Zenon Bańkowski, quoting an anecdote by Dworkin).

78.   Relate Herman Tennessen's attack on ordinary language philosophy in "Ordinary language *in memoriam*" (in Inquiry 8 (1965)) p. 241: "Hence, the whole point of exposing our undivulged habits - linguistic and non-linguistic - would be to

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improve our initial position for *choosing better habits.* To be unconscious of one's habits is a sufficient (but not necessary) condition of being their slave. The ambush of ordinary English is inescapable only to those who are blissfully unaware of its pits and traps. *Deceit is based upon trust.* The more a speaker is linguistically disillusioned, the less likely is he ever to be the laughing stock of any natural, everyday, ordinary, 'gewönliche', 'tatsätliche' language... The object... is... to enable us to disentangle ourselves from the grip of our language habits, the ordinary language, its models and metaphors, to be *in* command of the language, rather than *under* its command. 'The question is' said Humpty Dumpty, 'who is to be the master, that's all'."

"Deceit is based upon trust". Contrast the Tao: "If you don't trust the people, you make them untrustworthy" (Mitchell 17). "He who has no faith in others shall find no faith in them" (Giles p.53).

79. Remember that rational control is the Kantian definition of freedom.

80. Cf. Aristotle on the young, at Ρητορική B.12 (1389a3-b12).

81. Notice however that this is not the only possible conception of philosophy. I would not even say that it is the best one.

82. Compare C.S. Peirce Collected Papers V.5 §376: "...It is a very common idea that a demonstration must rest on some ultimate and absolutely indubitable propositions... But, in point of fact, an inquiry, to have that complete satisfactory result called demonstration, has only to start with propositions perfectly free from all actual doubt. If the premisses are not in fact doubted at all, they cannot be more satisfactory than they are..."

SELECTIVE
LITERATURE REVIEW

Robert Moles, in his book Definition and Rule in Legal Theory, has argued for a total condemnation of Hart and his Concept of Law, which he sees to have been "a retrograde step" "in terms of the historical development of ideas about law" (p. 81), and the cause for the professed fact that jurisprudence and our theorizing in general about law have since been led astray. In his attempt to justify this claim he discusses many issues, which are of some relevance to our examination of linguistic jurisprudence - or what he would more simply call the (lack of any) epistemological ground for Hart's theory. Here, I shall try to relate to my work, those of his comments, that coincide with, or are contradicted by, our epistemological analyses. On the contrary, I shall not be concerned with Moles' generally convincing re-interpretation of Austin's work, or his bitter attack on Hart for the latter's failure to appreciate Austin, or even his many substantive (i.e. not epistemological) criticisms of Hart.

We may start by noting that Moles takes Hart's theory to have nothing to do with descriptive sociology, or, at any rate, not to be sociology itself.' As we have discarded, in Part 2, any claims of linguistic jurisprudence's to a pure positivist description of social facts, we shall not take issue here. Furthermore, we too have come to point in the end that the distinction between "merely convergent and ruled behaviour" is analytic in linguistic jurisprudence; and we shall also agree obviously, that as a claim regarding what people actually happen to have in their minds, it is rather superficial. (Cf. p. 83f.). However, in view of Moles' taste for propositions of

the type 'A in fact believed that X, not Y', I have to remark that these conclusions of mine are not conclusions on what Hart (or anybody else) actually thought. They are conclusions on the epistemological possibility and worth of certain methodological claims that Hart happens to make. For all I know, Hart might indeed have happened on occasion to regard his writings as "descriptive sociology"; or he might, on reading this book, denounce it even, in indignation, as wild metaphysics having nothing to do with the spirit of his work.

Another issue I obviously agree with Moles on, is that the Concept of Law is quite confusing for methodological studies, and that Hart has failed to articulate an adequate epistemology.[2] Let me point out however, that I do not see this to be in itself so grave a defect of Hart's theory. The importance of an adequate epistemology lies not in some guarantee of value of the substantive work; there is no such guarantee. And I do not believe that an epistemological awareness is a prerequisite for making substantive claims; if it were so, it would be impossible to speak.[3] The value of good epistemological studies lies in themselves, in the knowledge and indeed wisdom they may bring for their student, and in the latter's ability as a result, to be able to accommodate apparently contradictory ideas, and to relate diverse disciplines and viewpoints - a matter of extreme importance in our days of extreme specialization, as Moles was keen to perceive.[4]

The main point, for what concerns us, that Moles makes, is that Hart has misunderstood Austin to be making a description of empirical - or anyway external - reality,[5] when defining law to be a command of a sovereign who is obeyed habitually. Accordingly, Hart examines this

definition and finds it inadequate as a description of what law, i.e.
a legal system, actually is. But of course, Austin was making a
definition, i.e. a description of an analytical tool, of a concept,
in the process of forming and clearly presenting his (a priori, viz.
prior (to experience and description)) conceptual model, *before*
applying it to the external reality. (And this probably means, in
more simple words, that Hart should be concerned with the idea of
'command of a sovereign' and whether it is a) analytically useful,
and b) adequately applied by Austin; not whether this idea is
actually equivalent in language to the word 'law', which Austin
stipulated - Austin could have used any symbol instead of 'law').

A few citations might be useful here.

> [Austin's purpose in defining e.g. 'law'] is a descrip-
> tion of an analytical tool which can be used to enable us
> to determine what features of the social order properly
> belong to a legal system. It is a description of a concept.
> (p. 23)

> [Austin's] critics mistake the object of his descrip-
> tions, and take his conceptual descriptions for empirical
> ones, and challenge them by applying the wrong test. (p. 24-
> 5)

> ...the very idea of abstraction means that certain
> aspects of the available material have been left out, and
> that we are utilizing a criterion of demarcation,
> explicitly or implicitly, to indicate, in the light of the
> question we are concerned to answer, what aspects of the
> phenomena we are concerned to explain. (p. 26)

It is not just that Austin intends his definitions to be
placed in one context and that Hart places them in another.
The difference is that Hart believes Austin to be putting
forward statements of fact when he is actually putting
forward definitions and he is thus led to the erroneous

view that Austin's claims can be refuted by facts, which for Hart take the shape of claims about what people say and do. This represents a failure to appreciate the conceptual-empirical distinction, and attempts to set up an inconsistency between logically different modes of discourse. (p. 190)

First of all, I must again distinguish. I do not presume to know what Hart or Austin really thought, and how in fact they regarded what they wrote - or, at any rate, this, as such, is not what I am interested to speak of. So I shall not discuss here whether or not Hart did misunderstand Austin's work in fact, or whether he regarded his statements to be true in virtue of the empirical reality - it is possible that he did. It is a separate question how these statements are to be understood - by us; viz. what we can learn, what we can take from them, what value they can be of.

In Part 2, we did consider linguistic jurisprudence, as making statements regarding a reality, which the theorist is in principle not part of. This was the social reality, the reality of the ways of thinking in the social environment. This was the logic that exists contingently to a social group, which group exists independently of the theorist. Here, the analytical distinctions (i.e. Moles' analytical tools, the concepts) the theorist starts from - e.g. the disjunction between a social rule and merely convergent behaviour - are taken from the standard ways of thinking of the social group described (in accordance with Winchian ideas on the methodology of sociology). Under this interpretation, linguistic jurisprudence was seen to be somewhat problematic and incomplete; its claims to objectivity were seen to be unjustified.

Moles does not pay much attention to the possibility of this

interpretation. (See however p. 84-5). Nevertheless, what we said regarding linguistic jurisprudence in its light, does not contradict what Moles has said.

However, this was not the interpretation of linguistic jurisprudence that we finally endorsed. For in the end, linguistic jurisprudence was seen to be a conceptualism, and so to ask what is the concept, or the nature, or the idea, or the central case, of law; what is the appropriate abstraction, what is the category the subject (and so the theorist) should employ. Here we are not in accord with Moles. Because, in the light of this interpretation, Hart is also seen to be making "descriptions of concepts" or of "analytical tools" in the end, same as Austin does (in the beginning). And Hart is seen to disagree with Austin - or perhaps with 'Austin' - not because of a misunderstanding of what the latter said, but because he judges Austin's analytical tool, Austin's definition of law, to be inadequate, because it does not depict the correct category, the correct lines of demarcation. It does not coincide with what is here significant, what matters. It does not correspond to the meaning of law; which meaning is of course an abstraction, and as such indeed "leaves out certain aspects of the available material", in accordance with a "criterion of demarcation", the theorist's perception of significance, which indicates not just what aspects of the empirical the theorist *chooses* to explain, but what aspects, according to the theorist, we need look at and use, as distinctions, in our seeing the empirical and judging.

(To give an example, without prejudice to what Hart or Austin really thought, the issue might be seen like this: What do we, the lawyers, study, in studying the "law"? (Or, what are we to study?) Do

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we study (should we study) the commands of the sovereign, or do we study those rules that are posited in accordance with our rule of recognition? (What do we (or they), the judges, apply, in applying the "law"?)[5a,b,c] In either case, 'law' is of course a concept – and so is a 'legal system': each and every legal system, as well as the idea of a legal system. Truly, what else could this term especially be, "legal system", other than a category created by legal dogmatics and jurisprudence, an abstraction, that defines (or "demarcates") its material?)

Under this interpretation then, we can see Hart to end, where Moles sees Austin to begin: at the creation and presentation of an analytical model, at the creation and presentation of a logic/ language. This can then be used – in principle – for the description of the empirical (i.e. the observable) – if this is what we want to do. Or it can be valued as such, for the organization it provides of what we observe and its effect of focussing the subject's attention to what matters. And it can be used in the process of the subject's learning and forming its identity, its place in the world, and in the discussion and regulation regarding common problems and decisions for action (i.e. politics). Of course, speaking of an "analytical model" rather than "logic", is more in line with description of the empirical, e.g. in sociology. But otherwise, there is no difference, save for the fact that the subject will normally *have* an analytical model, but, at least to the same extent, be had by (its) logic.

This disagreement of mine with Moles is of course in itself superficial. It is not one of epistemology. It comes down in the end to a disagreement of interpretation of Hart's work. Moles simply did not think of this possibility – probably because he did not like

Hart's work and style. Now what books one likes to read, is to a great extent beyond intellectual disagreement - just like tastes in food. And in the end, it is probably determined not by one's philosophy, but the type of (legal) education one has received, and the kind of confused and mistaken assertions one is tired of having had to listen to and deal with.

However, there may well be a much deeper - in terms of scholarly debate - disagreement too. Because Moles declares that stipulative definition "is the only proper way in which conceptual analysis can proceed, whether in law, mathematics or science" (p.26-7). I shall have to say a few - too few unfortunately - words on this.

There are two possible rationales behind this declaration. The first and foremost is the belief in nominalism, viz. the belief that there are no right and wrong concepts; no true ideas/ abstractions. What is significant, the differences and so analytical distinctions that matter, this is a matter of the specific individual's constitution and way of seeing things. It is a matter of the - non-rational - decisions the specific subject takes, the purposes it happens to have and so the projects on which it chooses to embark. So the author should set out in the beginning these decisions, purposes and projects, clearly, thus enabling the prospective reader to see whether there is any significance here from the latter's viewpoint. And so there is no sense in criticizing someone for having chosen these rather than those concepts; it would be like criticizing him for having named his son John rather than George. To say that "command of a sovereign" is not the correct concept of law, would be like saying "your son is not what a John is in fact".

Wittgenstein's writings and ordinary language philosophy in

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general, were to a large extent a rejection of precisely this assertion - which remains nevertheless a perfectly respectable position, even if my writings in Part 3 are not so friendly to it. I have indeed tried to indicate that it is sensible and philosophically respectable to argue about who we are, what decisions, purposes and projects we must have, and so that it does make sense to argue on true and false ideas - without thereby precluding the sense of the opposite possibility, i.e. of the individual's choosing and determining who he is and what matters to him, exclusively, viz. irrespective of any community. Yet this is too great an issue, for me to claim to have provided a complete proof, and Moles remains free to stick to the above rationale, if indeed it be what he truly believes (which I do not think is the case).

However, even so, we need not abandon our benign interpretation of linguistic jurisprudence - or its being benign. In total agreement with Moles on the importance he attaches to purpose as a presupposition (and also a consequence) of demarcation and generalization,[6] we can simply point out that the reader may happen to have a different purpose from the author, and so see the given demarcation and generalization not to suit him. Indeed, noone can start a novo. One cannot but start from demarcations and generalizations others have made. (One will start from a language that precedes him). Why then cannot the reader take existing demarcations and generalizations, and ask himself whether they are correct, in view obviously of his own purposes, of his own projects, thus modifying them and then using them as elements for his own "analytical model"? - But he should first relate what his purposes and projects are. - But again why cannot the reader ask himself what

these purposes and these projects ought to be, in accordance with his learning, i.e. receiving demarcations and generalizations (especially as applied to himself), if the latter are also a presupposition of purpose? Indeed, this is a good way to see my interpretation of linguistic jurisprudence: The reader, in asking himself what the concept of law is, is trying to determine what the appropriate related demarcations, purposes and generalizations, i.e. what the appropriate abstractions, for him (or according to him) are.

(And therefore, since nothing here is strictly predetermined, but is allowed to evolve instead, it is only natural for the use of the signs to shift, for "conceptual transitions" to take place,[7] i.e. for meaning as implication to prevail over meaning as equivalence.[8] It is obviously at the end only of this process, that clarity of concepts and rigour in the use of the signs can be achieved.)

Of course, it may well be that Hart the reader misunderstood Austin the author, and/or was unfair to him. But this is another issue. It does not entail that stipulative definition is the only proper way in which conceptual analysis can proceed.

Still, there is another rationale to back this idea: Research is one thing, and presenting its results is another. When sitting down to write a book as a scholar, one is expected to have finished interrogating oneself, and to be able to present in a precise and determinate fashion what his logic, i.e. his game is - so that the reader can pinpoint exactly what is being said, and so that it is easy to check for any mistakes. The loose style in writing, the lack of rigour, is dangerous, because it may mislead the author, and because it may cover his mistakes from the reader's check.

Again, this is a perfectly respectable position; except for the

fact that it overlooks a) the problems of communication, and b) that meaning, what matters, can recede through attention to the demand of rigour. Stipulations may improve certainty and precision, from the author's point of view, but they may also hamper the reader's understanding; for you cannot expect the latter to start using right away, after just reading a few definitions, a language of abbreviations you have concluded with, perhaps after ages of research. Because your analytical model will stand for and hide behind it a whole series of reasons, viz. purposes, beliefs and decisions. And unless you bring your reader into those reasons, he will not be able to see, except at best a glimpse from your definitions' sense, viz. reasonableness. As for the fear that loose talk may mislead the author and also make his speech's correctness difficult to check, it is only formal correctness that is assured through rigour, at the expense of the ease of judgement regarding the speech's wisdom. Because rigour and stipulative definitions, while making clearer and precise the demarcations and generalisations that are being made, will tend to blind one with regard to those demarcations and generalisations that are not chosen, that are – unconsciously, even by the author perhaps – rejected.

No. Stipulative definition at the beginning of the project is not the only proper way for conceptual analysis. It is one way, one style, which, just like the others, has its merits and demerits.

NOTES

1. See p.217: "Now... we can see why Harris might, with some justification, regard [Hart's theory] as sociology fit for Martians - for it is, of course, not sociology at all."

2. See p.5: "...the methodology [Hart] employs is extremely confusing. This results from his failure to articulate or employ an adequate epistemology."

3. Indeed, theory always comes after the action - and so meta-theory after the theory. I might even go as far as to admit that whatever the substantive claim, an epistemological grounding for it can be constructed.

4. Cf. p.6-7.

5. I do assume here that for Moles, 'empirical reality' is not contrasted to but includes 'institutional reality', since the empirical he contrasts to the conceptual, the former being what the subject seeks to understand and relate, the latter the analytical tools the subject uses in this process - and institutional reality is obviously included in the former in this context. I approve of course of the lack of contrast between the empirical and the institutional here, but I have used the term 'external' to avoid misunderstandings and make clear my assumption, as Moles is nowhere clear on this. Notice that 'external reality' here is to be contrasted to the way I often use 'reality' in the third Part, to refer primarily to the conceptual.

5a. Relate Beyleveld D. & Brownsword R., _Law as a Moral Judgment_ p.86 that "designating the concept of law is to be regarded not as an operation which we perform on the words we use to express concepts, but as an operation on concepts which those who disagree about the nature of law mutually agree specify their field of interest".

5b. It is true of course that for Austin at least, "the law" does not designate the field of the jurists' or the sociologists' discipline. Jurisprudence for Austin encompasses much much more than the law, viz. than the commands of the sovereign. This is only the key to the field, and a principle of its rational organisation. Yet Austin was subsequently very much criticized for his definition of "law", long before Hart's time, by jurists and sociologists or anthropologists alike, precisely because of the fact that his definition did not provide for things like international law, or primitive law, which were very much central in the activities of various people studying "the law". What in my

opinion gives meaning to most of those criticisms (and I disagree here with Williams ("The Controversy concerning the Word 'Law'" in Philosophy, Politics and Society ed. Laslett - cf. with it for references also to the aforementioned critics of Austin's definition)) is the need for a field-designating concept, for the then strongly emerging social sciences, and the corresponding (re)emergence of 'law' as this concept. When Hart's turn comes, the stage is already long set, and his criticism of Austin's definition is a brilliant rationalization of standard attacks (and it is certainly not, in this respect, a revolution, a novo, as today's belated defenders of Austin seem to believe), through which he then proceeds to put forth, in a further rationalization, the field-designating concept history demands/ has impressed. So no wonder his success. The point is that Hart is faced with and reproduces 'law' as the concept that designates an empirical field for the social sciences (but which concept must remain suitable for the legal dogmatics' activity too - hence the internal point of view), and rejects the definition of 'command of the sovereign', because unsuitable for this designation. And it is this determination by "social science" that as a result produces and hides this restriction of the field that is proper to legal dogmatics. It is the scientistic (or positivist if you wish) ideology that has conquered the humanities, and thus rendered ethics, what we must do, unsuitable for serious, *scientific* knowledge, and so unsuitable for the base of the scholar's (be he a lawyer or a "philosopher") claims to truth. It is this ideology that commands the reduction from Austin's much greater field of the discipline of jurisprudence, and, by the same token, renders 'law' suitable to become the field-designating concept that it is. (But the same concept for all social sciences? For jurisprudence and sociology alike? It is absurd yes, but under these conditions jurisprudence cannot stand on its own feet. It has to borrow sense from sociology. And anyway, the scientistic ideology, at least in the English language culture, where it is very firmly based on nominalism and empiricism (and where it is never seriously challenged) demands a thing, in experience, prior to the theorist's view and independent of it, that provide for the theorist's appearance to be talking about "facts" - no matter what kind of "social science" he engages in. Hence all this discussion about what law is in fact, viz. which is the *social phenomenon* we (must?) speak about. (Notice the contradiction with nominalism here; but of course 'nominalism' has changed meaning). Because some space need be retained for a part at least of the traditional idea and role of legal studies. And naturally, despite the grounding on empirical things, different studies (and also (the allowance of) different

viewpoints) cannot but have (entail) different fields, and so different field-designating concepts. Hence the production of this unbelievable ambiguity of the basic vocabulary here (into which, after all, more traditional ideas will need be translated as well), which comes to be explained away as inherent in language.)

5c.   Teubner could see here the explanation behind Kelsen's and Hart's success. With their theories, self-referential closure is achieved for legal dogmatics. (You might think that this applies better to Kelsen's theory, but I am tempted to say the opposite. Because with Hart, there is not even much restriction of the applicability of the system's perception, for there is little awareness of the system's perceiving and defining. The presentation is in terms of the wide undifferentiated society - the ordinary man in the street. And this is of course a construct of the system. Thus, the system defines the world. It is unaware even of the possibility of the outside, which possibility is on the contrary very pronounced once you explicitly assume a distinct viewpoint, like in the pure theory of law: there are other viewpoints too. And so, with Hart's theory, the move is not noticed, and thus becomes more acceptable and more complete.)

6.   See p. 182: "It is not possible to say of demarcation, generalization and purpose, which comes first. Each presupposes the other two. They can be separated for purposes of analysis, but any abstraction is a manifestation of all three; and thought necessarily presupposes the use of abstractions."

7.   See pp. 115-6, where Moles complains that Hart uses in an ambiguous fashion, concepts that are central to his exposition, and that he depends on the reader's "natural attitude" to facilitate the acceptance of his conceptual transitions.

8.   Cf. Eco U. Semiotics and the Philosophy of Language p. 14f. on the distinction between the sign as equivalence and the sign as implication.

Under the title The Legal Philosophy of H.L.A. Hart, Michael
Martin has attempted a painstaking analysis and thorough critique of
everything Hart ever dared write or think. In sharp contrast to most
of his specific points, his overall assessment of Hart is very
positive. But anyway, our concern, as with Moles, will be confined,
to those of Martin's discussions, that are directly related to our
examination of linguistic jurisprudence. However, in view of the fact
that Martin's epistemological criticisms, tend to centre on and take
meaning from his substantive ones, we shall need to digress into one
or two of his substantive criticisms, so that we may see more clearly
some essential differences between his work and mine.

The first point to take up, is Martin's censure of Hart's
allusions in The Concept of Law to a descriptive sociology. If Hart
is doing sociology, it is of a very bad kind. With its total
disregard for empirical evidence, and for the insights real
sociologists have in fact provided, it is nowhere near the type of
work sociologists are generally engaged in. And the sociological
assumptions Hart does in fact quite often happen to make, are, in
this context, rather crude, naive and unclear. (Cf. p. 27-8).

We may easily agree, that as a sociology linguistic jurisprudence
would have little to offer, and that if Hart really thought he was
doing sociology, a major misunderstanding must have been involved, as
to what sociology is. I am less certain than Martin that Hart did so
think, but I confess that this question is beyond my competence, or
indeed interest, to answer. At any rate, a certain controversial
understanding of the idea of social science, namely Winch's book by

the same name, was in fact around and seems to have played some part in Hart's allegation that he was doing sociology, with its fusion of philosophy and social science, and its apparent claim that, since meaning depends on a social context, the social scientist should rely on those understandings only that are actually established in the social context investigated and understood by the actors therein. This understanding Martin has rejected as ill-conceived and absurdly restrictive for social science (or philosophy).[1] When it comes to confronting it in Hart, Martin's main reason for the rejection is that surely the theorist cannot always be content with categories and explanations the observed actors would themselves understand and use; he may have instead "to ascend to abstract theory in order to gain a theoretical understanding of a legal phenomenon". (Cf. p. 25-7).[2]

In Part 2 we constructed linguistic jurisprudence's claims to truth, as regarding the established meanings that exist within a given social group and which the actors understand and use. We took Hart on the basis of the same understanding of objectivity that a Winchian social scientist would have assumed. Our reductio ad absurdum succeeded in showing us that the prior decisions of the theorist, in distinguishing and naming what he observes, regardless of the corresponding names the observed social actors may happen to use, is indispensable for any claim to impartial description. So long as the postulate of positivist description of external reality is observed, there is no escaping the adoption by the subject of a Logic, regardless of what the observed logic(s) may be. If the theorist should expect to get his logic of description from the ways of thinking observed, the claim to a positivist description of an external reality would be incompatible with the possibility that his

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work could come to an end. He could never come to tell us that this is what "the law" is as a matter of social fact - for in saying so, he would be choosing instead, one interpretation among many ones observable.

There is no way for me to know whether Martin would agree with this line of thought. In view of it however, it is obvious that I agree with him that the sociologist cannot be expected to employ only such categories as are actually used or understood by the actors observed. Furthermore, the ascent to abstract theory he says is needed for the social scientist, is equivalent, in my vocabulary, either to the construction and application of the theorist's Logic (if within this "abstract theory" he would allow the discussion and decision of the subject's about what matters), or to the application alone of this Logic to what is observed (if by "abstract theory" only the formulation of "abstract nomological statements" - i.e. of scientific laws - is meant).

Another point of general agreement with Martin lies in a) his rejection of Hart's claim to be attempting to provide an "elucidation" rather than a "definition" of law (cf. p. 138-40), and b) his decision to read The Concept of Law as providing a definition in effect, regardless of what Hart says (cf. also p. 39f.). It is true that, in Part 3. A, we have taken seriously this reluctance in linguistic jurisprudence to speak of and demand a definition of law, and we have given an explanation for it, in terms of the historical condition linguistic jurisprudence finds itself in, and of its need to accommodate some doubt in the theorist's conclusions. Nevertheless, the rejection of the search for a definition is incompatible with conceptualism. The question "what is X?" is to be

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answered by a definition of X, i.e. a determination of the appropriate abstraction, the concept, of X. To the extent that the subject remains confused or doubtful, the definition it results with will be less clear and precise. Even if we should demand a certain degree of clarity and precision before we speak of a definition, the result of the investigation as to what is X, will still be an attempt for a definition of X.[3] Again I cannot say to what extent Martin would agree with my definition of linguistic jurisprudence as a conceptualism, or with my reading of The Concept of Law at this point. Nevertheless, his writings are perfectly compatible with my definition of definition.[4,5]

On the other hand, even though I agree with Martin's decision to read The Concept of Law as providing a definition of law, I do not agree entirely with his analysis and criticism of the definition(s) he actually extracts (p. 39-48).[6] His work here suffers from one major defect, in that it disregards the theory of the open texture of language. Insofar as they can be attributed to Hart,[7] these definitions must be understood in accordance with this theory. And this means that not only the definiendum "law" or "legal system", but also each term in the definiens, is to be understood as capturing the central case only of its application. Thus Hart should reply that, for instance, an organised religious sect whose members follow as morally obligatory such rules as a particular leader happens to dictate (cf. p. 41f.), does not fall within the central case of "morality" (and so the fact that in such a sect the rules need not be important and are changed deliberately, makes no difference to his definition).

Martin would probably reply here that, even if Hart (or I) think

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that such a sect does not fall within the central case of "morality", he, at least, thinks that it certainly does. And that this points precisely to one of his most important general criticisms of Hart, namely, Hart's disregard for the role empirical evidence should play in the verification of claims about what constitutes each time the central case in language and what not. The appropriate determination of what exactly the practice of language within the social group concerned is, can take place only through the methods of sociometrics within the framework of linguistics. It is not a matter for the philosopher to decide from his armchair. [8]

This brings us to a most essential difference between Martin's explication of Hart, and my understanding of linguistic jurisprudence in Part 3. For me, language here is not to be understood as the happenstance of actual utterances and beliefs of other people, that a detached scientific observer will collect, count and weigh. Language is rules, taken for granted, in our minds, that we (the observers, scientists, theorists - *and actors*) follow, assuming that they are right, and which rules are being established and evolve, through our experience, reflection and interaction - not detached scientific observation. It is rules we (assume we) share - or should share; for they are rules for one to learn and act upon, if one (like e.g. an infant) happens to ignore them. Hence, the philosopher in linguistic jurisprudence (or ordinary language philosophy), when speaking of language, central cases in it, open texture, ordinariness and the rest, does not report other people's language (way(s) of thinking, form(s) of life). He examines his own. When he says "look at this (standard) instance of language", he does not give evidence. He gives an example (which he assumes is not only correct, but also standard,

ordinary, common, viz. familiar to the listener and so most suitable to illustrate the point). And hence, behind the open texture in language, lies not a difference in lingual usage between different individuals, but our doubt, our lack of knowledge and logical determinacy.

Therefore, there is nothing here for empirical evidence to decide. To return to our example about the central case of morality, suppose one were to count heads, and find a certain majority to acknowledge, that Martin's example of the religious sect does fall within the central case of application of 'morality' in language. So what? Any one in the minority - including Hart the theorist - could simply reply that those in the majority were wrong. And what's most important, in defending his definition(s), Hart should reply, that, even if he were wrong to think, that the central case of the application of 'morality', was one of rules that are considered important and are not changed deliberately, let Martin provide another way of denoting the central case Hart had in mind and meant to put in the definition. Because these definitions that the theorist seeks to provide, are not meant to be reporting others' ways of thinking. They are meant to be determining (his/our) logic.

In sharp contrast to our final understanding of linguistic jurisprudence, as a philosophy, Martin understands Hart to be engaged - in part at least - in a description of observable lingual (and - we should add - logical) regularities. And he sees Hart's claims to depend - partly - on whether this description is in fact accurate, i.e. on whether, if we were to count heads, we would find these regularities or different ones. [9]

On one view of it, this is a mere difference in interpretation of

The Concept of Law. In this case, there is not much to say. For even though it might be absurd to attribute to Hart, a view of language he is so much at pains to reject with respect to law and social rules in general, questions like what did Hart believe, or even like what is the correct interpretation of The Concept of Law, as such, do not hold for me enough interest to pursue such debates. I should simply end by saying, that if I saw a book like Hart's to be a matter of empirical report of the lawyers' language, I would throw it in the dustbin and forget all about it. I would not bother discussing it.

However, there is something more. For, on the understanding of Martin that I find most tempting, he is not really interested in such questions as what did Hart in fact believe either. I think he would say that he is concerned with them only instrumentally, in an effort to advance legal theory. And that what he tried to do was

a) to take the claims Hart made in legal philosophy and *explicate* them for the purposes of theory construction in social science; that is replace them partially, by ones that be (with respect to these purposes) clearer, unambiguous, determinate and so easily testable. [10] Then, once explicated,

b) to test them logically, and/or point to the type of empirical evidence that would be relevant to their empirical testing.

On this understanding, Martin's persistent and general criticism of Hart, for disregarding the need for empirical evidence, is not that much tied to the idea that Hart's claims are based on reports of an observed social group's language. [11] It is part and parcel of his underlying assumptions regarding the larger enterprise he sees Hart and himself to be engaged in. And it is an indication of a vast difference between his basic understandings and mine, which

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difference envelops his other major criticism of Hart as well, that Hart's definition of law is inadequate, even if assessed in terms of its usefulness on theoretical and practical grounds, because it fails to transcend the categories of the legal actor and "ascend to abstract theory".

[The rejection of the external point of view, for its inadequacy to capture the concepts of lawyers and laymen] will not do. First, it may be questioned whether an elucidation of a legal system that is adequate from a theoretical point of view needs to be concerned with the concepts of lawyers and lay people... Such concepts may be adequate for practical purposes but may have no relevance for theoretical purposes. Second, even if the concepts of a rule or a standard of conduct are utilized in an elucidation of a legal system, one may question whether they must be understood in terms of the categories of lawyers and lay people. After all, rules and standards can be understood from various theoretical points of view. Philosophers of law may deem that the categories of the actor are inadequate to their purposes. (p. 27)

But perhaps Hart's definition should not be evaluated in terms of standard usage but rather on theoretical and practical grounds. If so, the task would not be to capture the standard concept of a legal system but to develop a concept of a legal system that would be useful. There is surely no particular reason to suppose that [Hart's definition] would be justified on these grounds. For example, there is no attempt in [it] to transcend the standard categories used by the legal actor and to understand a legal system in terms of theoretical social science... A theoretically fruitful elucidation may well be couched in rather different terms [from the ones of the legal actor]. (p. 47)

Behind these words, behind the invitation that the categories of the actor be transcended by the theorist, I think I can detect a certain general assumption about the discipline of jurisprudence, that is quite popular in Britain and North America. According to it, even if the "philosophy of law" is somehow to be distinguished from the social sciences, it is still very much like them, in that in either case the theorist is a spectator, who stands back and observes the legal actors, in a detached, "objective" fashion, in order to draw his theoretical (not practical) conclusions. No wonder then that the conclusions depend to some extent on an accurate report of the observed practice, and may be defective because insufficiently corroborated by empirical evidence of how the legal actors under the microscope actually behave. And no wonder that the categories of the legal actors are of course to be distinguished from the theorist's metalanguage. Because the categories of the legal actors do not necessarily depict how they actually behave (which is for the detached theorist to perceive), but only how they imagine they behave.

In my view, this is a very distorted understanding of the philosophy of law. (In my view, the philosophy of law is not *science*, at all).[12] And perhaps, in view of it, it is only natural that the enterprise called jurisprudence, or legal philosophy, has become so confused, in the twentieth century English language culture, at least.

At any rate, regardless of what the philosophy of law is or should be, this is fundamentally at odds with the understanding of linguistic jurisprudence that we put forth in "Linguistic jurisprudence as philosophy". According to it, the theorist in

linguistic jurisprudence does not stand back to observe and report (to whom?) what the actors do. He is one among them, speaking to them, in their language, which is his own. There is no social group, no other actors under the microscope. There is (our) logic, which the theorist examines, in order to know, first and foremost himself, and to try to teach the others what to do, if he can. Actual categories and ideas, if diverging from the truth, are not data to be collected, but mistakes, transcended and forgotten as soon as detected.

On this understanding, what Martin has written on Hart's internal and external points of view (cf. p. 20-7), is entirely beside the point. Hart's talk and adoption of the internal point of view, has nothing to do with what meaning is or with whether and to what extent the social sciences should take the actor's point of view into account, in an effort of understanding. It is a defence, and definition, of his conceptualist enterprise. The external point of view that Hart rejects is neither the "cognitive internal point of view", nor the one that describes behavioural regularities in common sense categories. It is precisely the one resulting in abstract "nomological" statements (regardless of the employment or not of common sense categories) in science, i.e. the one Martin vaguely understands as "abstract theory", on p. 26, and advocates. What makes its rejection not just reasonable but logically necessary, a conditio sine qua non indeed, is that Hart is not doing *science* at all. And its reasonableness, is the reasonableness of the idea, that there are other things we need to do from time to time, besides science.

NOTES

1. Cf. Martin's "Winch on Philosophy, Social Science and Explanation" (in his _Social Science and Philosophical Analysis_ p. 370f.).

2. Notice however that Martin's interpretation of Hart's "external point of view" on p. 26 is mistaken. This is neither the "cognitive internal point of view", nor the one that describes behavioural regularities in common sense categories. It is precisely the one resulting in "abstract nomological statements" (regardless of its employment or not of common sense categories), i.e. the one Martin vaguely understands as "abstract theory" and advocates.

3. On this understanding of definition, it would be quite reasonable to say that Hart does not mean to give a definition, but to stop midway the attempt to answer what is law, in accordance with a certain scepticism regarding the attainability of the end. The end would be such a clarity and precision of logic, as to eliminate the penumbra of doubt. And indeed, Hart's answer to what is law, does not provide a complete entrenchment of the concept; it only depicts what he sees to be the central case.

    Notice that this way, the contrast between the definition and the elucidation can take a fruitful meaning in the interpretation of Hart's book: the definition amounts to strict scholastic logic and mathematical precision; the elucidation does not. However, when it comes to a general account, "elucidation" is a rather vague term, and I do not see why "definition" should not apply in either case. After all, clarity and determinacy exists not in an absolute way, as the above contrast implies, but either with respect to the specific issue one has to answer, or with respect to the degree of strictness of logic needed for the purposes of education. So rather than speaking of strictness in abstract or its lack, I would speak of a success or a failure, on the above accounts, to define.

4. See especially p. 138-9, where Martin points that a definition need not be concise, and that, even on the contrary assumption, a definition (i.e. the answer to what is e.g. law) will be a necessary part of an elucidation of the concept.

5. Hart's writings too are compatible with my definition of definition. They are only incompatible with my use of 'definition'.

6. I would also put forth a rather different definition of law (the object of legal study) than Hart's, but this is another story.

7.   And "Definition (3)" (at p. 41) can be so attributed, in my opinion, unlike "Definition (4)" (at p. 44), whose added condition of the legal system's monopoly over physical sanctions, renders it inconsistent and unduly restrictive, in the context of a theory that, unlike Kelsen's, is not based on a point of view from within legal dogmatics.

8.   Cf. p. 46-7, 133-4, 276. See p. 133: "It would seem that finding the standard or normal uses of expressions is a job for linguistic science. Philosophers of law may suggest hypotheses based on their linguistic intuitions, but the verification of these hypotheses is an empirical matter. So any approach that stresses the specification of truth conditions for the standard use must be based on empirical research that is not yet done."

9.   See the first part of his criticism of "Definition (4)" at p. 46-7. P. 46: "I assume that a standard case of a legal system is a non-controversial case: a system that does exist or has existed or could exist that has been or would be generally considered to be a legal system. The determination of what is standard usage is an empirical problem, not something that philosophers are particularly competent to answer." P. 47: "I have argued that a definition can be extracted from Hart's work, but that this definition may be inadequate if it is meant to capture standard legal usage. Whether this definition is inadequate with respect to standard usage I leave ultimately as a hypothesis to be confirmed by science..."

10.   Cf. his "The Explication of a Theory", as well as his other essays on explication *op. cit. supra n. 1.*

11.   Notice that the attack for the lack of attention to the need for empirical evidence, is indeed very general in Martin. See his conclusion at p. 276-7. It is also a common theme throughout his work, presenting itself with every opportunity. See for instance p. 237, where Martin concludes that the disagreement between Fuller and Hart is a matter of their making different empirical claims which "go begging for empirical evidence". See also p. 56-7 where he suggests that whether we should accept in practice or not the idea of the one right answer, is a matter for future scientific research, that would determine, whether people's confidence in the objectivity of the judicial process would be thereby eroded and whether, on the other hand, judges work harder on the influence of the one right answer as a working assumption, or not.

12.   But it may be Wissenschaft or επιστήμη.

Edgeworth

In <u>Legal Studies</u> 6/2, there is a very interesting article by Brendan Edgeworth, called "Legal positivism and the philosophy of language: a critique of H. L. A. Hart's 'Descriptive Sociology'". In it, a big part of our study of linguistic jurisprudence has been anticipated. Even if somewhat crudely, and with less clarity and awareness, many of the points we made in Part 2, against the idea of linguistic jurisprudence as a matter of positivist description of external facts, can embryonically be found in this article of Edgeworth's. We shall here discuss it extensively, picking the points of agreement and throwing light on the ones of potential disagreement.

I shall start by enumerating those of Edgeworth's contentions, that correspond to mine.

1) Hart tends to look at ordinary ways of lingually distinguishing situations as different, but not at the - equally ordinary - ways of assimilating them as the same. [1]

2) "...as far as ordinary language and common usage goes, 'one can find there anything one likes'". (p. 119-20) There are in it contradictory interpretations and understandings. [2]

3) There is not one "ordinary" language only. There are many ones. (Cf. p. 123-5).

4) There is not in Hart's work the detached scientific objectivity its aura projects. This is just a cover-up. [3]

5) A theory (a logic) is required determining what is to count as relevant. Without it, facts cannot even be identified. (Cf. p. 123-4)

6) The approach that relies on common usage, expecting thereby to improve knowledge of the social reality, is inadequate for the explanation of social change or of the emergence and disappearance of standard ways of speaking. [4]

7) "... *all* problems of legal philosophy... can reflect 'a divergence of basic point of view or values or background theory'" (p. 125). [5]

A few clarifications and qualifications are in order.

With respect to contention 2

Edgeworth has only claimed that observable ways of thinking *can* be contradictory. He might not agree with the - much more radical and difficult to maintain - idea, which we have come to, that they necessarily are.

With respect to contention 3

I must add here - what follows anyway from contention 5 - that this depends on the viewer. Apart from a presupposed logic, or an ad hoc decision what to see, there is one language, as much as there are many.

With respect to contention 4

In Edgeworth's eyes, the aura of detached scientific objectivity is a cover-up of ideology (in the Marxist sense) or myth (in Barthes' terms). Behind it there is a conservative attitude, serving the maintenance of the status quo. In my eyes, there is behind this cover-up a much more interesting - even if older - attitude, than the one of the detached scientist, and a much more exciting and respectable epistemology, than the one we have both rejected.

We shall leave this last disparity aside for the moment and turn our eyes to a particular difference between Edgeworth's understanding

of Hart's methodological assumptions, and our correlative understanding in Part 2 (and 3). We can see it on p. 119, where Edgeworth attacks Hart's identification and use of the lingual distinction between "being obliged" and "having an obligation". According to Edgeworth, "Hart claims that the term 'oblige' and not 'obligation' is appropriate" in the gunman situation - but other people might speak differently; where does this standard of correctness come from? We, on the other hand, have not taken linguistic jurisprudence to be making claims about correct and incorrect lingual usage. We have not taken it, that is, to be banning certain expressions in favour of others. In our understanding, Hart's claim here would be that in this lingual distinction (between "being obliged" and "having an obligation"), which one *can* make, one can see a real (i.e. significant, meaningful) difference. And there are these two variations in our Parts 2 and 3, that in the former, this reality of the difference, in no way depends on any involvement of me, the theorist, but is a matter of the independently existing practice in the social group I observe. Whereas in the latter, this reality is a matter of our recognising significance in the things (e.g. social groups) we observe and attributing it to them.

This (mis)representation by Edgeworth of Hart's position, has a double effect. First, it makes things easier for Edgeworth, than what they were for us in Part 2, since it furnishes him right away with a simple contradiction, between the claims to a positivist description on the one hand and the "foundation" the theorist gives to observed lingual practice on the other. Second, it restricts the scope of his work, as it means that, unlike us, he can reach the simple conclusion that there is "a number of serious flaws in the epistemology and

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methodology central to Hart's work" (p. 137), without having to examine first the senses in which it might be said that through lingual distinctions one can grasp real ones, and without having to take up any position on the structural character of language and social reality, except the commonsensical one that existing ways of thinking may happen to vary and to be contradictory on occasion.

With respect to this last difference, it is worth looking at another particular argument Edgeworth makes against Hart. On p. 129-30, Hart is accused of establishing the distinction between primary and secondary rules, in a way different from the one of looking at ordinary language, and despite the fact that this distinction seems not to exist in per Hart common usage.

> ...unlike the discussion of the oblige/obligation distinction, <u>there is no term identified here which evokes the different nature of secondary rules</u>. On the contrary, we use precisely the same words to describe officials' behaviour under the law as we use to describe ordinary citizens' behaviour, namely, the expressions 'follow', 'comply' or 'conform to'. Hart explicitly recognises this but does not seem aware of its implications for ordinary language philosophy. For <u>if ordinary language fails to provide a requisite expression here</u> and, as he does, Hart has to go beyond ordinary language to establish a real difference, he is implicitly undermining the case he made for this method earlier in the text. [6]

Now regardless of what Hart actually thought or said, it is rather more pertinent to notice that ordinary language does not of course fail to provide expressions indicative of the distinction between the official's and the citizen's behaviour. We normally say (and Hart could easily have said) that the judge or the public

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servant "applies" the law, but not that the citizen does so. The citizen only "obeys" - or "complies with", "conforms to", "follows" - the law; as does the official too of course (who does not merely obey passively, but also works with the law actively). What more lingual illustration do you want, for the dual character of the existence of a legal system? And as for the distinction between "primary rules", i.e. rules that everybody in the - "primitive" - social group is aware of and conforms with, and "secondary rules", i.e. ones that regulate the organisation and activity of the courts, the legislature and the administration, is it not the case that only the former are (meant to be) "obeyed" (by the citizen), while the latter are just (meant to be) "applied" (by the official)?

The point I want to draw here is that the problem is not a dishonesty on the part of the theorist, who sometimes relies on the facts of ordinary language and sometimes transcends them instead. In my opinion, there is no such discrepancy anyway: Every single distinction Hart draws in The Concept of Law, can be put in the form of the "obliged"/"obligation" one. What undermines the alleged positivist scientificity of the ordinary language approach, is that language, if meaning the actual observable ways of thinking in a given aggregate, is chaotic. It will never fail to provide the theorist with ways to distinguish two cases - or with ways to assimilate them. (It may fail on occasion, if the referred to language corresponds to a community or a society (as defined in Part 2), but then we have no postulate of positivist scientificity to begin with). Therefore a positive description of such a language would have to be chaotic too; and interminable.

We noticed earlier that Edgeworth does not necessarily subscribe

to this position about language (or social reality). And certainly, this position is not self-evident, or indeed commonsensical. It is a rather easy target for British scepticism instead. Without it however, linguistic jurisprudence could still maintain the idea of a positivist scientificity. It could still maintain the idea that jurisprudence can be a sort of descriptive sociology, merely describing what the law happens to be, in terms of the established necessary presuppositions of our political and other communication. It could still maintain that the theorist, in doing this, is a scientist, who is "the passive site of experience of an active world, and [who] can, if unbiassed, operate free from political and moral evaluations". (p. 127) And it could still maintain that some problems of legal philosophy do not reflect "a divergence of basic points of view or values or background theory".

Edgeworth does not take this theoretical and obscure route. Instead he takes two routes that we did not.

First, he moves to accuse the ordinary language approach of an inherent predisposition to conservatism (p. 121). We have dismissed this accusation in Part 3 as irrelevant, not because of a mistake in Edgeworth's argument, but mainly because we have understood "ordinary language" in a different way than the one that he has in mind. In our interpretation, it is not observable usage that matters, but the rules, the standard of correctness in our minds. Particular conclusions of linguistic jurisprudence, or in my work, may happen to be conservative (or progressive), but it is hard enough to establish that something is true, correct, accurate, without also having to make sure that it support progress. (And progress where to, anyway).

We also declined to take this up in Part 2, for the formal reason

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that we were concerned with the claims to a positivist description as such. To these again, conservatism or progressiveness is irrelevant, since the positivist is only concerned with relating how things happen to be, without thereby advocating that they ought thus to remain or not. There is also the substantive reason that, on a more careful look, it is not perhaps so very easy to maintain that attention to ordinary usage entails a predisposition to conservatism, when it is the established ways of thinking that approve so much of change, progress, innovation. Preserving the ideology of progress, is this conservative, progressive or what?[7]

Second, Edgeworth moves to show that Hart's approach is inadequate "for attending to the empirical realities of existent legal orders" (p. 128). By these empirical realities he means objects like the processes whereby political force is perceived to be legitimate, the law's function in the preservation of the status quo, its role in class struggle, etc. These issues would be pertinent from the point of view of sociology or history. And this part of Edgeworth's article is again irrelevant to our study, which was concerned instead with showing that linguistic jurisprudence (and jurisprudence in general) is and can be meaningful, interesting and respectable, without having to be sociology or history, and without having to be in some sense verified by them.

So we have a different view on what the appropriate understanding of linguistic jurisprudence is. Linguistic jurisprudence is not sociology, or science in any way. Despite its aura, it must not be understood as such, if at least we ought to pay attention to what it *tries to do* rather than what it (half) *says* it tries to do.[8] It is a modern sort of conceptualism, asking and trying to answer questions

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of the form "what is X?". The theorist is no observer of empirical realities, and the language he relies on is not just the happenstance of observable utterances. These are not defects of a fundamentally flawed theoretical manner, but main characteristics of a worthwhile enterprise. We have said enough about these, especially under "Martin"; there is no reason to repeat it here.

I like to think that Edgeworth would probably agree with this reinterpretation of Hart, or anyway, and this is what matters, that he would appreciate the epistemological way out that we have provided. There is nothing in his article that is actually incompatible with it.

On the other hand, he does not have to like this epistemology. There are in fact some echoes of Hegelian and Marxist origin in his article, indicating a strong challenge to the mode of philosophy we have retrieved. [9] From this point of view, we have done nothing more, than dress up an old cripple dinosaur in clothes torn long ago. Edgeworth might take up the idea that the rational is actual and the actual rational, that "what is" (and so logic, truth) is historical not transcendental, and dismiss our conceptualism as a-historical – if he has the faith in the route of history and/or the future of mankind, that I lack.

What Edgeworth cannot do, is dismiss this idea too, and maintain that a conceptualism such as we have understood it, will be "myth in Roland Barthes' terms, namely depoliticised and de-historised speech [having] the task of giving an historical intention a natural justification, and making contingency appear natural" (p. 136), in contrast to - say - studies of how power gets to be perceived as legitimate. Such a theory in jurisprudence will not be myth (not by

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definition anyway) any more than π is a myth in mathematics or the school's function in socialization is a myth in sociology. And it will certainly not be a-political, if by 'politics' we understand a discourse concerned with the determination of the appropriate common action. (It will be a-political if by 'politics' we understand some technocratic science or the activity of managing to get votes; but this I do not mind.) As for its making contingency appear natural, i.e. normal, stable, becoming, thus excluding something (a change) that would be abnormal or less becoming, I do not really care. I am tired of this mania of demystification, which can result in nothing more than the continuous replacement of concepts and points of view with other (more detached of course) concepts and points of view, to be demystified in their turn, in an endless verbiage, serving only for the hollow pleasure of the intellectuals. If there is no truth to teach, act on it and shut up.

The final attack against linguistic jurisprudence, that we can read in this article, is this: "Why the legal theorist should uncritically accept the discourse of officials at a particular point in history to comprehend hermeneutically the essence of the legal system, property, a contract, the corporation, is never convincingly spelt out, nor is the question of why that discourse should take epistemological pride of place over all others". (p. 138). We have already given an answer. It is that the legal *philosopher* is himself such an "official". He does not *accept* this discourse; he carries it. As do we all, as we carry the discourse of sociology, physics, mathematics. Or rather, as we carry our language: We do not critically assess it and then decide to accept it or not. We modify it by letting it evolve, while using it to think and communicate.

Should this discourse take epistemological pride of place over all others? (Should sociology take epistemological pride of place over physics?) No, of course not, unless "it", is conceptualism (philosophy) in general, in which case it is logically prior (even if historically posterior) in every discourse. (And unless *practical* "pride of place" is at issue, which naturally belongs to practical disciplines rather than sciences). What is most important to make clear (regardless of whether Edgeworth actually assumed the opposite or was just following after what he saw Hart's assumptions to be), is that with regard to law, there is no one such idea that all these actual discourses (of "officials", of sociologists or of psychologists) have as their common field-designating concept. It makes no sense to speak of a "legal theorist" who should be expected to take into account, on the same footing, what is being said under the terms sociology of law, history of law, philosophy of law, psychology of law, etc., or even MP's talk, solicitors' talk, criminals' talk, policemen's talk, etc., as giving different perspectives on the same empirical object, before he can "comprehend hermeneutically the essence of the legal system". To speak of "legal theory", expecting in it to find equally sociology, history, legal reasoning, "feminist studies", analytical jurisprudence, "semiotics", and "jurimetrics", is to speak of "whoever happens to use the word 'law' when denoting his/her (empirical or not) field of study". And this is fine, but it does not then follow that we can expect that there actually is one field of study that is the same for all these theorists. There will be more than one concepts (abstractions, ideas, essences) corresponding to the field-designating word 'law', not sharing obviously the same definition.

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One final general point. Edgeworth is the one critic of linguistic jurisprudence who actually saw the importance of the social reality of a variety of ways of thinking, for undermining Hart's claims to a detached positivist description.[10] Accordingly he often speaks of the fact that people grow up in different environments and come to believe and say different things; there are many "incommensurable usages", there are many, not one, languages. What we must add is that yes, people grow, people change, people *become* different or similar. That whether they will be seen (by themselves or someone else) to be different or not, depends on what will be seen to matter. And that whether they will tend to grow apart or alike depends on their eagerness to see past traits not to matter and to imitate and adopt (to learn) new ways. It is therefore no less a fiction to assume that we are fundamentally different, and that's it, that we have different and incompatible languages, than it is to presume "an essentialised, transhistorical, human subjectivity" (p. 124). We can converge and we can diverge. It just so happens, that people in the modern world of these last 400 years or so, have tended to (choose to) diverge rather than converge. But this changes nothing. It undermines not only linguistic jurisprudence, but sociology, mathematics, and Edgeworth's article as well. Of course, it undermines practical discourses more. But what good is speech with no view to action?

And in any case, to speak to someone, is to assume, that they can come nearer to you, and to invite them to do so.

NOTES

1.   See p. 120, that in ordinary language 'to have to' is applicable whether an obligation or coercion is at issue. "...concentration on minimally small differences can overemphasise the differences at the expense of the similarities... Why the differences of some terms should take precedence over the similarities of others is unclear".

2.   See p. 124, that (as Gramsci says) the bulk of the population may have two theoretical consciousnesses or one contradictory one. "...social pressures, ideology, or general confusion might necessitate forms of verbal conformity wholly at odds with material forces requiring practical conformity".

3.   See p. 120 that "the implication from [Hart's] method is that there is no question fo incommensurable usage, which gives the method, superficially, a spurious scientific appearance and this... gives the theory its legitimacy". See also the conclusion at p. 137 that "a number of assumptions embedded in the theory and practice of ordinary language philosophy subvert its self-projected aura of objective scientificity due primarily to the plenitude, fecundity and plurality of day-to-day linguistic practices".

4.   See p. 137f. "...this approach makes the explanation of social change and the emergence and disappearance of linguistic codes almost impossible".

5.   The reference is to Hart, Essays in Jurisprudence and Philosophy, p. 6.

6.   Edgeworth refers to Hart, The Concept of Law p. 112-3. The emphasis is mine.

7.   And if this is not a demonstration of the dialectical character of history and thought, I do not know what demonstration is.

8.   See p. 126, 137, where Edgeworth remarks that Hart focuses on what language *says* but not on what it *does*.

9.   See especially p. 124 that Hart "presumes an essentialised, transhistorical human subjectivity. But every social subject is constantly affected, transformed, modified by the unique interplay of forces in which he or she develops. Thus, it is a mistake to rely on some transcendental, pre-given essence..." And Hart is repeatedly accused throughout the article of being a-historical and a-political, and of covering the real transformations behind ideology.

10. See also Galloway "The Axiology of Analytical Jurisprudence: A Study of the Underlying Sociological Assumptions and Ideological Predilections" (in <u>Law in a Social Context</u> ed. Bechtler), p. 69-74, 95.

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