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The New Analytical Jurists

Robert S. Summers
Cornell Law School, rss25@cornell.edu

THE *NEW* ANALYTICAL JURISTS

ROBERT S. SUMMERS

I

INTRODUCTION

IT seems appropriate to introduce an article of this nature by describing what it is to be a jurist.[1] A jurist is not a lawyer, although he may be and often is. A jurist is not a teacher of substantive law, although he may be, and usually is. Instead of drafting contracts or trying cases, instead of researching and teaching the elements of a crime or the theory of consideration, the jurist studies jurisprudence. Jurisprudence is concerned with the nature of law, its functions, the means by which it performs these functions, the limits of law, the relation of law to justice and morality, the modes by which law changes and develops, and more.[2]

Jurisprudence, like many other branches of philosophy, has its schools of thought, among which are the "historical," the "sociological," the "evaluative," and the "analytical."[3] This scheme of classification is, in important ways, an unhappy one,[4] but it has served to differentiate those jurists who are primarily

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Robert S. Summers is Associate Professor of Law, University of Oregon School of Law. The author wishes to record his gratitude to the Social Science Research Council for a research fellowship in legal philosophy that enabled him to spend the academic year 1964-1965 at Oxford University. He is also grateful to the University of Oregon Office of Scientific and Scholarly Research for research support.

1. There is no up-to-date law review article on what a jurist is. But a chap named Anon. has recently written a brilliant piece on how to become a jurist in which, among other things, the learned author says:

> Perhaps the best tip that can be given is to cultivate a general air of vagueness and other worldliness. . . .
>
> A large part of [any article written by a would-be jurist] . . . should be taken up by quotations, preferably in foreign tongues, from the least comprehensible legal philosophies . . . . and remember that it is the footnotes that count.

Anon., How To Become a Jurist, 7 J. of Soc'y of Public Teachers of Law 129, 130, 133 (1963).

2. See 13 Encyclopedia Britannica 149 (1965) (entry by "L.L.F." (Lon L. Fuller)).

3. See Urmson, A Concise Encyclopedia of Western Philosophy and Philosophers 199-200 (1960) (entry by H. L. A. Hart). For detailed treatment of these schools of thought see Pound, Jurisprudence (1959) (5 vols.).

4. Unhappy because (1) all jurisprudential work must be in some sense "analytical" to be of any value at all, (2) few, if any, jurists are exclusively interested in one type of inquiry, (3) any "schools" scheme invites lumping quite different thinkers into the same category, and (4) such a scheme invites some thinkers to "take sides." On the last point see the thoughtful article by Ryle, Taking Sides in Philosophy, 12 Philosophy 317 (1937).

interested in approaching the problems of jurisprudence historically, those primarily interested in approaching them sociologically, those concerned with the evaluative or normative side of these problems, and those whose interest in such problems is "analytical."

Each of the foregoing general types of jurisprudential inquiry has its own distinctive history and its own hall of fame. Thus, Anglo-American[5] *analytical* jurisprudence may be said to have started with Hobbes[6] and to have achieved its zenith in the nineteenth century in the works of the British jurist, John Austin,[7] and his successors in the English-speaking world. But it is not the object of this article to trace the history of analytical jurisprudence. Rather, this article is addressed to two seemingly simple questions: What are the new analytical jurists doing? How does this differ from what their predecessors did?

Contrary to what is very widely assumed, even by interested legal scholars,[8] it is now both possible and important to distinguish between, on the one hand, the work of "old" analytical jurists—John Austin and his successors,[9] including Gray,[10] Hohfeld,[11] and Kocourek[12] in the United States—and, on the other hand, the published efforts of a group of Anglo-American analyti-

5. The work of contemporary continental analytical jurists such as Hans Kelsen, Alf Ross, and Norberto Bobbio is beyond the scope of this article.

6. See Hobbes, A Dialogue Between a Philosopher and a Student of the Common Laws of England (circa 1670); Hobbes, Leviathan (1651).

7. See Austin, The Province of Jurisprudence Determined (Library of Ideas ed. 1954). Austin was born in 1790 and died in 1859.

8. Only two scholars have been discovered who even recognize that there might be some significant difference between the old and the new in analytical jurisprudence. See Friedmann, Legal Theory 223-27 (4th ed. 1960); Bodenheimer, Analytical Positivism, Legal Realism, and the Future of Legal Method, 44 Va. L. Rev. 365 (1958).

9. See Sheldon Amos (1835-1886), The Science of Law (9th ed. 1909); Amos, Systematic View of the Science of Jurisprudence (1872); E. C. Clark (1835-1917), Practical Jurisprudence: A Comment on Austin (1883); William Hearn (1826-1888), The Theory of Legal Duties and Rights (1883); Sir Thomas Holland (1835-1926), Elements of Jurisprudence (13th ed. 1924); Sir William Markby (1829-1914), Elements of Law Considered With Reference to Principles of General Jurisprudence (4th ed. 1889); Sir John Salmond (1862-1924), Jurisprudence: The Theory of the Law (3d ed. 1910). An important predecessor of Austin, Jeremy Bentham (1748-1832), is not, for the purposes of this article, considered one of the old analytical jurists. Here, as in most other respects, Bentham was far ahead of his time. His best work on analytical jurisprudence consists of the following: The Comment on the Commentaries (Everett ed. 1928); A Fragment on Government (Montague ed. 1891); An Introduction to the Principles of Morals and Legislation (Hafner Library ed. 1948); The Limits of Jurisprudence Defined (Everett ed. 1945).

10. See Gray, The Nature and Sources of Law (2d ed. 1921).

11. See Hohfeld, Fundamental Legal Conceptions (1923).

12. See Kocourek, An Introduction to the Science of Law (1930); Kocourek, Jural Relations (1927).

cal jurists that has emerged since World War II. This latter group includes H. L. A. Hart,[13] Glanville L. Williams,[14] and Graham B. J. Hughes,[15] all Britons, and Ronald M. Dworkin,[16] Charles Fried,[17] Herbert Morris,[18] and Richard A. Wasserstrom[19] of the United States.[20] Inasmuch as the work of these new jurists is in the analytical vein, it plainly has more in common with the efforts of earlier analysts than with that of adherents of other modern "schools." Yet this fact should not be allowed to obscure the very great differences between the old and the new. The new is broader in scope, more sophisticated in methodology, less doctrinaire and positivistic, and more likely to be of practical utility.

13. Hart's most important writings include: Hart & Honoré, Causation in the Law (1959); The Concept of Law (1961); Bentham: Lecture on a Master Mind, 48 Proceedings of the British Academy 297 (1962); Definition and Theory in Jurisprudence, 70 L.Q. Rev. 37 (1954); Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Prolegomenon to the Principles of Punishment, 60 Proceedings of the Aristotelian Soc'y 1 (1960); Book Review, 78 Harv. L. Rev. 1281 (1965). On his work generally see Pannam, Professor Hart and Analytical Jurisprudence, 16 J. Legal Ed. 379 (1964); Summers, Professor H. L. A. Hart's Concept of Law, 1963 Duke L.J. 629.

14. See the following works by Williams: Salmond on Jurisprudence (11th ed. 1957); Carelessness, Indifference and Recklessness: Two Replies, 25 Modern L. Rev. 49, 55 (1962); The Concept of Legal Liberty, 56 Colum. L. Rev. 1129 (1956); International Law and the Controversy Concerning the Word "Law," 22 Brit. Yb. Int'l L. 146 (1945); Language and the Law (pts. 1-5), 61 L.Q. Rev. 71, 179, 293, 384 (1945), 62 L.Q. Rev. 387 (1946).

15. See the following works by Hughes: The Concept of Crime: An American View (pts. 1, 2), 1959 Crim. L. Rev. 239, 331; Criminal Omissions, 67 Yale L.J. 590 (1958); The Existence of a Legal System, 35 N.Y.U.L. Rev. 1001 (1960); Jurisprudence, 1965 Ann. Survey Am. L. 639 (1966); Jurisprudence, 1964 Ann. Survey Am. L. 685 (1965); Professor Hart's Concept of Law, 25 Modern L. Rev. 319 (1962); Book Review, 9 Natural L.F. 164 (1964); Book Review, 17 Stan. L. Rev. 547 (1965); Book Review, 16 Stan. L. Rev. 470 (1964).

16. See the following works by Dworkin: Does Law Have a Function? A Comment on the Two-Level Theory of Decision, 74 Yale L.J. 640 (1965); Judicial Discretion, 60 J. Philosophy 624 (1963); Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986 (1966); Philosophy, Morality and Law—Observations Prompted by Professor Fuller's Novel Claim, 113 U. Pa. L. Rev. 668 (1965).

17. See the following works by Fried: Justice and Liberty, 6 Nomos (Justice) 126 (1963); Moral Causation, 77 Harv. L. Rev. 1258 (1964); Natural Law and the Concept of Justice, 74 Ethics 237 (1964); Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755 (1963).

18. See the following works by Morris: Freedom and Responsibility: Readings in Philosophy and Law (Morris ed. 1961); Imperatives and Orders, 26 Theoria 183 (1966); Punishment for Thoughts, 49 Monist 342 (1965); Verbal Disputes and the Legal Philosophy of John Austin, 7 U.C.L.A.L. Rev. 27 (1960).

19. See the following works by Wasserstrom: The Judicial Decision: Toward a Theory of Legal Justification (1961); The Obligation To Obey the Law, 10 U.C.L.A.L. Rev. 780 (1963); Rights, Human Rights, and Racial Discrimination, 61 J. Philosophy 628 (1964); Strict Liability in the Criminal Law, 12 Stan. L. Rev. 731 (1960).

20. Of course, there are other new analysts of importance.

Before discussing each of these differences in turn, several caveats must be entered to forestall misunderstanding. First, it is not claimed that what is new in the recent analytical jurisprudence is new to the philosophical world generally. Many of the new analytical jurists have drawn on techniques, distinctions, and ideas already familiar in philosophy, particularly twentieth century analytic philosophy.[21] Most of what is new in their work is characterized as such only because of its novelty within the tradition of analytical jurisprudence as a branch of scholarship. Second, while the "new analysts" are grouped together for the purposes of this article, it must not be assumed that they agree on specific solutions to any of the problems they have been seeking to resolve. There is not yet any evidence of such agreement. Hence they do not, doctrinally, form a "school." They form a school only in the limited sense that a major part of the work of each is analytical in nature. This leads naturally to a third caveat. From the fact that these thinkers are concerned with analytical studies, it should not be concluded that they have no interest in sociological or evaluative inquiries. There is no evidence that any of them is exclusively occupied with analysis. Finally, it is not suggested that the new analytical jurists have a monopoly. They plainly do not. A significant number of professional philosophers interested in law are now pursuing what they call "legal philosophy."[22] Moreover, in spite of the rampages of behavioralism

21. The writings of the new jurists include many references to works of contemporary analytic philosophers. Figures who have profoundly influenced twentieth century analytic philosophy include Bertrand Russell (1872-), G. E. Moore (1873-1959), Ludwig Wittgenstein (1889-1951), J. L. Austin (1911-1960), and Gilbert Ryle (1900-). Russell, Moore, and Wittgenstein taught at Cambridge; Austin and Ryle taught at Oxford. It was not until the 1930's that the Cam began to flow into the Isis and the center of analytic philosophy moved from Cambridge to Oxford.

For introductory treatments of aspects of twentieth century analytic philosophy see Quinton, Contemporary British Philosophy, in A Critical History of Western Philosophy 530 (O'Conner ed. 1964); Urmson, Philosophical Analysis: Its Development Between the Two World Wars (1956); Warnock, English Philosophy Since 1900 (1958); The Age of Analysis: Twentieth Century Philosophers (White ed. 1955); British Analytical Philosophy (Williams & Montefiore eds. 1966).

22. A partial list follows:

(1) H. Bedau: The Death Penalty in America (Bedau ed. 1964); Justice and Classical Utilitarianism, 6 Nomos (Justice) 284 (1963); Law, Legal Systems, and Types of Legal Rules, Memorias del XIII Congreso Internacional de Filosofia, 7 Communicaciones Libres 17 (1964); On Civil Disobedience, 58 J. Philosophy 653 (1961).

(2) L. Boonin: Concerning the Authoritative Status of Legal Rules, 74 Ethics 219 (1964); Concerning the Defeasibility of Legal Rules, 26 Philosophy & Phenomenological Research 371 (1966); The Logic of Legal Decisions, 75 Ethics 179 (1965); The Meaning and Existence of Rules, 76 Ethics 212 (1966); The

within the discipline of political science, there are still some political "theorists."[23] While these thinkers are not, for the purposes of this article, called analytical jurists, there are no substantial differences between what they do and the work of the new jurists, all of whom are or have been members of law faculties.

II

Scope of the New Analytical Jurisprudence

The new jurists are performing a wider variety of analytical activities than did most of their predecessors. These activities can be divided into four main types (a good philosophical number): (1) analysis of the existing conceptual framework of and about law; (2) construction of new conceptual frameworks with accompanying terminologies; (3) rational justification of insti-

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Theoretical and Practical Approaches to Legal Reasoning, 49 Archiv für Rechts und Sozialphilosophie 433 (1963).

(3) M. Cohen: Law, Morality and Purpose, 10 Vill. L. Rev. 640 (1965).

(4) J. Feinberg: Action and Responsibility, in Philosophy in America 134 (Black ed. 1965); Justice and Personal Deserts, 6 Nomos (Justice) 69 (1963); Problematic Responsibility in Law and Morals, 71 Philosophical Rev. 340 (1962).

(5) M. Golding: Causation in the Law, 59 J. Philosophy 85 (1961); Kelsen and the Concept of "Legal System," 47 Archiv für Rechts und Sozialphilosophie 355 (1961); Principled Decision-Making and the Supreme Court, 63 Colum. L. Rev. 35 (1963); Principled Judicial Decision-Making, 73 Ethics 247 (1963).

(6) J. Rawls: Legal Obligation and the Duty of Fair Play, in Law and Philosophy 3 (Hook ed. 1964); Constitutional Liberty and the Concept of Justice, 6 Nomos (Justice) 98 (1963); Justice as Fairness, 67 Philosophical Rev. 164 (1958); Two Concepts of Rules, 64 Philosophical Rev. 3 (1955).

(7) M. Singer: Hart's Concept of Law, 60 J. Philosophy 197 (1963); Negative and Positive Duties, 15 Philosophy Q. 97 (1965).

The following remarks of one of the new analytical jurists are pertinent:

> Nowadays in philosophy departments in British and American universities, graduate students are busily writing dissertations on legal concepts or concepts having a close connection with law. The philosophy journals contain a growing sprinkling of articles on themes having relevance to the law. This development is very welcome. Jurisprudence, at least in its Anglo-American version, has suffered for too long through having little or no contact with professional philosophy. Competent legal scholars who venture into the field of legal theory often make blunders that a disciplined training in philosophy would have led them to avoid. But, correspondingly, philosophers may make very naive or misconceived appraisals of problems in legal theory simply through knowing too little law. They need to work together if only to correct each other's mistakes and there are now plenty of encouraging signs that, if not actually collaborating, lawyers and philosophers are at least paying attention to what the other has to say.

Hughes, Jurisprudence, 1964 Ann. Survey Am. L. 685, 687-88 (1965).

23. A representative cross section of their writings can be found in the annual publication of the recently formed American Society of Political and Legal Philosophy. This publication is called Nomos, and, to date, annual volumes have appeared devoted to the following topics: Authority, Community, Responsibility, Liberty, The Public Interest, Justice, Revolution, and Rational Decision.

tutions and practices, existing and proposed; and (4) "purposive implication"—tracing out what the acceptance of social purposes "implies" in terms of social arrangements and social ordering. All analytical jurists have been interested in the first of the foregoing activities—conceptual analysis. In fact, conceptual analysis has been a main, if not the primary, interest of analytical jurists, old and new. But, compared to most of the older analysts, the new are analyzing a wider range of concepts and performing a wider variety of analytical activities. These represent significant differences of scope.

A. Analysis of the Conceptual Status Quo

At least to philosophers, conceptual analysis is important because clarity and insight are important.[24] Concepts, and their interrelations, often turn out to be far more complex than is supposed. Through analysis, it is often possible to achieve better understanding. But this is not all that analysis accomplishes. As the philosopher J. L. Austin was fond of observing, a sharpened awareness of the uses of words can sharpen our awareness of phenomena.[25] This is not, by any means, a new idea. Plato, in the *Cratylus*, had Socrates ask of Cratylus: "What is the force of names, and what is the use of them?" To this, Cratylus replied: "The use of names, Socrates, as I should imagine, is to inform: the simple truth is, that he who knows names knows also the things which are expressed by them."[26]

What is conceptual analysis? Whether we speak of "con-

24. What is insight? There is, of course, no Platonic "form" of insight, and what is insight for one person may be old hat to another. An insight may be presented in such forms as (1) a sharpened awareness, (2) an exposed presupposition, (3) a novel line of argument, (4) a new distinction, (5) a relationship or a similarity or a contrast not previously seen, (6) a new technique or method, (7) an unseen implication, (8) an exemplification of something more general.

25. See J. L. Austin, A Plea for Excuses, 57 Proceedings of the Aristotelian Soc'y 1, 8 (1956).

26. 1 Dialogues of Plato 224 (Jowett transl. Random House 1937). H. L. A. Hart has made this point similarly:

> The question "Is analytical jurisprudence concerned with words or with things?" incorporates a most misleading dichotomy. Perhaps its misleading character comes out in the following analogy. Suppose a man to be occupied in focusing through a telescope on a battleship lying in the harbor some distance away. A friend comes up to him and says, "Are you concerned with the image in your glass or with the ship?" Plainly (if well advised) the other would answer "Both. I am endeavoring to align the image in the glass with the battleship in order to see it better." It seems to me that similarly in pursuing analytical inquiries we seek to sharpen our awareness of what we talk about when we use our language. There is no clarification of concepts which can fail to increase our understanding of the world to which we apply them.

Hart, Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer, 105 U. Pa. L. Rev. 953, 967 (1957).

ceptual analysis" or of "analyzing the *uses* of words," it all comes to much the same. The phrase "linguistic analysis," though often used, is less appropriate. It implies that language itself is the relevant subject matter, and this is not so. The relevant subject matter consists of concepts or ideas currently used by either laymen or professionals in dealing with law. Language, of course, is necessary, but only as the means by which, and the medium in which, concepts or ideas are dealt with.[27] It is possible to hint meaningfully at the range and variety of relevant concepts or ideas for conceptual analysis. Consider the following inexhaustive list:

(1) Concepts used in formulating theories of law, *e.g.*, sources of law, adjudication, minimum efficacy, sanctions.

(2) Concepts used in characterizing theories of law, *e.g.*, imperative, positivist.

(3) Concepts that are more or less creatures of law, *e.g.*, ownership, corporation.

(4) Concepts widely used in formulations of substantive laws, *e.g.*, intention, causation, possession.

(5) Concepts used to demarcate basic legal relations, *e.g.*, right-duty, power-liability.

(6) Concepts central to the administration of law, *e.g.*, interpretation, *ratio decidendi*, discretion, stare decisis, justification.

(7) Concepts used in classifying laws, *e.g.*, criminal, civil, substantive, procedural, public, private.

(8) Concepts used in criticism of law and its administration, *e.g.*, justice, freedom, equality, morality, natural law, "the rule of law."

So much for subject matter. What activities are involved in the "analysis" of this subject matter? Like most cover words, "analysis" suggests more unity than exists. For analysis is not a single activity, but rather a family of related activities. It includes breaking down concepts, differentiating related concepts, correlating and/or unifying related concepts, classifying them in some way, and charting their implications—their "logical bearings."[28] Perhaps "analysis" is not an ideal word,[29] but in the

27. This is not to say that idioms of language may not be useful as "pointers" to important distinctions or ideas. See Warnock, English Philosophy Since 1900, at 149-52 (1958).

28. In the course of these activities, various methodological techniques, distinctions, or ideas may come into play. For discussion of some of these as they figure in Hart's work see Summers, Professor H. L. A. Hart's Concept of Law, 1963 Duke L.J. 629, 661.

29. For those familiar with jurisprudence, it should be plain that "analysis," as used here, does not mean the formulation of logically equivalent definitions à

interest of brevity some cover word is essential, and "analysis" seems better than any other.

We should take an example—"justice"[30]—and, without attempting detailed elaboration, illustrate the general nature of conceptual analysis. After assembling representative examples of uses of "just" and "justice," an analytical jurist might try to establish that there is only one basic concept embedded in this usage, *e.g.*, the concept of just desert. Thus, he might try to show that a principle embodying this concept—each man shall have his due—in fact accounts for, or "ties together," the diverse uses we make of the terms "just" and "justice." Then, too, he might decide that no single principle ties them together, and that usage reflects not one unitary concept of justice but several distinct, though cognate, concepts. Thus, the principle that each man shall have his due may account for some uses, the principle that like cases are to be treated alike may account for others, and the principle that humans are to be treated humanely may account for still others. If this should be so, our jurist would want to stress that, since each of these principles embodies a different concept, there are distinct, though cognate, concepts of justice. Having identified and differentiated these, our jurist might then consider precisely how they are related—how they are cognate. He might go on to compare and contrast justice with allied concepts of evaluation such as utility. Though much more is involved, enough has been said to illustrate the technique of conceptual analysis. What will be the end result? Presumably a better understanding of some important domain within our conceptual scheme.

Because of vague similarities, conceptual analysis is not uncommonly confused with legal interpretation.[31] But when the jurist engages in conceptual analysis he is simply not doing the kind of work that the lawyer does when he interprets a statute or some other authoritative text. Although there are many differences, three will suffice for illustration. First, the sources of their problems are very different. The lawyer's interpretational problem arises because, for example, there is inconsistent usage of the same word in the text, syntactical ambiguity, or evidence of a difference between what the authority intended and the usual

la Russell and Moore. (The uninitiated would not know of and therefore not worry about this possible meaning anyway.)

30. Actually, analysts have done a great deal of work on this topic. See, e.g., 6 Nomos (Justice) (1963).

31. See, e.g., Bodenheimer, Modern Analytical Jurisprudence and the Limits of Its Usefulness, 104 U. Pa. L. Rev. 1080, 1085 (1956); Dunlop, Developments in English Jurisprudence 1953-1963, 3 Alberta L. Rev. 63, 72 (1963); Jones, A View From the Bridge, Law & Society, Summer 1965, pp. 39, 40.

meanings of the words used. The conceptual analyst's problem does not arise in this manner. Instead, it may arise because he is genuinely puzzled or confused about what is involved in the general content of some concept or about how it contrasts with and relates to other concepts. Alternatively, his problem may arise not because he is antecedently puzzled or in a fog, but rather because he simply wants to articulate a clear analysis of something he has set out to investigate.[32] Second, the lawyer can almost always frame his issue in terms of a choice between two alternative interpretations each of which he readily grasps and fully understands. This cannot be true of the jurist whose problem arises because of antecedent confusion or puzzlement. Moreover, the jurist's analysis—his "solution," if it can be called that —can hardly be described in terms of a choice between alternatives. The complexity of the activities involved in analysis defies such simplicity of description. Third, the lawyer will use techniques in his "analysis" that are hardly appropriate for the analytical jurist. Thus, interpreting a statute, the lawyer can be expected to invoke canons of statutory construction, canons obviously foreign to conceptual analysis. Also, the lawyer might involve himself in the old methodological dispute between purposive and literal interpretation.[33] But the jurist, qua analyst, could not even be a party to this dispute if he is analyzing the conceptual *status quo*, or, indeed, even if he is recommending the adoption of a better conceptual framework for representing reality.[34] In both cases, he is plainly not trying to determine what a specific person on a particular occasion meant by a specific use of a term. Furthermore, the lawyer, in interpreting a statute, may quite rightly marshal and rely on relevant arguments of public

32. See Warnock, English Philosophy Since 1900, at 147-57 (1958).

33. See generally Heydon's Case, 3 Coke 7a, 76 Eng. Rep. 637 (Ex. 1584). Every article on jurisprudence must include a citation to at least one case, for, as Holmes is supposed to have said, "Philosophising about the law does not amount to much until one has soaked in the details," quoted in J. Stone, Legal System and Lawyers' Reasonings 287 (1964).

34. Professor Lon L. Fuller appears to think the contrary. Thus, he has recently said that Professor Hart, in giving an account of judicial interpretation, is really "proposing" literal as opposed to purposive interpretation. See Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 661-69 (1958). Professor Hart, however, is not, in the relevant passages, proposing a theory of judicial interpretation at all. Rather, he is indicating his preference for one conceptual schema over another for the purpose of representing the nature of the process of judicial interpretation, and this he is doing in the context of conveying what he thinks is of value in the work of legal realists. Of course, he might be wrong in his preference, but this would be to adopt a framework that misrepresents reality, and not to adopt an indefensible theory of judicial interpretation. See Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 606-08 (1958).

policy. But it would be inappropriate, indeed, for a jurist to try to establish a *conceptual* connection between, say, the concept of law and the concept of general rules, by invoking considerations of "public policy." Similarly, it would be queer, indeed, for him to differentiate the concepts of purposive and reckless behavior "as a matter of public policy." It is proper that within *the substantive law's* own conceptual scheme, connections and distinctions be influenced by specific policies and purposes of duly constituted authorities. But it does not follow, in fact it is surely false, that all connections and distinctions within any conceptual scheme are exclusively creatures of specific human policies or purposes of the moment.[35] Whether or not there is a conceptual connection between the concept of law and the concept of general rules, and whether or not the general concepts of purposive or reckless behavior can be differentiated, are *not*, as such, questions arising within the conceptional scheme of the substantive law. Moreover, while over the long run such connections and distinctions are influenced by general human purposes, they have a reality of their own[36] which is not governed by short-run, transitory, practical policies or purposes of the moment. Of course, whether or not these connections and distinctions are to be recognized and embodied in the substantive law, and thus made subject to such policies and purposes, is an entirely different question, and itself one of policy.

With respect to conceptual analysis, how do the old analysts differ from the new? The new are methodologically more sophisticated, a point that will be developed later in this article.[37] Of equal, if not greater, importance is the fact that the new analysts are engaged in analyzing a wider range of concepts than their predecessors. John Austin very broadly defined the range of concepts jurists might investigate.[38] But most of his successors

35. From the tenor of Professor Fuller's article, it appears he believes that the very existence of any distinction between law "as it is" and law "as it ought to be" must ultimately turn somehow on the relevance of some specific and practical purpose. He suggests that the only "real" reason Professor Hart might have for insisting on this distinction is not conceptual in nature. Rather, it is a more specific and practical reason, namely, that Professor Hart believes strongly in "fidelity to law." Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958).

36. For a useful general discussion of the "theory of distinctions" in which the interplay between purposes and less transient factors is perceptively analyzed see Crawshay-Williams, Methods and Criteria of Reasoning 103-27 (1957).

37. See pp. 877-87 infra.

38. He said their study encompassed "principles, notions, and distinctions" that are "necessary" to law, and others not necessary but which, because of their "utility," "extend through all communities." Austin, The Province of Jurisprudence Determined 367-69 (Library of Ideas ed. 1954).

actually worked within far narrower bounds. This is especially true of analytical jurists in the United States, who by the mid-1930's had become almost exclusively preoccupied with analyzing concepts of "jural relations" such as "right," "duty," "power," and "liability."[39] In 1937, the then leading American analytical jurist, Albert Kocourek, proclaimed that "the jural relation is the central theme of analytic jurisprudence."[40] And so it was. This myopic narrowness contrasts strikingly with the wide-ranging interests of the new jurists. Already they have published studies of such varied subjects as justice,[41] discretion,[42] strict liability,[43] imperatives,[44] responsibility,[45] causation,[46] and the nature of law itself.[47]

B. Construction of a Conceptual Framework or Schema

If the analytical jurist is to provide the illumination and insight of which he is capable, he must commonly go beyond the conceptual *status quo*. He must go beyond analyzing concepts within our conceptual scheme as it is, and devise improved ways of more adequately representing reality.[48] The necessity for

39. See Hohfeld, Fundamental Legal Conceptions (1923); Kocourek, Jural Relations (1927); Cook, Hohfeld's Contributions to the Science of Law, 28 Yale L.J. 721 (1919); Cook, The Utility of Jurisprudence in the Solution of Legal Problems, 5 Lectures on Legal Topics 337 (1928); Corbin, Jural Relations and Their Classification, 30 Yale L.J. 226 (1921); Corbin, Legal Analysis and Terminology, 29 Yale L.J. 163 (1919); Corbin, Rights and Duties, 33 Yale L.J. 501 (1924); Corbin, What Is a Legal Relation?, 5 Ill. L.Q. 50 (1922); Goble, Affirmative and Negative Legal Relations, 4 Ill. L.Q. 94 (1922); Goble, Negative Legal Relations Re-examined, 5 Ill. L.Q. 36 (1922); Goble, A Redefinition of Basic Legal Terms, 35 Colum. L. Rev. 535 (1935); Goble, The Sanction of a Duty, 37 Yale L.J. 426 (1928); Goble, Terms for Restating the Law, 10 A.B.A.J. 58 (1924); Radin, A Restatement of Hohfeld, 51 Harv. L. Rev. 1141 (1938); Terry, The Arrangement of the Law (pts. 1, 2), 17 Colum. L. Rev. 291, 365 (1917); Terry, Duties, Rights and Wrongs, 10 A.B.A.J. 123 (1924).

For explicit statements of the scope of analytical jurisprudence as Hohfeld and Kocourek saw it see their remarks as quoted in Hall, Readings in Jurisprudence 336-39 (1938).

One brilliant American analytical jurist who was not preoccupied with the topic of jural relations during this period was John Dickinson. See, in particular, the following articles: The Law Behind Law (pts. 1, 2), 29 Colum. L. Rev. 113, 285 (1929); Legal Rules—Their Application and Elaboration, 79 U. Pa. L. Rev. 1052 (1931).

40. Kocourek, The Century of Analytic Jurisprudence Since John Austin, in 2 Law, A Century of Progress: 1835-1935, at 195, 216 (1937).

41. Fried, Justice and Liberty, 6 Nomos (Justice) 126 (1963).

42. Dworkin, Judicial Discretion, 60 J. Philosophy 624 (1963).

43. Wasserstrom, Strict Liability in the Criminal Law, 12 Stan. L. Rev. 731 (1960).

44. Morris, Imperatives and Orders, 26 Theoria 183 (1960).

45. Hughes, Book Review, 16 Stan. L. Rev. 470 (1964).

46. Hart & Honoré, Causation in the Law (1959).

47. Hart, The Concept of Law (1961).

48. On the general nature of this task see Hall, Conceptual Reform—One

such creative and constructive effort stems from two sources. First, our existing conceptual framework does not always have things right initially. Second, things change, and our concepts sometimes lag behind, thus becoming outmoded. Just as the nineteenth century concept of travel is outmoded today, so too is its concept of law.

Not all concepts, not all ideas, are about things. But some are, and we sometimes have the wrong *idea* of a thing. Thus, some do not have the right idea of what it is to have an obligation, or what it is to exercise discretion, or what constitutes punishment, or what morality involves. Instead, they have *mis*conceptions. Usually, misconceptions such as these can be cleared up by someone who has "got things right." But it is conceivable that no one has yet got some things right. Some things none of us yet understands. Our puzzlement exists not because we do not have enough facts about these things; rather, it is that our existing conceptual framework is inadequate—it does not take satisfactory account of what we are puzzled about. A different schema or framework is needed. While providing this involves going beyond the conceptual *status quo*, it does not necessarily involve introducing wholly new concepts or devising new terminologies in which to express these concepts. Frequently, it will involve combining old ideas or old and new ideas. Sometimes a new word or phrase will be invented, or an old word or phrase will be put to a new use.

In the following illustrative passages, Herbert Morris, one of the new analytical jurists, is striving to formulate an improved picture (conceptual schema) of the nature of what Dean Pound called "mechanical jurisprudence."

> First, why does Dean Pound say that "there was *usually* no logical compulsion" [in cases decided by judges]? What types of cases does he have in mind in which there is in fact the logical compulsion to "take the starting point"? Must we not keep steadily before us a fundamental distinction between reasoning logically and regarding oneself as bound by one's duty as a judge? It is not logic that "binds" a judge to apply rules or to decide cases. It is his obligation as a judge to do so. He might fail in his duties as a judge without reasoning illogically. Next, Dean Pound holds that once we "take the starting point" we are logically compelled to reach a result. But it is not clear what is involved for Dean Pound in a judge's "taking a starting point" or in this "logically compelling a result."
>
> Suppose a judge believes that a rule is clearly applicable to the facts of the case before him. Logic does not compel him to apply that rule. If he does not decide one way or the other he is an

Task of Philosophy, 61 Proceedings of the Aristotelian Soc'y 169 (1961); Nowell-Smith, Philosophical Theories, 48 Proceedings of the Aristotelian Soc'y 165 (1948).

irresponsible judge, not illogical in his reasoning. If he should overrule a line of decisions, he is not illogical, though he may be, of course, unreasonable. It is not logic, but *stare decisis* that directs him and in such cases he may be disregarding that principle but not necessarily reasoning invalidly. The judge may agree with counsel that the rule is, for example, that two witnesses are required to the signing of the will; he may agree that there was only one witness to the signing of the will in the case before him, and he still need not be "logically compelled" to reach any result. It is always open to him to take any feature of the situation and treat it as a relevant difference. He may select any difference as relevant without being logically inconsistent. There is a difference between logical inconsistency, involving the holding of two contradictory views, and making unreasonable or absurd distinctions. This is why the expression "carrying concepts to their logical extreme" makes little sense. As far as logic is concerned a judge can stop anywhere. But suppose that he does not overrule nor does he distinguish, what role is then played by logic in the result reached? Judges may, indeed, set their opinions out in a form such that, given the rule and given an additional premise, the conclusion follows logically. But is this what Dean Pound means by "the starting point logically compelling a result"? The impression his language gives is that once a judge has selected a rule, he is compelled by logic to reach a certain conclusion, and that is not so. Logic does not compel that a valid conclusion be drawn, for logic does not tell people to do anything. A person who agreed that "all men are mortal and that Socrates is a man" would not be compelled by logic to do anything further. He can stop talking and he would not be inconsistent. But if he draws the conclusion that Socrates is immortal, then we may say that he is inconsistent. Neither "starting points" nor "logic" compels any decisions.

It is, then, still not clear from Dean Pound's presentation precisely what role is played by logic in mechanical jurisprudence. But there are other difficulties. If we characterize mechanical jurisprudence as a judge's selecting a rule or conception and deriving implications from it without considering the effects of so doing, the following question may remain: First, must the judge in fact believe that logic requires him to choose a certain rule or conception and derive certain implications? Or is it sufficient that in his written opinion he gives the impression that logic is directing the result? To be sure that we have an instance of mechanical jurisprudence, must we first interview a judge or have independent knowledge of the thought processes which led him to his result? When we charge someone with mechanical jurisprudence are we objecting to the way he has written an opinion, setting forth his justification for a decision, or to the way we believe he has reached a particular result? Second, are judges who abide by *stare decisis*, and who apply rules without considering the social effects of so doing, guilty of mechanical jurisprudence? Third, suppose a judge concludes that justice in a particular case requires one kind of decision and the applicable rule another. Suppose, further, that he thinks it more important that a bad rule be applied and predictability furthered in the legal system than that a par-

> ticular case be decided on the equities. If he writes his opinion solely in conceptual terms, is he guilty of mechanical jurisprudence? Fourth, suppose the judge believes the rule a desirable one but recognizes that in the case before him its application will not be in accord with the equities. Suppose he decides to apply the rule but does not mention in his opinion any considerations other than conceptual ones. Is this mechanical jurisprudence?
>
> We have all had occasion to object to mechanical jurisprudence. We can pick out instances of it. What is rather more difficult to do is to pick out its essential characteristics so that we have a precise idea of what it is that we are objecting to.[49]

In the foregoing passages, the jurist tries to clarify something that is complex and only imperfectly understood. No readily available concept, no *use* of a familiar phrase or phrases seems to do the trick. Yet it is plain that there is an important phenomenon to be characterized. The only question is: How? In this example, the analyst has not, in the end, offered anything by way of a positive conceptualization of his own. Nor has he invented any words or recommended any new uses for old ones. Presumably, a positive account will eventually be presented. When it appears, it will, in one sense, be new. It will be an addition to, indeed a revision of, our existing conceptual scheme. The present scheme relies on "mechanical jurisprudence" and "logic" to represent the reality at hand, and in the foregoing passages we are shown that these are inadequate.

It is essential to stress that conceptual lag, as well as the failure to get things right in the beginning, gives rise to the necessity of constructing conceptual frameworks. To illustrate: One of the central problems of jurisprudence is the problem of explicating the nature of law itself. Law—the phenomenon of law—unlike elephants or triangles, is a mode of social organization and therefore is itself subject to some change, even fundamental change over long periods. Because of this, our understanding of law, our conceptions of it, may ultimately require revision.[50] Hence, in criticizing a theory such as John Austin's that law consists of sovereign commands, there are two possible dimensions of criticism. It is not merely that Austin might have gotten it wrong in the first place back in 1828. It is also possible that some features of his theory might need to be revised specifically to account for basic developments since that date.[51] For example, any account

49. Morris, Book Review, 13 Stan. L. Rev. 185, 203-04 (1960). (Reprinted with the permission of the Stanford Law Review.)

50. See generally Corbett, Innovation and Philosophy, 68 Mind 289 (1959). See also note 48 supra.

51. See generally Hexner, The Timeless Concept of Law, 52 J. Politics 48, 62-63 (1943).

of the nature of law in modern industrial societies must make a place for the pervasive impact of new administrative institutions with their varied structures and paraphernalia of orders, rulings, and regulations.

This, then, explains in a general way what is involved in constructing a conceptual framework, and explains what occasions this kind of creative analytical activity. With respect to this activity, how do the old and the new analysts compare? It cannot be said that old analysts did not engage in this activity. John Austin certainly did. His lectures are filled with formulations which he apparently thought more faithfully represented the nature of law than any framework theretofore devised.[52] But it can be said that, to date, conceptual revision, that is, the construction of new conceptual frameworks, appears to be a far more central interest of the new analysts as a whole than it was of their predecessors. Hart and all of the other principal analysts have been concerned with it, at one time or another.[53] Furthermore, since the nature of this kind of analytical work is much better understood today, it should be performed more perspicaciously.

C. *Rational Justification*

Rational justification is a third main type of activity that is, in its own way, analytical. Consider the following illustrative questions: What, if any, is the rational justification—the "case"—for civil disobedience? What, if any, is the rational justification—the "case"—for punishment as such? What, if any, is the rational justification—the "case"—for stare decisis? Questions of this type call upon the jurist to "make out a general case"—to marshal and articulate general justifying arguments, rather than to analyze the conceptual *status quo* or construct new conceptual schemes with their accompanying terminologies. Rational justification differs in two ways from the familiar day-to-day practical justification employed by the man of action. First, the analytical jurist works on a general type of question, *e.g.*, what, if any, is the rational justification—the "case"—for civil disobedience? The man of action, however, addresses himself to a more immediate and specific form of this general question, *e.g.*, is it justified to

52. See Austin, The Province of Jurisprudence Determined (Library of Ideas ed. 1954).

53. See, e.g., Hart, The Concept of Law (1961); Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961); Dworkin, Judicial Discretion, 60 J. Philosophy 624 (1963); Fried, Moral Causation, 77 Harv. L. Rev. 1258 (1964); Williams, Concept of Legal Liberty, 56 Colum. L. Rev. 1129 (1956); Hughes, Book Review, 16 Stan. L. Rev. 470 (1964); Morris, Book Review, 13 Stan. L. Rev. 185 (1960).

disobey the local ordinance against mixing races in public hotels? Second, the man of action, in the nature of things, takes a stand on the merits of his specific question, whereas the analytical jurist need not take a stand at all. His job is completed when he has formulated and marshalled the relevant arguments. While this task necessarily requires that he evaluate the *rational* plausibility of possible arguments, it does not *call* on him to take a stand on the ultimate question or to grind an axe of any kind. Rational justification is analytical at least in the positive respect that it involves differentiating, constructing, and marshalling rational arguments.

While rational justification does not appear to have engaged the old analytical jurists to any significant extent, it is a main interest of the new. Hart has written on the justification of punishment as a social practice,[54] Wasserstrom on the justification of judicial decisions,[55] and Dworkin on justified and unjustified uses of law to enforce morality.[56] This broadening of interests to include rational justification is a welcome development in an age incessantly plagued by forces fostering irrationalism.[57] It is simply not true that just anything can serve as a reason for anything else, nor is it true that all reasons are fungible, that one is always just as good as any other. Also, reasons count. They are seldom rationalizations.

D. Purposive Implication

Though of less significance than the activities already discussed, "purposive implication"[58] is another kind of analytical endeavor that has interested some of the new jurists. There is little or no evidence, however, that it occupied any of their pred-

54. See Hart, Prolegomenon to the Principles of Punishment, 60 Proceedings of the Aristotelian Soc'y 1 (1960).

55. See Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961).

56. Dworkin, Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986 (1966).

57. For the record, it is worth identifying some of these forces. First, the tag end, at least, of logical positivism remains. Some positivists thought rational justification was not even possible. Second, there is misplaced libertarianism: "A man is *free* to adopt any position." Third, there is misplaced egalitarianism: "One man's view is just as good as any other man's." Fourth, Freud gets into the act: "We don't know what our *real* reasons are, so they cannot be all that important." And, just to end this particular list, we have the alarming result-orientation of a few modern political scientists: "It's the result that counts, not the reasons; reasons have little to do with results anyway."

58. This phrase was very recently introduced into the literature by Professor Lon L. Fuller. See Fuller, The Morality of Law 184 (1964). While Professor Fuller's book and his other works are full of insights of interest to analytical jurists, he would probably not want to be considered one of them.

ecessors. Its general character can be briefly explained. Consider the following illustrative questions: Given a purpose to have an effective system of law, does it *follow* that, in general, there must be rules? Known rules? Rules that are prospectively applicable? Given man's purpose to survive, his nature, and the conditions under which he lives, does it *follow* that he must have rules proscribing theft and violence? Given a purpose to have a humane and liberal society, does it *follow* that the legal system in such a society must recognize some version of the doctrine of *mens rea*? Questions of this nature call for work different from rational justification. In addressing such questions, the jurist does not build up a general case for or against some general proposition, institution, practice, or idea; instead, he traces what the acceptance of social purposes, aims, or values *commits* us to in terms of social arrangements and social ordering.[59] This activity is "analytical" at least in the positive respect that it involves tracing implications of what may be called "social premises."[60]

Thus, in addition to conceptual analysis, some or all of the new jurists are interested in what we have called the construction of conceptual frameworks, rational justification, and purposive implication, each of which may be plausibly characterized as analytical in nature. In these latter three types of work, most earlier analytical jurists displayed little or no interest. In summary, it can be said that the concerns of the new analytical jurists are broader in at least two important respects—they are performing a wider variety of analytical activities and, in doing conceptual analysis, always a major concern of analytical jurists, they are focusing on a much wider range of problems.

III

Methodology of the New Analytical Jurists

With respect to methodology and approach, the new analytical jurists are more sophisticated than their predecessors. This is largely because the new analysts, as performers of what

59. Actually, the most outstanding contemporary example of this kind of work appears in Fuller, The Morality of Law 33-94 (1964). But see Hart, The Concept of Law 189-95 (1961), for an apt example from the work of an avowed analyst.

60. While this work is in one sense deductive, it differs from strictly formal deduction. It would be inappropriate to say that valid conclusions of purposive implication derive their validity—their "necessity"—from compliance with formal rules of logical inference. It is better to say, simply, that our shared purposes, our knowledge or assumptions concerning relevant facts, and our practical wisdom "demand" these conclusions. Cf. Hart, The Concept of Law 195 (1961), where the author discusses the concept of "natural" as opposed to "definitional" or "formal" necessity.

is essentially a philosophical enterprise, have been able to take advantage of important methodological advances in philosophy generally, advances which had either not yet occurred or were not so widely understood when the older analysts were at work.

It is not possible to present these advances in the form of positive "how to do it" formulas. There are no such formulas. Rather, the new-found methodological sophistication is best described in terms of a deeper insight into the basic nature of analytical work,[61] and a greater awareness of certain sources of error that have traditionally plagued analytical jurists. It is important to explain several of these sources of error in some detail. Examples will be given to show how these sources of error affected earlier analysts, but no attempt will be made to "prove" that the new jurists as a whole have escaped them. This would invite all the notorious difficulties of "proving a negative," and would require more space than is available. It is enough to say that the new analysts are cognizant of these sources of error,[62] and try to avoid them. So far they seem, on the whole, to have been rather successful. These things cannot be said of the early analytical jurists.

The sources of error to be explained are (1) the urge to convert conceptual questions into straightforward questions of fact, (2) the urge to "grind axes," (3) the influence of misleading models, (4) the reductionist impulse, (5) essentialism, and (6) misuse of definition *per genus et differentiam*. It is not claimed that no other influences are at work in the examples that will be used to illustrate the foregoing. Nor is it claimed that the errors involved are errors *because* of the influence of the sources of error identified. Whether an example illustrates an error obviously depends on the merits. For present purposes, however, it is not necessary to argue merits; error is therefore assumed in each example, and the focus is on its source.

A. The Urge To Convert Conceptual Questions Into Straightforward Questions of Fact

There is a difference between conceptual questions and straightforward questions of empirical fact. It may be true that,

61. Some say this insight has itself come to philosophers generally only in this century. Thus, it has been remarked, "it is only quite recently that the subject-matter, or rather the tasks, of philosophy have come to be clearly distinguished from those of other disciplines." Warnock, English Philosophy Since 1900, at 172 (1958).

62. Their own publications include many references to the works of thinkers who clarified the nature of these sources of error. Several of these earlier thinkers are referred to in note 21 supra.

despite the long history of philosophy, this difference has never been satisfactorily drawn.[63] But it is clear that a difference exists. For example, we must first decide what constitutes intentional behavior, before setting out empirically to find particular instances of it. For reasons we shall not try to explore, early analytical jurists seem to have succumbed to the urge to convert conceptual questions into straightforward questions of empirical fact. To cite an important example, John Austin and some of his followers were led to say that having an obligation consists merely of being threatened by a sanction if one does not act or forbear as indicated.[64] This is a faulty analysis, for one may quite rightly say a person has an obligation even if there is no possibility that a sanction will be imposed for noncompliance. What very likely accounts for this analysis is the urge to translate the conceptual question, "What constitutes having an obligation?" into the straightforward empirical or sociological question, "What is likely to happen if citizens do not act or forbear as indicated?" Unlike the former question, this is plainly a *straightforward* empirical question calling for sociological research into human behavior other than verbal behavior. Once such research (or, more often, speculation) shows that, as a matter of cold, hard, empirical fact, sanctions normally follow noncompliance, then it is but a short step to the erroneous conclusion that "having an obligation" consists merely of being threatened by a sanction and that, therefore, it is not possible to have an obligation if no sanction for noncompliance is likely.

A recent example, and therefore one not involving an earlier analytical jurist, superbly illustrates the widespread tendency to convert conceptual questions into straightforward empirical ones. It arises in one of the celebrated exchanges between Professor Lon L. Fuller and Professor H. L. A. Hart, one of the leading modern analysts. Hart wrote:

> If social control . . . [through legal rules] is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. . . . Plainly these features of control by rule are closely related to the requirements

63. Professor Gilbert Ryle has recently said: "We, too, know in our bones how philosophical problems differ in kind from scientific problems; but our statements of the differences continue to be inadequate." Ryle, Dialectic in the Academy, in New Essays on Plato and Aristotle 39, 67 (Bambrough ed. 1965). To add one remark, it seems plain that both are empirical, though in different ways. Hence, the use of the word "straightforward" in this paper. But it is not suggested that the word solves any problems.

64. For a faithful statement and incisive criticism of this view see Hart, The Concept of Law 79-88 (1961).

> of justice which lawyers term principles of legality. Indeed one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connexion between law and morality, and suggested that they may be called "the inner morality of law". Again, if this is what the necessary connexion of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.[65]

Interpreting this passage, Professor Fuller concludes that: "Certainly one could not wish for a more explicit denial of any possible interaction between the internal and external moralities of law than that contained in the last sentence."[66] This, however, is a false interpretation. Hart is not saying, as Fuller takes him to be saying, that law and morality do not, in fact, affect each other. He is only saying that they do not *necessarily* affect each other and that good law in the sense of intelligible, prospective law is *logically* "compatible with very great iniquity." Yet Fuller wants to convert Hart's proposition into a straightforward empirical proposition of fact.

B. The Urge To Grind an Axe

Conceptual questions are also sometimes, consciously or unconsciously, converted into questions of value. Analytical jurists have, from time to time, smuggled their own value preferences into what they seem to want to present as conceptual analysis. While purporting to analyze concepts, they have really been evaluating and recommending. Examples of this abound; one of the most spectacular appears in the work of Thomas Hobbes, the earliest thinker of importance in the history of analytical jurisprudence. Hobbes published his *Leviathan* in 1651, a period of great civil strife and turmoil. In this book, Hobbes' value preference for order emerges with luminous clarity, yet he pretends to be analyzing the concept of law within the framework of his day.[67] Thus, Hobbes wrongly contended that it would be conceptually illegitimate to speak of limited sovereignty[68] or a right to revolt.[69] While we may sympathize with Hobbes' desire for order in a time of great civil disorder, his is not really an analysis; rather, it is an indirect way of endorsing values. There is nothing conceptually illegitimate in the notion that sovereign power may

65. Id. at 202.
66. Fuller, The Morality of Law 154 (1964).
67. He renders his pretense explicit. See Hobbes, Leviathan 172 (Oakeshott ed. 1960), where he says he is showing "what is law."
68. Id. at 130, 173.
69. Id. at 113-15.

be limited, or the notion that citizens living under law have a right to revolt. These notions do not have the same kind of sound that "round-square" has.

Of course, the urge to grind an axe is not necessarily inconsistent with sound conceptual analysis. Indeed, it may provide the motivation for careful and, on its merits, wholly defensible analysis. But it may also distort an analysis, particularly if the axe at hand is one the analyst holds dear.

C. The Influence of Misleading or Irrelevant Models

Models play an important role in human thought. As ideal types, they provide something to anchor to and even to judge by. But not everything can be assimilated to a model. Moreover, not all relevant models are equally relevant. Finally, a model is nothing more than that. And it can blind us.

The influence of irrelevant or misleading models has been a fertile source of error in analytical and other kinds of jurisprudence. Thus, the model of scientific knowledge embodied in general laws has sometimes led jurists to seek more unity and universality than exists in the nature of the case. Austin, for example, was led to think that there *must* be certain principles of positive law common to all developed systems.[70] Mathematical models have played their part. Indeed, Kocourek lamented that jurisprudence had not sufficiently imitated mathematics and formal logic.[71] Because of this, he was sometimes led to insist on what *he* conceived to be "logic" at the expense of conceptual felicity. For example, he wrote as late as 1937 that the "proposition, 'that "sovereign power is incapable of legal limitation,"' while often denied, is an inescapable proposition of logical truth."[72] Similarly, Bentham thought that the activity of rational justification was essentially a process of calculation. We are to *add up* the pleasures and pains involved, *count* the number of persons affected, *multiply* this number by the relevant pleasures and pains, and act accordingly.[73] "The law giver . . . [and] the geometrician . . . are both solving problems by sober calculation," according to Bentham.[74] At the other extreme, some jurists have

70. See Austin, The Province of Jurisprudence Determined (Library of Ideas ed. 1954).

71. Kocourek, The Century of Analytic Jurisprudence Since John Austin, in 2 Law, A Century of Progress: 1835-1935, at 195, 210, 221 (1937).

72. Id. at 200.

73. Bentham, An Introduction to the Principles of Morals and Legislation 30-31 (Hafner Library ed. 1948).

74. 2 Bentham, Works 19 (Bowring ed. 1859).

been influenced by the so-called "Boo-Hurrah" model of "justification," according to which *rational* justification is simply not possible.[75]

Architectural models have played a part. Both Hobbes and Austin were inclined to apply a simple top and bottom framework to the analysis of law, with the sovereign on top "laying down" the law to the citizenry at the bottom.[76] This, combined with the influence of the "command" model drawn from the military,[77] probably kept Austin, at least, from seeing that "valid law" is a concept that can be most effectively analyzed in terms of the compliance of specific rules with generally accepted criteria for the identification of laws rather than in terms of whether the rules are commands of an uncommanded commander.

The influence of the criminal-law model has been pervasive. Among other things, it has led some thinkers to neglect the vital role in a legal system of rules that, unlike the rules of the criminal law, confer powers rather than impose duties.[78]

The foregoing are only some of the many models that have led analytical jurists astray. The new jurists are cognizant of this basic source of error, more so, it seems, than any of their predecessors, but this is not, of course, any *guarantee* that their work will always be free of it.

D. The Reductionist Impulse

Reductionism is not all bad. For example, generalization or systematization may be in order, and for purposes such as these it may be necessary to throw *different* things into the *same* category—to "reduce" one thing to another thing.[79] But for other purposes, distinctions may be more important than similarities. Succumbing to the reductionist impulse, the analyst may obscure important differences, and even ignore some things altogether. Thus, reductionism can be a vice. As such, it plagued the efforts

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75. The outstanding instance today is Hans Kelsen. See, e.g., Kelsen, General Theory of Law and State xvi (Wedberg transl. 1945), where it is said that the problem of justification is rooted "in the emotional, not in the rational." Kocourek also said that "in its pure form morals is an emotional reaction." Kocourek, An Introduction to the Science of Law 132 (1930).

76. Austin, The Province of Jurisprudence Determined 191-361 (Library of Ideas ed. 1954); Hobbes, Leviathan 188, 210 (Oakeshott ed. 1960).

77. Austin, The Province of Jurisprudence Determined 13-18 (Library of Ideas ed. 1954). Austin was in the army from the ages of sixteen to twenty-two.

78. For extended discussion of this see Hart, The Concept of Law 27-41 (1961).

79. For extended discussion of the nature of reductionism see Symposium—Reducibility, in Men and Machines, Aristotelian Society Supplementary Vol. XXVI, 87-138 (1952). See also Hart, Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer, 105 U. Pa. L. Rev. 953, 956 (1957).

of earlier analytical jurists such as Austin who sought, for example, to reduce all types of directives having authoritative force in a system of law to "commands."[80] This obscured the very great differences between such things as orders, rules, rulings, principles, and regulations. He sought to reduce the various factors that account for compliance with a system of law to "habits."[81] This obscured the differences between, and indeed ignored altogether, such differing factors as the desire for order, the inclination simply to do as others do, the wish to be respected, and so forth. Austin sought to reduce the diverse things citizens do with legal rules to that of "obeying" them,[82] whereas what is done with rules includes many other activities as well.

These examples suffice to show that the analytical jurist must be wary of the reductionist impulse. As Bishop Butler said, "Everything is what it is, and not another thing."[83]

E. Essentialism

Plato thought most things have an "ideal form." In *The Republic* he even said there was an ideal form for beds.[84] For Plato, to analyze a concept was to search for an ideal form—an essence. He assumed that all of the diverse things to which any general term is applied must have some defining property or properties in common.[85] While it may be true that essences can be found for some concepts, it is doubtful that an essence can be found for all concepts. Yet there is evidence that some philosophers, legal and nonlegal, have assumed this.

Austin seems to have been a searcher for essences where none could be found.[86] Consider, for example, his analysis of the concept of law. In Austin's day, many diverse societies existed to which this word was applied. Austin undertook to determine properties these societies had in common by virtue of which they were said to have law.[87] He concluded that it was not possible to con-

80. Austin, The Province of Jurisprudence Determined 10-33 (Library of Ideas ed. 1954).

81. Id. at 191-361.

82. Ibid.

83. See Moore, Principia Ethica iii (1903).

84. Plato, The Republic bk. X, in 1 The Dialogues of Plato 852-53 (Jowett transl. Random House 1937).

85. See, e.g., Plato, Meno, in 1 The Dialogues of Plato 352-53 (Jowett transl. Random House 1937).

86. This similarity between what classical jurists sometimes did and what Austin sometimes did has been noticed by others. See 4 Mill, Dissertations and Discussions 223 (1868); Chloros, Some Aspects of the Social and Ethical Element in Analytical Jurisprudence, 67 Juridical Rev. 79 (1955); Morris, Verbal Disputes and the Legal Philosophy of John Austin, 7 U.C.L.A.L. Rev. 27, 36 (1960).

87. Austin, The Province of Jurisprudence Determined 367-68 (Library of Ideas ed. 1954).

ceive of a system of law without the following properties as "constituent parts": duty, right, liberty, injury, punishment, sovereignty, and independent political existence.[88] This was Austin's "essence" of law. He was apparently led to search for such an essence because he assumed that the propriety of using the same term for diverse phenomena must inevitably turn on the presence of some property or properties *common to all the things* to which the term is applied. But with many terms of interest to analytical jurists, a search for an essence is likely to prove fruitless. This is certainly true of "law" itself. Of course, the various societies to which the term "law" is applied cannot lack all or even very many of the properties normally present in legal systems and still be legal systems. Yet even at this date no one has established that there is some defining property or properties which all things properly called legal systems have in common and which must therefore be present for the term to be correctly applied. Austin seems to have stressed the property of "unlimited sovereignty" more than any other, but even this is not present in many legal systems.

The influential Ludwig Wittgenstein, in one of his attacks on essentialism,[89] offered "family resemblances" as an alternative type of unifying factor. While there are still other types,[90] Wittgenstein's has been more widely discussed in philosophical literature than any other and is therefore singled out for explanation. He should be allowed to speak for himself:

> Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don't say: "There *must* be something common, or they would not be called 'games' "—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look!—Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost. —Are they all "amusing"? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches

88. Id. at 367.

89. On essentialism generally see Wittgenstein, The Blue and Brown Books 17-18 (1958). See also Pitcher, The Philosophy of Wittgenstein 215-27 (1964) (chapter entitled The Attack on Essentialism).

90. The best concise discussion of several others is in J. L. Austin, Philosophical Papers 37-43 (1961).

> it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; can see how similarities crop up and disappear.
>
> And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.
>
> I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: "games" form a family.[91]

F. Misuse of Definition Per Genus et Differentiam

There is evidence that Austin and some of his successors tried to use the technique of definition *per genus et differentiam* to explicate concepts of and about law.[92] The new jurists recognize, however, that this technique cannot be used illuminatingly on many such concepts, for it presupposes that the concepts to be analyzed are not sui generis, that they fall within familiar and well understood genuses, and that they can be meaningfully isolated as single words or expressions which can be relatively straightforwardly correlated with counterparts in the world of fact and then differentiated accordingly from other species of the same genus.[93] These conditions are met in the case of concepts such as "dog" or "chair." These are not sui generis; "animal" is the genus for one and "furniture" for the other and each genus is itself familiar and well understood. Moreover, the terms "dog" or "chair" can be taken in isolation from whole sentences in specific contexts and be more or less straightforwardly correlated with counterparts in the world of fact which can then be differentiated from other species of the same genus. But what of words such as "corporation," "ownership," "right," or "discretion"? The conditions for use of the technique of definition *per genus et differentiam* to explicate the uses of terms such as these are simply not present. Even if not sui generis, they cannot be assigned to a general and well understood genus. Moreover, it is not possible to take these words singly and correlate them straight-

91. Wittgenstein, Philosophical Investigations 31e-32e (1953).

92. See, e.g., Austin, The Province of Jurisprudence Determined (Library of Ideas ed. 1954). See also Holland, Elements of Jurisprudence passim (13th ed. 1924); Kocourek, An Introduction to the Science of Law 215-16 (1927).

93. Cf. Hart, Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer, 105 U. Pa. L. Rev. 953, 960-63 (1957).

forwardly with counterparts in the world of fact. To explicate the uses of such terms, the new analytical jurist can invoke other techniques, one of which we shall call "contextual explication."[94] Pursuant to this method, he assembles examples of the relevant uses of the term within whole sentences in specific contexts.[95] In this way, he reveals what these words do—the concepts they convey in the context of their use within specific sentences.

This process can be lucidly illustrated by reference to games. Consider, for example, the sentence: "The batter is out," and suppose that someone wonders what being "out" is. This cannot be explained by assigning "outness" to some familiar genus, correlating it straightforwardly with a counterpart in the world of fact, and then differentiating it accordingly from other species of the same genus. The analyst can, however, confront his questioner with examples of sentences in which the relevant expression is used and then identify the relevant conditions present in the context of these uses. Thus, to explicate "right," the analytical jurist would, among other things, put this term in the context of sentences such as "*A* has a right that *B* pay him $50." Once the characteristic uses of this expression are identified, he would then show how they presuppose such things as (1) the existence of a relationship between persons, (2) the existence of a system of law, (3) the existence of a rule of the system such that *B* must do something for *A*. It is an explication of this nature that many concepts demand, for they cannot be readily assigned to a familiar genus, and are, relatively speaking, far more "context dependent" —far more intricately bound up with the whole context of their use in sentences in specific instances—than are words such as "dog" or "chair."[96]

It is misleading to describe conceptual studies as definitional anyway. Consider, for example, the problem of constructing a theory of law. In some texts on jurisprudence, this problem is called "The Definition of Law."[97] Such talk of "defining" ought

94. Cf. Hart, Definition and Theory in Jurisprudence, 70 L.Q. Rev. 37 (1954).

95. Lawyers must be cautioned that this is quite different from *inferring from context* what some particular person most likely meant by the use of a term or expression on a particular occasion.

96. Bentham was aware of the limitations of "defining" *per genus et differentiam* and suggested an alternative procedure along the lines indicated in the text. Bentham, Fragment on Government 232-36 (Montague ed. 1891). Professor H. L. A. Hart engrafted onto this procedure a step that involves showing what is the logical "function" of the sentence in which the word appears, e.g., descriptive, ascriptive, conclusion-drawing, and so on. What this additional step adds is not clear. One thinker has recently argued against it. See Simpson, The Analysis of Legal Concepts, 80 L.Q. Rev. 535, 555-57 (1965).

97. See, e.g., G. Paton, Jurisprudence 62-93 (3d ed. 1964).

to be abandoned for the following reasons. First, for many persons, definitions are sought to clear up doubt about usage. But theories of law do not originate in doubts of this kind. Second, definition is, for many, something one finds in a dictionary. Yet legal theorists, even at Oxford, seldom rely on dictionaries. Third, a definition is typically something concise. But theories of law, though they can be summed up, are almost never concise. Fourth, to many, definition is a matter of drawing boundaries. Yet most theories of law are concerned not only with boundaries between, say, law and morals, but also with the internal complexities of legal systems. Finally, ordinary definitions may be criticized as accurate or inaccurate reports of usage, but theories of law are criticized primarily as adequate or inadequate for the purpose of representing the basic features of actual legal systems.

The conversion of conceptual questions into straightforward questions of empirical fact, the process that we have called "axe grinding," the use of irrelevant and misleading models, reductionism, essentialism, and misuse of definition *per genus et differentiam*, are, then, all basic errors or sources of error in analytical jurisprudence. The new jurists are cognizant of these, and of still others of perhaps equal significance.[98] Because of this, more can be expected of them than of their predecessors.

98. Other sources of error include:

(1) The assumption that all concepts have "positive" content only. Not all do. Some function as "excluders." See the important article by Hall, Excluders, 20 Analysis 1 (1959). For the argument that the concept "voluntary," in the criminal law, "serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, mistakes, etc., and not to designate a mental element or state . . ." see Hart, The Ascription of Responsibility and Rights, 49 Proceedings of the Aristotelian Soc'y 171, 180 (1949).

(2) The assumption that dichotomies are truly dichotomies. Often they are not. For general remarks on this source of error in philosophy and in jurisprudence see J. L. Austin, Philosophical Papers 138-41 (1961). For a recent attack on the "rule vs. discretion" dichotomy in jurisprudence see Dworkin, Judicial Discretion, 60 J. Philosophy 624 (1963).

(3) The assumption that the object of inquiry can, without distortion, be analyzed from only one point of view. For discussion of the inadequacies of the "legislative point of view" toward the nature of law see Summers, Professor Fuller on Morality and Law, 18 J. Legal Ed. 1, 19-21 (1956).

(4) The assumption that the object of study is static rather than dynamic in nature. Many objects of study are continually changing. For general discussion see Rescher, Revolt Against Process, 59 J. Philosophy 410 (1962). For an effort to show why the nature of law itself must be analyzed as in "a continuous process of *becoming*" see H. M. Hart, Holmes' Positivism—An Addendum, 64 Harv. L. Rev. 929, 930 (1951).

(5) The assumption that "if we can only discover the true meanings of each of a cluster of key terms . . . that we use in some particular field . . . then it must without question transpire that each will fit into place in some single, interlocking, consistent conceptual scheme." J. L. Austin, Philosophical Papers 151 n.1 (1961). This assumption is false. Among analytical jurists who have succumbed to it, Hohfeld is an outstanding example. Hohfeld assumed that the "true"

IV

Doctrinal Commitment and Positivistic Bias

The new analytical jurists are less doctrinaire and less positivistic than were Austin and his successors.

A. Less Doctrinaire

The new jurists are not committed to any particular doctrines, that is, they are not committed, as a group, to any particular solutions to the problems they confront. Indeed, as we remarked earlier, there is very little evidence of agreement between any of them on any solutions.

This cannot be said of John Austin and many of his successors. Explaining the nature of law may be said to be the central problem of jurisprudence. For many of the early jurists, the "party line" became Austin's "imperative" theory of the nature of law.[99] Essentially, this theory is that law consists of sovereign commands of an uncommanded commander.[100] Analysts became so closely associated with the imperative theory that some observers identified the whole discipline of analytical jurisprudence with this crude and simple account of law. Thus, the phrases "analytical jurisprudence" and the "imperative theory" were sometimes used interchangeably.[101] This was and is a mistake. Analytical jurisprudence is a discipline, not a doctrine, let alone a doctrine about the nature of law, and its problems include many besides this one.

It goes without saying that none of the new jurists adopts Austin's theory of law. In fact, the only new jurist to publish a general and systematic account of the nature of law has extensively criticized and rejected Austin's analysis.[102]

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analysis of "right" neatly yields four relations, each with its "correlative" and its "opposite." See Hohfeld, Fundamental Legal Conceptions (1923). For criticism see J. Stone, Legal System and Lawyers' Reasonings 156-61 (1964).

(6) The influence of doctrines current in philosophy generally. For a general discussion of this source of error in jurisprudence see Bobbio, Nature et Fonction de la Philosophie du Droit, 7 Archive de Philosophie du Droit 1, 4 (1937). For illustrations of specific ways such doctrines can lead to error in jurisprudence see Hart, Scandinavian Realism, 1959 Camb. L.J. 233.

99. See Amos, The Science of Law (9th ed. 1909); Amos, Systematic View of the Science of Jurisprudence (1872); Holland, Elements of Jurisprudence (13th ed. 1924); Markby, Elements of Law Considered With Reference to Principles of General Jurisprudence (4th ed. 1889). See generally Brown, The Austinian Theory of Law (1906).

100. See Austin, The Province of Jurisprudence Determined passim (Library of Ideas ed. 1954).

101. See, e.g., E. W. Patterson, Jurisprudence: Men and Ideas of the Law 14-15 (1953).

102. See Hart, The Concept of Law 1-120 (1961).

B. Less Positivistic

What is "legal positivism"? Today, this phrase is used to describe so many different things that it surely deserves to be junked. Here are some of the differing views the phrase is used to refer to:[103] (1) that law as it is can be clearly differentiated from law as it ought to be,[104] (2) that only the concepts of existing positive law are fit for analytical study,[105] (3) that force or power is the essence of law,[106] (4) that law is a self-sufficient closed system which does not draw on other disciplines for any of its premises,[107] (5) that laws and legal decisions cannot, in any ultimate sense, be rationally defended,[108] (6) that a logically self-consistent Utopia exists to which positive law ought to be made to conform,[109] (7) that, in interpreting statutes, considerations of what the law ought to be have no place,[110] (8) that judicial decisions are logical deductions from preexisting premises,[111] (9) that certainty is the "chief end of law,"[112] and (10) that there is an absolute duty to obey evil laws.[113]

Most of the new jurists are very likely legal positivists in the first of the foregoing senses. That is, most of them would probably say that the law as it is can be clearly differentiated from the law as it ought to be.[114] In this, they are at one with their predecessors. But, thereafter, the new and the old part company. There is no evidence that the new are "legal positivists"

103. In surveying the relevant literature, wholly novel senses of "legal positivism" have been disregarded. One such example quite recently appeared. See Ehrenzweig, Psychoanalytical Jurisprudence: A Common Language for Babylon, 65 Colum. L. Rev. 1331, 1336-37, 1353 (1965). While the matter is not free of interpretational difficulties, what the author seems to be saying is that the two "philosophies," "positivism" and "natural law," are, analytically at least, *identical*. Similarly novel (and similarly questionable) is the author's suggestion that "positivism" does not have as strong an "emotional preference" for justice as does "natural law." Id. at 1342.

104. See generally Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958).

105. See Kelsen, General Theory of Law and State xiii (Wedberg transl. 1961); Ehrenzweig, supra note 103, at 1355.

106. See Friedmann, Legal Theory 221 (4th ed. 1960).

107. See Bodenheimer, Analytical Positivism, Legal Realism, and the Future of Legal Method, 44 Va. L. Rev. 365 (1958).

108. See Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 624 (1958). Cf. Ehrenzweig, supra note 103, at 1335, 1346.

109. See Kahn-Freund, Introduction to Renner, The Institutions of Private Law and Their Social Functions 8 (1949).

110. See Berman, The Nature and Functions of Law 23-25 (1958).

111. See Morison, Some Myth About Positivism, 68 Yale L.J. 212 (1958).

112. See Friedmann, Legal Theory 163 (4th ed. 1960).

113. See Shuman, Legal Positivism, Its Scope and Limitations 177-209 (1963).

114. The most comprehensive presentation of this view by one of them is in Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958).

in any of the other foregoing senses of this expression. But were their predecessors? There is evidence that some of them were legal positivists in senses (1), (2), (3), and (5).[115] It is largely for this reason that it is possible to say that the new jurists are *less* "positivistic." But, in truth, very little evidence has been found that Austin or any of his successors were "legal positivists" in the other senses of this expression. It would not, however, be possible to *demonstrate* this without writing a series of articles comparable to Morison's *Some Myth About Positivism*,[116] in which the author shows that, contrary to conventional understanding,[117] Austin did not believe that judicial decisions were logical deductions from preexisting premises (sense (8) above).

The opportunity must not be missed to point to a further moral of this story. The phrases "analytical jurisprudence" and "legal positivism" are not uncommonly used interchangeably in contemporary legal literature.[118] From what has been said, it follows that this practice should be discontinued. Logically, a scholar can engage in analytical work without espousing any of the foregoing "positivist" doctrines. Moreover, many have.

V

Practical Utility of the New Analytical Jurisprudence

It is one of the important lessons of the history of inquiry in the physical sciences that many things turn out to have practical uses not foreseen at the investigatory stage. Moreover, things can have practical value in different ways. Thus, although an idea may not appear to have any immediate and specific practical use, it may influence a thinker's general outlook or approach and thus better equip him to do his work. Furthermore, what sometimes seems initially to be practical may turn out to be very impractical.

All this is widely understood. It would seem to follow that scholars, at least, would be wary of condemning systematic intellectual endeavors as of "no practical value." But the late Dean Roscoe Pound, the leading American jurisprudential scholar in

115. Thus, Austin for one certainly believed that law as it is could be differentiated from the law as it ought to be. Austin, The Province of Jurisprudence Determined 365-69 (Library of Ideas ed. 1954). It is not clear that he thought force or power to be the "essence" of law, but his predecessor, Hobbes, came near to saying this. See Hobbes, Leviathan (1651). Kocourek seemed to think that preferences for specific laws and legal decisions could not be rationally defended. See Kocourek, An Introduction to the Science of Law 132 (1930).

116. 68 Yale L.J. 212 (1958).

117. See, e.g., the widely read book J. Stone, The Province and Function of Law 55-73 (1946).

118. See, e.g., Hall, Studies in Jurisprudence and Criminal Theory 13 (1958).

this century, thought analytical jurists were wasting their time in "Cloudcuckootown" and said so.[119] In a recent book by one of Dean Pound's students and for which Dean Pound wrote an introduction, the author quotes some lines that express Dean Pound's own judgment of analytical jurisprudence better than anything he wrote himself. These lines open with a question put to an analytical jurist who is assumed to reside in a "heaven of juristic concepts":

> Permit me still another question: are the difficult judicial problems, which you have set out up there, practical, have they any importance in life?
>
> There you show once again that you have absolutely no understanding for our heaven. Practical? You mustn't even use that word here; if another than I had heard the word you would have been ejected at once. Importance of the problems for life? Is there any life here? Here pure science, pure legal logic rules supreme, and the condition of this supremacy . . . is precisely this, that all this has nothing in the least to do with life.[120]

Against a background of life-long attacks on earlier analytical jurisprudence by the leading sociological jurist of this century, it should not be surprising to find that there are those who are similarly skeptical of the ultimate practical significance of the work of the new analytical jurists.[121] At times, it seems almost as if the skeptic really wants to say that analytical work, by its very nature, cannot possibly have practical relevance. In this concluding section, an effort will be made, through several examples, to demonstrate that there is nothing inherent in analytical work as such that necessarily deprives it of all practical significance. Perhaps the skeptic should not be taken so seriously. Perhaps he does not himself intend to be. But he cannot have it both ways.

It is appropriate to begin with the effect that efforts to explicate the concept of law can have on practical affairs, because it is commonly assumed that work of this generality can have no practical significance whatever. Ronald M. Dworkin, one of the new jurists, has quite recently demonstrated the falsity of this

119. See Pound, The Progress of the Law: Analytical Jurisprudence, 1914-1927, 41 Harv. L. Rev. 174, 184 (1927).

120. The remarks are by Rudolph Von Ihering, as translated and quoted in Von Mehren, The Civil Law System 79 (1957). Incidentally, the identification of analytical jurisprudence with logic is and was a common thing. *One* of the problems with this is that "logic" is often used by such writers in a variety of senses. A spectacular example of this, a book in which the word is used in *many* different ways, is J. Stone, Legal System and Lawyers' Reasonings (1964). See Summers, Book Review, 53 Calif. L. Rev. 386, 393-95 (1965).

121. See, e.g., Fuller, The Morality of Law 131, 95-151 passim (1964); Jones, A View From the Bridge, Law & Society, Summer 1965, pp. 39, 40.

assumption in terms that can scarcely be improved. Hence we quote at length, for the point cannot be meaningfully made briefly:

> Suppose a court finds itself faced in a particular case with two inconsistent lines of authority, one favoring the plaintiff and one the defendant. After study and reflection the two lines appear almost equally persuasive and sound. The court, hard pressed to decide which to adopt, resolves its dilemma by awarding the plaintiff *half* of the damages to which he would have been entitled had his arguments prevailed.
>
> . . . .
>
> Consider now a different form of objection: the decision is wrong because it is a *compromise* rather than an *adjudication*. It is not a decision "of law," and hence it is an improper result for a *court of law*, constituted and seized of the matter as such, to reach. These are jurisprudential contentions; they involve claims about the nature of the law and its related words and concepts. Of course, they might be unsound jurisprudential contentions. But if we assume that the decision *can* be shown to be a compromise and therefore *not* a decision "of law," what sort of rebuttal can now be made?
>
> A defender of the decision now faces not simply a principle or a policy which he might reject, or against which he might produce countervailing principles or policies in the light of particular circumstances. He faces instead a set of rules defining a pertinent institution and thus structuring the background against which his argument is being made. So long as he perceives himself, and wishes others to take him, as participating in or criticizing the workings of *that* institution (as distinguished from some other which it might have been or might become), he cannot step outside those rules.
>
> Of course, he can propose and argue that the conceptual frame of the institution be broken and rearranged, so that bodies otherwise constituted like courts may compromise some arguments instead of adjudicating them. But he would labor under some distinct burdens in urging this. First, one feature of his position (indeed, one way of describing his position) is that the other participants will normally be excused by the logic of the context from acknowledging and responding to his argument—it will be, in this sense, *out of order*. Second, his argument must acknowledge and accommodate the fact that any recognizable conceptual change must entail vast, possibly incalculable ramifications. We cannot alter, for particular cases only, conceptual notions of what a court is and should do. Third, he is likely (depending on how closely his proposals touch the core of the concepts involved) to have a special sort of difficulty in finding principles or policies of wide appeal in the community which support his proposal. What principles, for example, would support the argument that tribunals of compulsory jurisdiction should be allowed to dictate compromises in ordinary law suits? The likely candidates (principles of political justice, or of good public order, for example) cannot easily be made to serve. For these principles each *include* or *reflect* our concept of law—we cannot use them without im-

porting the practice to be tested into the standards used to test it. So these principles, far from aiding the attack on the concept of law, must be indicted, at least in part, along with it. The more deeply the ground rule in point is set into the concept of law, the greater becomes the Archimedean predicament of being unable to find a point to stand and a fulcrum for a lever.

In these ways and to this extent standards entering into and forming the concept of law operate differently from, and independently of, the standards of fairness, policy, or strategy more often used in criticism of the legal process. Once they are perceived as in point, in the absence of pertinent and successful challenge of the sort imagined in the last paragraph, these conceptual standards function as reasons in their own right and not simply as signals that the particular decisions they indict are unfair or unwise. . . .

. . . .

A statute is passed in terms so ambiguous as to leave extensive doubt about its proper application. A court adopts and applies a novel rule of law flatly inconsistent with another rule recently promulgated, with no recognition of the contradiction. Price ceilings are established retroactively, making illegal sales which have already taken place. These are the shadow cases in which the institutional and conceptual commitments of the law's vocabulary are ranged against policies and purposes, noble or ignoble, best served by their breach. . . .

These shadow cases in part explain why the business of arguing about the concept of law and other central terms of the legal vocabulary thrives and turns up in outpockets all over the legal terrain, despite lawyers' supposed sophistication in avoiding "verbal" arguments. There are at stake, in each academic confrontation about the meaning of law, groups of choices and decisions whose number and even whose nature is largely unforeseeable, but which will swing one way or the other depending upon which priority, which emphasis, which modulation now predominates.[122]

A second and less subtle example illustrating how the work of the new jurists can have practical relevance involves what we have called rational justification. When, for example, the analytical jurist sorts out and constructs general arguments for or against civil disobedience,[123] he is formulating arguments that can also be particularized and brought to bear on the solution of the specific practical problems of civil disobedience. Thus, general considerations such as the possibility of harm to others

122. Dworkin, Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim, 113 U. Pa. L. Rev. 668, 679-83 (1965). (Reprinted with the permission of the University of Pennsylvania Law Review.)

123. See Wasserstrom, The Obligation To Obey the Law, 10 U.C.L.A.L. Rev. 780 (1963). See also the perceptive Maccabaean Lecture on the topic of civil disobedience delivered on June 16, 1965, to the British Academy by the too little-known Scottish analytical jurist, A. H. Campbell. The Lecture will be published in the Academy Proceedings for 1965.

and the feasibility of rapidly reforming the law are relevant to the man of action who must, for instance, decide whether to disobey a law against abortions in a case in which a young girl has been raped, or whether to disobey a local ordinance prohibiting the mixing of races in restaurants.

A third example reveals the profound practical significance that careful conceptual differentiation and explication can have. One scholar of the criminal law has recently written of "the disorderly state of traditional criminal law with respect to the mental element in the definition of offenses, a highly complex cluster of problems, for which the tag of *mens rea* stands as a convenient but elliptical symbol."[124] Since the differentiation and explication of different possible states of mind that figure in human action interests them, some of the new analysts can be expected to help solve this tangle of problems.[125] This should not be surprising, for "voluntarily," "intentionally," "purposefully," "knowingly," and "recklessly," to name some of the relevant concepts, are all well within the family of general notions that make up the daily diet of conceptual analysts.[126] Once the relevant conceptual possibilities are carefully differentiated and explicated, the legislator can be expected to enact less confusing statutes and statutes more consistent with his objectives. The lawyer, with a relevant scheme of distinct logical possibilities firmly in mind, should be able to determine better what specific mental element is embodied in the statute at hand.

A final example that shows how the work of the new jurists can bear on practical affairs involves both conceptual differentiation and rational justification. The problem of justifying judicial decisions can be broken down into the problem of justifying decisions that extend doctrine, that create exceptions to doctrine, that abolish doctrine, and so on. Once the analytical jurist identifies and differentiates these types, he can identify and articulate

124. Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 108.

125. The lawyers responsible for the Model Penal Code have themselves recently made substantial progress. See Model Penal Code §§ 2.01-.02, § 2.02, comment 2 (Tent. Draft No. 4, 1955).

126. See generally the collection of materials edited by one of the new jurists: Freedom and Responsibility: Readings in Philosophy and Law (Morris ed. 1961). See also Hart, Acts of Will and Responsibility, in Jubilee Lectures of the Faculty of Law, University of Sheffield 113 (Marshall ed. 1960); Hart, Negligence, Mens Rea and Criminal Responsibility, in Oxford Essays in Jurisprudence 29 (Guest ed. 1961); Dubin, *Mens Rea* Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, 18 Stan. L. Rev. 322 (1966) (drawing in part on recent analytical jurisprudence); Morris, Punishment for Thoughts, 49 Monist 342 (1965); Samek, The Concepts of Act and Intention and Their Treatment in Jurisprudence, 41 Australasian J. Philosophy 198 (1963).

the kinds of considerations that ought to figure in each.[127] This, in turn, may help Judge and Co. write more relevant, more persuasive, and more articulate opinions. To illustrate: It should be of value to a judge seeking to justify the creation of an exception to have before him an account of the factors that can plausibly be said to figure in the best possible "case" that could be made out in favor of creating an exception to any doctrine. Among such factors would be the following: (1) that when the doctrine itself was being formulated, it was not foreseen that its terms could apply to the facts at hand, (2) that the exception would interfere little, if at all, with the policy or policies of the doctrine, (3) that an independently significant policy can be furthered by recognizing the exception, (4) that the facts of the exception can be ascertained judicially without making significantly more mistakes (as to the facts) than would be made if no exception were recognized,[128] (5) that the exception can be formulated in such terms that it will not be likely to "swallow" up the doctrine itself, (6) that the boundaries of the exception can be formulated in nonarbitrary terms, and (7) that exceptions have similarly been made elsewhere in the law without adverse consequences.

VI

CONCLUSION

The new analytical jurisprudence is an autonomous discipline with practical relevance and promise. In closing, two questions naturally present themselves: What explains the rise of the new analytical jurisprudence? What are its prospects for the future? The answer to each question must, of necessity, be speculative and incomplete.

Several factors probably explain the flourish of interest in analytical studies. To begin with, in 1945 the problems of analytical jurisprudence were far from solved. Austin and his followers had left much work to be done. Furthermore, professional philosophers had, by the end of the war, become enamored of analytical philosophy generally. It was only natural that this interest should eventually manifest itself in such special branches of the field as legal philosophy. There is a further factor of a more accidental

127. The author of the present article is at work on a book along these lines.

128. For perceptive clarification of this important factor see Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification 162-71 (1961); Ross, The Value of Blood Tests as Evidence in Paternity Cases, 71 Harv. L. Rev. 466, 482-84 (1958).

nature. In 1952, H. L. A. Hart, who is a lawyer and a philosopher, became Professor of Jurisprudence at the University of Oxford. A powerful and articulate analytical jurist, Hart gave special impetus to the resurgence of his discipline, not only in Britain but also in the United States where he lectured extensively in the 1950's and 1960's. Undoubtedly other factors help explain the rise of the new analytical jurisprudence, but the foregoing seem the most significant.

What of the future? Although the new jurists are making headway, their discipline is not likely to be established, at least in American law schools, for some time. This seems true for several reasons. First, the work of the new jurists is not yet generally being differentiated from the old analytical jurisprudence, and the old had less than a good press. Second, some law teachers believe they already perform the work of analytical jurists. Third, analytical jurisprudence, as a branch of philosophy, must make its way against the whole range of familiar charges against philosophical work as such, including the "Armchair Speculation" charge, the "Excessive Generality" charge, the "No Progress" charge, and the "Triviality" charge. In spite of all this, professional interest in the new analytical jurisprudence grows each year.