Conceptual Analysis in Jurisprudence: an Essay in Methodology

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Dedication

This dissertation is dedicated to all my teachers who have taught me how to think.

Begriffe leiten uns zu Untersuchungen. Sind der Ausdruck unseres Interesses, und lenken unser Interesse.

(Concepts lead us to make investigations. They are the expression of our interest and direct our interest.)

—Wittgenstein, *Philosophical Investigations*, §570

Abstract

Conceptual analysis has been central to philosophy, at least in the analytic tradition. The nature of this method, its possibilities and limits, however, are not well understood. Furthermore, conceptual analysis as a methodology for philosophy has been criticized in multiple ways in recent years, especially under the influence of the so-called "Naturalistic Turn" in philosophy. All of these raise questions about the nature and grounding of a philosophical inquiry. In this dissertation, I respond to those criticisms of conceptual analysis and defend it as a legitimate methodology in the context of jurisprudence. In the first half of the thesis, I analyze some prominent arguments about the nature of law and examine their methodological commitments. I argue that those criticisms of conceptual analysis in jurisprudence relying on W. V. O. Quine's attack on the analytic-synthetic distinction and on empirical/psychological discoveries about the use of intuitions are misguided. Accepting them would miss the opportunity to reflect on the methodology of philosophy, and blind us to the insights of the past generations of philosophers. A case study of how the method of conceptual analysis is actually at work in a theory of criminalization shows that this method is much richer and subtler than its critics have assumed. In the second half of the thesis, as a way of preparing for a positive view of conceptual analysis, I propose a new way of understanding necessary truths in a changing human institution such as law, and offer a series of reflections on the nature of concepts as related to the meta-discussions of legal theorizing. Drawing on materials from the recent history of analytic philosophy, I go on to show that the term "conceptual analysis" has been used in different ways. I argue that the contemporary dominant conception of conceptual analysis is a hangover from logical positivism. Finally, borrowing a term from P. F. Strawson, I characterize conceptual analysis as "connective analysis." I then clarify its features in relations to necessity, analyticity, meaning, a prioricity, ordinary usage, and historical understanding.

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Chapter 1 Introduction: Conceptual Analysis and the Problem(s) of Jurisprudential Methodology

I. The Background of the Dissertation

The overarching concern of the dissertation is how philosophy works, what kind of results it can produce, and, to the extent these two questions can receive intelligible answers, why we should care. These are persistent yet pressing questions for philosophy, understood as a humanistic discipline, at a time when education and research are increasingly oriented toward the technical and the practical. I address these concerns from the angle of understanding the *methodological underpinnings* of philosophy.

It is a natural question to ask: what, if anything, makes a branch of philosophy such as the philosophy of physics, *philosophy* rather than *physics*? In our time where there is a philosophy of almost anything (ranging from physics to comics), meta-philosophical questions concerning the nature and foundations, especially the methodological underpinnings, of a philosophical inquiry have come to the fore. Is there a distinctively *philosophical* method? If so, how does it work and what can it do for us? Philosophers generally assume that what they are doing is *conceptual analysis* (e.g. White 1975, Strawson 1992), and think that conceptual analysis is central to philosophy, at least in the analytic tradition (e.g., Jackson 1998, Beaney 2014). However, most philosophers rarely pause to reflect on the nature of this method, and its possibilities and limits.

There are many questions we can (and should) ask when we try to understand better what conceptual analysis is. For example, what is it to *analyze* a concept (in contrast, for example, to analyzing an organic compound in chemistry)? What are *concepts* anyways? How, for example, is a concept different from a *word*? Why are concepts important? What's the point of studying *concepts* (of law, of mind, of knowledge, etc.)? Instead of studying concepts, why don't we just study the *things themselves* in doing philosophy? What, finally, can conceptual analysis do for us? These are difficult questions. Not only has this series of questions not received satisfactory answers, the method of conceptual analysis faces severe criticisms in contemporary philosophy, especially under the influence of the so-called "Naturalistic Turn" in philosophy (e.g. Leiter 2007, Williamson 2007, 2014), which, through its critique of conceptual analysis, aspires to raise questions about the identity and autonomy of philosophy as a discipline.

I propose to explore these questions in the context of jurisprudence, that is, legal theorizing. In particular, I will be examining debates related to the nature of law or general jurisprudence,[1] where methodological controversies about conceptual analysis have presented acute problems and formed a subfield in jurisprudence in recent years. Exploring questions of philosophical methodology in the context of legal theorizing gives my discussion a tractable shape. But this by no means implies that my discussion is parochial or evading larger philosophical problems. The methodological debates about

[1] With the exception of Chapter 4, where I discuss a theory of the boundaries of the criminal law.

conceptual analysis in jurisprudence are informed by recent developments in other areas of philosophy.[2] Responding to methodological debates in jurisprudence therefore necessarily involves responding to those developments in other areas of philosophy. This will be obvious in the first two chapters, and more so in later ones.

A few words about general jurisprudence and its methodology are in order. Lawyers are typically interested in the question: What is *the law* on this particular issue? The answer to this question inevitably varies according to, for example, the specific jurisdiction in which the question is being raised. General jurisprudence, by contrast, focuses on the question: What is *Law*? It attempts to offer a general theory about the nature of law wherever and whenever it exists. It has been pointed out by contemporary scholars that the mere asking of the question, what is law?, assumes a great deal (e.g. Bix 2009). It assumes, for example, that there is a delineated category or object, i.e. law, to theorize about, that this category by its very nature possesses certain essential features that are discernable through philosophical analysis, and that we can say something interesting about it at some level of generality. Are these assumptions justified? What is this category, *law* that general jurisprudence focuses on? Does it possess necessary features? How is an abstract and universal theory of a changing human practice possible in the first place? The long tradition of theorizing about the nature of law has only fairly recently come to the realization that there are deeper methodological questions underlying this whole inquiry (e.g. Finnis 1980/2011).

One influential approach in modern analytical jurisprudence, represented by

[2] Especially philosophy of language. See Leiter (2007a, 133).

prominent legal philosophers such as H.L.A. Hart and Joseph Raz (e.g. Hart1961/1994, Raz 2010), assumes and/or advocates focusing on the *concept* of law as the proper subject matter for theories of law.[3] According to this approach, legal theorists analyze the concept of law and make *conceptual claims* revealing the *essential properties* of law. Theories of law are forms or products of conceptual analysis. However, these methodological remarks immediately invite questions such as, how could a *concept* possibly be the subject of a theory of law?, as well as the host of questions about the nature of concepts and analysis mentioned earlier.

While the approach to theories of law focusing on analyses of the concept of law requires clarification regarding its methodological foundations, some legal theorists, echoing changes in the larger philosophical climate, have challenged this approach and advocated "naturalism" in jurisprudence, the view that not only must jurisprudence be consistent with the scientific knowledge we have, but the fundamental features of law must also be explained by predictive sciences. They argue that conceptual analysis is a dead end, a lesson that legal philosophers ought to have learnt from Quine's attack on the analytic-synthetic distinction by now. At best, conceptual analysis offers a collection of linguistic intuitions that empirical work has shown to be merely ethnographic facts (Leiter 2007).

If I am right that, from the methodological point of view, the nature of concepts and conceptual analysis requires clarification that are by no means easy to supply, and that legal

[3] For Raz, it is *our concept* of law. See Raz (2005), 324-42. The modifier we place in the description can be very important. Are we analyzing *the* concept of law, implying that there is only one concept or are we offering an analysis of *a* concept of law, admitting that there are other possible concepts? I come back to this question in chapter 6.

theorists have not sufficiently addressed methodological questions about their very inquiry, then there is something odd about the situation of methodological debates in contemporary jurisprudence: the method of conceptual analysis, as employed in jurisprudence, is being challenged before it becomes sufficiently clear what it is. This oddity, I shall argue, reflects a significant *mismatch* between the criticisms of conceptual analysis and their intended target. It is one of the fundamental points of this dissertation that the method of conceptual analysis criticized (both in and outside of jurisprudence) is not the same as the conceptual analysis actually practiced by many philosophers. Recognizing this goes some distance toward establishing my point, discussed in detail in later chapters, that contemporary critics of conceptual analysis vastly misunderstand its nature, and we are in urgent need of an alternative account of conceptual analysis. However, to get there, it is necessary to take a closer look at the criticisms of conceptual analysis in jurisprudence and get clear about what they say.

II. Criticisms in Context: Hard Positivism and the Hart/Dworkin Debate

In a series of recent works, the legal philosopher Brian Leiter has argued that conceptual analysis in legal philosophy is a dead end and advocated naturalism as an alternative (Leiter 2007a, 2007b, 2011, 2012). Leiter's challenges resonate with skepticism about conceptual analysis in contemporary legal theory and philosophy in general.[4] This

[4] For other criticisms and doubts about conceptual analysis within legal theory, see Patterson (2006), (2011), Marmor (2013), Rappaport (2014), Dan Priel (2015). I focus on Leiter's work because it is the most articulate and links with larger problems in other areas of philosophy. For criticisms of conceptual analysis in general, see Harman (1999), Margolis and Laurence (2003), Fodor (2004), Williamson (2007, 2014). The views of these

section sets up the jurisprudential context in which Leiter criticizes conceptual analysis, while the next lays out his exact complaints. I focus on two works anthologized in Brian Leiter's 2007 book *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, both of which concern the success of the arguments for Hard Positivism.[5]

In "Legal Realism, Hard Positivism and the Limits of Conceptual Analysis" Leiter argues that American Legal Realists tacitly rely on the thesis of Hard Positivism to support their agenda.[6] The idea, roughly, is that legal positivists generally hold that criteria of legal validity consist of social facts. According to the positivists, legal standards are created, modified and annulled according to some social conventions (cf. Marmor 2011). However, this so-called "Social Thesis" leaves open the possibility that it could be part of the social convention in a certain community that the criteria of legal validity make reference to *moral considerations*. This is the position usually described as Soft Positivism. Hard Positivism, in contrast, puts an extra constraint on the "Social Thesis." It holds that the content of the social conventions, hence the criteria of legal validity, must *exclude* moral considerations. According to Hard Positivism, criteria of legal validity must be about pedigree or sources only, i.e. from what kind of institution or lineage legal norms are derived. Joseph Raz, for example, adopts this strong version of

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authors will be discussed in chapter 7.

5 Leiter rightly points out that methodology implicates substance (Leiter 2007b, 155). The methodological issues concern the viability of legal positivism. I am less interested in this aspect of the problem, although the discussion certainly has implications for substantive issues in legal theories.

6 This part of Leiter's argument and whether it succeeds need not concern us here.

the Social Thesis, which he dubs "the Sources Thesis," and therefore is a Hard Positivist. Now the question is: is the strongest case for Hard Positivism convincing enough (so that American Legal Realism can carry out its agenda)? Leiter considers two candidates, both of which concern the *function* of law: arguments from Public Guidance and arguments from Authority. In short, Leiter thinks the Argument from Public Guidance is less convincing because it rests on H.L.A. Hart's "particular, and perhaps idiosyncratic, meta-jurisprudential scruples" (Leiter 2007a, 128). Raz's Argument from Authority, on the other hand, "captures something essential about the concept of authority" as it "coincides with our intuitive way of thinking about the status of overruled precedents" (Leiter 2007a, 131). However, Leiter immediately expresses his dissatisfaction with the *style* of Raz's argument, i.e. conceptual analysis, and suggests that jurisprudence move beyond this methodological device.

In "Beyond the Hart/Dworkin Debate: The Methodological Problem in Jurisprudence," Leiter places his criticism in a different context. While Ronald Dworkin has been a prominent critic of Legal Positivism since the publication of H.L.A. Hart's *The Concept of Law* in 1961, and the so-called "Hart/Dworkin debate" has been dominating the legal philosophy curriculum for the past three decades, it is time, Leiter suggests, that we reassess the importance of Dworkin's work and move beyond it. The reason, in short, is that there is a clear victor of the debate, namely, Hart, and the remaining problems facing Legal Positivism are different in kind from those that Dworkin raised. Leiter points out that Dworkin often misrepresents Hart's view, and

there are resources in Hart's writings that can respond to Dworkin's earlier critiques of Legal Positivism. Furthermore, Dworkin's later, influential work, *Law's Empire*, published in 1986, simply changed the terms of the debate: while Hart was aiming at a *general* (in the sense that it is not tied to any particular legal system or legal culture) and *descriptive* (in that it is morally neutral and has neither justificatory nor recommendatory aims) account of law as a complex social phenomenon, Dworkin limits "his account of law only to those cases where the exercise of coercive power in accordance with law can be morally justified" and "takes a particular legal culture, the Anglo-American, as its central concern" (Leiter 2007b, 159). Leiter hence suggests that the importance of Dworkin's work in future jurisprudential curriculum should be reduced. The significant issues facing Legal Positivism are: one, the debate between Soft Positivism (represented by Hart) and Hard Positivism (represented by Raz), which depends on the success of Raz's Argument from Authority; and two, the methodological challenge from the natural law theorist John Finnis. Finnis's critique targets the positivists' methodological commitment that a theory of law is *descriptive*. The argument is, in rough terms, that when a theorist constructs a theory of law, she cannot escape the "theoretical requirement that a judgment of *significance* and *importance* must be made if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies" (Finnis 1980/2011, 17, original emphasis). But, from what point of view does a theorist *select* those important and significant features of law? Along these lines, Finnis argues that the legal philosopher, in giving a general theory of law, cannot avoid

committing herself to some value judgment, and that means a general account of law cannot be descriptive. Leiter's response to Finnis, roughly, is to say that there are different kinds of values, e.g. epistemic and moral, and the former is sufficient for demarcating legal phenomena for jurisprudential purposes. Legal philosophy or general jurisprudence, therefore, is still descriptive and Finnis's challenge can be dismissed. However, Leiter argues that in their disputes over whether general jurisprudence is descriptive or evaluative, legal philosophers have been having the *wrong* debate about jurisprudential methodology. General jurisprudence *is* descriptive. The real worry about jurisprudential methodology, and this is the thrust of Leiter's position, is that the two argumentative devices of jurisprudence—analyses of concepts and appeals to intuition—are "epistemologically bankrupt" (Leiter 2007, 175). Why is that?

III. Criticism of Conceptual Analysis in Jurisprudence

The complaint centers on Raz's argument for Hard Positivism. Leiter points out that Raz's argument,[7] and legal positivists' arguments in general, are *conceptual arguments*. That means that they defend their jurisprudential positions on the ground that their accounts provide better explanations for various features of the concept of law (Leiter 2007a, 123). But problems with this style of argument are revealed if we heed "a more general lesson of modern philosophy of language" (Leiter 2007a, 133).

Leiter maintains that (legal) philosophers have not taken seriously W.V.O.

[7] Raz's argument will be explained in detail in chapter 2.

Quine's attack on the analytic-synthetic distinction, the upshot of which is that "the claims of conceptual analysis are *always* vulnerable to the demands of *a posteriori* theory construction" (Leiter 2007a, 134, original emphasis). He accuses conceptual analysis of having delivered a "disastrously bad record of pseudo-truths" and cites the philosopher Gilbert Harman to support this claim. It will be helpful to reproduce Harman's quote at length here:

> When problems were raised about particular *conceptual claims*, they were problems about the examples that had been offered as seemingly clear cases of *a priori truth*—the principles of Euclidean geometry, the law of excluded middle, "Cats are animals," "Unmarried adult male humans are bachelors," "Women are female," and "Red is a colour." Physics leads to the rejection of Euclidean geometry and at least considers rejecting the law of excluded middle (Quine). We can imagine discovering that cats are not animals but are radio-controlled robots from Mars (Putnam). Speakers do not consider the Pope a bachelor (Winograd and Flores). People will not apply the term "bachelor" to a man who lives with the same woman over a long enough period of time even if they are not married. Society pages in newspapers will identify as eligible "bachelors" men who are in the process of being divorced but are still married. The Olympic Committee may have rejected certain women as sufficiently female on the basis of their chromosomes. (Robert Schwartz pointed this out to me many years ago.) Just as a certain flavour is really detected by smell rather than taste, we can imagine that the colour red might be detected aurally rather than by sight (Harman 1999, 140, my italics).

Leiter comments that "if these 'classics' of conceptual analysis all failed for *a posteriori* reasons, why in the world think conceptual analysis in jurisprudence will fare any better" (Leiter 2007a, 134)? I will come back to Harman's views in chapter 7. For now, let us focus on Leiter's point that Quine's attack on the analytic-synthetic distinction undermines the credibility of using the method of conceptual analysis in jurisprudence.

There is, however, an implicit assumption in Leiter's argument that calls for

careful examination. It is the assumption that conceptual analysis in jurisprudence produces analytic claims that are in the same category as the ones listed in the Harman quote. In the article discussing Dworkin's work mentioned earlier, what Leiter says affirms that he indeed makes this assumption. Leiter writes:

> '[E]very analysis of a concept is inextricably bound to a collection of purported analyticities.' But post-Quine we know (don't we?) that the analytic-synthetic distinction does not mark an epistemic difference but a social-historical one…So there is no real distinction between claims that are 'true in virtue of meaning' and 'true in virtue of facts,' or between 'necessary' and 'contingent' truths…without a domain of analytic truths—truths that are *a priori* and hold in virtue of meaning—it becomes unclear what special domain of experience for philosophical reflection remains…and if analytic statements are gone, then so too is conceptual analysis (Leiter 2007b, 175-176).

Warning that the contemporary defenders of conceptual analysis such as Frank Jackson run the risk of blurring the distinction between conceptual analysis and lexicography, Leiter summarizes his criticism of conceptual analysis: conceptual analysis, as employed by Raz and other legal theorists, is expected to deliver *necessary truths* and *essential properties* of law. But such an approach "depends on the assumption that Quine is fundamentally wrong about analyticity, an assumption that, at this late date, requires some explicit defense if we are to take the results of jurisprudential inquiry seriously" (Leiter 2007b, 178).

I will take the critique of conceptual analysis in jurisprudence summarized above as a starting point. My response begins with an exploration of the truth of the implicit assumption in Leiter's argument that conceptual analysis in jurisprudence produces analytic claims. The absence of support for this assumption opens an important gap in

Leiter's argument, and the fact that Leiter (along with many other philosophers, as I shall note later) was not even aware that this assumption requires validation, I shall argue, shows there is something wrong with a general line of criticism of conceptual analysis in jurisprudence, and in contemporary discussions of philosophical methodology in general.

The problem, to elaborate, is that in his critique Leiter never uncovers the methodological commitments of Raz's argument, except the remark that it is a *conceptual argument*. And he never considers whether Quine's attack on analyticity really constitutes a challenge to those commitments. The central question that needs to be asked but did not get asked in Leiter's discussion is whether Raz's argument, granted it is *conceptual*, consists of *analytic statements*, statements whose truths are grounded in word-meaning alone and independent of what the world is like. If it does not, then Quine's argument is not applicable to Raz. We remember Leiter asking that if those "classics" of conceptual analysis such as "unmarried adult male humans are bachelors" fail, why we should think conceptual analysis in jurisprudence will fare any better. But he never asks the question: Does Raz's argument consists of statements like those "classics"? Without asking this question and examining Raz's argument in detail, Leiter's criticism runs the risk of assuming too much, rather hastily. It closes the possibility that conceptual analysis in jurisprudence has a different character, as I shall argue it does in later chapters.

To examine Leiter's assumptions and assess his criticisms of conceptual analysis, and see what this gap in his argument leads to, we need to know first of all what Raz's

argument for Hard Positivism (the Argument from Authority) is and what its methodological assumptions are. Then, there are questions of how we shall understand Quine's "Two Dogmas of Empiricism," what we have learned from it,[8] and especially, what its implications for philosophical methodology are. These are the questions I shall explore in chapter 2. Below, I provide a map of the points and argument made in the individual chapters to follow.

IV. Summary of Chapters

Part 1 of this dissertation, consisting of chapters 2-4, responds to specific challenges to conceptual analysis in jurisprudence and ends with a case study of the method employed in philosophy of criminal law.

Chapter 2 This chapter presents Raz's Argument from Authority for Hard Positivism, and an exposition of Quine's classic paper "Two Dogmas of Empiricism." I argue that Leiter's implicit assumption in his critique of Raz's methodology, namely that conceptual claims made in Raz's argument are analytic, is false. I show this by a detailed examination of the status of some key claims in Raz's argument. The upshot is that we cannot deploy Quine's attack on analyticity to undermine the method of conceptual analysis.

Chapter 3 This chapter deals with another aspect of Leiter's critique of the conceptual methodology practiced by legal philosophers such as Raz and Hart, namely, their alleged

[8] As shall be pointed out in chapter 2, the lesson of Quine's "Two Dogma" is not as straightforward as Leiter assumes.

appeals to intuitions. After offering an outline of the historical roots of our idea of (appealing to) intuition and indicating why the use of intuition becomes a problem, I point out that the contemporary usages of the term "intuition" has a more or less stable set of characteristics, and that it plays different roles in philosophical inquiry. Based on these, I argue that while the kind of intuition Leiter/empirical psychology criticizes is irrelevant to jurisprudence, linguistic intuitions can aid philosophical inquiry. I defend Hart and J. L. Austin's appeal to ordinary language against common misunderstandings. The general upshot is that characterizing jurisprudential debates as conflicts of intuitions causes more harm than good.

Chapter 4 Toward an alternative account of conceptual analysis, it is helpful to examine a concrete case of how conceptual analysis actually works in legal theory. This chapter examines a theory of criminalization that possibly has significant social impact. It demonstrates that analyzing concepts goes beyond looking for analytic truths, and it takes different forms than what its critics allow. This is illustrated in two arguments. First, conceptual analysis involves both our concepts as well as our understanding of the relevant practices, that is, it is connected with our experience. Second, there are instances where the theorist makes innovative conceptual connections from which significant results follow. By showing how conceptual analysis contributes to the construction of a legal theory, I show that conceptual analysis as a philosophical method can be *fruitful*.

Part 2, consisting of chapters 5-7, discusses a host of general issues related to

conceptual analysis (ranging from necessity, the nature of concepts, to different conceptions of conceptual analysis in recent history of analytic philosophy) and defends the method of conceptual analysis as connective analysis.

Chapter 5 An alternative view of conceptual analysis begins with understanding necessary truth in law. I suggest we could achieve that by learning something from Wittgenstein's *On Certainty*. I argue that necessary truths in law are not analytic or metaphysical truths; rather they could be understood as *hinges*: they are presupposed so that the other parts of our understanding, inquiry, and practice make sense. Their necessity is thus determined by what lies around them. Additionally, they are interwoven into our ways of acting and grounded in our form of life. Because the concept of law the legal theorist is working with is parochial, such necessary truths are parochial and hence contingent. The upshot of this chapter and the previous one both hint at an alternative picture of conceptual analysis where human experience has a role to play.

Chapter 6 This chapter inquires into the nature of concepts. A survey of contemporary theories of concepts shows that none of them is satisfactory, largely due to their unpalatable background assumption about language, thought, and mind. I argue a fruitful strategy would be to transform the question "What is a concept?" My examination takes up Raz's suggestion that concepts are between words the world, and shows that they are in very complex relations with both sides. There are unlexicalized concepts, and there could be concepts that are grounded in human actions alone. On the other hand, we need to distinguish different kinds of concepts and hence different kinds of inquiry, in

particular, between empirical or factual investigation and conceptual investigation. These two lines of inquiry converge on the point that concepts are closely related to human understanding. The rest of the chapter deals with the question of the plurality of concepts, simultaneously in one given community and inter-culturally, over time. I argue that we should not be too quick in accepting the plurality of concepts if we distinguish a concept from its various conceptions.

Chapter 7 The final chapter begins with an observation that the term "conceptual analysis" is used in at least two different ways in the philosophical literature. I point out that the conception of conceptual analysis critics have is a distinctively logical positivist conception. It is a problematic feature of contemporary philosophical literature on conceptual analysis that when this conception is attacked from various directions, the result is taken to be a demise of conceptual analysis *in toto*. I then take a first step toward reviving, articulating, and defending an alternative. Suggesting that we need to reject the reductive/decompositional model of analysis, which lies at the foundation of the logical positivist conception, I borrow a term of art from P.F. Strawson to characterize the alternative conception of conceptual analysis as "connective analysis." I then clarify its in relation to definition, analysis of linguistic meaning, ordinary usage, necessity, analyticity, a prioricity, and human experience, thus piecing together the elements from previous chapters. I point out that the kind of understanding conceptual/connective analysis is after might be characterized as a second-order understanding of our understanding. I end with a note on the possible limits of conceptual/connective analysis, emphasizing the role of

historical understanding.

Chapter 2 Raz's Argument from Authority and Quine's "Two Dogmas": A Preliminary Response to Criticisms of Conceptual Analysis in Jurisprudence

I. Introduction

To give an adequate response to Leiter's criticisms of conceptual analysis in jurisprudence, as outlined in chapter 1, we need three items: the methodological commitments of Joseph Raz's Argument from Authority, the implications for philosophical methodology of Quine's argument in his classic paper "Two Dogmas of Empiricism," and an examination of whether the latter constitutes a challenge to the former. In this chapter, I will present Raz and Quine's arguments, and then, as a response to Leiter's criticism, I will argue for two things. First, I argue that Quine's supposed attack on the analytic-synthetic distinction, construed in its proper light, does not warrant some sound-bite conclusions as expressed in Leiter's (and others') critique of conceptual analysis. Second, I argue that even if we take the putative lesson we have learned from Quine's "Two Dogmas" at face value, it does not amount to a challenge to Raz's methodology, because what Raz is doing is different from what Leiter assumes. Conceptual analysis as a methodological commitment of Raz's legal theory, therefore, requires an alternative characterization. I conclude by raising further questions for inquiry.

II. The Argument from Authority: Joseph Raz on the Nature of Law

In this section and the next I offer reconstructions of Raz and Quine's arguments. In subsequent sections I consider whether Quine's critique applies to Raz. My presentation of Raz's argument is based on his paper, "Authority, Law and Morality" (Raz1994). It is worth bearing in mind that I do not intend to evaluate the persuasiveness of Raz's argument. My purpose is to prepare for a discussion of some of its methodological aspects later in the chapter.

The objective of Raz's argument, as mentioned in chapter 1, is to defend the position that all law is source-based, the idea, if we recall, that law's existence and content can be identified by reference to social facts *alone*, without resort to any moral consideration. The focus of his argument is the nature of practical authority, whose directives are reasons for action for their subjects.[1] Raz points out that generally what distinguishes authorities from other people or institutions is their special *preemptory* status. To explain that, Raz invites us to consider a case where two people refer a dispute to an arbitrator, having agreed to abide by her decisions.[2] Two features of the situation are significant for our purposes here. First, the arbitrator's decision is a reason for action for the disputants and is related to other reasons that originally apply to the case in the following way: it is meant to be based on those reasons, sum them up, and reflect the

[1] Raz claims that his views apply to theoretical authority as well, although he only focuses on practical authority in this essay (Raz 1994a, 195).

[2] This strategy, as I shall discuss in detail later, is an important aspect of Raz's methodology. It relates to the topic of the role of experience in doing philosophy.

balance of them. Raz calls this the *dependence thesis*. Second, it is important that the arbitrator's decision (as a reason for action) is not an additional reason parallel and to be added to the original reasons. It is meant to *replace* the reasons on which it depends. Once the decision is made, reasons originally applying to the case cannot be used again to justify the disputants' future actions. This is because in agreeing to follow the judgments of the arbitrator, they essentially have handed over to the arbitrator the evaluation of those reasons they originally had. If, once the decision is made, they come back to those original reasons and base their actions on them, they defeat the point of arbitration in the first place. Raz calls this the *pre-emption thesis*. This does not imply that arbitrators are not subject to criticisms or that their decisions are not open to challenge. There are conditions that must be met to justify the legitimacy of the authority. In the case of a practical authority, Raz argues that the normal and primary way to establish authority involves showing that we are more likely to act according to the right reason by subjecting our will and judgments to the authority than if we try to make our own decisions based on the reasons that apply to the cases directly. This is a necessary condition for the disputants' initial agreement to refer the dispute to the authority. Raz calls it the *normal justification thesis*.

These three theses summarize Raz's conception of authority. Raz calls this the *service conception of authority*: authorities mediate between people and the right reasons

that apply to them. Raz thinks that these features are present in all practical authorities.[3] Raz assumes that the service conception of authority he articulates captures our concept of authority (Raz 1994a, 204). Now this analysis of authority, Raz argues, has important implications for our understanding of the law.

Raz connects authority and law by stating "I will assume that necessarily law, every legal system which is in force anywhere, has *de facto* authority" (Ibid., 199). The idea of law having *de facto* authority entails that, whether it has legitimate authority or not, it *claims* that it possesses legitimate authority.[4] Elsewhere in the essay, Raz puts the matter more simply: law necessarily claims authority (Ibid., 202),[5] and he takes this claim to authority to be part of the nature of law (Ibid., 199).[6] Raz further points out that to claim authority, whether actually possessing it or not, a legal system must be a system of the kind that is *capable* of possessing authority. Only those who are capable of having authority can claim to have it. Trees, for example, cannot have authority over people because they cannot communicate with people. It follows that the law may fail to possess legitimate authority (e.g. fail to satisfy the normal justification thesis), but it can only fail in certain ways. A legal system cannot fail to possess authority in a way a tree does.

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3 Raz maintains that the features of an arbitrator are typical of an adjudicative authority; however, he thinks a legislative authority has the same features (Raz 1994a, 197-198).

4 Raz points out that since it is not necessarily the case that every person who has authority claims it, while the law necessarily does, the law's necessary features are not the same as those of other practical authorities.

5 For simplicity, in the following discussion, law's claim to authority should be read as law's claim to legitimate authority.

6 The necessity talk naturally associates with the "nature" of a thing. On the topic of necessary truths in a changing human institution such as law, see Chapter 5. A point worth noting is the peculiarity of the language used by Raz: he *assumes* that law necessarily claims authority. How can a necessary claim be "assumed"? This will be discussed in chapter 5.

Since law necessarily claims authority, it follows it is capable of having authority.[7]

Raz argues that anything capable of possessing authority must have two further features which, properly understood, can be used to support the Sources Thesis. First, to be capable of being authoritative, the directives issued by authority must be of the right kind. They must be presented as the authority's judgment on how the subjects should act, as opposed to, say, an instruction to run an errand, in jest or presented as threat. Second, more importantly, the directive issued must be *identifiable* without appealing to the reasons and consideration that the authority is meant to settle in the first place. A directive from an authority is serviceable only if its existence and content can be established *independent of* those original reasons without raising the very same issues that the authority sets out to settle. If the disputants of the arbitration example were told that the arbitrator just made the right decision or the best decision, it would not help them at all, and the disputants would probably have to return to the original dispute. Since law necessarily claims authority, it is (necessarily) capable of possessing authority. It follows that law (necessarily) has these two features.[8]

These central features of law can "mesh in with and acquire a special significance from the service conception of authority" (Raz 1994a, 205). This is because these two features are closely connected, through the idea of capability, to the two features of

[7] One may ask: can we not be wrong about this? Can we be conceptually confused such that the law is not the kind of thing that is capable of having authority? Can the law turn out to be something like a tree that is incapable of having authority? I return to this point when I discuss Raz's methodology later in the chapter.
[8] Raz affirms that the three common legal sources—legislation, judicial decisions and customs—do bear these features.

arbitration based on which Raz articulated his service conception of authority. The directive of the authority must be of the right kind to be *capable of* meeting the dependence thesis, i.e. they must be presented as someone's view on how the subjects ought to act, although it may fail to comply with the dependence thesis (e.g. legislation may be arbitrary); and the directives must be identifiable by means other than appealing to the original reasons to be *capable of* meeting the pre-emption thesis, although they might not be in accordance with the right reason (e.g. the authority may fail to meet the normal justification thesis). These connections should not be surprising, because the central features of law are implied in the service conception of authority (Raz 1994a, 205).[9]

When these items are in place, the next step in Raz's argument is easy. In a nutshell, Soft Positivism must fail because it allows moral considerations in the identification of law, the very reasons and considerations that authoritative directives are supposed to pre-empt. Soft Positivism is thus at odds with a central aspect of law, i.e. the legal system's claim to be a legitimate practical authority. Since I am primarily interested in the methodological aspects of Raz's argument, we do not need to go further into it.

III. Making Sense of Quine's "Two Dogmas of Empiricism"

In this section, I set out Quine's main argument in his 1951 classic essay, "Two Dogmas

[9] It seems to me that Raz does not really need the line of argument centered round the idea of capability. Law necessarily claims authority, and as a practical authority, it necessarily has the feature expressed as the *pre-emption thesis*. But we can see his argument as starting at different places but meeting at the same place.

of Empiricism," and lay a further ground for responding to Leiter's criticism of conceptual analysis.

Quine's targets in the essay are two inter-related beliefs that underlie the then influential logical positivism: one is the belief in some fundamental cleavage between analytic truths, truths grounded in meaning alone, and synthetic truths, truths grounded in meaning and the way the world is; the other is the belief that each (empirically/cognitively) meaningful statement is reducible and equivalent to some logical construct upon terms that refer to immediate experience.[10] Exposing the first dogma is the primary focus of Quine's essay, but undermining the first dogma leads to the abandonment of the second.

Quine points out that Kant's cleavage between analytic and synthetic truths was foreshadowed in Leibniz's distinction between *truths of reason* and *truths of fact*, as well as in Hume's distinction between *relations of ideas* and *matters of fact*.[11] He then reformulates the conception of analyticity thus: a statement is analytic when it is true by virtue of meaning and independent of fact. The concept of meaning then naturally becomes the focus of inquiry. In particular, Quine takes accounting for sameness of meaning, or synonymy of linguistic forms, to be the primary business of a theory of meaning, while other questions such as "what sort of things are meanings?" are misguided questions (Quine 1951/1961, 22). According to Quine, there are two kinds of

[10] Analytic statements are, according to the logical positivists, tautologies; and they have no empirical/cognitive meaning.

[11] Before Leibniz and Hume, Hobbes' distinction between *knowledge of fact* and *knowledge of the consequence of one affirmation to another* can also be considered along the same line. See Thomas Hobbes, *Leviathan*, chapter IX.

analytic truths. The statement "No unmarried man is married" is true under all interpretations of "man" and "married" as long as we suppose an inventory of logical particles such as "un," "not," etc. and let them remain constant. Quine calls this type of analytic statements "logically true" (Ibid., 22). Quine has no problem with this kind of analyticity. What is problematic is the second class of analytic statement, typified by the statement "No bachelor is married." If we follow Quine's restatement of Kant's conception of analyticity, we can see that while the truth of the first class of analytic statement relies on the meaning of logical constants, the truth of the second class relies on the *sameness of meaning* of its extra-logical components, in this case the synonymy of "bachelor" and "unmarried man." Hence, one feature of the second class of analytic statements is that they can be turned into logical truths by replacing synonyms with synonyms: "No bachelor is married" can be turned into "No unmarried man is married," which is a logical truth. Now the question Quine poses is whether we can make sense of the notion of synonymy here because it is "no less in need of clarification than analyticity itself" (Ibid., 23). The problem of analyticity is thus reduced to accounting for the notion of synonymy. After examining several proposals to clarify the notion of synonymy, Quine concludes that we lack an intelligible account of synonymy and therefore lack a proper characterization of the second class of analytic statements.

The first proposal is to appeal to *definition*: "bachelor" is defined as "unmarried man." But "who defined it thus, and when?," asks Quine. If we appeal to dictionary definitions, the problem is that a definition given by a lexicographer relies on the fact that

there is already an observed synonymy in our usage. This underlying presumption of a lexicographer's work entails that definitions rely on pre-existing synonymy and therefore cannot be taken as the ground of synonymy. Quine examines several other types of definitions and concludes that—except in the case of "explicitly conventional introduction of novel notations"—"definition rests on synonymy rather than explaining it" (Ibid., 26).

Quine then considers the proposal that synonymy consists in interchangeability *salva veritate*, i.e. interchangeability in all contexts without change of truth-value. The problem with this proposal is that the notion of interchangeability *salva veritate* cannot do any work for us unless relativized to a language whose richness is specified. In an extensional language, for example, where any two predicates true of the same objects are interchangeable *salva veritate*, the interchangeability rests on accidental matter of fact rather than meaning, just like "creatures with a heart" and "creatures with kidneys" are interchangeable because of their extensional agreement, but they are not synonymous. Interchangeability *salva veritate* is not, therefore, a sufficient condition for synonymy. It will be sufficient if we introduce an intensional adverb such as "necessarily," but such a term would again require no less clarification than the term "analyticity" itself.

At this point, Quine says that deriving analyticity from an account of synonymy is "perhaps the wrong approach," and declares that "synonymy turned out to be best

understood only by dint of a prior appeal to analyticity itself" (Ibid., 32).[12] The attempts to account for analyticity Quine considered have all failed and we are left with no satisfactory explanation of the notion of analyticity.[13] This leads Quine to the conclusion that "a boundary between analytic and synthetic statements simply has not been drawn" in spite of its "a priori reasonableness" (Ibid., 37).

What Quine's attacks here are some preconceived notions about language and truth. It is presumably reasonable to hold that the truth of our statements depends on both language and extra-linguistic fact. We therefore are tempted to assume that each individual statement is somehow analyzable into a *linguistic* component and a *factual* component, and in a limiting case, a statement could be without any factual element. It also seems natural to think that there is a certain relation (either confirming or disconfirming) between a statement and a unique range of experience that determines its truth. In the limiting case where the factual component is null, the statement is confirmed vacuously. Such a statement is analytic.

However, the previous discussion shows that since we lack an explanation of analyticity, we cannot make sense of such limiting cases. The upshot of Quine's considerations summarized above is that *every* statement is a mixture of linguistic and

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[12] This is an unintuitive claim given that "synonymy" and "synonymous" are ordinary terms while "analyticity" is almost exclusively used in philosophical discourses. Grice and Strawson (1956) take up this line as a response to Quine.

[13] Quine further points out that the difficulty we face in accounting for analyticity is not limited to the case of ordinary language. In an artificial language, which is supposed to be rid of the vagueness of ordinary language, the problem of making sense of an idiom such as "a statement S is *analytic for* language L" "retains its stubbornness" for the reason that in such a case we need to appeal to the notion of a "semantical rule" or "postulate" that is as much in need of clarification as the term "analytic for."

factual elements; the talk of limiting cases is an "ungrounded article of faith."[14] This conclusion already undermines certain forms of the logical positivists' second dogma, i.e. reductionism: if every statement is a mixture of linguistic and factual components between which a boundary is hard to draw, then it won't be the case that every (empirically/cognitively) meaningful statement is reducible or translatable into a statement about immediate experiences. For a non-analytic statement, there will be linguistic residues that are not reducible to immediate experiences.[15] If Quine's attack on the first dogma, i.e. the fundamental distinction between analytic and synthetic, is sound, then the dogma of reduction is also undermined.

Quine, however, does not stop here. For there is apparently a question left: if a statement is always a mixture of the linguistic and the factual and hence cannot be reduced to immediate experience without residue, then how are statements and experiences related to each other, since somehow statements must be conformed or disconfirmed by experience? Quine's proposal is, famously, confirmation holism. He claims that the dogma of reductionism survives the previous critique in a more nuanced form: the supposition that an *individual* statement can admit of confirmation or disconfirmation *in isolation*. Hence Quine shows that we can understand the connection

[14] This conclusion seems to require that Quine's argument show that a distinction between analytic and synthetic *cannot* be drawn. Quine's position in the essay, however, seems to be weaker. As previously quoted, he says that the distinction "has not been drawn" (Ibid.,, 37) and that it has stubbornly "resisted any straightforward drawing" (Ibid., 41).

[15] I think this point naturally follows from Quine's discussion although Quine himself does not seem to make this point. In turn, as I show below, Quine understands the two dogmas to be connected in a way that has to do with the idea that a statement can be confirmed in isolation. To that, Quine proposes his confirmation holism as a response.

between this nuanced form of the dogma of reductionism and the dogma of the analytic-synthetic distinction in the following way: as long as we continue to think that a statement can be confirmed or disconfirmed in isolation, "it seems significant to speak also of a limiting kind of statement which is vacuously confirmed, ipso facto, come what may; and such a statement is analytic" (Ibid., 41). The analytic-synthetic distinction is not drawn; yet statements must somehow face the tribunal of experience. The suggestion that a statement is tested against experience when joined with other statements is very natural: truth depends on both language and experience; however, this duality is not traceable into statements one by one. Rather, "our statements about the external world face the tribunal of sense experience not individually but only as a corporate body" (Ibid., 41).

Quine famously argues that human knowledge or beliefs, from a statement of geography or history to the laws of physics or of mathematics or logic, form a connected totality, a man-made fabric that impinges on experience only along its edges. A conflict with experience results in readjustments in the interior of the field. Readjustments of some statements lead to readjustments of others because they are connected as a whole. Laws of physics and of logic, for example, are less likely to be revised simply because they are more centrally placed in this totality. However, "there is much latitude of choice as to what statements to reevaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole" (Ibid., 43). Under this view, the distinction between statements holding true contingently

on experience (synthetic statements) and statements holding true come what may (analytic statements) is clearly untenable: no statement is immune to revision; if we adjust the system drastically enough, any statement can hold true come what may, although our natural tendency to disturb the total system as little as possible leads us to adjust only those statements that are not centrally located in our web of belief, so far as possible. At the end of the essay, Quine briefly discusses the related idea of ontological commitment, which he developed in detail in later works, and hints at his pragmatism: physical objects, forces, sets, the Homeric gods are on the same epistemological footing; they only differ in expediting our dealing with sense experiences.

I end this section with three remarks on Quine's arguments as outlined above. First of all, Quine's overall strategy in repudiating the analytic-synthetic distinction can be questioned. In looking for a clarification of analyticity, Quine rules out candidates in the same family such as synonymy, necessity, semantical rules, etc.—because, as Quine repeatedly says, they need no less clarification than the notion of analyticity itself—and declares the distinction is illusory once a non-circular definition cannot be found. But once the bar is set this high, artificially, it is hard to see what an adequate clarification of this notion could be.[16]

Second, even if we grant that Quine has shown that the analytic-synthetic distinction is hard to draw,[17] he has not shown that it makes no sense to talk about such a

[16] See Grice and Strawson (1956), pp. 147 onward.
[17] Note, as I have indicated earlier, Quine's final word on the analytic-synthetic distinction seems to be that the distinction "has not been drawn" and "resisted straightforward drawing."

distinction. In fact, such a distinction, in conjunction with other (non-positivist) assumptions, is not incompatible with Quine's confirmation holism. We may abandon the logical positivist assumption that a particular statement is associated with some particular experience and is confirmed or disconfirmed individually, and thus the talk of a limiting case where a statement is vacuously confirmed is discredited. But we can maintain that *at a given time*, there are truths that are analytic—as long as the usage and meaning of our terms are stable—though revisable when we adjust other parts of our belief system.[18] In Quine's picture, some truths are less likely to be revised because they are at the center of our web of belief (law of physics, mathematics and logic, etc.); but some others are just as unlikely to be revised because stable usage and meaning in this web of belief have to be assumed at a given time.

Third, a remark that connects to topics in the next few sections. Quine's original target in his critique of the analytic-synthetic distinction is certain assumptions of logical positivism (e.g. the distinction between formal and factual truths). For Quine's critique to be applicable to Raz (and indeed to any philosophical arguments employing conceptual analysis), it is important to ask whether Raz's arguments share the same or similar assumptions with logical positivists, in particular, whether his theory consists of analytic statements. If it turns out that analyticity does not play any role in Raz's argument, then it is *prima facie* problematic to apply Quine's critique to Raz. I shall argue that we have

[18] In fairness to logical positivists, they did not say that analytic statements are not revisable. Carnap thinks that an analytic statement can be abandoned, because of a change of meanings in one or more of its component terms (e.g. Creath 2004, 59). What Quine seems to offer is a different picture of meaning change.

good reasons to think that the Quinean critique of the analytic-synthetic distinction does not apply to Raz's conceptual argument. Leiter's criticism fails, yet it calls our attention to the need of clarifying legal positivists' methodological commitments.

IV. On Leiter's Interpretation of Quine: Some General Remarks

Let me now turn to discussing the reasons why I think Leiter's critique of conceptual analysis in jurisprudence, at least in its current form, fails. My grounds of suspicion are at two levels: 1) Leiter's interpretation of Quine—his "sound bite" take, one might say—is inaccurate; 2) even if we present Quine's argument in its proper light, the critique in the "Two Dogmas" does not seem to apply to Raz's argument. Let me start with Leiter's interpretation of Quine.

First of all, different kinds of claims/propositions are mixed up in Leiter's discussion, not all of which are what Quine sets out to examine. Recall a passage I quoted from Leiter in Chapter I:

> So there is no real distinction between claims that are 'true in virtue of meaning' and 'true in virtue of facts,' or between 'necessary' and 'contingent' truths…without a domain of analytic truths—truths that are *a priori* and hold in virtue of meaning—it becomes unclear what special domain of experience for philosophical reflection remains…and if analytic statements are gone, then so too is conceptual analysis (Leiter 2007b, 175-176).

We notice that Leiter does not seem to distinguish among *analytic* claims, *necessary* claims, *a priori* claims, nor these from *conceptual* claims, which presumably are what he takes Raz to be making. He writes as if Quine has exposed and rejected all of them, once and for all. But this is obviously not the case in Quine's work, and as a result, it obscures

its implications for philosophical methodology. For example, necessity has a wider scope than analyticity. Quine himself is aware of this in "Two Dogmas" (Quine 1957, 29-30). It follows that Quine's critique is not applicable to Raz's necessity claims to say the least.[19] Additionally, post Kripke's work, we know that necessity and the a priori do not always go together either (Kripke 1980). Furthermore, Quine never himself used the term "conceptual truths/claims" in the "Two Dogmas" and it is entirely unclear how they are related to the necessary, a priori, and analytic claims. Leiter complains that conceptual analysis proceeds in an a priori manner, but not all a priori reasoning is analytic and hence subject to Quine's critique. For example, a priori, a rod painted green all over cannot be red all over, but the statement is not analytic.[20]

Second, a point about "recalcitrant experience." Leiter writes:

> All statements are, in principle, answerable to experience, and, conversely, all statements can be maintained in the face of recalcitrant experience as long as we adjust other parts of our picture of the world…if all claims are, in principle, revisable in light of empirical evidence, then would not all questions fall to empirical science? Philosophy would be out of business, except as the abstract, reflective branch of empirical science. And if analytic statements are gone, then so too is conceptual analysis: since any claim of conceptual analysis is vulnerable to the demands of a posteriori (i.e. empirical) theory construction" (Leiter 2007b, 176).

The first half of the quote is roughly in line with Quine's argument. But it certainly does not follow from that that "all questions fall to empirical sciences" and "philosophy would

[19] My discussion of necessity in legal theory is in chapter 5.

[20] This loose use and conflation of terms is also evident in the paragraph Leiter quotes from Harman (see chapter 1 of this dissertation). Oddly, it does not in fact mention analyticity; rather it speaks of *conceptual claims* and *a priori truths*. Though Harman's examples are as diverse as to include principles of Euclidean geometry, the law of excluded middle, and classical example like "unmarried adult male humans are bachelors," it is not clear that conceptual claims like the ones Raz has made will be among them. The conflation here also finds its expression in discussions of conceptual analysis in general, as we shall see in the last chapter, when I discuss e.g. Jerry Fodor's work. I think *the conceptual* encompasses all of these, and, following Putnam, I think it is the task of philosophy to clarify the status and connections among these claims. See chapter 7.

be out of business," if that means all questions are to be decided by empirical science. The important point here is that one should not overstate the role of "recalcitrant experience" in refuting a statement and exaggerate our willingness to adjust our belief system. Even in science, the adjustment of theoretical commitments in the face of recalcitrant experience takes a more complex form than a simple, one-direction, "refutation." It is often hard to say whether, in the end, it is recalcitrant experience that refutes a theoretical claim or, through reinterpretation, what was recalcitrant experience becomes part of a theoretical commitment. This is one lesson we learned from, for example, Thomas Kuhn.[21] When we turn to jurisprudence, it is even harder to imagine what an a posteriori refutation of claims about the nature of law would look like. If, for example, a certain law court is willing to nullify every decision it has made whenever the defendant complains, it is unclear if that counts as a refutation of Raz's claim of authority of law, or it should stop us from applying our concept of law to this case.

As for our unwillingness to revise our belief system and hold on to commonsense, Quine makes it clear in "Two Dogmas" that conservatism governs our theory construction, and he points out in a later paper that to question the core of commonsense is not perfectionism, but pompous confusion (Quine 1957, 2). This leads to my third remark. Leiter says "if analytic statements are gone, then so too is conceptual analysis." One should be careful, first of all, about saying that analyticity is gone in light of what we've learned from Quine. I have mentioned the possibility that, as long as we abandon

[21] See Kuhn (1962). Kuhn admired Quine's work on the analytic-synthetic distinction (Kuhn 1962, vi).

or reconsider the logical positivists' assumptions, at a given time some statements can be treated as analytic because the meaning of the terms in those statements is stable.[22] Then there is the more pressing issue that whatever position we take on analyticity, to say that conceptual analysis is also gone with analyticity, Leiter has to implicitly presuppose that conceptual analysis produces analytic statements. Is this true?

V. Raz's Methodology: A Reply to Leiter

Now that both Quine and Raz's arguments are laid out, we are in a position to assess what I take to be the central problem of Leiter's criticism. My focus will be the following question: does Quine's critique of the analytic-synthetic distinction in "Two Dogmas" really amount to a challenge to Raz's methodology? To address that, we need to uncover Raz's methodology. I shall therefore examine the status of several key claims Raz made in the course of his argument and examine their status. I shall make the case that criticisms of conceptual analysis in jurisprudence based on Quine's attack on analyticity, as exemplified by Leiter's criticism of Raz's methodology, are not successful.

There is the initial puzzle about which aspects of Raz's argument are liable to Quine's criticism. Leiter states the problem of conceptual analysis thus: "the claims of conceptual analysis are always vulnerable to the demands of a posteriori theory construction" (Leiter 2007a, 134). But what exactly are the "claims of conceptual

[22] I shall come to this again in chapter 7 when I discuss Putnam's response to Quine. It is worth mentioning that Quine himself, after abandoning Carnap's assumptions, has retained a certain version of analyticity: If everybody in a linguistic community learns that a sentence is true by learning its words, then the sentence is analytic. See Quine (1974, sect. 21, 78-80). We also have to keep in mind that the debate between Carnap and Quine by no means has a clear victor (see, e.g. Creath 2004).

analysis" in Raz's argument that can be picked out and subjected to Quine's criticism? If we recall, according to Leiter, Raz's argument is a *conceptual argument*. But what does that mean? Leiter does not tell us much, except that it is supposed to "provide a better explanation of the features of the concept" (Leiter 2007a, 123). Presumably, then, the necessary features of our concept of authority as presented by Raz—the dependence thesis and the pre-emption thesis—are "claims of conceptual analysis." There are two more (kinds of) claims in Raz's argument that are integral to his argument. One is what Raz *assumes*: "I will assume that necessarily law, every legal system which is in force anywhere has *de facto* authority" (Raz 1994a, 199). This claim, as I noted earlier, is taken by Raz to be part of the nature of law. The other type of claim is exemplified by the following proposition: "to claim authority, [the law] must be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority."[23] Are these claims analytic?

It might be helpful to begin by asking why the analytic-synthetic distinction was held in the first place, what purpose it served, and, as suggested earlier, whether the same reasons for holding on to the distinction are also adopted by Raz and whether it serves the same purpose for Raz. In other words, we can learn a lesson from the history of philosophy. If the logical positivists' assumptions with regard to analyticity are irrelevant to Raz's project, applying Quine's critique to Raz at least loses part of its plausibility. To

[23] As can be seen from my previous presentation of Raz's argument, this claim serves an important role in Raz's argument as it connects features of the law with Raz's conception of authority and is used to support the Sources Thesis.

make a long and complex episode in the history of philosophy short, the logical positivists' motivation to hold on to the analytic-synthetic distinction derives from an attempt to reconcile the empiricist world-picture with logic and mathematics. For an empiricist like Carnap, all our knowledge of the world is a posteriori and contingent. But how do we account for the nature of logic and mathematics, which appear to be a priori and necessary? The logical positivists' answer is that logical and mathematical truths are *analytic*: statements of logic and mathematics lack empirical content and their necessity derives from their analyticity, that is, they are true (or false) solely in virtue of the meaning of the terms in the statements. Quine made this point in a paper reconsidering his "Two Dogmas of Empiricism" 40 years later:

> I think Carnap's tenacity to analyticity was due largely to his philosophy of mathematics. One problem for him was the lack of empirical content: how could an empiricist accept mathematics as meaningful? Another problem was the *necessity* of mathematical truths. Analyticity was his answer to both. I answer both with my moderate holism. (Quine 1991, 269)

If Quine is right, then the idea of analyticity served a specific purpose for the logical positivists, and Quine's criticism, in turn, targeted an understanding of analyticity as it served that specific purpose.[24] It is immediately obvious that even if the key statements in Raz's conceptual argument are analytic, he does not have Carnapian motivations for holding them to be so. Raz is concerned with the nature of law, not logic or mathematics. Further, Raz is not trying to fit propositions about the nature of law into an empiricist world-picture either. However, is it not possible that, regardless of Raz's motivations, the

[24] Hence we cannot say that Quine has exposed the unintelligibility of similar and related notions articulated by Kant, Leibniz, Hume, etc. As indicated in the previous section, Quine, in "Two Dogmas," reformulated the question of analyticity.

propositions about the nature of law in his argument are, in fact, analytic, and hence subject to Quine's critique?

Analytic statements/truths, as conventionally understood and understood by Quine, are truths in virtue of meaning alone, and independent of matters of fact, or the way the world is (Russell 2014). Are Raz's claims of this nature? Consider what Raz takes to be a necessary feature of practical authority, the pre-emption thesis: the fact that an authority requires performance of an action is itself a reason for its performance, a reason not to be added to all other relevant reasons when assessing what to do, but should *replace* them (Raz 1994a, 198). Now is this necessary feature of authority the result of an analysis of the meanings of any of the terms and words in the above statements? If the answer is "yes," what are the terms whose meaning renders the proposition true? The most likely candidates would be terms such as "authority" and "arbitration." But it is entirely unclear how the meaning of these words could entail such a complex and subtle point. On the other hand, if the pre-emption thesis does follow solely from the meaning of the word "authority," for example, it should not take the reflection of a philosopher to come to that point: any competent user of the English language would be able to know it, or, find a statement of it in an English dictionary. But this is not the case. We do not find the pre-emption thesis in an English dictionary, and it is implausible to think that Raz formed his ideas about authority by consulting the dictionary.

We can try to apply the other half of the definition of analyticity and ask: is the pre-emption thesis "independent of matters of fact" then? Not obviously so. On the

contrary, it is reasonable to say that the argument relies on experience of some sort.[25] Recall how Raz started his investigation and sets up his argument: "consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. Two features stand out…"(Raz 1994a, 196). When we review the course of the argument, we notice that the two necessary features of our concept of authority derive their plausibility partially from our experience with regard to arbitration via authority.[26] It is true that the arbitration case Raz invites us to consider is a heuristic and we do not need to look at the details of a *specific* case of arbitration to make these observations, just like we do not need to find a bachelor in the real world to confirm that he is unmarried. In this sense both Raz's statement and "bachelors are unmarried men" are a priori. However, we do need to go beyond the meaning of the terms involved in the statement of the thesis and reflect on our relevant experience of arbitration—both for Raz to make the observations and for us to assess their persuasiveness. We need to know, *in general*, what authoritative arbitrations are like to appreciate the point that in this scenario, if the disputants (without good justifying reasons) go back to the original reasons after the authority has made a decision, they defeat the purpose of arbitration. While it does not rely on a particular piece of experience such as the statement "Germany is made up of sixteen Bundesländer" does, it does reflect certain features of our (social) world and our actions: this is what authority entails and this is how we *act* with regard to

[25] To clarify the concept of experience and its role in philosophy will be essential to a defense of conceptual analysis. This point will become clearer as this dissertation develops.
[26] The experience here, of course, does not have to be first hand experience. It would be a part of our general understanding of the (social) world.

it. If, on the other hand, we had totally different experience with regard to authority and arbitration, Raz's observations will lose their force. In that case, we might say that he has (or we have) different concepts of authority and arbitration.[27] This suggests that conceptual analysis goes beyond analysis of meaning of terms. Reflections on concepts involve our experience and understanding of *how the world is*, in a general way. This will be a recurrent theme in this dissertation and I shall explore it from different angles. For now, it is sufficient to conclude that Raz's pre-emption thesis is quite unlike the example Quine discusses, "No bachelor is married."

To make the case stronger, let us consider a few more claims in Raz's argument. My considerations will suggest that they share similar characteristics: they are not derived from the meanings of terms, and although they seem to be made in an *a priori* manner, they are related to experience in some ways. Consider, again, Raz's claim that law necessarily claims authority.[28] What is interesting is that the evidence he uses to support his claim is related to experience. Raz writes:

> I shall argue…every legal system claims that it possesses legitimate authority. …The law's claim to authority is manifested by the fact that legal institutions are officially designated as 'authorities', by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed. (Raz 1994a, 199-200)

Interestingly, a set of *facts* seems to be appealed to here to support the claim. This

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[27] This does not mean that we cannot disagree with Raz with regard to the understanding of authority. It is important to ask what a disagreement in this case would amount to, what conceptual disagreements are. I will touch on these issues in chapter 3 and chapter 7.

[28] The nature and status of this kind of claim, i.e. the talk of necessary truths in law, has attracted some scholarly attention (e.g. Bix 2003). I will suggest that clarifying the nature of necessary truth in law holds one key to many puzzling issues in jurisprudential methodology. See chapter 5.

observation helps to show that the claim "law necessarily claims authority" does not fall into the category of analytic truths. It is not independent of matters of fact. For otherwise, how would appealing to some facts help Raz's argument? We do not appeal to the fact that the bachelor John Doe is unmarried to manifest or consolidate the truth of the statement "A bachelor is a unmarried man." However, it is important that Raz has not checked every legal system that ever existed to make this claim (there was perhaps no way to do that either). He is not pointing to a *particular* legal system as the basis of his claim.

An examination of another important claim in Raz's argument again brings out the dissimilarity between conceptual claims and analytic ones. Raz argues that to sincerely claim authority, the law must be *capable of* having authority. What is the status of such a statement? Is it an analytic one, therefore true in virtue of meaning and independent of matters of fact? It seems hard to even clearly state what is supposed to follow from the meaning of which terms. "Being capable of" follows from the meanings of the term "sincerely claim," maybe? It seems to be a real stretch of matters if we juxtapose this statement with classic analytic claims such as "Bachelors are unmarried men." Raz thinks his claim is vague and requires further argument to make it clear. And we can again gain some further insights into his methodology by looking at how he supports his claims. One of Raz's clarifying points is that such a statement is about *making sense*:

The statement that a normative system is authoritatively binding on us may be

> false, but at least it makes sense, whereas the claim that a set of propositions about volcanoes authoritatively determines what we ought to do does not even make sense (Raz 1994a, 200-201).

If the law were not a normative system, it would not *make sense* to say that it is (or it is not) capable of having practical authority. Making sense may appear to be something similar to knowing the meaning of words. A child who says that trees have practical authority over people is not making sense, and he might very well be said to have not grasped the meaning of the word "tree". However, is the reasoning here entirely in virtue of meaning of words? What Raz says softens the seemingly necessary character of this statement and again relates it to experience. Raz remarks:

> Since the [law's] claim [to authority] is made by legal officials wherever a legal system is in force, the possibility that it is *normally* insincere and based on a conceptual mistake is ruled out. It may, of course, be *sometimes* insincere or based on conceptual mistakes. But at the very least *in the normal case* the fact that the law claims authority for itself shows that it is capable of having authority" (Raz 1994a, 201, my italics).

Later, Raz modifies the claim thus: since the law necessarily claims authority, therefore it *typically* has the capacity to be authoritative. Raz's language to describe the statement diverges from what we would use to describe an analytic claim. We don't say, for example, that a bachelor is, *in normal cases* or *typically*, an unmarried man; nor do we determine its truth by relating it to experience, as Raz seems to be doing in the quote.

The previous discussion is meant to show that the central claims in Raz's conceptual argument, those that Leiter might include in the category of "claims of conceptual analysis" that are subject to Quinean criticisms, are not "grounded solely in meaning" in any usual and obvious construal of the term "meaning," nor do they seem to

be "independent of matters of fact." In short, they do not fit the definition of analyticity. I have shown that it is implausible to think that those conceptual claims are grounded in meaning alone, yet they are not obtained by checking particular facts either. They rely on both meaning (note that synthetic claims do too) and the way the world is, in a particular way. If this line of reasoning is correct, Leiter's criticism of conceptual analysis in Raz's argument, and in jurisprudence at large, is problematic. The criticism, if we recall, is built on the implicit assumption that results of conceptual analysis rely on the notion of analyticity, and Quine's critique of the distinction has undermined this very notion. But the above discussion shows that Raz's conceptual claims are anything but analytic claims. The implicit assumption of Leiter's criticism of Raz is therefore false.

Raz and legal positivists' arguments have been traditionally taken to be *conceptual arguments* and their approach has been described as *conceptual analysis*. On the other hand, Quine has been understood to have attacked the analytic-synthetic distinction and hence the philosophical approach of *conceptual analysi*s. Critics such as Leiter never consider the details of conceptual analysis and investigate how conceptual analysis actually works in philosophical arguments.[29] What I have shown above is that we cannot appeal to Quine's attack on analyticity to criticize the methodological assumptions of conceptual arguments, as exemplified by Raz's Argument from Authority. It might be open to a critic of conceptual analysis to say that Raz's argument still relies

[29] Raz himself never admits that his work has anything to do with analytic claims. In fact, he denies that inquires into the nature of law is about determining the *meaning* of the word "law" (Raz 1994b, 179-193).

on meaning (hence analyticity) of sorts, although perhaps not the narrow, linguistic kind of meaning Quine's critique focuses on. Granted that the term "meaning" could mean a lot of things, the burden of proof is on the critic to show whether and how Quine's critique could be extended to undermine those other species of meaning.[30]

VI. Conclusion and the Way Forward

I hope to have shown in the above discussion that appealing to Quine's attack on the analytic-synthetic distinction is not a promising line in launching a methodological challenge to legal positivists' conceptual arguments. The above discussion also leads proponents of conceptual analysis to examine their own methodological commitments, since the nature and status of Raz's claims themselves are by no means well understood. In the rest of this chapter, I sketch a few points for further inquiry.

We may first ask why a criticism of conceptual analysis like the one advanced by Leiter is blind to the (somewhat obvious, in retrospect) problem that Raz's claims are not analytic claims. I have suggested that it is unclear, to date, what exactly we have learned from Quine's argument, and part of the complication is that varying interpretations use misleading terminologies. The philosopher David Chalmers, for example, takes Quine's

[30] My argument above is not to deny that meaning or analyticity has a role to play in conceptual analysis or in philosophy. Trivially, a philosopher needs to know the meaning of her words to make a philosophical argument. Nor do I rule out the possibility that certain analytic statements might be significant for philosophical purposes. This is partially because "meaning" could be construed more widely. My present point is that, as it stands, it is hard to see how Quine's critique could be applied to Raz's conceptual argument, because what Raz does is not analyzing the meaning of words, the kind of meaning Quine's critique targets. I shall come back to this in Chapter 7, where I argue that even if the notion of meaning is extended to cover things beyond what Quine discusses, conceptual analysis still goes beyond that extended notion, although it might form a continuum with analysis of meaning.

critique to be discrediting *conceptual truths* (Chalmers 1996, 52). Later commentators also seem to assume that analytic claims fall into three categories: mathematical truths, logical truths, and the so-called *conceptual truths*; and it is the third category that was the main target of "Two Dogmas." Paradigm cases of conceptual truths are: *bachelors are unmarried* and *squares have fours sides* (Russell 2014). If we think that Quine exposed the idea of conceptual truths and Raz's argument is a conceptual argument, it might be natural to think that Quine's work can be used to undermine Raz's argument. Quine himself, however, never used the term "conceptual truth" in "Two Dogmas," and I have suggested we have not much reason to think claims in Raz's conceptual argument are of this kind. Another possibility is that the influence of logical positivists has been so strong such that when philosophers talk about conceptual analysis or philosophical analysis, critics automatically assume it is the logical positivist kind that is being discussed. I shall explore this line in chapter 7, in which I argue that different views of conceptual analysis have been conflated if we look at the recent history of analytic philosophy.

These are factors external to Raz's work that are worth exploring. However, there also seem to be factors within Raz's argument that invite misunderstanding. We can ask the question: what is it about Raz's argument that renders it susceptible to Leiter/Quine's criticism? One striking feature of Raz's argument is that it makes strong claims of (conceptual) necessity (recall Raz's claim that law *necessarily* claims legitimate authority). Bix (2003) and Patterson (2011) have all noted this feature of Raz's argument and pointed out that appeals to necessity in jurisprudence require defense. This aspect of

Raz's argument naturally leads some critics of conceptual analysis to think that Raz is making analytic claims.

Let me highlight a few points on this. I have pointed out earlier that Leiter does not seem to distinguish analyticity and necessity, and there are necessary claims that are not analytic claims. For example, some theorists have given "water is necessarily H_2O" as an example of metaphysical necessity.[31] Bix (2003) points out that the kind of necessity involved in Raz's argument is not the same as metaphysical necessity and mathematical necessity. What kind of necessity claim is involved in Raz's argument and what is the source of this kind of necessity are important questions for a defense of Raz's methodology. More importantly, concepts, nature, and necessity seem to be very closely connected in Raz's argument. For Raz, "only necessary truths about the law reveal the nature of law" (Raz 2005, 328), and in "Authority, Law and Morality," Raz's usage seems to indicate that "necessarily p" and "conceptually p" are very closely related, if not interchangeable (Raz 1994a, 201). Additionally, in "Can There be a Theory of Law," Raz thinks explaining a concept is close to explaining the nature of what it is a concept of (Raz 2005, 327). These claims all require further and detailed examination.[32] This shows that talk of necessity, if justified, is closely connected with the viability of the conceptual analysis approach to the nature of law. Clarifying the nature of necessity in law will to a large extent clarify the nature of conceptual analysis.

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[31] So is my example mentioned earlier: necessarily, a rod painted green all over cannot be red all over.
[32] These topics (concept, nature, and necessity) will be explored in chapters 5, 6, 7.

Another aspect of necessary claims in legal theory concerns their revisability. One source of Leiter's worry is that necessary/analytic truths are not meant to be revisable unless we change the meaning of the terms involved (hence Leiter's worry that results of conceptual analysis fail for a posteriori reasons). However, Raz himself seems to affirm that our concept of law and hence our legal theory do change (Raz 1996), implying that what we take to be necessary features of law here and now might also change. This makes Raz's necessity claims appear paradoxical: truths about the nature of law in legal theory are necessary, but they also change (Raz 2005). An important question is raised then: in what sense are necessary claims in legal theory *necessary*? There is yet another equally significant issue. Leiter was worried about the prospect of *a priori* method in legal philosophy or in philosophy in general. I have pointed out that Raz's argument is indeed a priori in that it does not rely on our experience of specific examples of arbitration. In other words, the argument does not involve checking the way the world is. But it certainly relies on our experience *in some way*. If my observation is right, that our experience does figure somehow in Raz's conceptual argument, then the question naturally arises: exactly what role does experience have in conceptual argument? And what kind of experience is involved? Logical positivists divided the world into facts and meaning/language, are we to say that Raz's conceptual propositions are in between? All these issues are ultimately tied with any possible clarification and defense of conceptual analysis. Before turning to these issues in chapter 5, 6, and 7, one should not forget, however, that there is a related and equally significant charge against the conceptual

analysis approach in legal theory.

Chapter 3 Intuitions, Ordinary Language, and Jurisprudential Debates

I. Introduction

In this chapter, I discuss another major criticism of the conceptual methodology employed by legal theorists such as H.L.A. Hart and Raz, i.e. their alleged appeal to intuitions in theorizing about law. In the case of Hart, the criticism is tied to his commitment to ordinary language under the influence of his Oxford colleague, J. L. Austin. I begin with a summary of Leiter's criticism of the use of intuition in legal theory (section II), and then place it in the context of an inevitably brief survey of the contemporary literature on intuition and philosophical methodology (section III). After that, I offer a historical sketch of the use of intuition (section IV). The discussion shows that although intuition has various historical roots, the term "intuition" has a more or less stable usage in contemporary philosophical literature (section V). The main point I shall be making is that intuitions can play different roles in philosophical argumentation and it is important to distinguish these different roles (section VI). I then turn to addressing Leiter's criticism (section VII) and the common misunderstanding of the method of ordinary language philosophy (section VIII). Drawing on examples from Hart's legal theory, I go on to point out that to the extent that our ordinary language can be of service to philosophy, good intuitions about distinctions in linguistic usage can have a role to

play in philosophical argumentation. Finally, using the debate over legal authority between Raz and Perry as an illustration, I argue that characterizing jurisprudential debates as conflicts of intuitions causes confusion and harm to legal theory (section IX).

II. Criticisms of the Use of Intuition in Legal Theory

Let us begin with another major criticism of the (conceptual) methodology in jurisprudence, from the two articles by Brian Leiter discussed in chapter 1. Drawing on the work of Stephen Perry (Perry 1987), Leiter argues that a legal theorist cannot engage in the conceptual analysis of law while remaining committed to methodological positivism—the idea that legal theory is a descriptive, non-evaluative enterprise. The reason is that a legal theory necessarily assumes a background conceptual framework to demarcate the data for theorizing, including a view about the function of law. But to assume such a framework would engage the theorist in evaluative work, because "our concept of the 'function' of law does not hang together sufficiently well to admit of analysis: there are too many incompatible understandings of the concept, for the jurisprudent simply to fall back upon appeal to 'our' concept" (Leiter 2007a, 132).[1] Conceptual analysis *alone* does not give us grounds for choosing one understanding instead of another. There does seem to be several views of the function of law among legal theorists: the positivists' idea of law as providing public guidance, Dworkin's view that the fundamental function of the law is the settlement of disputes according to moral

[1] This point is connected to the question of existence of multiple concepts of law in a community. I shall address this question in chapter 6.

principles, and Holmes' conception of law as creating prudential reasons for action on pain of sanctions. For a complex human institution such as law, it is not surprising that there are different understandings of its function. What *is* surprising is that Leiter goes on to characterize the competition among these views as "intuition mongering." He maintains that Dworkin's and Holmes' views have an equal claim to being the "fundamental intuitions" about the concept of law and that no single theory can account for all these differing claims (Leiter 2007a, 133). This is the basis of his worry about this "morass of warring conceptual intuitions."

As mentioned in chapter 1, Leiter argues that legal philosophers have been having the wrong debates about jurisprudential methodology, about whether legal theory is descriptive or not (Leiter 2007b). The real worry, according to Leiter, is that appealing to intuition is discredited in light of recent empirical work.[2] It is, like conceptual analysis, "epistemologically bankrupt." A prominent work Leiter cites to support his view was a paper by Weinberg et al. (Weinberg et al. 2001).[3] The gist of it was that our epistemic intuitions, for example our intuitions with regard to Gettier-type cases, merely reflect ethnographic facts. The data drawn from an empirical survey show that East Asians for instance gave answers systematically different from Westerners, and people with different socio-economical status also give systematically different answers. Hence there are no deeper truths (e.g. essential properties of knowledge) other than ethnographic facts

[2] Hence Leiter thinks the attack on traditional philosophical method is not exhausted by Quine's attack on analyticity. Appeals to intuition constitute another problem for traditional philosophers.

[3] Weinberg et al.'s conclusion of cultural differences has been contradicted by recent empirical studies. See Kim and Yuan (2015).

to be uncovered from our intuitions. Additionally, Leiter uses this critique of intuition to undermine Hart's commitment to ordinary language philosophy, i.e. the idea that there is deeper social reality to be found via careful consideration of ordinary concepts.[4] Leiter's suggestion is that we should abandon the methodological device of appealing to intuitions and initiate naturalistic reform in jurisprudential methodology.

III. Intuition Talk in Contemporary Discussions of Philosophical Methodology

Leiter's methodological considerations with regard to the use of intuition echo larger debates in general philosophical method in recent literature.[5] Below, I give a brief outline of some of the works on this topic. One worry Leiter mentions, which he thinks forms a parallel with Hart and Raz's approach, is the problematic use of intuition in moral philosophizing. The use of intuition is predominantly connected with the strategy of constructing unusual or fantastic examples in moral philosophy (and epistemology) to solicit our intuitions.[6] R.M. Hare's 1981 book, *Moral Thinking*, contains a critique of such strategy (Hare 1981, esp. chaps 1, 3, and 8). Hare's work, however, does not inquire into the psychological underpinnings of our intuitions. In 1998, DePaul and Ramsey brought together an anthology about the use of intuitions in general philosophical inquiry, where naturalists such as Kornblith and Cummins, aided by work in psychology, argue

[4] As against that, Leiter says, with much sarcasm, that Oxford is a place where philosophers take *their* intuitions *very seriously* (Leiter 2007b, 178 n.93).

[5] It is part of Leiter's point to remind legal philosophers that the methodological debates in legal theory have been rather idiosyncratic and narrow in that they are not informed by recent disputes over general philosophical methods. I fear these disputes might inform jurisprudence in the wrong way.

[6] Here one should be reminded of unusual examples such as "trolley case," "people seeds," "dying violinist" etc. in debates in moral philosophy, and "Gettier cases", "Fake barn," "Zebra case" etc. in epistemology.

that intuitions provide no access to philosophical truths, while anti-naturalists such as Bealer and Sosa maintain that philosophical intuitions support a non-empirical domain of knowledge (DePaul & Ramsey ed. 1998, p.7).

A year later, the philosopher Jaakko Hintikka argued that appeals to intuition, as a favorite argumentative method of present-day analytic philosophers, are usually "without respectable theoretical foundations" (Hintikka 1999, 127). What is of special interest is that Hintikka's article gives a historical perspective on the notion of "intuition."[7] In 2001, the frequently-cited article, "Normativity and Epistemic Intuition," by Weinberg et al. appeared, calling into question the move from our intuitions to normative claims about what should guide our epistemic efforts. In the face of the criticisms based on empirical research, Gary Gutting's 2009 book, *What Philosophers Know*, defends Kripke's use of intuition in *Naming and Necessity* and the appeal to intuitions by epistemologists. With the goal of showing that "there is a body of disciplinary philosophical knowledge achieved by (at least) analytic philosophers of the last fifty years," Gutting distinguishes different sorts of intuitions and discusses the different roles they play in philosophical argumentation (Gutting 2009, 2-5).[8] A more recent addition to the literature is Cappelen's 2012 book, *Philosophy Without Intuition*, where he argues that the widely accepted claim that contemporary analytic philosophers rely extensively on intuitions as

[7] I will rely on Hintikka's work in my historical survey in the next section. Hintikka links intuitionist methodology with Chomsky's linguistics and targets in particular Kripke's use of intuition in his 1972 book *Naming and Necessity*.

[8] I think this is a helpful thing to do, if we want to clarify the role of intuition in doing philosophy. Below, I shall employ the same strategy.

evidence is false.

Without doubt, the debate is of some significance.[9] But for my purposes in this chapter, it is worth asking, in the first place, whether it is correct to characterize the methods legal philosophers use as "appealing to intuitions." To answer that question, then, it is mandatory that we address the question "what is intuition?" It will be helpful, however, to get a sense of why and how appealing to intuition becomes a problem.[10]

IV. Whence Comes the Intuition Talk? Some Historical Perspective

Hintikka surveys a few historical ancestors of our contemporary practice of appealing to intuitions.[11] Aristotle's νοῦς (*nous*) is one perhaps.[12] Its function is to give the first premises of a science. For Aristotle, *nous* is an intellectual faculty with a special power. Later, rationalists like Descartes held the doctrine of innate ideas,[13] the origin of which, according to Hintikka, could be traced to Plato's ἀνάμνησις (recollection)—another possible historical root of intuition as a special faculty or power.

In late 17th century, we do find the use of the English terms "intuition" and "intuitive knowledge" in e.g. John Locke's work. Intuition now seems to have less metaphysical baggage, even if it still appears to be a faculty of some kind. Some quotes

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9 In Gutting's very strong view, the disagreement over intuition is "at root a battle for the preservation of philosophy as an autonomous field of inquiry" (Gutting 1998, p. 7). I do not share Gutting's view on this.

10 The historical threads that tie together my discussion below are drawn from Gutting (1998), Hintikka (1999, in particular, 130-2), and Audi (2004).

11 Hintikka writes that these are "philosophers or philosophical traditions whose argumentation relied on intuitions (or their equivalent)" (Hintikka, 1999, p.130). It is of course open to debate whether Aristotle's νοῦς can be considered a form of intuition in the modern sense. Hintikka himself seems to be aware of this.

12 It is translated as "intuitive reason" in, for example, David Ross/Lesley Brown's translation of the *Nicomachean Ethics* (Oxford: Oxford University Press, 2009). See Book VI of the Ross/Brown translation.

13 Arguably (but perhaps misleadingly), Descartes' appeal to "clear and distinct" ideas is an instance of "appealing to intuitions."

from Locke will be helpful:

> For if we reflect on our own way of thinking, we shall find, that sometimes the mind perceives the agreement or disagreement of two *ideas* immediately by themselves, without the intervention of any other: and this, I think, we may call *intuitive knowledge*. For in this the mind is at no pains of proving or examining, but perceives the truth, as the eye does light, only by being directed toward it.

Giving "white is not black," "a circle is not a triangle" and "three are more than two, and equal to one and two" as examples of intuitive knowledge, Locke continues:

> Such kind of truths, the mind perceives at the first sight of the *ideas* together, by bare *intuition*, without the intervention of any other *idea*; and this kind of knowledge is the clearest, and most certain, that human frailty is capable of. This part of knowledge is irresistible, and like the bright sunshine, forces itself immediately to be perceived, as soon as ever the mind turns its view that way; and leaves no room for hesitation, doubt or examination, but the mind is presently filled with the clear light of it. 'Tis on this *intuition*, that depends on all the certainty and evidence of all our knowledge…(Locke 1689, Book IV, Chapter II, section 1)

Locke's use of "intuition," according to Hintikka, played an important role in subsequent philosophical terminology, and Kant, in the 18th century, seemed to follow his use.[14] For Kant, an intuition (*Anschauung*) is "immediate presentation of the particular," a kind of mental representation from which we can recover the a priori structures we impose on them. Hence intuition can aid us in yielding synthetic a priori propositions.[15]

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[14] See Hintikka (1999, 131). I shall get back to Locke's use of "intuition" below. One can see that if there is any continuity between Locke's use of "intuition" and earlier philosophers (whether they used the term "intuition" or not), and if "intuition" does refer to a faculty, there is nothing special about it in Locke. Indeed, the idea of intuition is very commonsensical in Locke's discussion: we have the ability to perceive some simple truths immediately with certainty.

[15] Kant's "Anschauung" is commonly translated as "intuition." However, Kant did use the term "intuitiv" (intuitive). An "Anschauung," according to Kant, is "unmittelbare Vorstellung von dem Einzelnen" (immediate representation of the particular). Kant writes in *Prolegomena*:

> The concept of twelve is by no means thought by merely thinking of the combination of seven and five; and analyze this possible sum as we may, we shall not discover twelve in the concept. We must go beyond these concepts by calling to our aid some intuition corresponding to one of them, i.e. either our five fingers and five points; and we must add successively the units of the five given in the intuition to the concept of seven. Hence our concept is really amplified by the proposition 7+5=12, and we add to the first concept a second one not thought in it (Kant 1783/2001, 269).

In the 20th century, "intuition" was famously associated with a school of ethics represented by G.E. Moore and W.D. Ross, although intuitionism already received discussion at length in Henry Sidgwick's *Methods of Ethics* (first published in 1874).[16] According to Sidgwick, intuitionism holds that "rightness is ascertained simply by 'looking at' the actions themselves." However, it is important that intuitionism does not posit intuition as a sort of special faculty. An ethical intuition is an "immediate judgment of what ought to be done or aimed at."[17] As Audi points out, for Sidgwick and for Ross, the prima facie moral duties are recognized in the same way as the truths of mathematical axioms and logical truths (Audi 2004, p.29), and they provide the starting point of an ethical theory. However, one might object that the epistemological status of ethical propositions is unlike mathematical and logical ones after all. The objection, briefly put, is that it is unclear how there could be cultural disagreement over such necessary truths—if ethical proposition are indeed like necessary truths of logic and mathematics (cf. Williams 1985/2011, 104-5).

Hintikka points out that contemporary philosophers' appeal to intuition is problematic and calls for justification. This is because the status of intuition becomes problematic once it ceases to be a special power or faculty. In ethics, as well as in mathematics/logic, intuition "explains nothing" (Williams 1985/2011, 105). This echoes

[16] According to Robert Audi, the origin of the "intuitive school" goes back at least to Thomas Aquinas. The view took shape in the hands of 17th and 18th century British moralists and was criticised in Mill's *Utilitarianism* in the 19th century. See Audi (2004, chapter 1, p. 5).

[17] In Sidgwick's discussion, the intuitionistic method allows an agent to *reflect* before judging and a moral intuition is fallible. The Sidgwick quotes are from Audi (2004).

Gutting's judgment that contemporary philosophers are uneasy and hesitant about this intellectual tool they employ precisely because the philosophers' argumentative strategies involving intuition have either failed or been considered obsolete. Gutting considers positivists' commitment to the analytic-synthetic distinction and the incorrigible givens of sense experience as products of the tradition of thinking that philosophy has a special domain of truths to be discovered by intuitive insights. And he points out that these philosophical endeavors after Kant received devastating critiques from Quine, Sellars and Davidson. But contemporary analytic philosophers once again fall back on the idea of intuition, now "meaning simply the rock-bottom beliefs they find themselves forced to take as basic in their search for philosophical truths" (Gutting 1998, pp. 6-7). But what is it then, exactly? What characteristics does it have?

V. Characteristics of an Intuition

A survey of the usage of the term "intuition" shows that it has different formulations in the hands of different theorists: "intellectual seemings" (Bealer), "spontaneous judgment" (Goldman and Pust), "non-inferential beliefs" (Sosa), etc. are some of the candidates.[18] These differences aside, however, we can see that there are several characteristics that our contemporary uses of "intuition" more or less adhere to.[19]

First of all, it should be uncontroversial that an "intuition" is most often meant as

[18] See the articles in DePaul & Ramsey (1998).

[19] These features are important features of what we call "intuition," but I do not take them to be exhaustive of its features. Nor are they meant as necessary and sufficient conditions for something to be an intuition.

a kind of cognition, with a certain specifiable content. So when we say "S has an intuition that p," the usage is perfectly in order.[20] Now what features does this cognition have? I suggest that we return to Locke's use in the passages quoted above, a use of the term *in its minimal sense*, as Hintikka calls it. Locke's discussion brings out several important features of intuition, and I shall suggest that these features are to a large extent preserved in contemporary philosophical literature. One of them is the *immediacy* of an intuitive judgment. Locke's idea that when it comes to intuitive knowledge, the mind is "at no pains of proving or examining" and "without the intervention of any other idea" brings out this feature. When we say some proposition p is intuitive or S has the intuition p, part of what we mean is that the judgment is not arrived through some complex reasoning.[21] Two clarificatory points are in order here: 1) The fact that an intuitive judgment is arrived at in a way that does not rely on complex reasoning should not be taken to mean that we are unable to uncover the reasons behind our having such and such an intuition. As I shall argue below, in some cases (noticeably linguistic cases) at least, we might be able to do so and these reasons can be philosophically important. 2) The immediacy of an intuitive judgment is not equivalent to its *quickness* in being recognized. An unusual case like the Gettier counterexample might call for some deliberation before we come up with a judgment. We can also imagine that, in Locke's example, someone might take some time

[20] Audi (2004) distinguishes this sense of intuition (what he calls "propositional intuition") from *property intuition*, the intuition of apprehensions of some property. See Audi (2004), chapter 1, n. 37. I shall focus on "propositional intuition."

[21] Though, as I shall argue below, in some cases (noticeably, linguistic cases) at least, we might be able to uncover the reasons behind our having such and such an intuition and these reasons can be important and enter philosophical discussion. But it is important to notice that these uncovered reasons are not usually the ones that we *rely on* to arrive at the intuitive judgment in question.

to learn that three is equal to one plus two.

The second feature in Locke's discussion is that an intuitive judgment is *compelling*. Recall that an intuitive judgment for Locke is "irresistible" and "leaves no rooms for hesitation, doubt, or examination." However, this does not rule out the possibility that an intuitive judgment can be open to debate once challenged or reconsidered. A third feature, I think, seems to follow from an intuitive judgment's immediacy and compellingness: the content of the judgment should be stated in a relatively short form. Immediate and compelling cognitions are typically very short. If what is intuited runs two pages, for example, it is not an intuition. Call this feature "*shortness*." It echoes a contrast Locke draws between *demonstrative knowledge* and *intuitive knowledge*. For the former, the mind requires reasoning to connect a series of immediate ideas to reach a conclusion, while the latter does not (Locke 1689, Book IV, Chapter II, section 2).

We can see a continuum between features of contemporary uses of "intuition" and that of Locke's. Two of the characteristics of intuition in Locke's account discussed above are reformulated and expanded in a recent account developed by Robert Audi (Audi 2004, esp. pp.32-39). Audi lists four characteristics of an intuition. First, an intuition must be non-inferential, i.e. at the time a proposition is held to be intuitive, it is not believed on the basis of a premise.[22] Audi calls this the *non-inferentiality requirement*. Second, intuitions must be "moderately firm cognitions," that is, "we do not

[22] Audi links this to the *unprovability* of an intuitive ethical judgment in Ross and Moore.

have one without a definite sense that the proposition in question holds" (Audi 2004, p.34). Audi calls this the *firmness requirement*. One can see that these two requirements from Audi are very similar to the features of immediacy and compellingness in Locke's discussion. To these Audi adds two further requirements: his third requirement is that intuitions must be formed in the light of *some* understanding or reflection on the proposition. Audi calls it *comprehension requirement*. The fourth requirement is that intuitions are neither evidentially dependent on theories nor themselves held as theoretical hypotheses, i.e. they are not posited to explain some observable data. Audi calls it *pre-theoretical requirement*.[23] The comprehension requirement should be uncontroversial. It is implicit in Locke's account as well.[24] The pre-theoretical requirement is less obvious.[25] The idea seems to be that the non-inferential/immediate nature of intuition rules out the possibility of its being a theoretical hypothesis to explain some data: if it is, it relies on some reasoning and hence is not an intuition.[26]

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[23] As I shall discuss below, Kripke, for example, seems to use his intuition to posit theoretical hypothesis (that proper names are rigid designators), from which he developed a theory of how names refer. I shall argue that Kripke's intuition such as proper names are rigid designators is best not called an "intuition."

[24] In a complex situation, though, our understanding can be inadequate and hence our intuition is defeasible. Audi points to the concept of a promise as an example to show that sometimes rich concepts can be involved in a proposition such that they require more adequate understanding to form any belief/intuition (see Audi 2004, p.35)

[25] Audi told me that we are not talking about the *propositional content* of an intuition, rather *a proposition intuitively held*; intuition as such is pre-theoretical. I thank Professor Robert Audi for clarifying his position to me in an email exchange. However, Audi's explanation of this point is still not entirely clear to me.

[26] I take these characteristics in Locke and Audi's discussion to be more or less salient in contemporary philosophers' use of "intuition." But the philosophically obnoxious might say: that is just *your* intuition about "intuition"; that says nothing about what intuition really is! To this I can only give a very brief reply: what alternative is there to investigate what intuition *really is* besides examining its usage, examining what philosophers can possibly mean by it?I will indicate a different line of response to this kind of objection by way of discussing J. L. Austin's work below: how a word is *used* can be constitutive of what the reality behind it *is*.

VI. Roles of Intuition in Philosophical Argumentation

Despite the common characteristics of what we call "intuitions," they seem to have different status in different philosophical contexts. In this section, I shall explore this point.[27]

As part of a common strategy in philosophical argumentation, intuition is often solicited as a response to a fabricated, usually unusual example that is intended as a counterexample against a certain philosophical theory. Prominent examples of such use of intuition are: Gettier's examples against traditional analysis of knowledge as justified true belief (Gettier 1963), Kripke's Gödel-Schmidt example against descriptivist theory of name reference (Kripke 1972, pp.83-4), and the large number of fantastic examples in moral arguments that I will not enumerate here. This use of intuition requires no further elaboration or arguments. Once the right kind of intuitions from the readers is motivated based on a *particular* counterexample, those intuitions by themselves are supposed to count as evidence to refute a theory. A new theory that is able to accommodate such unusual examples is usually offered as a replacement of the old one. The intuitions in question can be open to debate, and may vary from person to person, as Weinberg et al. have shown. They do so partially because the examples are very unusual and artificial. I shall return to this use of intuition and its problems below.

The second role intuitions can play is to serve as an (supposedly) uncontroversial

[27] My discussion on this point was inspired by (Gutting 2009), but my account diverges from what Gutting has to offer.

starting point of a philosophical inquiry. The purpose of such intuitions is to guide us to a philosophical insight or to serve as the basis or data of a philosophical theory, especially an ethical theory (See Williams 1985/2011, 104). An example of this kind would be W.D. Ross' intuition that that an act qua fulfilling a promise is prima facie right is self-evident. And he seems to be explicit about the kind of method: "the moral convictions thoughtful and well-educated people have are the data of ethics, just as sense perceptions are the data of a natural science."[28] Presumably the intuitions used in "reflective equilibrium" serve such a purpose. Similarly intuitions can be clear-cut responses to supposedly uncontroversial examples in the process of making an argument. Kripke's examples, such as Aristotle might not have taught Alexander the Great (Kripke 1972, p.30), and "it is not necessary, not true in all possible worlds, that the number of planets is odd" (Kripke 1972, p.40), fall under this category. Locke's examples, mentioned earlier, are also of this kind. So is the use of linguistic intuition as data (for linguistic theory), though they differ from moral intuitions or convictions, a point I shall come to below.

The third use of intuition is to be posited like an intellectual insight. A prominent example of this is Kripke's "intuition" that proper names are rigid designators. A distinctive feature of this kind of intuition is that it does not function as a solicited response to a counterexample (ordinary or unusual), nor does it serve as a supposedly uncontroversial starting point for a philosophical argument. Rather, it connects with other bits of a larger picture or theory and receives support from other parts of a larger

[28] The Ross quote is from Audi (2004), pp.25-6.

argument (e.g. in Kripke's case, defense of essentialism, the way we think about possible worlds, the posit of necessary a posteriori truths, etc.). The power of such an argument by no means relies on the persuasiveness of this one single intuition or its intuitiveness, but rather on the new picture or philosophical theory we have (about naming, essentialism, necessity, etc.) once we assume such an intuition. In that sense, the intuition is not a premise on which a whole theory is built but rather a conclusion, toward which the rest of the arguments point. As Gutting points out, Kripke " 'assumes' the intuition only in order to persuasively elaborate it" (Gutting 2009, p.92). It rather resembles the old form of intuition as a kind of special faculty, power or insight. I shall argue in section IX that something like Kripke's insight is best not called "intuitions" since they are inconsistent with the common characteristics outlined above, and Leiter has been misled to think that such an "intuition" can be evaluated based on its being intuitive or not.

These roles that I sketch by no means exhaust the possible use of intuitions in philosophical arguments.[29] And I leave open the larger general question of whether appealing to intuitions can be justified as a respectable philosophical method. That task certainly goes beyond the scope of this chapter. My central concern is whether jurisprudential debates can be characterized as disputes among different intuitions. I think we now have grounds for saying that they are not debates among different intuitions.

[29] See Gutting (2009, pp.99-100), for a discussion of intuition as evaluative attitudes.

VII. Are Jurisprudential Debates about *Intuitions*? A Preliminary Reply to Leiter

My response to Leiter takes three steps. In this section, I make some preliminary remarks on Leiter's charge that legal theorists are employing intuition as part of their jurisprudential methodology. The next section turns to a particular aspect of this charge, i.e. under the influence of J. L. Austin, Hart's appeal to ordinary language in his argument. The final section of this chapter completes my response by looking at some details of Perry's dispute with Raz over legal authority. My general conclusion is that the empirical psychologists' critique of the use of intuition does not apply to legal philosophy, and good ordinary linguistic intuitions can aid philosophical inquiry, and finally that the Raz-Perry debate shows that characterizing the debate as a conflict of intuition makes deep philosophical arguments rather shallow.

To begin, it seems to be the case that Leiter has only in view intuitions as playing the first kind of role in philosophy, as outlined above. Leiter writes: "[I]t is a question for a different day to show that the Weinberg et al. critique of intuitions in epistemology has a parallel in legal philosophy" (Leiter 2007b, 179). The discussion up to this point has prepared the ground for us to say that the day has come to show that there is no such parallel. To begin with, the "intuitions" Leiter discusses (the various views on the function of law, for example) are simply not the kind of thing Weinberg et al. were concerned about. The different views on the function of law are simply not intuitive responses to fabricated unusual examples constructed to solicit our intuitions (intuition in

its first role).

One might object that there *are* fabricated examples employed by legal theorists in service of constructing a legal theory. For example, in H.L.A. Hart's work or, more recently, in Scott Shapiro's writing,[30] there are examples of primitive legal systems, from the elaborations of which the authors draw various conclusions. Aren't they examples supposed to pump our intuitions then? Aren't the responses to these examples open to the kind of criticism Weinberg et al. have developed? There is a fundamental difference between Gettier-type examples Weinberg et al. criticize and the kind of heuristic constructs Hart and Shapiro use: as pointed out earlier, in the Gettier-type examples (or Gödel-Schmidt type examples), an intuition is the *only thing* needed for the examples to function; no further arguments would be given as long as the author thinks that the right kind of intuition is motivated. No further discussion or modification of the example is possible even if the readers have misgivings about these examples. This is due to the way these examples are constructed and intended: they are often to solicit a clear-cut response to refute a theory. The consequence of this is that the relevant factors affecting our judgments are usually not spelled out. The intuition on its own, as a response to a unusual situation, does not tell us what it is that is affecting our judgment in a particular case.[31]

It is exactly this aspect of such uses of intuition that makes them susceptible to Weinberg et al. type criticism. The fantastic examples solicit *mere* intuitions, the

[30] See Shapiro (2011), chapter 2, the section titled "how is law possible?"
[31] Recall how Gettier tries to pump our intuition by asking whether Smith knows "the man with ten coins in his pocket will get the job." See Gettier (1963).

underlying presuppositions of which are opaque, and the limitations of which unrecognized. We just have an isolated intuition as a response to an unusual situation in a fantastic example. Naturally, there will be other people taking the examples differently. Given the way these examples are designed, the information given in the examples is not sufficient to have a further, more solid consideration or consensus. Viewed from this perspective, the Weinberg criticism of (conflicting) intuitions is valid only when there is no way to address the underlying assumptions of these intuitions.

Hintikka, from a different angle, made a similar criticism of contemporary moral philosophers' practice of generalizing from intuition to substantive moral principles. Hintikka thinks the key problem is that those intuitions moral philosophers use are about *particulars* and thus lack generality. Those who try to generalize from intuitive statements such as "it is morally wrong to torture a child for pleasure" have one debilitating weakness in their argument: we don't know the parameters of the given situations with respect to which we should generalize to make a philosophical point. Hintikka asks: "Is it sometimes all right to torture a child for reasons other than pleasure? If so, what reasons? Is it ever permitted to torture an adult? If so, what is the critical age?..."(Hintikka 1999, pp.137-8). The intuition in the particular statement does not shed any light on these questions. On the other hand, our intuition that honor conferred on someone who is not responsible for the honorable deeds is not really honor for that person is a useful one, because it has the implicit generality that a "conceptual condition"

for someone's enjoying honor is that she is responsible for the deeds that deserve honor.[32]

Hintikka's criticism is in line with what I said about intuitions as responses to Gettier type examples. The lack of generality and room for elaboration and discussion, blocks the possibilities to further the philosophical dialectic. The source of the problem, as indicated, lies in the design of this kind of argumentative strategy. Thus it forms a contrast to the type of examples Hart and Shapiro use. An example I shall come to again below is Hart's discussion of the "gunman situation":

> A orders B to hand over his money and threatens to shoot him if he does not comply…we would say that B, if he obeyed, was "obliged" to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B "had an obligation" or a "duty" to hand over the money… (Hart 1994, 82).

Another example comes from Scott Shapiro's recent book *Legality* (2011). To motivate a problem about legal authority,[33] Shapiro invites us to "engage in a philosophical fantasy:"

> Imagine that law was first invented in a small agricultural village in the Fertile Crescent on January 1, 10,000 B.C. On that day, the village elder, Lex, had an idea and called a communal meeting to discuss it. He addressed his people thus: "Many of you have approached me recently to complain about the increasing divisiveness of village life….Year after year, as our village grows, the situation becomes worse….In order to remedy the situation, I propose the following course of action: I will come up with a set of rules that address the pressing issues of our time. You will know when I have made a rule when I issue a command while sitting under the big palm tree in the village square…"
>
> Virtually everyone in the village liked Lex's proposal. They respected his wisdom and character immensely and trusted him to make good rules….Only one villager objected to Lex's plan: Phil, the village philosopher.

[32] This is a variation of Hintikka's example. According to Hintikka, the intuitive judgment that a gift is not meritorious when it is given merely to satisfy the recipient's expectations is a useful intuition. This is because it has some (implicit) generality: it presupposes the ethical principle that a necessary condition for an act to the meritorious is that it is spontaneous. See Hintikka (1999, 138).

[33] What Shapiro calls the "chicken-egg" problem.

> "Lex, your proposal sounds nice, but it will never work. You see, in order for you to have the power to make, change, and apply rules for our village, there has to be a rule that empowers you to do so. But no such rule yet exists. If you try to make a rule under the palm tree without a rule empowering you to do so, it will have as much force as if I try to make a rule, which is to say 'None.' "
>
> Lex pondered the objection for a short time before responding: "Phil, couldn't I just make a rule that empowered me to make a rule for the community?" Phil shook his head wistfully and said, "Unfortunately, that won't work either. Since there is no rule empowering you to make an empowering rule, your attempt to make such a rule will similarly be null and void"[.] (Shapiro 2011, 37-8)

I am not so much interested in the problem of authority this example presents as the methodological feature of it. We can see that even if Hart's example and this "fantasy" can be characterized as trying to pump our intuition, the examples have generality in that they explore or reveal conceptual conditions for applying a certain concept and hence have some philosophical significance. The use of such kind of examples—like the example about honor, is fundamentally different from those examples fabricated to solicit merely our intuition as responses to a particular, carefully crafted case.

Let us get back to Leiter's criticisms. Leiter's understanding of the role of intuition in legal theory seems to have two parts. One part is that different views about the function of law are based on legal theorists' *intuitions*. Another, related, part is that the debate among these different views is to be settled based on which of them is more *intuitive* (Leiter 2007a, 133). Both of these points are misguided. The former tells us that those considered views about the function or nature of law—for example, the positivist position that the essence of law is the authoritative guidance of conduct by means of source-based, duty imposing rules (Perry 1987, 216)—are intuitions. There is the initial

worry that if we call that an "intuition," the use of the term "intuition" might get too loose. Why cannot we call all the things philosophers posit, e.g. views, propositions, arguments, theoretical postulates etc. "intuitions" as well? But, as discussed earlier, the term "intuition" has some criteria governing its use and setting its boundaries. If we recall those characteristics of intuitions outlined above, it is not obvious that those views on the functions of law are intuitions. In both Perry and Raz's discussion of the concept of authority, we can find elaborate arguments and counterarguments for the views that authoritative directives are exclusionary reasons. If so, then the conclusions reached are not intuitions because they simply don't have the feature of being non-inferential.[34]

This might appear to be a mere verbal dispute with Leiter. However, the worse problem is the confusion this first part of Leiter's view causes: if these well-considered views on the nature or functions of law are characterized as intuitions, it naturally invites the view that jurisprudential disagreements are nothing more than a morass of clashing intuitions. Assimilating these "intuitions," mistakenly and misleadingly, to intuitive responses we give to Gettier type examples—the only role of intuition Leiter seems to have in view—the solution to such debates naturally suggests itself: these views are to be evaluated by way of determining which is more intuitive, as if the debates are to be solved *at that level*. Seeing the matter this way then opens up a vulnerability to Weinberg et al. type criticism. It appears that different people from different cultures or of different

[34] I shall get back to this point at the end of this chapter. But might a term such as "intuition" get a more flexible use so that it can extend to cover other things? Perhaps, but when a term enjoys such a wide range of coverage, it is probably not interesting and useful to us anymore.

socioeconomic status have different intuitions, while given the design of such examples, the solution is doomed to fail: no intuition can establish itself as *objectively* more intuitive. Leiter's conclusion would then appear to make sense: philosophy becomes unsatisfying if it is intuition mongering. But it is not. Taking jurisprudential debates to be a clashing of intuitions fundamentally mischaracterizes the nature of jurisprudential debates, in a way that renders them trivial and shallow. An examination of the details of conflicting jurisprudential views would help us see this. Before moving on to that discussion, however, I would like to remove one particular criticism about H.L.A. Hart's methodology, i.e. his alleged commitment to ordinary language philosophy under the influence of J. L. Austin. Leiter explicitly ties this commitment of Hart's with his critique of the use of intuition in legal philosophy. Was Hart mistaken in taking his intuitions very seriously?

VIII. On J. L. Austin's Influence on Hart's Methodology: A Plea for Ordinary Language

Leiter quotes R.M. Hare at length to support the point, that our intuitions only reflect ethnographic facts (Leiter 2007b, 178, n.98). The core of the problem is that "[the moral intuitions] have absolutely no authority for this claim [to correctness] beyond the original convictions, for which no ground or argument was given."[35] With regard to our moral

[35] Hare states:

> "The appeal to moral intuitions will never do as a basis for a moral system. It is certainly possible, as some thinkers even of our times have done, to collect all the moral opinions of which they and their contemporaries feel most sure, find some relatively simple method or apparatus which can be represented, with a bit of give and take, and making plausible assumptions about the circumstances

intuition, Hare's point can be granted. As mentioned earlier, both Williams and Hintikka have made a similar point about the legitimacy of generalizing from moral intuitions. What Leiter fails to mention, however, is Hare's immediate point, that we should notice a difference between moral intuitions and linguistic intuitions. While our moral intuitions alone have no probative force for a moral argument, our linguistic intuitions "can support theses in empirical linguistics and, in a subtler way, in philosophical logic. In the first case, the native speakers of a language are the authorities on how it is spoken. In the second, the intentions of a speaker on how his words are to be taken (what they imply) is authoritative" (Hare 1981, 11). One might argue that to the extent that linguistic intuitions "can support theses in empirical linguistics," moral intuitions can support theses in ethnography. This is fine. But Hare's point hints at the idea that linguistic intuition can establish something of philosophical importance.[36] Is there anything to our linguistic intuitions such that they can help (legal) philosophy? The philosopher who might be said to have taken our linguistic intuitions most seriously is J. L. Austin. I wish to start with a brief description of the way H. L. A. Hart's methodology came to be under his Oxford colleague J.L. Austin's influence and then move on to a discussion of whether, and if so, to what extent, that aspect of Hart's methodology is defensible.

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of life, as generating all these opinions; and then pronounce that that is the moral system which, having reflected, we must acknowledge to be the correct one. But they have absolutely no authority for this claim beyond the original convictions, for which no ground or argument was given. The 'equilibrium' they have reached is one between forces which might have been generated by prejudice, and no amount of reflection can make that a solid basis for morality. It would be possible for two mutually inconsistent systems to be defended in this way; all that this would show is that their advocates had grown up in different moral environments" (Hare 1981, 12).

[36] Though it is unclear what he means by "philosophical logic" in that context.

When his service in M15 (a division of British military intelligence) was coming to an end with WWII, Hart accepted an offer of a teaching fellowship from his former teacher A.H. Smith, then Warden of New College, to teach philosophy at New College, Oxford.[37] The old philosophical tradition then was under increasing attack since 1930s onward from two planks: the "new" linguistic philosophy propounded by J.L. Austin and Gilbert Ryle, and the logical positivism of the Vienna Circle (the early and middle work of Wittgenstein).[38] The new development was at the same time an inspiration as well as a cause of anxiety for Hart, given that he had had only an undergraduate education in academic philosophy.[39] However, a decisive moment in Hart's philosophical development was his encountering J.L. Austin, a then authoritative figure in Oxford, which drew him into the linguistic philosophy movement.[40] In 1947, Hart co-founded a

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[37] The factual basis of my account of Hart's intellectual development is the excellent biographic work by Nicola Lacey (Lacey 2004). Smith's intention was to invite Hart back to revive the idealistic philosophy and in particular Platonic philosophy, which was central to Hart's own education. See Lacey (2004, chapter 6).

[38] It is interesting and perhaps also important to note that Hart's initial conviction was that the new linguistic philosophy of the late 1930s was "merely a crude version of some of the themes of logical positivism, drawn from Ayer's *Language, Truth and Logic* (1936), a book of which he always had a poor estimation" (Lacey 2004, 114). But Hart quickly came to feel that "there might be something both important and subtle about the new developments" (Lacey 2004, 114). I think this point is worthy of our further attention and opens up new discussion of Hart's methodology. If Stuart Hampshire, Gilbert Ryle and J.L. Austin's work is mistaken to be of the same nature as the work of the logical positivists, it makes sense to think that Quine's attack on the analytic-synthetic distinction also applies to this ordinary language approach, because Quine's view was targeted at the logical positivists. This is a view held by many contemporary philosophers, represented by Brian Leiter. But if, as I have been trying to show, this view is mistaken, then it implies that there was some misunderstanding of the linguistic approach to philosophy (Hart himself was equating it to logical positivism!) that is still prevailing in contemporary discussion. I shall revisit this point in chapter 7.

[39] In a letter to the philosopher Isaiah Berlin in October 1944, Hart writes:

> My greatest misgiving (amongst many) is about the whole linguistic approach to logic, meaning…semantics, metalanguage, object language…At present my (necessarily intermittent) attempts to understand this point of view only engender panic and despair but I dimly hope that I cannot be incapable given time of understanding it. The solution or dissolution of philosophical problems in this medium is however at present incomprehensible yet terrifying to me. My main fear is that it is the fineness and accuracy of this linguistic approach which escapes my crude and conventional grasp and that it may be very difficult at 37+ to adjust one's telescope to the right focus (Lacey 2004, 115).

[40] Hart was advised by Isaiah Berlin to "fish out" Major Austin, according to a letter from Berlin to Hart in February 1945 (Lacey 2004, 133).

group meeting every Saturday morning with Austin, which became an important institution in the exercise of Austin's authority and the propagation of his method and ideas. In 1948, Hart and Austin started co-teaching seminars on subjects of mutual interests. A sense of the intellectual atmosphere and the development of philosophy in post-war Oxford would help us to see why the appeal to ordinary language held attraction for Hart:[41] a refreshing sense of breaking free from traditional philosophy and connecting linguistic practice of everyday life with deep philosophical issues; the apparent authority of people like Austin, Ryle, Hampshire, and Strawson and Hart's deep regard for them; a brand new start for a late returner to philosophy. Most importantly, "Austin's method gave Herbert for the first time a clear view of the distinctive contribution which he might make to philosophy" (Lacey 2004, 144). The contribution was made possible by combining Austin's method with Hart's legal background. What is Austin's method then?

Since day one, the method has been subject to severe criticism. A representative view of it comes from Bertrand Russell, which to a large extent is preserved in the contemporary philosophers' attitude toward the ordinary language philosophy when they talk about it, if at all. In *Portraits from Memory and Other essays*, Russell writes:

> The most influential school of philosophy in Britain at the present day maintains a certain linguistic doctrine to which I am unable to subscribe. The doctrine…consists in maintaining that the language of daily life, with words used in their ordinary meanings, suffices for philosophy, which has no need for technical terms or of change in the significance of common terms. I find myself totally unable to accept this view. I object to it: (1) Because it is insincere; (2)

[41] Chapter 6 of Lacey 2004 provides a fascinating portrait of these aspects.

> Because it is capable of excusing ignorance of mathematics, physics, and neurology in those who have had only a classical education; (3) Because it is advanced by some in a tone of unctuous rectitude, as if opposition to it were a sin against democracy; (4) Because it makes philosophy trivial; (5) Because it makes almost inevitable the perpetuation among the philosophers of the muddle-headedness they have taken over from common sense (from Lacey 2004, 137)

I think these criticisms are based on a misunderstanding of Austin's (and hence Hart's) method. And the misunderstanding comes largely from the fact that the method has been characterized in unfair ways. Below I shall try to salvage the central, valuable insights of this method. I shall discuss aspects of Russell's (quite unfair) characterization of it and make a case for the thesis that there is something worth keeping in the ordinary language approach to philosophy.[42]

Recall Leiter's characterization that the philosophical assumption of ordinary language philosophy is that there are deeper truths about reality, including social reality, to be found via careful consideration of ordinary concepts (Leiter 2007b, 178, n.93). Leiter thinks this is an "immodest form of conceptual analysis" that Hart shares with other legal theorists, like Raz and Julie Dickson.[43] As the criticism stands, it is unclear where the immodesty of the ordinary language approach comes from. It seems to be a modest and sensible one as long as it does not claim that *all* reality is to be discovered by examining ordinary linguistic usage. The central insight of this approach is: *some* linguistic usages can reflect important distinctions in human understanding, and they can

[42] But it is worth pointing out that Hart himself is not without reservations with regard to this method, despite his commitment. He does not, for example, identify himself with the sense of aridness in this philosophy, which can be sensed in Peter Hacker's description of those Saturday morning meetings Hart helped to found. See Hacker (1996, 151, 172).

[43] The term is from Jackson (1998).

therefore serve as *pointers* or *signposts* to these distinctions. And it is in this way that our linguistic intuitions, an acute sensibility to the subtleties of language, can be helpful. In his classic paper "A Plea for Excuses," J.L. Austin gives a more careful clarification of this approach.[44]

The dominant tone of "A Plea for Excuses" shows that the paper is actually a precautionary note *against* this linguistic/ordinary language approach. The justification of this approach is very brief: words are our tools and we should use clean tools, knowing what we mean and what we do not; words are not facts or things, thus we need to hold them apart from the world "so that we can realize their inadequacies and arbitrariness;" on the positive side, "the common stock of words embodies all the distinctions men have found worth drawing, and the connections they have found worth marking, in the lifetimes of many generations" (Austin 1961, 130). The main concern of Austin, however, is "a warning about the care and thoroughness needed if it [i.e. this method] is not to fall into disrepute" (Austin, 1961, 129). To proceed from "ordinary language," Austin tells us, is to examine "*what we should say when*, and so why and what we should mean by it" (Austin 1961, 129, original italics). The statement might have led many people to think that ordinary language philosophers resolve vexed philosophical issues by looking at what ordinary people *say* in ordinary situations.[45] If so, it *does* make philosophy trivial, as "in order to be a competent philosopher, it is only necessary to study Fowler's

[44] The paper was originally Austin's Presidential Address to the Aristotelian Society in 1956. My following discussion follows Austin's thoughts in that paper, but there are also points of my own rumination and extrapolation.

[45] What the "men on the street" say, as philosophers tend to characterize this method.

'*Modern English Usage*'" (Lacey 2004, 137). But even in this short statement of this method, Austin does not say that what most people *say* will settle philosophical issues. Clearly, there is more than appealing to what we *say*; it is also (perhaps more) important to inquire *why and what we should mean by it*. According to Austin, correctness never comes from *majority*, or what *most people say*. Russell's criticism (3) is therefore off the mark. "Why should what we all ordinarily say be the only or the best or final way of putting it" (Austin 1961, 131)? Ordinary language has no claim to be the last word, if there is such a thing (Austin 1961, 133). Its inadequacies are very clear: it is not the best approach if our interests are more extensive or intellectual than the ordinary; and further, the experience on which our ordinary language is based is not examined;[46] and Austin issues a warning that "superstitions and error and fantasy of all kinds do become incorporated in ordinary language and even sometimes stand up to the survival test"(Austin 1961, 133). This indicates that Austin is aware of the kind of criticism along lines of Russell's accusation (5). Austin summarizes the discussion by saying something very noncommittal: "in principle [ordinary language] can everywhere be supplemented and improved upon and superseded" (Austin 1961, 133). "Technical terms or change in the significance of common terms" are not ruled out by this methodological approach. Russell's characterization is again inaccurate.

Nevertheless, ordinary language could be the *first word*. This is because it marks

[46] Austin writes "And again, that experience has been derived only from the sources available to ordinary men throughout most of civilized history: it has not been fed from the resources of the microscope and its successors" (Austin 1961, 133).

distinctions that are embodied in our "inherited experience and acumen of many generations of men" (Austin 1961, 133). Ordinary language is for practical purposes in ordinary life. Thus there is something to it if a distinction works well for practical purposes.[47] It will not mark nothing if it is apt for practical purposes. Think about Austin's example: you and I both have a donkey and they graze in the same field. One day I decide to shoot mine. I aim, fire and the donkey falls in its tracks. But when I inspect the victim I find out it is yours. What do I say to you? I've shot your donkey "by mistake" or "by accident"? Then again, I go to shoot my donkey as before, but as I do so the beasts move and yours falls. What do I say to you in this case (Austin 1961, 133)? While in the first situation things are still a bit opaque, it is uncontroversial that "accident" does the job better in the second situation. It works better in such a practical situation because it does "better justice to the realities of the conceptual situation" (Hintikka 1999, 139). This brings out Austin's point that in examining what we should say when, why and what we should mean, we are looking not merely at words, but also at the *realities* we use the words to talk about. The distinctions in our linguistic practice are markers of some kind of reality. Tracking and examining such linguistic distinctions can lead to significant results, in, for example, law.

In criticizing early legal positivist John Austin's version of legal positivism,[48] Hart points out that a fundamental element is missing in John Austin's picture of the

[47] Austin thinks this is a no mean feat since it is full of hard cases. Austin (1961,133).
[48] John Austin (1790-1859) was a British legal theorist, forerunner of modern legal positivism, not to be confused with J. L. Austin (1911-1960), the British philosopher. Both of them, however, have influenced H. L. A. Hart intellectually.

nature of law, i.e. that the subjects of law obey the law not merely because they are afraid of facing evil consequences if they don't comply; they also use the law in reasoning about right and wrong, and, further, as a basis for criticizing other people's deviant behavior. In short, the subjects of law take law to be *normative*. Therefore, our legal institution is not a "gunman situation writ large." It is precisely this normative aspect in law that is not accounted for in John Austin's version of legal positivism. Now, Hart points out that this normative aspect is reflected in our linguistic practice. Here is the "gunman situation" again:

> Let us recall the gunman situation. A orders B to hand over his money and threatens to shoot him if he does not comply….The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was "obliged" to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B "had an obligation" or a "duty" to hand over the money….There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it (Hart 1994, 82, original emphasis).

Harts goes on to give a detailed analysis of the difference involved in the two different usages, which I shall not recount here.[49] But the discussion illustrates the (rather modest) point that a distinction in linguistic usage *can* point to significant aspects of social situations and social relations. In other words, important aspects of our understanding of the social world can be brought to light through noticing differences in the relevant linguistic usage. In sharpening the awareness of the words we use, we are also sharpening our perception of the phenomena—Hart famously quotes Austin's "A Plea from Excuses"

[49] See Hart (1961/1994), pp.82-3.

(Hart 1961/1994, vi). When we examine words and usages, we are also dealing with reality. This method, then, as a part of philosophy, is not trivial at all. Russell's criticism (4) that the ordinary language approach makes philosophy trivial is unwarranted.

It is important to notice that Austin also puts some general qualifications on this method. First, we use such a method to investigate a field where ordinary language is rich and subtle, a field "not too much trodden into bogs or tracks by traditional philosophy" (Austin 1961, 130). So while in the practical matters of excuses ordinary language can be useful, I don't think Austin would say that ordinary language is useful for the present day philosophy of physics or mathematics, nor in a field where ordinary language is infected with jargon of traditional philosophy or theoretical views. Second, this approach is informed by developments in the sciences. As mentioned earlier, Austin thinks ordinary language can be supplemented and superseded according to our interests and purposes. Legal cases and psychology are two major fields that might cause us to override ordinary language.[50] Further, Austin lists psychology, anthropology and animal behavior as major sources in addition to ordinary language for our study of excuses, because there are in these fields ways of acting and explanations of the doing of actions that are not "observed or named by ordinary men and hollowed by ordinary language" (Austin 1961, 137). Austin adds: "there is real danger in contempt for the 'jargon' of psychology, at least

[50] Austin's discussion here is very brief. But the general idea, I think, is that the law and psychology generate novel cases. In law, new cases are always coming up and brought up for decision. In psychology, new cases and phenomena require a more or less systematic way of categorizing and so that we can bring the phenomena under observation and study. In these processes, ordinary language is not sufficient, even in *describing* the novel cases.

when it sets out to supplement, and at least sometimes when it sets out to supplant, the language of ordinary life"(Austin 1961, 137). It is clear that Russell's second criticism, i.e. ordinary language philosophers pay no attention to developments in other scientific disciplines, is based on a preconceived idea. Last but not least, Austin indicates that the ordinary language approach to philosophy is *one* philosophical method. It does not proclaim to be *the* philosophical method (Austin 1961, 129).

In sum, Austin's clarification of the method and the example from Hart's legal theory show that linguistic intuitions, a sharpened awareness of the differences in the words we use, have a modest role to play in doing philosophy. An intuition here amounts to the sensitivity to the kind of linguistic distinctions that might lead us to significant distinctions in our understanding. A good ear is important for music and literature, but probably equally so for philosophy. A sharp intuition of the differences between expressions such as "by accident" and "by mistake," "being obliged" and "having an obligation" can help us to identify the first word in philosophizing. It is in this way that our linguistic intuition can prove to be helpful for doing philosophy. But it is important to reiterate the point that it is not that we rely on intuitions to settle philosophical issues. Austin has warned us against confusions and muddles in ordinary language. So we are not to take ordinary usage to be the final arbiter of philosophical issues. There is muddle as well as treasure in the language of ordinary life. Linguistic intuitions might lead us astray, but we don't throw out the baby with the bath water.

IX. Intuitions on Authority: the Raz-Perry Disagreement

I have argued, in the previous two sections, that contrary to what Leiter has argued, the Weinberg et al. critique of the use of intuitions in epistemology and moral philosophy has no overall parallel in legal philosophy. Jurisprudential theses (about the function of law, for example) are not responses to fantastically fabricated examples soliciting our intuitions, which were the target of Weinberg et al. On the other hand, linguistic intuitions, unlike moral intuitions, can aid philosophical inquiry. To complete my response to the (muddled) charge that legal philosophers appeal to intuition in legal theory, let us examine some details of the Raz-Perry debate.

Recall, from my discussion of Raz's service conception of authority in chapter 2, that central to that conception of authority is the following thesis: an authoritative directive is an exclusionary reason, a reason that excludes from further consideration the reasons upon which the authoritative directive relies. Leiter cites Stephen Perry's objection that an authoritative directive is "a second-order reason [which is] a reason for treating a first-order reason as having a greater or lesser weight than it would ordinarily receive, so that an exclusionary reason is simply the special case where one or more first-order reasons are treated as having zero weight" (Perry 1987, 233). Leiter presents the case as if there is a direct conflict of *different intuitions* about authority, which in turn, is to be settled by their relative *intuitiveness*. He goes on to say that in the case of a court overruling a precedent, however, we see that the higher court does not treat the prior

court decision as authoritative because it restrikes the balance of dependent reasons differently than the prior court. This shows that authority does seem to go with exclusionary reasoning. If Perry's view were right, it entails the *unintuitive* view that an overruled precedent is still "authoritative" as long as the later court accords it more weight than normal. Leiter concludes that Raz's view "coincides with our intuitive way of thinking about the status of overruled precedents" and thus captures something essential about the concept of authority (Leiter 2007a, 131).[51]

I shall suggest that this disagreement is not a conflict of intuitions, much less to be settled by determining which view is more intuitive. It is a mistake to characterize the debate in terms of intuitions. To start with, as pointed out earlier, the different views on authority are based on complex arguments. Thus, characterizing them as intuitions diverges from the more or less stable contemporary usage of the term "intuition." Further, a closer examination of Stephen Perry's 1987 paper, "Judicial Obligation, Precedent and the Common Law," reveals that it is not that Perry just happens to have a different intuition of what authority is, rather his view on the authority of a precedent is embedded in a number of mutually connected arguments pertaining to some fundamental issues in jurisprudence. Let me lay out the structure of Perry's argument.

The overall purpose of Perry's paper is to show that the positivist account of understanding certain aspects of common law reasoning, in particular, the doctrine of

[51] But he adds a note saying that someone might not share his *intuitions*: Waluchow thinks it is equally natural to say that the latter court deemed the precedents' authority to be outweighed by strong reasons while Leiter thinks saying this is just saying that it is not authoritative. But Leiter stops there, because he is doubtful about this whole mode of philosophical argumentation: appealing to our intuitions (Leiter 2007a, 131, n.36).

stare decisis, is deficient.[52] Perry's argument, in the main, consists in the following theses:[53]

(1) Raz made an important distinction between two modes of practical reasoning: acting on the *balance of reasons* and acting on the basis of *an exclusionary reason*. The former assumes that all relevant reasons for actions are commensurable and assigns a weight to each of them. An agent acts on the basis of the total weight of each alternative course of action. The latter is based on a reason to refrain from acting on a reason or category of reasons. These two modes of reasoning correspond to two ways of understanding the common law practice of following precedent: the prior decision is regarded as binding unless a court has a positive reason for not doing so, or the prior decision is regarded binding as an exclusionary reason for a later court; the second view is how Raz interprets the practice of following precedents.

(2) There is, however, a third conception of precedent that corresponds to a mode of practical reasoning that Raz did not discuss: a court might consider a precedent binding unless it is convinced that there is *strong* reason for deciding otherwise (so they need to have more than simply *a* reason). Perry calls this the *strong Burkean conception*. The corresponding mode of practical reasoning can be considered as acting in accordance with a *weighted* balance of reasons: one acts on the basis of a second-order reason to give some first-order reasons a greater or lesser weight than in

[52] *Stare decisis*: the legal principle of determining points in litigation according to precedent.
[53] I shall limit myself to the outline of the argument. What follows is of course a very schematic and simplified version of the main arguments in Perry (1987).

an ordinary balance of reasons. This is a way of understanding second-order reason that Raz ignores; in fact, Raz's exclusionary mode of reasoning can be understood as one extreme of this way of understanding second-order reason.

(3) As we have seen, Raz's analysis of an exclusionary rule is the key to many fundamental aspects of positivism, including the justification of his Sources Thesis and the nature of judicial obligation.[54] Precedents, according to the positivist view, are to be regarded as exclusionary rules that are binding for both the citizens and courts alike. A court can overrule a binding precedent only when its justification lies beyond the scope of the exclusionary reasons;[55] it is not free to depart from a precedent merely because a later court thinks it a better thing to do.

(4) But this is not what common law precedents are like in real practice. A closer examination of common law practice shows that common law propositions and precedents cannot be characterized as instances of exclusionary rules in Raz's sense. The strong Burkean conception of precedent, however, can serve as the basis for an alternative interpretation of following precedent in common law. According to this view, a precedent is not binding or not binding, valid or invalid in an all-or-nothing fashion. The authority of a precedent is a function of a range of factors: the strength of the justification, its age, the hierarchical status of the deciding court, etc.

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[54] The primary obligation of courts, according to this view, is to apply pre-existing source-based laws. When disputes arise where there is no pre-existing law, the court settles the dispute through an exercise of discretion, and thus creates a binding precedent, offering authoritative guidance to the population and the subsequent courts.

[55] The scope of an exclusionary reason is the range of first-order reasons that are pre-empted by that exclusionary reason. For example, the defense of necessity and duress are beyond the reach of rules of the criminal law.

(5) This interpretation of the common law doctrine of *stare decisis* offers a better picture of the common law practice. It also points to a richer picture of judicial obligation and the function of law in general.

We can see that in places where Perry's view of the authority of precedent differs form Raz's (see point (4) for example), it can hardly be characterized as an intuition. This is because, for one thing, the view depends on an analysis and observation of common law reasoning in real practice. For another, it is integrated into a more complex argument, which connects with the large topic of practical reason. To call Perry's alternative view an intuition runs against the common characteristics of intuition such as immediacy, compelling, short, pre-theoretical, etc., as outlined earlier.[56] It is unlike the intuitive statements Locke gives, nor is it an intuition as a response to a fantastic example. It rather bears some resemblance to Kripke's intuition that proper names are rigid designators. But for the same reasons, Kripke's thesis is better not called an intuition. I have pointed out that the persuasiveness of this "intuition" does not merely come from its being *intuitive*. Rather, it depends on the whole structure of argument to give it persuasive elaboration—just like Perry's case for an alternative view of authority.

It is not that Perry gives us a different concept of authority that is more (or less) intuitive. The disputes between Perry and Raz are at a deeper level. Perry's argument opens up space for discussion in jurisprudence by offering us a new way of looking at a

[56] Audi's pre-theoretical requirement seems to be about the explanatory relation between the intuition in question and observable data. Perry's thesis involves observation of legal practice.

set of mutually related legal phenomenon, of which the disagreement with Raz on authority is one part. It follows that to evaluate Perry's view, and hence the dispute with Raz on authority, we must evaluate the argument as a whole. We must, for example, determine if Perry's addition to Raz's two modes of practical reasoning is tenable, whether the analysis of the common law practice is flawed, and/or whether the strong Burkean conception can do the work it is supposed to do, so on and so forth. It is not surprising that we won't be able to settle this dispute in short and easy terms, when we realize that we are theorizing about a complex and changing social institution, law. It is via these disagreements, however, that our understanding of law and society etc. are enlarged and deepened.[57]

Such a debate will never be settled at the level of whether one view is more *intuitive* than the other.[58] Even if Leiter's rhetorical, intuition-pumping question—"should we really say that an overruled precedent is 'authoritative' just because the overruling court says, 'We accord this precedent considerable weight in our decision, but in the end we decide the same issue the opposite way?'" (Leiter 2007a, 131)—can be legitimately asked and answered, we know in what sense an overruled precedent is authoritative and in what sense it is not. If I have to retake the final exam for some reason, it is not mysterious at all in what way the previous exam is "final" and in

[57] Here one is reminded of Hart's disagreements with early legal positivist John Austin: we have a much richer understanding of law thanks to Hart's theory of law. Hart did not give us an "intuition" about law that is different from Austin's.

[58] Even Saul Kripke, who thinks being intuitive is "heavy evidence in favor of anything" (Kripke 1972, 42) , does not think that being intuitive is the end of the story in doing philosophy.

what way it is not. No intuition is required.

If the points made above can be granted, we can begin to see the harmful consequences of characterizing legal debates as a clash of intuitions. Once these philosophical views are characterized as intuitions, they are on an equal footing. At that level we seem to have reached an impasse sometimes because there can be equally *intuitive* views. Leiter thinks this is intolerable, but the intolerability comes exactly from the fact that the views are represented as *intuitions*. As a consequence of that, the *depth* of a philosophical view vanishes. The nature of intuition rules that out: an intuition is usually *immediate*, *short and thus meager in content* and *isolated from other parts of our understanding*. Our views (even just the garden-variety type) come with varying depths; some are more centered in our worldview, and are connected with a host of other views, reasons, dispositions, commitments, projects, and some are backed by rational arguments, while some others are not. But once they are seen as intuitions, all these differences disappear. Characterizing philosophical views and insights as intuitions makes philosophy shallow in this particular way. Philosophy becomes shallow and unsatisfying because intuitions are shallow and unsatisfying. This feature of intuitions naturally invites, or paves the way for, Weinberg et al. type treatment, in which everyone's intuition is of an equal status as another's. But I have tried to show that there is something wrong with this approach from the very beginning: jurisprudential debates are not about intuitions. I am not trying to deny that looking at what anthropologists, sociologists, psychologists and others do and say can tell us informative things about law. In light of the above

discussion, however, we have reasons not to be naturalists with regard to jurisprudential methodology—if the reason to do so is merely the worry that we are faced with warring intuitions.

Chapter 4 Limits of the Criminal Law: A Case Study of Conceptual Analysis

I. Introduction: A Conspectus of the Previous Two Chapters

In order to properly situate this chapter, let me summarize what I have argued in the previous two chapters and indicate what I shall do in the rest of the dissertation. In chapter 2, I argued that contrary to some legal theorists' belief (e.g. Leiter 2007, Patterson 2006), Quine's influential attack on the analytic-synthetic distinction could not be deployed to undermine the conceptual analysis method as demonstrated in Raz's argument for Hard Positivism. The main reason is that conceptual analyses in Raz's theory do not seem to produce analytic truths.

Chapter 3 takes up the other prong of contemporary criticism of conceptual analysis in jurisprudence, i.e. that it relies on appealing to our intuitions, which has shown by empirical work to be unreliable. I argued, through a historical *and* analytical reflection on the concept of intuition, that this criticism is rather a misguided one. While there is very little use of intuition in the sense of being responses to fantastically constructed examples about particular cases, there is a legitimate role for linguistic intuition. A detailed examination of the Raz-Perry debate shows that characterizing jurisprudential debates as a conflict of intuitions causes more harm than good.

So far, then, my discussion has been largely negative, trying to counter the

criticisms directed at conceptual analysis from two major directions. In retrospect, the general point I made in chapter 2, I should think, is rather obvious. It is therefore a perplexing as well as interesting question why some philosophers think that Quine's work *would* dictate that "no project of 'conceptual analysis' gets off the ground" (Patterson 2006, 257).[1]

We commit ourselves to this thought only if we think (1) there is only *one* form conceptual analysis can take, i.e. producing analytic truths;[2] and (2) legal theorists like Hart and Raz etc., are committed to analysis of this kind. Chapter 2 (and my discussion of e.g. Hart's analysis of legal obligation and Perry's discussion of authority from chapter 3) shows that there are no good reasons to hold (2). But Quine's work is fatal for conceptual analysis in jurisprudence only if we also hold (1).[3] I shall argue (1) is false as well. Conceptual analysis in legal theories and other domains of philosophy can and does take forms other than what its critics (Leiter et al.) think. In other words, the term "analysis" does not need to be monopolized by Quine's or a logical positivist's use. Philosophers (not limited to legal philosophers) talk about conceptual analysis as a methodology for philosophy in different ways.[4] I shall begin to vindicate this point in this chapter and give

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1 One reason, perhaps, is that legal theorists have been characterizing their jurisprudential projects as *analytic/analytical jurisprudence*. This pervasive yet often unreflective use, along with similar use of the term "analysis," might have invited the thought that Quine's demolition of analyticity should undermine the methodological basis of these conceptual projects.

2 Perhaps to put the (mistaken) point differently, what's been called "conceptual analysis" can only take one form. Or, producing analytic truths is what conceptual analysis *is*.

3 This is the case because there is a possible objection to my project which says the following: we agree with you that legal theorists are not committed to doing conceptual analysis understood as discovering analytic truths, but your discussion only shows that their analyses are not cases of conceptual analysis. In response, one should ask: why think conceptual analysis can take one and *only one* form?

4 A further remark is in order here: the misunderstanding I have been discussing might also involve a historical dimension. There are reasons to think that perhaps unfortunate historical misunderstanding have resulted in

a more positive account of what conceptual analysis is. Chapter 5 takes a first step toward thinking differently about conceptual analysis by offering an alternative view of necessary truths in legal theory, thus loosening up the grip of the notion of analyticity, which figures predominantly in discussions of necessity and conceptual analysis. The last two chapters deal with more general issues of concept and conceptual analysis. Chapter 6 reflects on the nature of concept. Chapter 7 concludes the dissertation by offering a proposal of an alternative way of thinking about what conceptual analysis is.

No defense, and clarification, of the method of conceptual analysis works better than a demonstration of how it works and what results it can produce for us. Before an alternative picture of conceptual analysis is supplied and related issues addressed, we would benefit from looking at more examples of conceptual analysis, examples where this method is at work and proves to be fruitful. I have discussed cases of conceptual analysis mentioned in Leiter's work. In this chapter, I propose to examine conceptual arguments in another domain of legal philosophy: the philosophy of criminal law.[5] What

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lots of confusions in the methodological debate in contemporary jurisprudence. I have mentioned in the previous chapter that H.L.A. Hart himself, under the influence of the "new approach" to philosophy, first thought that the new analysis was like that of A. J. Ayer, a logical positivist (See Lacey 2004). Yet although he later explicitly diagnosed the mistake of logical positivism (Hart 1983), and told us what conceptual analysis is not, he never articulated what it *is*. More interestingly, there also seems to be a divide (not the cliché analytic/continental divide) within Anglophone philosophical circles on the nature of conceptual analysis: while there are people like Fodor who announced that "since Quine, the practice of conceptual analysis has lacked a fully rationale" and for philosophers doing conceptual analysis post-Quine, "there were guilty conscience wherever you look" (Fodor 2004), there are philosophers like P.F. Strawson who happily talked about conceptual analysis as "a favored description of [a philosopher's] favored activity" (Strawson 1992, 2). Strawson published this in 1992, 41 years after the publication of Quine's paper. Being one of the two people who co-wrote one of the most cogent responses to Quine, Strawson could not have been unaware of Quine's work. So, what explains this drastic contrast? I suspect that there is some interesting and perhaps important misunderstanding of conceptual analysis. The final chapter hence will start with a discussion exploring possibilities in those directions.

[5] This choice is to some extent not necessary, and goes beyond debates in the nature of law. However, the same methodological points emerge.

I want to accomplish below is threefold: (1) by analyzing a theory of criminalization, I present a concrete case of how the method of conceptual analysis is at work in a legal theory; (2) by looking at how conceptual analysis *actually* works in legal philosophy, I demonstrate that analyzing concepts goes beyond looking for analytic truths. (this point will echo the argument of chapter 2 and show that conceptual analysis does take different forms than what its critics allow); and (3) by showing how conceptual analysis contributes to the construction of a legal theory that is interesting on its own and likely to have significant social impact, I show that conceptual analysis as a philosophical method can be fruitful, and is an essential architectural technique of a legal philosopher.

II. A Theory of Criminalization and Conceptual Analysis

Let me begin by supplying some background of the legal theory I am about to examine. One distinctive characteristic of the current criminal justice system in the United States, which has been the subject of intense academic and policy debates, is the dramatic expansion in the size and scope of the criminal law. While we have various reasons to be concerned about this tendency to overcriminalize,[6] one central concern for legal philosophers is that too much criminal law unjustly creates too much punishment. To retard this tendency, therefore, a theory of criminalization—a normative framework that can help us determine whether given kinds of conduct should or should not be criminalized—has an essential role to play.

[6] E.g. it incurs massive opportunity cost; it is destructive of the rule of law, etc.

One recent attempt to provide such a theory is Douglas Husak's 2008 book *Overcriminalization: the Limits of Criminal Law*, in which he defends seven general constraints to limit the authority of the state to enact penal sanctions.[7] These constraints are divided into two categories: *internal constraints*, i.e. those that can be obtained from the criminal law itself, and *external constraints*, i.e. those that are imported from outside of the criminal law, i.e. a theory of the state. In what follows, I will provide a meta-analysis of Husak's work from a methodological point of view.[8] I shall examine how (part of) the theory is constructed and what explicit and implicit methodological tools have been employed, and argue that (at least) a significant portion of Husak's theory, what Husak calls the "internal constraints," is obtained through analyzing the relevant legal concepts.

III. Internal Constraints on a Criminal Code

What Husak calls "internal principles" in his theory of criminalization are: the nontrivial harm or evil constraint, the wrongfulness constraint, the desert constraint, and the burden of proof constraint. Husak maintains that "*any* respectable theory of criminalization must include these internal constraints; no adequate criteria to limit the penal sanction can afford to reject them" (Husak 2008, 55, original emphasis). Now, the question that guides my inquiry is: how does he come up with these four constraints?[9]

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[7] Husak admits that "I describe as a theory of criminalization even though it might be construed as a *decision procedure* for justifying criminal law" (Husak 2008, p.55, n.3).

[8] Again, methodology has implications for the substance of a theory of criminalization as well.

[9] In what follows, my discussion may sometimes depart from what exactly Husak had intended to say. I hope

Husak argues that the general part of the criminal law, the part that concerns a broad range of offenses rather than particular crimes,[10] actually contains sources for limiting its own scope. Two principles of criminalization can be obtained from the general part of the criminal law. The first principle is called "the nontrivial harm or evil constraint": "criminal liability may not be imposed unless statues are designed to prohibit a nontrivial harm or evil" (Ibid., 66). Taking positive law as it is, Husak argues that we can derive this principle by realizing that three familiar justification defenses would become *unintelligible* if criminal offenses are *not* designed to prohibit a nontrivial harm or evil. The first defense is called "lesser evil," "necessity" or "justification in general." The thought that grounds this defense is very simple and goes back to at least Aristotle: a defense applies to the defendant who does an action that is prohibited by the law, but in order to avoid a greater harm or evil.[11] Next, consider the defense of consent. The Model Penal Code states that "the consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent…precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."[12] Third, the defense of *de minimis*: "The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct… did not actually cause or threaten

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this can be justified on two grounds: 1) this is a reconstruction of large tracts of issues and discussion in the book; some regimentation is necessary; and 2) In doing this, I have a different purpose and interest in mind.

[10] Questions such as: Why should all crimes include a voluntary act? What mental states make agents culpable for their criminal conduct? Should persons be ever punished for their negligence?, etc.

[11] See Aristotle's *Nicomachean Ethics*, Book III, chapter 1. The example discussed there is throwing away cargo good off the ship to save the ship in a sea. Aristotle thinks such actions are not as blameworthy.

[12] Model Penal Code 2.11(1).

the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction."[13] Husak argues since "none of these three justification defenses can be *interpreted* or *applied* unless each statue is designed to prevent a nontrivial harm or evil," positive law itself entails the nontrivial harm of evil principle (Ibid., 67, emphasis added).[14]

The second constraint on the scope of criminal sanction emerges from a consideration of the nature of excuses, another large category of legal defenses. Husak adopts the influential treatment of excuses by Jeremy Horder, who argues that any claim to excuse is "an explanation for engagement of wrongdoing…that sheds such a favorable moral light on D's conduct that it seems entirely wrong to convict, at least for the full offense."[15] The idea here is very straightforward: the very practice or institution of excusing someone in a legal case presupposes that the defendant has engaged in some wrongful acts. In Husak's words, "legal excuses can be understood only against a background of criminal wrongdoing" (Ibid., 72). If the defendant has not engaged in wrongdoing at all, then there is nothing to excuse. "Because *wrongdoing is included in this concept of excusing conditions*," Husak agues that the very practice of applying excuse defenses in criminal law presupposes the second constraint on criminalization: "penal liability may not be imposed unless the defendant's conduct is (in some sense)

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13 Model Penal Code 2.12(2).

14 Husak also makes an ancillary illustration to support this principle (the point is that decisions about whether conditional intentions amount to mens rea presuppose the nontrivial harm or evil constraint). I think it is not essentially different from the above argument. Thus I will not include a discussion of it here.

15 Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004), pp.8-9.

wrongful" (Ibid., 73, emphasis added). This is the *wrongfulness constraint*.[16]

Turning to the third and fourth internal constraints on state authority to enact penal offenses, Husak links the current concern with one major topic in the philosophy of criminal law: the nature and justification of punishment. He argues that normative justification of punishment provides another source of constraints on criminalization. Some conceptual background is in order here: a theory of criminalization is a set of principles to limit state authority to enact *criminal* law. But why limiting criminal law in particular, rather than, say, tort law? What is so special about criminal liability that concerns us? The answer Husak provides is that criminal law, and criminal law *alone*, subjects offenders to *state punishment*.[17] Husak treats criminal law and (state) punishment as providing a defining characteristic for each other.[18] The identity of the criminal law with the susceptibility to punishment, according to Husak, approximates a "conceptual truth."[19] Now a fundamental question for a theory of criminalization arises: for what conduct may the state subject persons to punishment? And this immediately connects with "one of the deepest quagmires in the history of political and legal philosophy": the justification of state punishment. It is on this issue the opinions of legal

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16 Husak offers a further illustration of this principle. The gist of this illustration has to do with the controversy of strict liability, under which people can be held criminally liable for outcome they did not intend or even cause (thus theorists have generally denounced this offense). The point is that we cannot identify what is objectionable unless penal sanctions require wrongdoing. I will, for the sake of space and relevance, skip a discussion of this second illustration of the *wrongfulness constraint*.

17 The point is echoed by the work of other commentators. For instance, George Fletcher comments: "the institution of punishment provides the distinguishing feature of the criminal law". See Fletcher (1998, 25).

18 Husak thinks that there are (presumably) theoretical advantages resulting from that (Husak 2008, 77). One of them being: it explains why a theory of criminalization is needed.

19 Elucidating the nature of such truth is part of the goal of my dissertation. For philosophers like Williamson (2006) and Fodor (2004), perhaps for different reasons, "conceptual truths" don't exist.

theorists divide in profound and radical ways. However, legal theorists of various persuasions all seem to agree that the infliction of punishment requires justification, even though they disagree *how* it might be justified. By connecting the concept of criminal law with the concept of punishment, Husak is able to explore the implications of this connection. The most significant theoretical consequence of this connection is that if there are constraints on any theory of justification for state punishment that must be satisfied before the punishment is justified, these constraints will also have limiting effect on the content of criminal law.

It is against this conceptual background that Husak introduces his third constraint on criminalization, the *desert constraint*: punishment is justified only when and to the extent it is deserved. It follows that undeserved punishment is unjustified.[20] It is unclear to me how exactly Husak argued for this constraint/principle. Husak probably thinks it is a self-evident truth that punishment of all forms is not justified if undeserved. After all, he immediately says: "I admit that a persuasive *argument* for these constraints is difficult to construct. I would have little idea how to respond to a theorist who alleges that punishments are justified even when they are *not* deserved," and if the state were to respond to an individual "your punishment is not deserved, but still it is justified," the response is "so peculiar that further dialogue between the individual and the state is unlikely to be fruitful" (Ibid., 83, original emphasis).

[20] We might think the desert constraint and the second constraint, the wrongfulness constraint, are identical, but Husak points out that they are different, for three reasons: first, punishment is undeserved if the wrongful conduct can be excused; second, punishment is undeserved if it is *disproportional*; and finally, *private* wrongdoing does not deserve state punishment.

Having established that "any plausible theory of punishment *must* constrain the substantive criminal law (Ibid., 89, original emphasis), Husak proceeds to a further question: what is it about (state) punishment that makes it so hard to justify? He suggests that the answer lies in two essential features of state punishment: *hard treatment* and *censure*.[21] These two problematic features are what render state punishments so hard to justify, and it is exactly because of these two features that imposition of punishment requires justification. The imposition of hard treatment and censure, brought about deliberately rather than accidentally under normal circumstances, violate important personal interests. The setting back of personal interests in the case of legal punishment is to such a significant degree that it (often) transcends any utilitarian grounds.[22] Husak then introduces the idea that the interests that are set back in the case of punishment rise to the level of *rights*. Husak argues that we have *a right not to be punished*. Those who deny this would have difficulty showing why our strong (moral) intuition that *mere* utilitarian gains do not justify legal punishment is mistaken (Ibid., 101).[23] Conceptual distinctions are made to clarify the status of the right implicated in punishment: we would

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[21] The former ingredient was recognized by H.L.A. Hart as the first element in a standard or central case of "punishment": "It must involve pain or other consequences normally considered unpleasant" (Hart 1984, p.4). However, not all state inflicted unpleasant measures are modes of punishment (e.g. cutting back on tax benefits is unpleasant, but not a form of penal punishment). Husak argues that there must also be a stigmatizing element in it, what he calls an "expressive dimension" of punishment.

[22] This is not Husak's exact words, but I hope my reconstruction captures his central thought here. The qualifying "often" is used because Husak maintains that "we should not invoke the familiar metaphor of *trumps* to express how rights withstand competitive utilitarian considerations. I do not mean to suggest that utilitarian reasons cannot *possibly* justify state actions that implicate rights. No rights—including the right not to be punished—should be protected come what may" (Ibid., 100, original emphasis).

[23] This right not to be punished is not recognized by contemporary theorists. However, Husak points out that its novelty is no reason to deny its existence, although he concedes that he has not produced a definitive argument for its existence, hence the conclusion is tentative. Part of the issue here hinges on the nature of rights, and how the existence of *any* right can be substantiated.

not hesitate to say that *un*justified punishment *violates* rights, but when the punishment is justified, we say the rights are *infringed*; and in both cases, our rights are *implicated* in punishment.[24] Further, rights can be *cancelled* or *overridden*: in the case that you release me from the promise that I take you to the airport, your right has been *cancelled*, while if I take your car to take my friend who is bleeding to death and your car is the only one available to get to the hospital on time, your right is *overridden*. Which way of conceptualizing right is more plausible for punishment? Husak argues that in the case of a right having been cancelled, it ceases to exist, while if it is overridden, i.e. in cases where the punishment is justified, it is plausible to think that it somehow leaves a residue, something seems to be owed to the person who possesses it. Husak thinks the second way is the more plausible way to characterize the situation of right in the case of punishment. When rights are infringed, even when the punishment is justified, they are not cancelled; there is something owed to the punished. And what is owed to the person is precisely an account that justifies the punishment.

The upshot of this discussion, essential to the project, is that employing "the language of rights" to describe what is problematic about punishment reminds us that laws backed up by criminal sanctions are "presumptively unjust" and we need to be more vigilant about demanding justifications for punishment (Ibid., 99). Generally, the burden of proof in justifying the infringement of rights is on those who are likely to violate them, in this case, those state responses involving penal sanctions. If so, employing "rights talk"

[24] "Actions *implicate* a right when they are contrary to that right" (Ibid., n. 183).

to characterize what is problematic about legal punishment leads us to a fourth constraint on criminal law: the burden of proof should be placed on those who favor criminal legislation.

I have thus finished my discussion of the internal constraints on criminal law in Hsuak's theory of criminalization.[25] In what follows, I will uncover and examine the methodological assumptions of Husak's project, more specifically, whether, and if so, to what extent, the principles obtained are results of conceptual analysis.

IV. Methodological Observations and Reflections on Husak's Project

I will simply assume that Husak's theory is philosophically interesting and has made important contributions to the current literature on criminal law.[26] If Husak's result is widely accepted and put into practice, we can entertain the hope that it will produce some positive social impact. My analysis of this theory of criminalization in this section is that of an (philosophical) observer, taking an interest in finding out what a legal theorist does when he theorizes about law, and what the methodological commitments are, either explicitly recognized or implicitly assumed.

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[25] Husak is going to develop three more principles that he termed "external constraints". More importantly, he is going to supply *content* to the afore-developed four principles by applying them to offences that are new additions to the criminal law, and to crimes known as *malum prohibitum* (conduct not wrongful prior to or independent of law). I will not pursue these lines of inquiry here.

[26] I hope to have brought out its philosophical interest in my previous discussion by showing how it bears on important questions about harm, responsibility, rights, etc. For some of the responses to Husak's book, see Gardner (2008), Yaffe (2010), and Segev et al. (2010).

IV.1 Conceptual Analysis: Concept and Practice

The first point I want to make is that the set of constraints on criminal law emerging from Husak's discussion are results of conceptual analyses of, or reflection on, relevant legal concepts, such as justification, excuse, legal right, etc. Husak did not use the term "conceptual analysis," nor did he explicitly say what his methodology was. But I should think that this characterization of the methodology is uncontroversial. He made a remark that his methodology is unremarkable (Ibid., vi). By "unremarkable" Husak means constructing thought-experiments and soliciting widely shared, uncontroversial, intuitions from the readers.[27] And one can see that there are also multiple instances of appeal to how we ordinarily talk in Husak's theory. These are techniques and approaches traditionally associated with the method of conceptual analysis. If my characterization were disputed, however, I would have to ask the dissenters what Husak's methodology could be, if it is not conceptual analysis. What would be an alternative way of characterizing this project methodologically? After all, it seems rather implausible to say that Husak has done some *scientific* or *empirical* work, taking these terms in their usual sense.[28]

Another way to get a sense of Husak's methodology is to look at his comments on his own writing. As mentioned earlier, he starts from what legal theorists have already

[27] He explicitly says that he avoids "wildly fanciful and unfamiliar hypothetical cases" (Ibid., vi). I shall return to this below, in section IV.2. On intuitions, cf. chapter 3 of this dissertation.

[28] Husak allows a role for empirical research (e.g. in applications of the harm principle and the defense of excuses), but it is extraneous to his project of articulating a theory of criminalization.

said and therefore are likely to agree with, and reminds us what we also commit ourselves to if we accept those things already said. For example, as mentioned in the previous section, Husak argues that the first two constraints can be found in legal theorists' work on the general part of criminal law. They are just unaware of these constraints or have never paid sufficient attention to them. [29] These are characteristics of philosophical/conceptual reflections, reminiscent of Wittgenstein's remark that a philosopher's job is to assemble reminders for a particular purpose. I shall take it as uncontroversial that Husak's methodology, in large part, involves conceptual analysis.[30] Let us now take a closer look at this method in his theory.

I shall first point to an interesting feature of Husak's theorizing.[31] Husak's discussion of the first and second constraints on the criminal law seems to operate at two levels which mutually constitute each other: our legal *practices* and our *concepts* of these practices. It seems straightforward to see that the analysis is operating at the conceptual level: the first constraint is obtained by analyzing legal justifications in which the

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[29] More specifically in the discussion of the first constraint, he comments that "although many commentators hold harm or evil to be prerequisites for the imposition of criminal sanction, none appears to have noticed that the foregoing [justification] defenses are unintelligible unless their belief is true" (Ibid., 68).

[30] Wittgenstein (1953/2001, sect. 127).

[31] A caveat is worth reiterating. By saying that Husak's method is conceptual, we should not think of it as focusing on the meaning of terms and being committed to the linguistic/factual (or the analytic-synthetic) distinction, etc. This picture of conceptual analysis is false and detrimental, as I have been trying to point out in earlier chapters. It explains some of the hostility toward conceptual analysis as a philosophical methodology: if we think of conceptual analysis in such a way, there is already an arid atmosphere surrounding it. The reason is that the method, understood in this mistaken way, is severed from experience! The truth is, as I have indicated in discussing Raz's argument in chapter 2, conceptual analysis is always in touch with experience. Philosophers do not usually appeal to experience to settle a philosophical issue. But analyzing concepts and making a philosophical point without appealing directly to experience to validate it does not mean that they do not involve experience in some ways. This is a point I made in chapter 2. Here I shall give further support to this picture of conceptual analysis by taking a closer look at some of the details in Husak's project.

concepts of harm or evil are involved.[32] The inference here is particularly obvious since the three justification defenses Husak appeals to, "lesser evil/necessity," "consent," and "*de minimis*," as formulated in the Model Penal Code, all contain the concept of evil or harm.[33] A defense is supposed to negate or mitigate a criminal offense. Toward that end it has to make reference to the "harm or evil sought to be prevented or avoided" in the stipulations about the offense, and show that it is in the actual case either of a much smaller magnitude than what was sought to avoid, precluded by consent or too trivial to warrant criminal liability. If the criminal statue does not seek to prohibit a (nontrivial) harm or evil, there is nothing for a defense to defend, negate or mitigate. A reflection on the concept of *defense* in these cases therefore shows that criminal statues about *offense* has to presuppose this constraint for the possible defense to *make sense*—a point I shall come back to in a moment. Likewise, a consideration of similar nature is applied in the case of the second constraint, in an even more straightforward way. It is obtained when we reflect on the concept of excuse. It is the conceptual presupposition of an excuse that the conduct to which it applies must be in some sense wrongful: otherwise we cannot even apply the concept of an excuse, since it works only by shedding a favorable (moral) light on the conduct that is *prima facie* wrongful.

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[32] An objection might be interjected there: why not talk about *words* instead of *concepts*? Can Husak's analysis be thought of as an analysis of meaning of words and therefore is a semantic project, as Dworkin might say? This involves multiple difficult questions. Discussions of what meaning is are so copious such that if one discusses this issue, even in a sensible way, one discusses nothing else. Some reflections on meaning will be offered in chapter 7. The objection also raises the question of what a concept is. Some reflections on the distinction between a word and a concept will be offered in chapter 6. Here, only a very brief response will be attempted: first, it is entirely unclear that Husak's focus of analysis is mere *words*, understood as pieces of our language (either in acoustic form or visual forms). Second, Husak seems to be committed to the idea that only concepts are the objects of a philosopher's analysis, by talking about concepts throughout his book.

[33] See my discussion in section III.

What happens if things were otherwise, i.e. criminal liability *were* imposed when criminal statues are *not* designed to prevent some harm or evil and when the defendant's conduct is *not* wrongful? Husak's answer is that in such a situation, our familiar defenses of justification and excuses are *unintelligible*: they don't make sense to us, and we cannot understand them.[34] It is important to notice that Husak uses the term "unintelligible" and a failure of "understanding" to describe such a counterfactual case, in contrast to, say, "false," "mistaken," or the justification or excuse being "too weak." It is one thing to say that an excuse does not work because it is too weak or false for the wrongdoing at hand; it is quite another to apply the concept of excuse where the conduct in question does not involve any wrongdoing, except perhaps as a joke, or, if it were to be serious, an expression of inhumanity.[35] What this shows are features of our conceptual structure that involve concepts such as justification, excuse, harm, and wrongdoing in legal cases.[36] If a justification defense does not refer to the harm/evil sought to be prevented in the offense, or if a legal excuse is to be applied to cases where the conduct is not wrongful, we simply cannot *recognize* the concepts of justification and excuse. They don't make sense any more, precisely because the concepts have been misplaced (hence, words misapplied). Our conceptual foothold, so to speak, has been lost while the linguistic forms still linger.

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[34] These are Husak's own words across pp.66-76 in his book.

[35] I am having in mind what the Nazi *Hauptsturmführer* Amon Goeth said to his servant boy in Spielberg's film *Schindler's List*: "I pardon you."

[36] It is a good question to ask to what extent our legal concepts are different from our ordinary concepts. I am not going to pursue it here. Alan White (1985) has argued that they are the same.

Yet there is another important aspect of the matter. It is a truism to say that our actions can become unintelligible as well. Suppose I am waiting for a bus and the young man standing next to me suddenly says to me: "The name of the common wild duck is *Histronicus bistrionicus bistrionicus*." His utterance makes sense to me (assuming I happen to also have some quite detailed knowledge about wildlife), but what is puzzling is not so much the utterance itself as his *action* of making such an utterance, *to me*.[37] Now we can see that conceptual analysis in Husak's argument also involves a second level: the analysis is about legal *concepts* of justification and excuse, but at the same time, they are about the legal *practices* of applying defenses of justifications and excuses. When I reflect on excuses, for example, what am I reflecting on? It is natural to say that I am reflecting on the concept of an excuse, as well as the practice or phenomenon of excusing. There is no way to make a conceptual point such as "wrongdoing is included in this concept of excusing conditions" (Husak 2008, 72), if our legal practices were not practiced in that way. This point is indicated in Husak's own writing (even though the author himself seems to be unaware of its methodological significance) when he says e.g. that if things were otherwise, many of the defenses in the general part cannot be *understood* or *applied*.[38] "We *simply* cannot understand or *apply* many of the defenses in the general part unless criminal statues are designed to prevent a nontrivial harm or evil"(Ibid., 68, emphasis added). Husak considers an imaginary jurisdiction that prohibits

[37] The example is from MacIntyre (2007, 210). Of course actions can be unintelligible in different ways and to different degrees. Some of them can be rendered intelligible by supplying more background information, e.g. the young man mistook me for a spy he is supposed to get contact with.
[38] See Ibid. 66-8, 73, etc.

users of prescription drugs from removing the medicines from their original containers. Now a defendant commits such an offense prior to his vacation to save himself the inconvenience of carrying extra bottles. Husak asks whether the defendant is wholly or partially excused. It is impossible to answer this question one way or another because "*it makes little sense* to inquire whether the defendant's reasons for committing cast his behavior in a favorable moral light" if the conduct proscribed does not appear to be wrongful in the first place (Ibid. 73, emphasis added). This shows that when a statute does not seek to prevent a harm or proscribe wrongdoing, what is unintelligible is not only the legal *concepts* of justification and excuse, but also the legal *practice* of applying these defenses to the defendant.

We may ask: what is preventing us from applying these defenses here? Our knowledge of law or our intellectual capacity falls short? The situation is rather like someone who wants to command that the sun should rise at 2am, which is simply not in his power. But this lack of power of a person is not something that could be remedied: it is lacking in a particular way, that is, given our understanding of things, and given the nature of things, a sunrise is not something that could be commanded by us. Raz made a similar point: a tree is not the right kind of thing to have authority and the possibility is *conceptually* ruled out.[39] The man could have a linguistic performance of this command, even accompanied by bodily gestures that usually go with a command, but the whole

[39] Is it logically ruled out? In the strong reading of the word "logic," it is not. We can imagine a case in which a man could command the sun to rise, just like a tree starts talking to us and issues good reasons for actions, etc. In the weak reading of "logic", as in when we say "the logic of scientific discovery", it is.

action is still farcically empty (as empty as the ceremony of my left hand "giving a gift" to my right hand). The conceptual background for applying the concept of command is missing here. So is the factual background for the actual commanding. It is hard to make a distinction whether it is our concepts that are derailed or it is that we have a rather different practice that no longer makes sense in *our* form of life. But the fact that it is hard to distinguish one from the other is precisely because there is a tight connection between our concepts and experience of the practice: our concepts are grounded in and shaped by our experiences; and concepts can in turn structure, expand, and deepen our experience.[40] When we analyze (legal) concepts, then, the analysis involves our experience. This is often because they *constitute* one another.[41]

IV. 2 Conceptual Analysis: Connections and Innovations

We see in the above discussion that an analysis of a (legal) concept is at the same time an analysis of our experience of a legal practice in the area where the concept is naturally rooted. I now move on to discussing a further feature of the conceptual method as employed in working out the third and fourth constraints in Husak's theory. It involves something methodologically different from what has been the case in the first and second constraint. It is here that we see most clearly that conceptual analysis goes beyond finding analytic truths.

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[40] This happens when, for example, when we learn a new concept. A detailed account of the interactions between concepts and experience is a very large and difficult topic that I cannot go into here. I only need the general point that when we analyze concepts, we are attending to experience in a certain way.

[41] Kant's famous statement is relevant here: thoughts without content are empty; intuitions without concepts are blind. Kant (1781/1958, A51/B75).

As we have seen from earlier discussion, the third and fourth constraint on criminal law are results of linking the concept of criminal law with the concept of state punishment, and Husak himself is conscious of this move, as well as its consequences and benefits.[42] A preliminary point from Husak's discussion is that sometimes a conceptual connection is revealed at a linguistic level, though perhaps in some other language rather than in English. For example, in German *Strafrecht* (criminal law) indicates that criminal law essentially has to do with *die Strafe* (punishment). When a conceptual link is reflected at the level of linguistic practice, it is a good reason to think that there is a tight connection between the concepts, i.e. the connection is established in a stable way. It is hence not surprising that Husak thinks that the identity of the criminal law with susceptibility to state punishment is so tight that it approximates a *conceptual truth* (Ibid., 78, emphasis added).[43]

The main point I want to make is that unlike the first and second constraints, which are obtained by examining conceptual presuppositions and relevant legal practices, the third constraint follows from *connecting two concepts*.[44] It is from this connection between criminal law and punishment that Husak derives the principle that criminal liability must be deserved, since no one would accept undeserved punishment. The rest of the conceptual distinctions Husak draws (e.g. between desert and wrongfulness) then

[42] He writes: "the thesis linking the criminal law with state punishment has the advantage of resolving two problems simultaneously" (Husak 2008, 77)
[43] Though he thinks an appeal to such truths is no argument for the connection on its own.
[44] Or, to put it differently, we might say that the connection is already there and it is the work of a legal philosopher to reveal it and call our attention to it.

further delineates the conceptual space this connection occupies and why it is significant. This shows that such a conceptual move, that is, connecting two concepts, can be theoretically fruitful, provide new perspective, and deepen our understanding. It is important to note that however tight the connection is between criminal law and punishment, the statement "criminal law involves punishment" is not analytic, if the paradigm cases of analyticity we are thinking about are classic analytic truths such as "a bachelor is an unmarried man," "a cat is an animal," and "a square has four sides." The statement is not derived from the "meaning" of the term "criminal law." This is because we could imagine a system of criminal law without punishment. Defining something as a "crime" does imply that some public response is called for, but as Duff puts it:

> [T]hat public, condemnatory response could consist in nothing more than, for instance, some version of a criminal trial which calls the alleged wrongdoer to answer for her alleged wrongdoing, and condemns her for it, through a criminal conviction, if she is proved guilty. One can of course count a criminal conviction as a kind of punishment: but it does not entail the kind of materially burdensome punishment, imposed after conviction, with which penal theorists are primarily concerned (Duff 2013, section 2).

It follows that a criminal law might still be a criminal law without punishment, but a bachelor could not be a bachelor if he were married, nor could a square be a square without having four sides.

We have seen in the previous discussion that the fourth constraint on the criminal law, the burden of proof constraint, is dependent on the thought that any legal punishment is "presumptively unjust." That thought follows from thinking that we have *a right not to be punished* and legal punishment, even if justified, infringes and overrides

our rights. It is through a certain connection between *punishment* and our *rights* that we come to see legal punishment as presumptively unjust, and once that connection is established, it is a short step from there to claim that the burden of proof should be placed on those who favor criminal legislation. The conceptual maneuver here is hence again a connecting move—only less obvious than in coming up with the third constraint. It involves establishing connections between two concepts that are not usually thought of together. As a result, some significant results follow. It can be therefore said that the move is an *innovative* one. This innovative aspect was obvious to the legal theorist himself. In the course of discussing the fourth constraint, Husak says he is "*employing the language of rights* to describe what is morally problematic about punishment" and shortly after he says his "*decision* to describe what is worrisome about punishment in terms of rights helps to combat the problem of overcriminalization by reminding us laws backed by the penal sanction are presumptively unjust" (Ibid., 99, emphasis added). It is clear from this way of putting it that introducing the concept of right into the context of legal punishment has some novelty rather than necessity, and this is a kind of *decision*. The theoretical benefit is that when we think of punishment in tandem with rights, we then have to think of the content of criminal law in a different way.

One final methodological remark before concluding. Husak points out in the preface of the book that his methodology is "unremarkable," in that it consists of thought-experiments, soliciting readers' judgment to imaginary cases. He explicitly mentions that he avoids "wildly fanciful and unfamiliar hypothetical cases that have

helped to give philosophy a bad reputation among legal theorists" (Ibid., vi). Later in the book, he remarks that "throughout the book, I appeal to specific intuitions rather than to abstract principles to defend my judgments that an action is or is not wrongful" (Ibid., 76). In a different context discussing the third internal constraint, he remarks that his "effort to provide content to this constraint will proceed by developing intuitions I am confident are widely shared" (Ibid., 83). I agree with Husak that "wildly fanciful and unfamiliar hypothetical cases" cannot deliver any reliable philosophical conclusions. But if I am right about "intuitions" in chapter 3, then it is best not to describe the conceptual methodology discussed above as soliciting *intuitions*, since that might generate confusions or attract misguided criticism from critics of conceptual analysis (e.g. as if it is a special faculty). In fact, there was not much to *intuit* in my analysis of Husak's argument above. This point about intuition of course is tied into the point made earlier, that our conceptual scheme is not only in touch with but also in part grounded in our experiences. Our "widely shared" reactions and judgments reflect our common experience, and that does not require a lot of intuition or intuiting. In his famous paper, "Moral Luck," Bernard Williams invites us to reflect on how to think and feel about some rather unusual situations (the situation of the creative artist Gauguin and Anna Karenina in Tolstoy's *Anna Karenina*) in light of how we tend to think and feel about more usual situations. He cautions that we do this "not in terms of substantive moral opinions or '*intuitions*' but in terms of the *experiences* of those kind of situation" (Williams 1982, 22, emphasis added). I think there is a methodological lesson for philosophers in Williams's

advice.

V. Concluding remarks: Two Conceptions of Conceptual Analysis?

Any thinking or rethinking of philosophical methodology must involve seeing and understanding how philosophical work is actually done. Toward a fuller defense and clarification of conceptual analysis as a legitimate and fruitful methodology for legal philosophers, I have in this chapter discussed in detail the construction of (part of) a legal theory and the role conceptual analysis plays in such a project. What the above discussion has shown, in the main, are the two following results.

First, we see what conceptual analysis can do for us. In this case, we see that it contributes to a theory of criminalization that is likely to have significant impact on social justice. Second, more importantly, if the project of coming up with such a theory essentially involves examining the legal concepts, my discussion shows that we cannot, without immense difficulty and distortion, fit this kind of conceptual work into the model of conceptual analysis under attack by Leiter/Quine. In other words, the model of conceptual analysis as looking for analytic truths is far from being adequate as a characterization of the methodology as it is actually employed in varieties of philosophical works. If it is still unclear in the discussion of the first and second constraint on criminal law that the results are not analytic truths, it should be clear from the discussion of the third and fourth constraint that the innovative conceptual connections established are *not* analytic. It would be an implausible stretch to say that the

statement "criminal law involves punishment" is analytic, just like "a bachelor is a unmarried man." It is equally implausible to say that it follows from the meaning of the word "punishment," as a matter of linguistic meaning, or "definitional consequences" (a term used by A.J. Ayer), that a person being *punished* has a certain *right*, and therefore the statement "we have a right not to be subject to legal punishment, because of its deliberate infliction of harm and stigma" is analytic. None of these ring true.

If this conclusion is warranted, then a further, more important question arises: if the model of conceptual analysis that is mainly focused on discovering analyticity—a notion attacked by Quine, rehearsed by people like Williamson, Fodor, Leiter, etc., to criticize conceptual analysis as a dead end for legal philosophers and philosophy in general—does not fit the method that is actually employed in many philosophical works, what would be an alternative way of characterizing it so that we can capture the nature of this methodology that is widely used and still called "conceptual analysis"? I suggest that thinking of conceptual analysis in terms of connecting concepts provides us with a new direction of search.[45] Instead of saying that the theorist analyzed the concept of legal punishment and found that one of its components is the concept of right, it is, I suggest, more natural and sensible to say that the theorist connected the two concepts in a manner such that some interesting and theoretically significant results followed. I shall argue the idea that conceptual analysis as a practice of connecting one concept with other concepts

[45] Even in the case of the concept of an excuse, where "wrongdoing is *included*" (Husak 2008, 72, emphasis added), we might think in this way. I say more about this in chapter 7.

(nearby or far way) can be fruitfully employed to think about conceptual analysis in general. An account of conceptual analysis as *connective analysis* is a far better way to characterize this method employed by many philosophers. Before that final suggestion, something about the nature of necessary truths—as sometimes the claims of conceptual analysis take that form—and more generally of concepts, must be said. These are what I will turn to next.

Chapter 5 On the Nature of Necessary Truths in Legal Theory: A Lesson from Wittgenstein's *On Certainty*

I. Introduction: a Puzzle about Necessity in Law

Starting with this chapter, I begin to discuss what conceptual analysis is, if understood properly. My discussion will inevitably touch on some general issues that go beyond legal philosophy—especially in the last two chapters. As a first step toward understanding conceptual analysis properly, I propose to deal with the problem of necessity in legal theory. There are two major reasons for such priority. First, the question whether we can legitimately speak of "necessary truths" in theorizing about a human institution and social practice that changes over time is an interesting one on its own.[1] Second, the status of necessity claims seems to stand and fall together with the prospect of conceptual analysis as a legitimate methodology. A lot of criticism of conceptual analysis in legal theory replicates those of necessity or necessary truths. Recall that in his criticism of conceptual analysis, Leiter equates necessity with analyticity, and assumes that Quine's attack on the analytic-synthetic distinction also undermines necessity talk in legal theory (Leiter 2007b, 175-176).[2] Likewise, in Patterson (2011), three reasons "why unreflective recourse to claims of 'necessity' is problematic" are given: Quine's critique of the analytic-synthetic distinction, the

[1] We can ask many interesting questions here: What makes them necessary? What is the nature of a necessity claim in legal theory in contrast to logical or metaphysical necessity, or, are they the same after all?

[2] I have already mentioned problems of this view in chapter 2. I shall argue in chapter 7 that equating necessity with analyticity is distinctively a logical positivist notion.

so-called "experimental philosophy" demonstrates widespread divergence in linguistic intuitions, and that there is a "catalog of monumental failures of conceptual analysis." Thus Brian Bix has written:

> [T]he possibility of 'necessity' talk in jurisprudence goes hand-in-hand with the possibility of conceptual analysis: if one concludes that one is impossible or inappropriate in discussing law, then likely the other is as well….[W]ithout a clear understanding of what is meant by a claim of 'necessity' in jurisprudence, we cannot begin the process of defending conceptual analysis (Bix 2003, 538, 556).

The reason that the two are closely connected seems to be patent: the conceptual analysis approach to the nature of law aims at discovering *necessary* features of the concept of law and most theorists hold that only necessary features reveal or explain the nature of law.

What are some of the necessity claims made or necessary truths posited by legal philosophers? One prominent example, as I indicated in chapter 2, is Raz's claim that law necessarily claims legitimate authority. As we saw, that claim is central to Raz's argument for the positivist account of the nature of law. A cursory survey of literature in legal philosophy shows that the talk of necessity is not merely an idiosyncrasy of Raz's theory. Jules Coleman, for example, takes the project of jurisprudence to be identifying "the essential or necessary features of *our* concept of law" (Coleman 1998, 393 n.24).[3] Julie Dickson holds that a successful theory of law "consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law"

[3] The complications involved in using "*our* concept of law" or "*the* concept of law" will be further discussed in chapter 6.

(Dickson 2001, 17).[4] Scott Shapiro writes in a similar sprit: "to discover the law's nature…would be in part to discover the necessary properties, that is, those properties that law could not fail to have" (Shapiro 2011, 9). These legal theorists all seem to share Raz's pronouncement that "A claim to necessity is in the nature of the enterprise [of the general theory of law]" (Raz 1996, 2). Moreover, there are legal theorists who are less interested in advancing a general theory of law but nonetheless employ terminologies in the same spirit.[5]

The nature and status of such claims in legal theory require clarification and defense. And the clarification and defense would have implications for conceptual analysis. Bix (2003) calls people's attention to the status of necessity claims in Raz's theory, but he does not go any further in clarifying or defending the notion of necessity in jurisprudence. However, Bix made a brief suggestion: the kind of necessity involved in legal theory is grounded in a community's self-understanding and way of life and perhaps is a Wittgensteinian notion (Bix 2003, 555-556). My purpose in this chapter is to follow this suggestion and take a step toward clarifying necessity in jurisprudence. I propose that

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4 Dickson notes immediately "it would be far beyond the scope of this work to enter into a discussion of the kind of necessity which might be in play here."

5 For example, Nicola Lacey, in an essay discussing the "Hart-Fuller" debate, describes Hart's argument as "an analytic truth about the concepts of law and legality" (Lacey 2008, 1068). Similarly, Ekow Yankah writes about liberal retributivism's account of justified punishment "in a manner that lays claim to analytical truth" (Yankah 2012, 1). The two examples involve the term "analytic truths." My previous discussion of Quine shows that speaking of analytic truths in these cases can be misleading and problematic. Legal theorists should perhaps be more careful in their usage of these terms. For another example, in Kenneth Himma's recent work on legal obligation, he employs term "necessary feature" and "conceptual truth" interchangeably and widely throughout his writing (Himma 2012). Himma writes: "Hart seems to be conceiving the problem of law's normativity as the problem of explaining how law *necessarily* provides reasons for action…and not as the problem of showing merely how it is possible for law to provide reasons for action. If it is a *conceptual truth*, as Hart believes, that obligations provide reasons for action, then Hart's view that it is a *conceptual truth* that law creates legal obligations entails that it is *conceptual truth* that law provides reasons for action (Himma 2012, 7).

certain aspects of Wittgenstein's thoughts contained in his last manuscript (published as *On Certainty*) could be used to elucidate the nature of necessity in jurisprudence. I suggest that the kind of necessary truths in jurisprudence are not analytic or logical truths, or truth across all possible worlds, but can be thought of as what Wittgenstein calls "hinge propositions." They are grounded in a community's practices and way of life that are historically contingent. My investigation will start with a discussion of Wittgenstein's ideas of *hinges* in *On Certainty*. Several insights will then be drawn from this discussion to shed light on the status of the necessity claim in Raz's theory of law and his methodology. I conclude with a general note on the historical aspect of necessary truths in legal theories, and what implications this understanding of necessity would have for conceptual analysis.

II. Moore and Wittgenstein on Doubt

In this section, I lay the background for my later discussions by expounding some of Wittgenstein's guiding ideas in his posthumously published notes, *On Certainty*.[6] Three caveats are in order. First, since its publication, *On Certainty*, like Wittgenstein's other two major works, the *Tractatus* and the *Philosophical Investigations*, has aroused intense scholarly debates, and has been considered an immensely rich work.[7] My discussion is not to be a comprehensive (far less definitive) interpretation of the work. Second, the

[6] First published in 1969, New York, Harper & Row, edited by G.E.M. Anscombe and G. H. von Wright, translated by Dennis Paul and E.E.M. Anscombe. Henceforth, I will use "OC" as a short form when I quote from *On Certainty*. Reference to *On Certainty* will be "OC" followed by a section number.

[7] See the summary of literature on this book in Stroll (1994, 5-6).

difficulty of interpreting *On Certainty* is increased by the fact that it is far from being a finished work. It is a compilation of a series of first-draft notes written in the last year and a half of Wittgenstein's life. And the author did not live to edit and polish them.[8] Third, it must be noted that Wittgenstein himself does not explicitly take up the task of elucidating the concept of necessity in this work. What I am doing in this chapter is *not* applying an already-existing Wittgensteinian notion of necessity to legal theory.[9] Rather, I develop an interpretation of some of the ideas from *On Certainty* to shed light on philosophical issues that concern us in jurisprudence.

As is well known, the starting point of Wittgenstein's inquiry was his interest in certain propositions that the philosopher G.E. Moore claims to *know* with unquestionable certainty. Such propositions are "Here is one hand, and here is another," and "The Earth existed for a long time before my birth," and "I have never been far from the Earth's surface."[10] Moore's purpose was to refute skepticism. He thought he had found the Archimedean point of knowledge where no doubt is possible. Wittgenstein's initial interest lies not so much in refuting skepticism as in understanding the status of these claims.[11] As his notes developed, various examples of the same type were given by Wittgenstein himself: "For months I have lived at address A (OC 70)," "There is an

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8 The last entry was on April 27, 1951, two days before the philosopher's death. There are noticeable repetitions, omissions and references to other works or manuscripts throughout the text.

9 Wittgenstein's notion of necessity might well be very different. Michael Dummett (Dummett 1959) and Barry Stroud (Stroud 1965), for example, have both written on this topic.

10 See *On Certainty*, preface. A more detailed list of Moore's propositions can be found in Moore's original papers: "A defense of Common Sense" (1925) and "Proof of an External World"(1939).

11 By elucidating the nature of these propositions, Wittgenstein, as I understand *On Certainty*, gives a cogent response to skepticism. But this is not our main concern here.

island, Australia (OC 159)," "Trees do not gradually change into men and men into trees (OC 513)," etc. Wittgenstein notices some interesting features of these propositions: we do not seem to learn these explicitly as propositions; we usually do not state these propositions in ordinary situations; everyone seems to know them and agrees with Moore that they are unquestionable; no special investigation is needed to know these things;[12] and lastly, they seem to be empirical propositions in the sense they refer to the world, but they also seem to be indubitable truth.

I will get back to these features. For now, let me explain one reason why Wittgenstein thought Moore's response to skepticism was not successful. Moore famously claims that he knows he has two hands, and thus at least two external objects exist. Wittgenstein asks an interesting question: what supports my claim that "I know I have two hands?" We are tempted to say it is the *evidence* from my senses: we can look at our hands. But under normal circumstances, we don't arrive at the conclusion that "I have two hands" by *looking at* them. As Von Wright interprets Wittgenstein, the thought is if I am uncertain about the number of my hands, why should I trust my eyes (von Wright 1983, 170)? It is unclear, in this case, what is to be tested by what (OC 125). The grounds (*Gründe*, OC4) for a claim are not surer than what they are supposed to provide support for (OC 243).[13] This shows that perhaps Moore's propositions require a different *kind* of grounding.

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[12] There are investigations into the exact age of the Earth, but not whether the Earth has started to exist five minutes ago (cf. OC 84).

[13] I have more to say about Wittgenstein's use of *ground* (*Grund*) below.

To explore in the opposite direction: if we cannot seem to produce *grounds* for a proposition such as "I know I have two hands," do we then have grounds to *doubt* it? Can I even be *in doubt* as to whether I have two hands? Wittgenstein asks: what would a mistake here be like (OC 17)? In most cases, being wrong about my having two hands is impossible. Impossible not because the possibility of being wrong is reduced to zero, but rather doubting it would not make sense. That is, we usually would not understand the question: do I have two hands (OC 32)? Nor the statement, "I doubt it if I have two hands." We can of course imagine a situation where such a statement or question *would* make sense: a patient is about to have both of his hands amputated but is not sure if the operation has happened or not. In such a situation, he might ask: do I (still) have two hands? But absent such background description, "do you/I have two hands?," a *question* demanding an answer or even a proof thereof, simply loses its foothold. Wittgenstein summaries his view on this:

> What right have I not to doubt the existence of my hands?...But someone who asks such a question is overlooking the fact that a doubt about existence only works in a language-game. Hence, that we should first have to ask: what would such a doubt be like?, and don't understand this straight off (OC 24).

It would be getting beyond the scope of this chapter to explain Wittgenstein's idea of a "language game" in detail. Suffice to say that for a doubt to make sense, it relies on a certain *background*, just like the request of cashing a check requires the institution of money and banking as a background to be intelligible. Sometimes, the background is easily available. My friend can wonder or doubt whether I have two cars, but usually not question whether I have two hands. He can raise the question about my car while having

dinner with me. But to sincerely raise the question "do you have two hands?" during our dinner gathering, we probably would have to understand what happens at our dinner gathering very differently. This is because, most of the time, the fact that I have two hands is part of the background that allows various other questions to be asked and discussed sensibly.

This way of putting it makes it sound like what is open to doubt and what is not is a matter of degree: we just ask the question whether a person has two hands or not *less often*. But one central point in *On Certainty* is that there is a categorical or conceptual distinction between the background and the linguistic practice that takes place against it, although the boundary line between the two varies depending on the specific conceptual situation:[14]

> This situation is thus not the same for a proposition like "At this distance from the sun there is a planet" and "Here is a hand (namely my own hand)." The second cannot be called a hypothesis. But there isn't a sharp boundary line between them (OC 52).
>
> For it is not true that a mistake merely gets more and more improbable as we pass from the planet to my own hand. No: at some point it has ceased to be conceivable (OC 54).[15]
>
> Doubt gradually loses its sense (OC 56).

The linguistic practice or language game of doubting relies on certain undoubted things as its background, just as a game requires rules to be a game. Doubting this background would make the very act of doubting unintelligible, just like a move violating the rules of a game is not recognizable as a *move* in that game. In OC 55, Wittgenstein gives an

[14] This term appears in OC 51.
[15] The German here is: *nicht mehr denkbar*. Literally: no longer thinkable.

example of how and why a doubt loses its sense at some point: we can doubt whether snowmen exist, but if we doubt whether "all the things around us don't exist," it is like saying that we have miscalculated in all our calculations (OC 55). The concepts of correctness and incorrectness begin to lose their footing.

III. World-picture, Hinges, and the Shifting Riverbed of Thought

The foregoing paves the way for discussing one central thought in *On Certainty*, the idea of a *hinge*. Wittgenstein pursued the question of whether it would always be *intelligible* (*verständlich*, OC 10)) or *make sense* (*sinnvoll*, OC 2) to doubt a proposition such as "I know I have two hands." I mentioned that there could be situations where this question has a legitimate use. But are there propositions that it would *never* make sense to doubt? The proposition "The Earth existed for a long time before my birth," which Moore claims to *know* with absolute certainty, seems to be a good candidate.

Wittgenstein points out that *that* Moore or anyone else knows this is uninteresting. However, "it is interesting that, and how, it can be known." We do not, for example, make special investigations to arrive at this conclusion (OC 84, 134). A geologist might investigate into the exact age of the Earth, but not whether it started to exist, for example, 10 years ago. As before, Wittgenstein is making a conceptual point here: if we were even uncertain about whether the Earth has existed for a long time before my birth, and need special investigations to assemble evidence for this conclusion, then whatever evidence we give, it is unclear whether the evidence could be any surer

than the conclusion (cf. OC 111).

However, "it is difficult to imagine why anyone should believe the contrary" (OC 93). "Everything I have seen or heard gives me the conviction…nothing in my picture of the world speaks in favor of the opposite" (OC 93). Everything in my life seems to give me the conviction that the Earth has existed a long time before my birth: that I know of my grandparents and ancestors, that I have read of very ancient historical events, that I have seen fossil records of ancient animals, and I have learned that fossil formation takes a significant passage of time, etc. The "everything I have seen and heard" forms a system, or what Wittgenstein calls a world-picture (*Weltbild*). I have *this* world-picture rather than a different one *not* because this one is *correct*. We do not choose a world-picture. A world picture is inherited (*überkommene*) and "the propositions describing this world-picture might be part of a kind of mythology" (OC 95). For example, a king in a tribe might be brought up believing the world began with him (OC 92). Our world-picture is "the substratum of all my enquiring and asserting" (OC 162) and hence must not be open to doubt as a whole.[16] It constitutes a frame of reference (OC 83), and serves as a background against which our judgments become true or false (OC 94). In this frame of reference, the proposition that the Earth has existed a long time before my birth occupies a special place. It is more strongly held, centrally

[16] The "as a whole" part is my interpretation. Wittgenstein's discussion of a world-picture is very loose and sketchy. OC 162 says that the world-picture is "the substratum of all my enquiring and asserting." But if the world-picture simply is defined as "everything I have seen or heard" (OC 93, where the idea of a world-picture is first introduced), then it could not be the case that no part of it is open to doubt. I doubt if there is any way to make Wittgenstein's idea of a world-picture more precise. The key point about a world-picture, I think, is that "the propositions describing [the world picture] are not all equally subject to testing" (OC 162). My interpretation gives emphasizes the special status of hinges in a world picture, which is in line with OC 162.

located, and everything in the picture *points to* it. Wittgenstein calls such beliefs "hinges":

> That is to say, the *questions* that we raise and our *doubts* depend on the fact that some propositions are exempt from doubt, are as it were like hinges on which those turn (OC 341, original emphasis).

Hinges are part of our world-picture, but they have a special status in it (cf. OC 95). They are exempt from doubt because doubting them would involve overthrowing the whole world-picture and hence make the very act of doubting unintelligible (OC 341). They stand fast and are at the center of our other beliefs. We feel certain, comfortable, and satisfied about them (cf. OC 299, OC 357).

The inherited background will not be the same cross time and culture. Nor are the hinges. Furthermore, there is no absolute and eternal difference between what counts as the background (the base) and what is happening against this background (knowledge and inquiry). Wittgenstein uses a metaphor to illustrate this point:

> It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels, for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions hardened, and hardened one became fluid (OC 96)….The mythology may change back into a state of flux, the river-bed of thoughts may shift. But I distinguish between the movement of the waters on the river-bed and this shift of the bed itself; though there is not a sharp division of the one from the other (OC 97).

People used to believe various mythologies and they served as the riverbed of their thinking. Many of them are no longer held. A hinge belief Wittgenstein held to be absolutely certain and gets discussed at various places in *On Certainty* is that no man has been far from the Earth (OC 93). The physics of the time when Wittgenstein was writing

required that to be believed (OC 108). This belief is no longer held now.[17] Yet it is important to note that we distinguish the background beliefs and those that rest on them. It is also important to observe from the above passages that the bedrock propositions such as "the Earth existed a long time before I was born" have the *form* of an empirical proposition, though they are of an indubitable character, in that they are the *scaffolding* of our thoughts (OC 211). It follows that *not* all empirical propositions have the same status (OC136, 167). The propositions Moore enumerates have such "a peculiar role in the system of our empirical propositions."

IV. Wittgenstein's Foundationalism: Hinges and their Grounding

This hinge metaphor might prompt one to think in Quine's terms: hinge propositions are more centrally located in the "enormous system" of our knowledge, and are unlikely to be revised in the face of recalcitrant experience (cf. OC 410). However, one major difference between Wittgenstein and Quine is that for Wittgenstein, those centrally located beliefs are of a different category from our other beliefs while for Quine centrally located beliefs and beliefs in the outskirts form a continuum. As we shall see, the hinges are more based on human instinct and tacit reaction than on rational judgment or inquiry, and are grounded in our *action* rather than *ratiocination* (cf. OC 475). It is along these lines that Avrum Stoll takes Wittgenstein to be advancing a new kind of foundationalism,

[17] It might be still held in our own time by some religious or cult group. Wittgenstein thinks that the assertion "we are quite sure of it," in various circumstances, does not mean every single person would agree, but "that we belong to a community which is bound together by science and education" (OC 298).

wherein lies one of Wittgenstein's major contributions to Western Philosophy:

> Wittgenstein's genius consisted in constructing an account of human knowledge whose foundation, whose supporting presuppositions, were in no way like knowledge. Knowledge belongs to the language game, and certitude does not. The base and the mansion resting on it are completely different….And it is his rejection of the thesis of homogeneous foundations that, to a great extent, separates him from that [Western Philosophical] tradition (Stroll 1994, 145-146).

Let us first explore the idea that the base and the mansion resting on it are different in nature.

To begin, the hinge beliefs, and background beliefs in general, are *usually* not objects of knowledge.[18] They are "perhaps not even ever formulated" (OC 87). However, our acquisition of knowledge and our discourse (language games) concerning knowledge require these bedrock beliefs. Knowledge takes place on a background, but the background itself does not usually appear in these language games *as knowledge* or *objects of inquiry*. We investigate whether gravitational wave exists or not, but not whether the Earth exists or not. In *Philosophical Investigations*, Wittgenstein remarks that a certain custom or form of life has to be assumed for something to be recognizable as a game, but that custom itself is not part of the game (PI 199, 200, 204). One of Wittgenstein's guiding thoughts in *On Certainty* is that those "empirical propositions" Moore enumerates belong to this category of bedrock beliefs on which knowledge rests. To say, then, as Moore did, that I *know* them with absolute certainty, is based on confusion.

[18] I say "usually" because I think the formation of a world-picture could be a process of knowledge acquisition. For example, that there is a big island called Australia might be a part of my world-picture now, but I learn it as a bit of knowledge in a geography class.

What appears to ground knowledge, then, is perhaps not grounded in the same manner. It is in this context that we can best make sense of Wittgenstein's two paradoxical remarks: "The difficulty is to realize the *groundlessness* of our believing" (OC 166, my emphasis), and "At the foundation of well-founded belief lies belief that is not founded" (OC 253). The background beliefs are usually not information or knowledge. They can of course be formulated and brought to the foreground, but only for heuristic purposes. No one thinks it is worth pronouncing that the Earth has existed a long time before his or her birth *as a piece of knowledge*. They thus strike us as *truisms*.

Yet hinges are still to serve as part of the background or substratum of our knowledge and other beliefs. How is this possible, if they are themselves *unfounded*? This perhaps means that they are founded in a different way. What, then, makes a hinge proposition *a hinge*? This question can be broken down into two related questions: one, how those hinge propositions and other empirical propositions (the river and riverbed), *hang together* if the hinges stand fast and are to be the background for the other beliefs? Two, what grounds the hinges, if they are grounded at all? Is there *anything else* lying underneath them?[19] I think Wittgenstein's thinking on this issue consists in two interesting points. First, a hinge stands fast, not because it is intrinsically obvious or convincing; it is rather held fast by *what lies around it* (OC 144): rather than the usual picture of the base grounding or supporting the mansion, Wittgenstein's insight here is

[19] This might already be a bad question to ask, because according to Wittgenstein those background beliefs are *groundless*. But we can still ask what makes them *certain*.

that the mansion on the base also contributes to the stability of the whole structure. Second, if we can talk about *grounding* at all, the bedrock beliefs or hinges are not founded on any further beliefs, but rather are founded on our way of *acting* (OC 204). Let me discuss these two points in order.

IV. 1 What lies around a hinge determines its immobility

Wittgenstein first points out that our beliefs come in as a totality:

> [W]e are taught *judgment* and their connexion with other judgments. *A totality* of judgments is made plausible to us….When we first begin to believe anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.)….The child learns to believe a host of things. I.e. it learns to act according to these beliefs. Bit by bit there forms a system of what is believed…(OC 140, 141, 144, original emphasis).

This is a conceptual point about our understanding and believing. A child does not come to believe one isolated thing at a time when she first begins to learn things; she learns a host of things. Later additions to this belief system must fit into what already exists.[20] In this totality or system, some, such as that the Earth has existed for a long time before I was born, stand unshakably fast while others are more likely to shift. However, part of what makes the hinge propositions stand fast are those beliefs that lie around them:

> What stands fast does so, not because it is intrinsically obvious or convincing; it is rather held fast by *what lies around it*….[T]his axis is not fixed in the sense that anything holds it fast, but the movement around it determines its immobility (OC 144, 152, my emphasis).

This, I think, is the key to understanding Wittgenstein's idea of hinges and has implications for our understanding of necessity.

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[20] I shall revisit this point in chapter 7.

That the Earth has existed a long time before I was born is a belief various other beliefs in my "world-picture" *point to*: what I read from history books, that I know my grandparents and heard of my ancestors, that I learned that human beings die with a certain relatively determinable age range, that I have seen fossil records of ancient animals and human beings, that I learned that fossil formation takes a significant passage of time, etc. But the proposition that the Earth has existed a long time before I was born is not an extra bit of knowledge that is intrinsically obvious or self-evidently true, and can then serve as the *basis* or *foundation* based on which we acquire other beliefs and knowledge (in the sense sentential logic is the basis or foundation for studying symbolic logic). As pointed out earlier, this hinge belief is not in the same category as the other pieces knowledge. We never learned this explicitly as a piece of information. Furthermore, if it is in the same category as the other beliefs, and if this belief is the foundation of other beliefs, then it is in principle open to doubt and requires further evidence to support it. But it is not clear in that case what evidence can we use to support or ground this hinge belief.

The Wittgensteinian picture is rather different. We have various beliefs about history, the age of the Earth, fossil formation, etc., some of which are more certain than others, and they figure in our various discourses and inquiries. For these discourses and inquiries (language games) to function, that the Earth has existed a long time before my birth has to be presupposed, since "if I want the door to turn, the hinge must stay put"

(OC 343). In this sense, what lies around the hinge proposition determines its stability.[21] Our discourses concerning knowledge dictate that something stays stable.[22] What surrounds the hinges fixes their stability. A metaphor recapitulates the spirit of Wittgenstein's version of foundationalism: "[O]ne might almost say that these foundation-walls are carried by the whole house" (OC 248). That is, rather than having a solid and secure foundation first so that we can build a stable mansion on it, Wittgenstein's idea is that the mansion itself contributes to the stability of the whole structure.

IV. 2 In the Beginning was the Deed: the Enacted Nature of Hinges

Now it is very natural to press this metaphor and ask: wouldn't the foundation-walls have to somehow touch the ground? Wittgenstein's answer is that if we could talk about the grounding of a hinge at all, the ground is not any foundational clear and distinct beliefs, but consists in the fact that hinge beliefs are interwoven into our *ways of acting* (OC 204). It is a recurrent theme in Wittgenstein's philosophy that justification for our beliefs comes to an end, and the end is not some foundational belief but rather how we *act*:[23]

> Giving grounds, however, justifying the evidence, comes to an end;—but the end is not certain propositions' striking us immediately as true, i.e. it is not a

[21] But isn't there a sense that the hinge stabilizes the door by being fixed itself? Don't the hinges have a support themselves? This will be addressed below, where I discuss the grounding of hinge propositions in human actions.

[22] There is a sense in which the surrounding beliefs do *support* the hinge belief in that "the opposite hypothesis has *nothing* on its side." Again, here, it is important to keep in mind that the relation between the hinge and surrounding beliefs is not that of an evidential relation. I can discover an axial belief (OC 152), but that does not mean that I *derive* it from the other beliefs and use them as *evidence* for the axis. Rather, the sense of support is that what we call evidence *points to* (*auf…hindeuten*) the existence of the Earth a long time before my birth (OC 190).

[23] Also, cf. Wittgenstein (1953/2001, sect. 217).

> kind of *seeing* on our part; it is our *acting*, which lies at the bottom of the language-games (OC 204, original emphasis).

In *On Certainty*, very earlier on, Wittgenstein has associated our beliefs with our way of acting. Our certainty of certain beliefs is *shown* in our actions rather than uttered or argued for.

> My life shews that I know or am certain that there is a chair over there, or a door, and so on.—I tell a friend e.g. "Take that chair over there," "Shut the door," etc. etc. (OC 7).

For hinge beliefs in particular, we cannot offer any further justification other than pointing out that how we act shows that we believe such and such. I am certain that I have two hands and two feet, but:

> Why do I not satisfy myself that I have two feet when I want to get up from a chair? There is no why. I simply don't. This is *how I act* (OC 148, my emphasis).[24]

Moyal-Sharrock calls this "the enacted nature" of foundational beliefs (Moyal-Sharrock 2004, 97). The point is brought out further by the *practical aspect* of our world-picture:[25]

> The picture of the Earth as a ball is a *good* picture, it proves itself everywhere, it is also a simple picture—in short, we *work with it* without doubting it (OC 147, my emphasis).

The world-picture is not only the background against which we carry out various intellectual activities, but also something that plays a practical role in our daily life. The role the world-picture plays is not qua a set of propositions, but rather a *praxis*. Von Wright writes:

> The fragments of a world-picture underlying the uses of language are not originally and strictly *propositions* at all. The pre-knowledge is not propositional knowledge. But if this foundation is not propositional, what then

[24] The "satisfy myself" part translates the German "überzeuge ich mich davon"; an alternative translation would be "convince myself".
[25] Cf. OC 422: So I am trying to say something that sounds like pragmatism.

is it? It is, one could say, a *praxis* (von Wright, 1982, 178, original emphasis).

For example, that I live in address A (OC 70), that the Earth is of such a shape (OC 147), that there is the island Australia (OC 159), that trees don't change into men or vice versa (OC 513), all are interwoven into and shown in human activities such as going to work and back home, planning trips, booking flight tickets, making phone calls, cutting down trees, seeking help from people (rather than trees), etc. We don't apply a world-picture when we act, rather, our world-picture is *manifested* in our actions. These beliefs probably have never entered my mind when I am doing these things. Although they might be formulated for heuristic purposes (e.g. teaching a child (OC 106)), they are normally revealed in our practical attitudes. This is *how* we act, and it tells us *what* we believe. I am comfortable with my world-picture because I work with it without running into problems. The fact that I am comfortable provides me with certainty. "My life consists in my being content to accept many things"(OC 344). Wittgenstein compares certainty with a form of life (OC 358).[26] This certainty, this contentedness, is something animalistic (OC 359).

V. Two General Lessons from *On Certainty*

I would like to end this discussion of *On Certainty* by drawing out two significant points. Philosophers have been trying to mark off, as a privileged category of human knowledge, necessary and indubitable truths that can serve as a foundation for human thought and

[26] OC 358: "Now I would like to regard this certainty, not as something akin to hastiness or superficiality, but as a form of life. (That is very badly expressed and probably thought out as well.)" The uncertainty here indicates that Wittgenstein was still looking for better ways to express his ideas.

knowledge. Carving a cleavage between the empirical and the logical, or between the factual and the linguistic, has been a main approach. The analytic-synthetic distinction is one such attempt, as exemplified in logical positivism and attacked by Quine. However, there are perhaps different ways of understanding necessity in which the traditional distinctions, such as the one between fact and language and the one between the empirical and the logical, are blurred. The traditional approach has been to find those characteristics of an individual proposition that can mark it off as belonging (or not belonging) to a special category of truths (necessary rather than contingent). In contrast, my interpretation of *On Certainty* shows that necessity might *also* be a matter of the role a proposition plays in a system or network of propositions, and the relationship it has with other surrounding propositions. To determine, therefore, whether a proposition is necessary, we need to examine a system of propositions, and be sensitive to the contingent relations among them.[27]

It is worth noting that in *On Certainty* Wittgenstein also takes traditionally accepted necessary propositions—analytic/linguistic, logical, and mathematical ones—to be hinges.[28] Discussing them would have to be a task for a different occasion. For my purposes, the importance point is that Wittgenstein's thoughts have opened up new possibilities for understanding necessity talk in areas that go beyond logic, mathematics, etc. I will argue in the next section that features of what Wittgenstein calls hinge

[27] I thank Doug Lewis for helping clarify this point.
[28] They are treated as hinges in *On Certainty* as well. See Moyal-Sharrock 2004, p.102 for a discussion of this.

propositions are helpful for understanding necessary claims in legal theory.

A related but more general lesson is to realize that, although removing the "experiential" components of a statement has been a typical move in philosophers' attempts to attain necessary truths, there are empirical propositions—or, in Wittgenstein's terms, "propositions of the form of empirical propositions"—that have a necessary character. They are the hinges of our world-picture, or, of a particular discourse or inquiry. These hinges or foundational beliefs are connected with our experience. They are grounded in our ways of action. Thus, we need to reconceive the role of experience in our understanding of necessity and hence in conceptual analysis overall. This has been a recurrent theme in my discussion.

VI. Hinge Propositions and Contingent Necessity in Raz's Theory of Law

Now what does this discussion of *On Certainty* have to do with jurisprudence? What I want to suggest, ultimately, is that necessity claims in legal theory could be understood in a Wittgensteinian spirit. It is important to add the caveat that I am *not* saying that necessity claims in legal theory are in the same category as "I have two hands," "The Earth has existed a long time before my birth," etc. Rather, I mean to show that we can benefit from what Wittgenstein has said about hinge propositions to account for the nature of necessity in legal theory. In this section, I will revisit and examine Raz's necessity claim in his Argument from Authority, as discussed in chapter 2. I argue that it could be understood as a hinge of our understanding and practices regarding the legal

institution.

VI. 1 *Assuming* a Necessary Proposition?

I would like to start with an interesting correspondence, coincidental or not, between Raz's argument and Wittgenstein's text. Recall the beginning of Raz's argument: "I will assume that necessarily law, every legal system which is in force anywhere, has *de facto* authority. That entails that the law either claims that it possesses legitimate authority or is held to possess it" (Raz 1994, 199). From this claim, as discussed in the last chapter, Raz works out his version of legal positivism. What is striking is that Raz would ever *assume* a necessary claim. Indeed, commentators notice that Raz does not even set the ground for this claim with prior arguments (Bix 2003, 538), nor does he support it with any independent, further argument. Now, interestingly, a hinge in *On Certainty* seems to share similar features:

> If I say "*we assume* that the Earth has existed for many years past" (or something similar), then of course it sounds strange that we should *assume* such a thing. But in the entire system of our language-game it belongs to the foundations. The assumption, one might say, forms the basis of action, and therefore, naturally, of thought (OC 411, original emphasis).

We might feel strange that such a hinge/necessity claim can ever be *assumed*, and our feeling of strangeness comes from two opposite directions: on the one hand, people with a skeptical bent might argue: how can we *assume* such a thing (indeed anything!) without arguing for it? On the other hand, the ordinary intuition might say: why do we even *need* to assume this, isn't it evidently true that law necessarily claims authority!?

VI. 2 Raz's Necessity Claim Revisited

Wittgenstein's thought, to summarize, is that a hinge is beyond doubt as it is part of the substratum of our inquiring and asserting (cf. OC 162). (1) It is *assumed* in the sense that for our other inquiries and assertions to proceed, for other propositions to be true or false, this proposition has to be presupposed and exempted from doubt. Its immobility or necessity is determined by what lies around it (OC 144, 152). Denying it would mean toppling all our assertions, inquiries, judgments, and discourses around it (OC 419). (2) Because it is "isolated from doubt," and "simply gets assumed as a truism, never called in question, perhaps not even ever formulated" (OC 87), it appears that it is not worth asserting or formulating. Such a proposition is the bedrock of our thought and action (OC 411). No further proof or argument would be and could be given other than showing its status in a particular kind of inquiry or discourse. (3) It is a foundational belief that is interwoven into our ways of acting and the human form of life ultimately provides it with a ground. It is therefore manifested in our actions and attitudes.

These thoughts provide us with several helpful points in understanding the nature of Raz's necessity claim. To begin with, the reason Raz could *assume* such a thing is exactly that that law claims authority lies at the foundation of our legal discourse and legal practice. Our practices regarding legal procedures, trial, court decisions, precedents, etc., our feeling of obligation and reasons for actions, as well as our understanding of these, *turn on* this claim. That is to say, for our operation with these institutions to be

what we understand them to be, that law claims authority has to be *assumed*. Our understanding of these institutions and practices form a system within which that law claims authority is a hinge. Denying this claim would amount to toppling the legal institutions we have and derailing our understanding of them (cf. OC 419). These legal institutions will make no sense to us or will work very differently if this proposition is denied. Therefore, the necessity of the proposition that law claims authority partially comes from the fact that it is at the center of the surrounding practices and understandings, a hinge that has to be assumed for them to operate. On the other hand, it is the existence of these legal institutions and our understanding of them in the way we do that *point to* the fact that law claims authority, while its opposite (law does not claim authority over its subjects) has nothing on its side (cf. OC 190). So, in this sense, the validity of the proposition that law claims authority requires the existence of those institutions and practices and our understanding of them, and it is being held stable and immobile by them (cf. OC 144, 152, 153, 248, 343). They form a mutually supported whole.

That law claims authority does not require a further proof; it is not validated via a further argument. Not because our intellectual or philosophical powers fall short, but because it is not something we could *argue for*. We have reached the bedrock of our reasoning. Even if we were to produce arguments for it, they will not be more evident than the claim that law claims authority. Such a claim is rather grounded in the way our legal practices operate, in our ways of acting or being conditioned to act in relation to

those practices in the legal institution. Thus, what we can do is to *describe* the *manifestations* of such a necessity claim, in connection with our experience and relevant facts. This is exactly what Raz did to support his claim:

> The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e. by the institutions of the law. The law's claim to authority is manifested by the fact that legal institutions are officially designated as "authorities," by the fact that they regard themselves as having the right to impose obligations on their subjects, by the claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed (Raz 1994, 199-200).

Nowhere else does Raz give further argument or support for this necessity claim. Even here, Raz does not intend this as a *proof* or *argument*, but rather a *description* of how legal officials talk and behave, how legal institutions function. In Wittgenstein's language, the way the legal institutions operate and legal officials behave *show* that the law claims authority (cf. OC 7). Raz simply gives a description to show the truth of the claim and he is justified to do so. There is nothing we can offer to support the claim that law necessarily claims authority but give a description of the relevant facts about legal practice, our attitude toward it and our understanding of it. This is because the necessity claim is grounded in our action and experience, and derives part of its convincingness from our experience of law. It is not some rational principle or metaphysical truth. Nor is it derived from the meaning of words.[29]

[29] The discussion here further strengthens my argument in the previous chapters that Leiter's critique is completely missing its target.

VI. 3 A Role for Experience in Conceptual Analysis

But we need to go a bit careful here with regard to experience. There is important distinction between *specific, isolated* experience and *general* experience that is located in the center of our web of belief.[30] An example of such a contradistinction of the tow kinds of experience is the following: in 2008, California legislature enacted a new law that prohibits the use of cellular phones while driving except when using a hand-free device,[31] and, in contrast, subjects are generally expected to obey a legal directive regardless of their own opinion of its wisdom, i.e. authoritative directives have preemptory status (Raz 1994, 196).[32] It is important to observe two interconnected contrasting features of them.

First, the former is a report of a *particular* legal rule while the latter is grounded in our (reflected) experiences such as how legal institutions work and how legal authorities talk *in general*.[33] The latter kind of experience has generality while the former does not. Second, there is a point about their different epistemology. Propositions such as "law necessarily claims authority" and "authoritative directives in an arbitration case (necessarily) have preemptory status" are those that Wittgenstein calls "general empirical propositions (*allgemeiner Erfahrungssätze*)." They are different from a specific bit of experience in that while the example that California enacted a new law regarding

[30] I think this distinction holds the key to understanding a qualm in legal theory such as expressed in Bix (2007, p.1): it is hard to determine whether a legal theorist such as John Austin is making empirical claims or conceptual ones. Conceptual claims can involve experience. The distinction is certainly fluid.

[31] The example is from Andrei Marmor (2011, 1).

[32] This is modified from Schauer (2009), p. 62.

[33] Recall the discussion in chapter 2. One feature of referring to an authority is that, if, after the arbitration, the subjects still come back to using their own reasons as the basis of their action, they defeat the purpose of referring the case to the authority in the first place.

cellular phone use while driving is learned as an isolated, specific bit of experience (from reading, hearsay, or direct acquaintance, cf. OC 275), the latter group are learned together with a whole system of experience. Wittgenstein comments:

> There are countless general empirical propositions that count as certain for us….Experience can be said to teach us these propositions. However, it does not teach us them in isolation: rather, it teaches a host of interdependent propositions. If they were isolated I might perhaps doubt them, for I have no experience relating to them (OC 273-4).

The proposition that the Earth has existed a long time before my birth is not learned as a single proposition—indeed as I pointed out earlier, there is a sense it is not learned explicitly at all—because there is "no [single and isolated] experience relating to them." Learning this proposition involves acquiring a whole system of experience. It is these surrounding experiences *point to*. Likewise, that law necessarily claims authority is connected with, and occupies the center of, a host of our other experience related to legal institution, in a manner that the proposition that California enacted a new law regarding phone use does not. So learning that necessary proposition involves learning a host of experience related to the legal institution.

Finally, a clarificatory point: the claim that law necessarily claims authority is not merely an induction based on many instances of law's exercise of authority; if it were so, there would not be necessity involved:

> I am taught that under *such* circumstances *this* happens. It has been discovered by making the experiment a few times. Not that this would prove anything to us if it weren't that this experience was surrounded by others which combine with it to form a system (OC 603, original emphasis).

Our concept of law is not a mere collection of instances of experience with regard to law.

The experiences related to law form an organized system, whose elements are interrelated in a more or less logical order: the proposition that law necessarily claims authority occupies the center and plays an organizational role. This system is part of our general understanding of what law is. It is hence an important feature of the second kind of general, structured experience that it is *constitutive of* our concepts. It is as if they are fossilized, fused into our general understanding of law.[34] Therefore, our experience related to legal authority and our concept of law are inseparable from each other. This point has been demonstrated in a different way in my previous discussion of the relation between legal concepts and legal practice in the case of criminal law as well.

VI. 4 Parochialism and Contingent Necessity in Jurisprudence

I now turn to some implications of understanding Raz's necessity claim in a Wittgensteinian spirit. Raz (1996, 2005) argues that our concept of law and hence a general theory of law is parochial in the sense that it is produced by a particular culture or society at a particular time in history. In Raz (2005), he uses the term "*our* concept of law" to indicate this feature of the concept of law. This gives rise to a question: how can we obtain necessary truths from analysis of a concept that is *parochial*?

My discussion of *On Certainty* can shed some light on this. The concept of law, the one that modern Western society has, is a product of a specific culture in a specific time period. It therefore is imbedded in and is part of a world-picture our community

[34] Cf. OC 657: "The propositions of mathematics might be said to be fossilized…".

currently has.[35] That our concept of law and a general theory of law are parochial follows from the fact that our world-picture is parochial.[36] So the claim in Raz's (parochial) theory, "law necessarily claims (legitimate) authority," is parochial. But it is also necessary? Odd though this may sound, it is necessary, and at the same time, because it is parochial, also *possibly* contingent.[37] We now know the sense in which it is *necessary*. As argued for above, within our world-picture it serves as an indubitable foundation of our legal discourse. The other beliefs and practices in legal thoughts *turn around it*. The denial of such a proposition will overthrow a whole area of our thought and action.[38] Now in what way can it be contingent, hence necessary only relative to a particular time and culture?

Just as a world-picture might be mythological (cf. OC 95) and thus entail that the Earth has only existed a very short period of time, it could entail a different concept of law, e.g. a concept of law that does not claim authority, or does not involve coercion or punishment. *That* world-picture and its concept of law (is that still "law," we might ask?)

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[35] I am aware that even within one society there might be multiple co-existing concepts of law. See Bix (2007, 3). I discuss, and caution against, this way of thinking in chapter 6.

[36] However, a theory of law makes universal claims, attempting to uncover the essential features of law, purporting to apply to all law, wherever and whenever it is found. So a theory of law is both parochial and universal (cf. Raz 1996, 2). I shall come back to the topic of parochial versus universal aspect of concepts and conceptual theories in chapter 6.

[37] Whether, and under what conditions, a necessary proposition in a (parochial) theory of a certain concept is contingent must be decided on a case-by-case basis. Raz made it clear that our concept of law is parochial. However, there are concepts that seem to be universal across cultures and history (See Williams 2008, chap. 3). Therefore I am only speaking of possibilities here. Necessary claims following from an analysis of those concepts might be universal, and less contingent in the sense that they are less dependent on the specific culture or historical period that produces them. Even here, however, we might say that they are contingent truths of human condition (mathematical truths then have the same character. We can imagine that aliens use an alternative mathematics). See Chapter 6 for more discussion of these topics.

[38] It is unclear whether it is an empirical or logical/linguistic proposition in the traditional understanding, but that distinction itself should now be loosened given Wittgenstein's picture. What matters is the role a proposition plays in our various inquiries and discourses. A necessary proposition can be "of the form of empirical propositions," yet function as "channels for such propositions as were not hardened but fluid" (OC 96).

will be very different from ours, and in order to understand *that* world-picture, we will be "brought to look at the world in a different way" (OC 92). Furthermore, our own inherited world-picture, or our form of life, undergoes change. Language-games are rooted in our form of life (cf. PI p.148) and will undergo change as a result of the changes in our form of life. "When language-games change, then there is a change in concepts" (OC 65).

The concept of law and necessary truths about law will in turn change as a result of the changes in legal discourse and legal institutions over time. One possible way of change is that a necessary truth will cease to be necessary and drop out of use, while some other proposition that used to be contingent becomes necessary; and when we juxtapose them, we observe more of a (paradigmatic) shift in people's way of thinking rather than one proposition directly denying the other.[39] Law and its theory in our own world picture have undergone significant changes. A case in point is the change from John Austin's fundamental idea that law is the *command of a sovereign* (beginning of the 19th century) to H.L.A. Hart's guiding thought in his *The Concept of Law* (mid-20th century) that law is *a system of rules*. The change consists not so much in falsifying Austin's proposition in the tribunal of empirical evidence (as in the case where we falsify phlogiston theory or verify the existence of gravitational wave), as rather in the fact that

[39] The change might happen in other ways. A necessary and indubitable proposition will be directly denied. Wittgenstein's example, i.e. no one has been far away from the surface of the Earth (a hinge in his world-picture when he was writing), is an example of a different possibility. It was a hinge in an old world-picture, but not any more in our own time. In this case, we have one hinge contradicting the other. But both of them play a kind of organizing role in the two world-pictures.

larger social, historical changes have led us to the point where we no longer accept a picture of the society that embodies Austin's theory of law. Hart's theory, therefore, is not merely a theoretical innovation, but also an expression of the ideal of "the rule of law and not of men" in modern democratic societies. Necessary truths, in this sense, are contingent and reflect the zeitgeist of the time.

Two possible objections must be met here. First, can we not say that Austin's proposition was wrong *in his own time* (hence not necessary), when we apply Hart's famous criticism to Austin's theory of law (see Hart 1961/1994, pp. 18-78)? Such possibility of criticism does not affect my thesis that Austin's proposition is necessary relative to his time. Generally, we, standing where we are, are able to criticize those strongly held beliefs and propositions most fundamental to a specific time and culture, i.e. those moral beliefs, assumptions of the society, theories of sciences, etc., that are necessary relative to that time or culture, but no longer accepted by us. Slavery in ancient Greece was thought of not as an issue of justice, but as a necessity of that kind of social structure (Williams 2008, 103-129). We, of course, no longer accept slavery, or any theory trying to justify it as a necessity, and we can criticize and condemn slavery in an ancient Greek polis. However, that does not undermine the point that slavery was the fundamental assumption of the time that cohered with many other political, social, and moral settings of ancient Greece, and was something around which many of these other assumptions turn.

Second, the discussion above seems to have assumed that Austin's concept of

law (from which the above necessary claim follows) as embodied in his theory of law, and the concept of law in early 19th century England (if it is different from our concept), are one and the same. Is this assumption justified? Can we accept the assumption that a theory or a concept of law must reflect or express the views of law of the time and culture, absent further historical, sociological, and anthropological arguments? Might there be distances and difference between them? There might very well be. However, the assumption that a theory or a concept (of e.g. law) reflects or expresses the views (of e.g. law) of the time also has a lot of plausibility. People and their theories are products of their time in varying ways, and often to a greater extent than they might recognize or acknowledge. In John Austin's time, the idea of the Rule of Law was not as prevailing, and what he offered was a theory that fits more with the rule of men. It was a theory that emphasized the government's use of law as a form of social control and instrument of power, a truth about law that still holds today, though widely thought to be inadequate, distorted, and require qualification and supplementation to be a theory of the nature of law. While it is true that in our own time, we have, for example, Hart, Dworkin, Kelsen, etc. offering differing views on law, we see that they systematically differ from Austin's theory in that, rather than seeing law as an exercise of pure power, they emphasize to varying degrees, among other things, the importance of *rules*, *principles* (Dworkin 1977, 14-45; 1986, 243), or *norms* (Kelsen 1992) in understanding the nature of law. There has been a change of paradigm in discussing the nature of law, so to speak.[40]

[40] The two points of clarification are responses to critical comments made by my reviewers, Brian Bix and

The processes of change can be described using a metaphor already discussed: The relation between necessary propositions and other contingent ones "*altered with time*, in that fluid propositions hardened, and hard ones became fluid" (OC 96, my emphasis). The riverbed of thoughts may shift, but at a given time, "I distinguish between the movement of the waters on the river-bed and the shift of the bed itself; though there is not a sharp division of the one from the other" (OC 97). Thus the *necessity* of a proposition is also *relative* to those other propositions and practices that surround it and hold it fast, and to a particular time and place. That relation might change, but we are able to distinguish what is changing from what remains stable. There is no *inherent* difference between hinges and what lies around them. Hinges are distinguished by the roles they play in a particular kind of discourse and the fact that they are less likely to be subject to revision. The propositions "form an enormous system. And only within this system has a particular bit the value we give it" (OC 410).[41]

VII. Concluding Remarks

Legal philosophers talk about necessary truths about law, and necessary features of our concepts of law, authority, precedent, obligation, etc. Critics of their methodology too often conflate these claims with results from an analysis of the meaning of the terms such as "law," "authority" and "precedent," etc. Hence we have the Leiter type critique drawing on Quine's attack on the notion of meaning or analyticity. Once we see the

Antony Duff, and also comments from Doug Lewis. I thank Bix, Duff, and Lewis for their very helpful suggestions.

[41] *This* aspect, I think, brings Wittgenstein's thought close to Quine's holism.

problems with Leiter's criticism of conceptual analysis (as I have shown in previous chapters), we need a new way of thinking about conceptual analysis. And that, I suggest, begins with understanding necessity. I have argued that necessity in legal theory could be understood in a Wittgensteinian fashion, learning a lesson from his *On Certainty*. Necessity claims such as the one Raz gives are not grounded in the meaning of words, or some ultimate metaphysical or rational principle. Rather, they are necessary in that they are the hinges of a discourse and/or practice. We therefore need to view a necessity claim in a system of propositions in a particular kind of language game or discourse. Such necessary truths are embedded in a form of life, grounded in our actions, and are contingent to a particular time and culture.

Given this picture, our consideration of the nature of conceptual analysis can be seen in a new light. One consequence of this understanding of necessity is that necessity claims do not appear to be results of *analysis*—if the term is taken in the usual sense that one breaks down the concept of law and finds one of its elements to be authority. In other words, the concept of authority is not, as it were, originally contained in the concept of law but concealed for some reason. Indeed, we don't see *analysis* in this sense in Raz's making of his claim. There are descriptions of how this claim of authority is manifested, but not how this claim is derived. Such a necessity claim is the first step of a philosophical argument. Might we think that the necessity claim is established in other ways, such as showing that the concept of authority is closely connected with the concept of law? The substantive part of the conceptual argument—the *analysis*, in the traditional

terminology—then investigates not so much how we establish this claim as *implications* of such a claim? And this again might be thought of as being accomplished in a manner of drawing *conceptual connections*. For example, in Raz's argument, the statement "since the law claims to have authority, it is capable of having it" (Raz 1994, 201) is an implication of the necessity claim that connects *claim* and *capacity*, while the statement "authorities should act for reasons" draws a connection between authority and reason. The "conceptual situation" of arbitration makes these connections, and ultimately his (hard) positivist position, convincing and plausible (cf. OC 51). We are now back to the suggestion about a different view of conceptual analysis at the end of the previous chapter. But aren't concepts already connected? Why do we need to *draw* connections? Can it still be *analysis* if we are not breaking down a concept? Such questions must be answered with a fuller understanding of concepts and analysis. Now to these tasks I turn.

Chapter 6 What is a Concept?

I. Introduction

It is time to discuss some general issues and make positive suggestions in the concluding chapters. The focus of this chapter is possible responses to the question "what is a concept?" To understand conceptual analysis in general, it is inevitable that the nature of concepts be discussed, because otherwise we don't know what it is we are analyzing. That, however, is no small task, given the vast amount of literature involved in discussing the nature of concepts, ranging from fields like empirical psychology to speculations along Kantian/Hegelian lines. My goal, in any case, is not to advance a systematic *theory* of concept, as some contemporary philosophers have tried to do. For one thing, I do not think a clarification of a philosophical topic necessarily has to take the form of a theory. For another, I shall point out that usually a theory of concept would not be acceptable without larger and controversial assumptions, and the current theories of concepts have failed to convince us of these assumptions.

My strategy is rather to transform the question "what is a concept?" into different but more fruitful questions. By doing that, I have probably broached more questions than I have answered. And there will not appear to be a definitive answer to the question "what is a concept?" in my account. But if what I shall suggest in the next chapter is correct, that is, what results conceptual analysis can give us is dependent on our purposes and interests, then there cannot be a definitive analysis of a concept,

including the concept of a concept.

II. What is a Concept? Some Straightforward Answers

Contemporary philosophers use the term "concept" in almost every piece of their wiring,[1] but seldom have they paused to reflect on what a concept is. The question "what is a concept?" is certainly a difficult one. In a recent review of a book on the subject, the reviewer writes: "it is difficult to think of a foundational scientific concept about which there is more controversy among experts than the concept of a *concept*".[2] However, when the question is put in a standard form in philosophy—"what is a concept?"—one needs to keep in mind what it is exactly that is generating the qualms.[3] H.L.A. Hart reminds us that when the question "what is law?" arises, there can be very different concerns prompting such a question. For example, "how does law differ from and how is it related to orders backed by threats?" and "What are rules and to what extent is law an affair of rules?" (Hart 1994, 6-12). Addressing these questions is usually more effective and productive than directly addressing the original one, "What is law?" Likewise, in the case of concept, there might be diverse strands of concerns that give rise to the question, "what is a concept?," such that the question might not be as helpful as, for instance, "what it is for someone to have a concept (of X)?" and "How, if at all, is a concept

1 Certainly, it is not limited to philosophers. Scholars in other disciplines use it very often too.
2 See Genone (2016), a review of *The Conceptual Mind: New Directions in the Study of Concepts* in NDPR: http://ndpr.nd.edu/news/67095-the-conceptual-mind-new-directions-in-the-study-of-concepts/. The question "what is a concept?" is also included in the question pool for Oxford University's Examination Fellowship Exam, a telling fact about how puzzling this question can be.
3 This is by no means the only important question about concepts. For example, "what is it to acquire a concept?" is a question of equal importance. I start by discussing the ontological status of concepts for its apparent relevance. I touch on aspects of other question as I go along.

different from a word?" Some of these concerns will be explored later in this section. There are, however, seemingly *straightforward* answers to the question, "what is a concept?" Let me consider briefly some of them from historical as well as contemporary philosophers.

II.1 What is a Concept? Some Historical Answers[4]

Aristotle, Locke, and Hume

Although the Aristotelian tradition is said to have produced many of the elements of the "traditional view of concepts,"[5] Aristotle himself never explicitly discussed the nature of concepts, nor is there a word in classical Greek that corresponds to our modern term "concept." In the modern era, Locke and Hume's use of "idea" comes close to our modern usage of "concept." For Locke, ideas are what he calls *objects* or *materials* of thinking, expressed by words (Locke 1689/1996, Book II, chap. 1). Hume complained about Locke's use of "idea" and made a distinction between *impressions* and *ideas* according to the degrees of their "force and liveliness." Perceptions that enter the human

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[4] In the history of philosophy, not many philosophers directly provide reflections on what a concept is. But we can perhaps gather some clues about what a philosopher thinks a concept is by reflecting on what she implies about concepts in using the term "concept" or some other relevant terms.

[5] See Burge (1993). Burge writes "[Aristotle] seems to have thought, in the case of concepts like *eclipse* or *thunder*, that the essence could be discovered only through empirical investigation; the epistemic conditions for applying the concept seem to precede and underdetermine the outcome of the investigation" (Burge 1993, 311, n. 3). He refers us to *Posterior Analytics* II, 8 for the relevant discussion. However, it is unclear whether Aristotle's discussion is about the *concepts* of eclipse and thunder or the *phenomena,* eclipse and thunder. Aristotle's concern in *Posterior Analytics* is *ἐπιστήμη* (*episteme*, often translated as "scientific knowledge") and demonstrations that are conducive to it. So it is reasonable to think Aristotle is talking about the phenomena, eclipse and thunder. However, one of the starting points for such demonstrations is to give *definitions* of terms like "eclipse" or "thunder." What are definitions? There seem to be two kinds of definitions discussed in Aristotle's *Posterior Analytics.* I shall indicate below that "What is the nature of water?" and "What is the nature of responsibility?" are very different kinds of questions. The second uses Aristotelian language like the first one, but asks a different question.

mind with most "force and violence" are called "impressions," which include "sensations, passions and emotions, as they make their first appearance in the soul." Ideas are "faint images of [impressions] in thinking and reasoning" (Hume 1738/1978, Book I, Part I, Section 1).[6] However, the term "concept" appears neither in Locke's work nor in Hume's.[7] For both Locke and Hume the origin of all ideas is experience. Hence they are sometimes identified as precursors of the modern Representation Theory of Mind (RTM) (Margolis and Laurence 2011).

Kant

Kant famously disputed the *origin* of the idea/concept of the necessary connection between cause and effect (Kant 1783/2001, Preface) and argued that there are a priori concepts. The term "concept," which translates Kant's *Begriff*, enjoys frequent use in Kant's philosophical writings. According to Kant, concepts play an essential role in *understanding* (in contrast to *sensibility* and *reason*), which is a faculty of judgments. "Concepts rest on functions," by which Kant means "the unity of the act of bringing various representations under one common representation" (Kant 1781/1958, A68/B93). Hence for Kant, a concept (*Begriff*) is a "rule for combining certain representations (and thus also a principle for excluding certain others)…and bring them under a higher representation, i.e. the *concept*" (Förster 2012, 23, original emphasis). But a concept as such does not refer to an object, "no concept is ever related to an object immediately, but

[6] For Hume's complaint of Locke's use of "idea," see footnote to Hume (1738/1978, Book I, Part 1, section 1).
[7] In Hume's *Treatise*, I found his use of "conception." A *conception* for Hume seems to be a particular way of conceiving an object. See Hume (1738/1978, Book I, Part III, section VII, n.1).

to some other representation of it," and the representation here could be an intuition (*Anschauung*) or a concept (Kant 1781/1958, A68/B93). Nor does a concept as such constitute knowledge until combined with other concepts in forming judgments. Since "the only use which the understanding can make of these concepts is to judge by means of them," judgment is "the mediated knowledge of an object, that is, the representation of representation (*Vorstellung einer Vorstellung*) of it" (Kant 1781/1889, A68/B93). In this sense, then, understanding for Kant is also a faculty of concepts (cf. Föster 2012, 22). However, Kant also held the view that there could not be combinations of concepts unless there is something (he called the "unity of judgments") that permits this kind of combination. This view of the priority of judgments over concepts implies that concepts cannot be mere products of sensory experience. They must contain a priori elements (cf. Sluga 1980, 91).

Frege

Some commentators point out that Kant's views on judgments and concepts anticipate those of Frege.[8] An early remark by Frege shows that he thinks a concept is "nothing complete, but only the predicate of a judgment from which the subject is missing."[9] In the beginning of his 1892 essay "On Concept and Object," Frege remarks that "The word 'concept' is used in various ways; its sense is sometimes psychological, sometimes logical, and sometimes perhaps a confused mixture of both" (Frege 1892a, 42). Frege was

[8] For example Sluga (1980) holds this view.

[9] The quote is from Frege's *Nachgelassene Schriften*, from Sluga (1980, 138.). Cf. Kant's discussion in (Kant 1781/1958, B94): "But concepts, as predicates of possible judgments, relate to some representation of a not *yet* determined object."

interested in determining the logical sense of the term "concept (*Begriff)*" and his approach is, as the title of the essay suggests, to draw a logical distinction between object and concept. Frege argues, "The concept (as I understand the word) is predicative. On the other hand, a name of an object, a proper name is quite incapable of being used as a grammatical predicate." But surely we can say someone *is* Barack Obama, and at the same time *is* a human being? Frege points out that the two instances of "is" are different in usage. In the second example, it is used as a copula, a "verbal sign of predication," and says that a certain something *falls under* a concept, while in the first example it expresses an equation, like in arithmetic. To further illustrate the point, Frege compares two sentences. In the sentences "the morning star is Venus" and "the morning star is a planet", we have a proper name and a concept-word (*Begriffswort*) after "is," respectively. The first sentence expresses an equation and the relation, therefore, is reversible, i.e. we can say "Venus is the morning star". In contrast, the second sentence says some object falls under a concept and this relation is irreversible. To say "A planet is the morning star" does not make sense. In "the morning star is the Venus," according to Frege, the "is" is part of the predicate and "Venus" does not constitute the whole of the predicate. However, if we say "the morning star is no other than the Venus," the "is" is used as a copula and "no other than the Venus" *stands for* a concept (Frege 1892a, 44).[10] The view emerging from "On Concept and Object" is that "a concept is the reference of a predicate; an object

[10] I want to point out that we don't usually consider *no other than the Venus* to be a concept. Although this does not harm the distinction Frege makes, it does tell us something about Frege's technical objectives in making the distinction between concept and object. See my comment below.

is something that can never be the whole reference of a predicate, but can be reference of a subject" (Frege 1892a, 48). Frege was not satisfied with this account.[11] Later, in "Function and Concept," Frege holds that there is a sharp distinction between names and functional expressions; the former stand for objects and latter for concepts. Frege hence identified concepts with functions that correlate objects, as arguments, with truth-values.

Frege's view on concepts has problems within his own system.[12] But it is also worth keeping in mind that his view on concepts serves his technical interests in logic and thus is also changing the ordinary understanding to accommodate the development of his theoretical work. For example, as mentioned earlier, Frege considers "no other than Venus" in the sentence "The morning star is no other than Venus" as *standing for* a concept. This diverges from our ordinary usage. In addition, Frege thinks that a concept is the reference (*Bedeutung*) of a predicate, and a predicate stands for (*bedeuten*) a concept (Frege 1892a, p.43 footnote and p.44).[13] Later in his writing, functional expressions stand for functions/concepts, and names stand for objects. But, as one commentator points out, "one of the most notable features of the argument is Frege's readiness to proceed immediately from name and functional expressions to what these expressions stand for. Why should we assume that they stand for anything? No argument is provided" (Sluga 1980, 140). Frege seems to think that if a distinction is fruitful for logic, it must represent something real or objective (Ibid., 140). In this sense, Frege's

11 See Sluga (1980), pp. 138-9.
12 Cf. Sluga (1980), pp.142-4.
13 For Frege's discussion of "references", see Frege (1892b). I include the German here to illustrate the direct connection of the two terms translated as "reference" and "stand for" respectively.

view on concepts can be viewed as a critical response to certain problematic aspect of Locke/Hume's *idea*. An *idea* is too imprecise or too subjective for the development of the exact sciences.[14] But once these notions are made more precise, they diverge from our original qualms (about concepts, etc.), even if technical problems are avoided.

II. 2 What is a Concept? Contemporary Responses

More recent views on concepts can be seen largely as developments along the lines of thinking represented by Locke/Hume and Kant/Frege. However, they very often take the form of a systematic theory, with larger (often implicit) assumptions. I discuss briefly three contemporary theories of concepts in this sub-section. It will be clear what my account is *not* and why I am avoiding such theoretical aspirations about concepts.

Concepts as Mental Representations

Let us begin with a view of concepts that traces back to Locke and Hume's *idea*, a view that is the default assumption of much current cognitive science/empirical psychology. According to this view, "concepts are mental representations. They are the constituents of propositional attitude such as beliefs and desires" (Margolis & Laurence 2007, 563). The background assumption of this theory is the so-called Representation Theory of the Mind (RTM), according to which thinking occurs in an internal system of representation. Beliefs, desires, and other propositional attitudes enter into mental processes as internal

[14] Frege writes, "the reference and sense of a sign are to be distinguished from the associated idea. If the reference of a sign is an object perceivable by the senses, my idea of it is an internal image…the idea is subjective: one man's idea is not that of another" (Frege 1892b, 59).

symbols (Margolis & Laurence 2011). These symbols or representations have internal structures and more basic components. Concepts are then identified with these more basic representations. According to some theorists, these basic representations are just what Locke and Hume called "ideas." However, contemporary theorists do not take them to be mental images, as Locke and Hume did. The so-called "language of thought hypothesis," for example, treats the internal system of representation as having a language-like syntax and compositional semantics (Margolis & Laurence 2011).

The underlying motivation of this theory is to explain the productivity of thought. However, the view faces serious objections. For starters, there is a line of criticism that goes back to Wittgenstein, and has received a more elaborate expression in Michael Dummett's work: what is it to associate mental representations, be it image-like or word-like, with a person's linguistic or behavioral expressions? "[T]he concept has no representation intermediate between it and its verbal expression. Or, if it does, we still have the question what makes it a representation of *that* concept" (Dummett 1993, 98). Secondly, the individuation of concepts can be a matter of controversy. For a theorist who holds that concepts are mental representations, Sue's belief that Dave is taller than Ben is "constituted by mental representations that are about Dave, Ben, and their relative heights".[15] But are the mental representations of Dave and Ben *concepts*? Normally we don't think they are. Are some constituents of thoughts not concepts? What are they then? Thirdly, not all mental representations or events have to do with concepts. The fact that

[15] The example is from Margolis and Laurence 2011.

the concept of socialism represents horrible images in my mind but pictures of a promising future in your mind does not entail that the concept of socialism has different content for us or that we are using different concepts. Are concepts a special category of mental representations? This problem affects a lot of work in empirical psychology of concepts (cf. Georges Rey 1983&1985). As I see it, however these technical difficulties are handled (if they indeed can be), the fundamental qualm with the thought that concepts are mental representations is its background assumption about the human mind. According to RTM, *thinking* is a matter of manipulating symbols in an internal system of representation, where the concepts are its basic symbols. But why does the mind have to work like that? We use the term "thinking" in many ways, but not all of them involve mental representation (e.g. "She is thinking about the performance of Beethoven's Fifth she just heard," "He is thinking about his whole life."). It is no doubt that concepts play important roles in human cognition, but why do they have to be representations?

Concepts as Abstract Objects

As opposed to the mental representation view, there are views on concepts that take a Fregean line and identify them with abstract objects. It is interesting to note that contemporary theorists do not take Frege's discussion of concept, as outlined above, to be an explication of *our concept* of a concept. Rather, they take Frege's *sense* (*Sinn*) to be the analogue of that (cf. Burge 1993, n. 15; Zalta 2001; Margolis and Laurence 2007).[16] Concepts are Fregean senses according to this contemporary view. For example, Zalta

[16] For Frege's discussion of sense, and its distinction from reference, see Frege (19892b).

offers what he calls a "precise theory" of concepts as abstract objects by linking it to his theory of Fregean senses (Zalta 2001). A brief statement of this position goes: "concepts are abstract objects; they are constituents of Fregean propositions" (Margolis & Laurence 2007, 565). By "Freagean proposition," I take it that the authors mean *thought*. For Frege, a thought is the *sense* of a sentence or proposition (both translate the German *Satz*), and is what is expressed by sentences or propositions (Frege 1918-9/1956). Thoughts are abstract entities in the Third Realm that human beings can entertain, assert, and make judgments on. So concepts, according to the contemporary view, are constituents of thoughts, or components of the sense of a proposition, in Frege's terms. "[They] mediate between thought and language on the one hand, and referents, on the other" (Margolis & Laurence 2011).

I pointed out earlier that theorists in a more or less Fregean mindset would find the Locke/Hume "idea" too subjective. The view that concepts are abstract objects derives part of its motivation from such a complaint. Concepts seem to have at least some degree of objectivity, since all competent participants in a linguistic community share them. Peacocke remarks that "[I]t is possible for one and the same concept to receive different mental representations in different individuals" (Peacocke 1992, 3).[17] Unlike ideas or mental representations, Fregean senses are non-mental, objective (in a robust sense, if they are constituents of Fregean thoughts), hence shareable by different people.

[17] This connects to the third problem I mentioned above about the mental representation view: not all mental representations have to do with concepts.

But it is exactly this aspect of the view that lends itself to objections. Opponents have asked how we can access these concepts, if they are such abstract objects, taken to be standing outside of the causal realm.

The basic qualm is that this view involves some large metaphysical assumptions that are hard to swallow. A term such as "abstract objects" is loaded philosophical jargon. We are puzzled by what kind of things concepts are, and philosophers appeal to "abstract objects" to explain the ontological status of concepts. But the ontological status of abstract objects itself is unclear and involves another whole set of debates. Therefore, while there might be a "precise theory" of concept, as Zalta offered, equipped with an "axiomatic theory of abstract objects," it is unclear how such theories can illuminate our original sense of puzzlement. It is like answering a child's curiosity of why birds fly by offering her a blueprint of an airplane.[18]

Concepts: Mental Representations VS Abstract Objects

I mentioned that the RTM view of concepts involves a controversial assumption of how the human mind works, while the view that concepts are abstract objects has unsavory metaphysical assumptions. There are currently heated debates between these two theories in the philosophical literature, sometimes leading to really bewildering discussions. They provide a further reason not to side with either of the two views. Readers can easily tell that the theorists are pushed to some weird positions and saddled with undesirable

[18] I do not recall the origin of this. But it seems to stem from an Oxford philosopher's comment on Carnap's program in *Aufbau*.

consequences due to their committed theoretical assumptions. For example, as mentioned, if concepts are abstract objects that are just "out there" in some Third Realm, awaiting our "grasp," then they can exist independently of human practices and human life at a given time. Hence Peacocke comments: "it can, for instance, be true that there are concepts human beings may never acquire, because of their intellectual limitations, or because the sun will expand to eradicate human life before humans reach a stage at which they can acquire these concepts"(Peacocke 2005, 169). But since it does not make much sense to say there are mental representations that are not in anyone's mind, concepts had better be abstract objects of a particular kind. To that, the representationalists respond by invoking the type/token distinction with respect to mental representations. According to the mental representation view, concepts that haven't been acquired by us are just representations of a type that have never been tokened (Margolis & Laurence 2007).[19]

The existence of our concepts certainly depends on particular social historical conditions, and there are concepts whose coming into existence is contingent upon the development of human history. The historian Eric Hobsbawm once invited his readers to measure the profound impact of the French and Industrial Revolutions that broke out between 1789 and 1848, by imagining our modern world without concepts such as the concepts of *industry*, *factory*, *middle class*, *capitalism/socialism*, *liberal/conservative*,

[19] Margolis and Laurence also present a "mixed view," trying to combine a representational theory with the abstract object theory, but I shall not explore along that line. See Margolis and Laurence (2007). But they end up rejecting that view and favor the mental representation view of concepts.

nationality, *scientist*, *engineer*, *statistics*, *journalism,* etc. (Hobsbawm 1996, 1).[20] The words expressing these concepts were invented or gained their modern meanings substantially in the period of sixty years between 1789 and 1848. For some of these concepts, I don't think it makes much sense to speak of their existing *out there* as abstract objects before 1789. People in 7th century China certainly did not have these concepts, and had no way of accessing these concepts. One piece of evidence for that is that there were no expressions in Chinese language at that time that can give translation of these words. MacIntyre notices that no expression in any ancient or medieval language can be correctly translated by our expression "a right" until near the close of the Middle Ages. It follows that "no one could have known that there were [natural or human rights]" (MacIntyre 2007, 69).[21] I will come back to the historical dimensions of concepts and conceptual investigation below. Suffice it now to say that *that* the existence of concepts depends on human/historical conditions does not automatically make concepts mental *representations*, much less *mental* creations.

Concepts as Abilities

While the two contemporary views on the ontological status of concepts can be seen as developing certain aspects of the Lock/Hume and Kant/Frege traditions respectively, there have been philosophers who provide an interesting third alternative: a concept is a certain kind of ability. For example, Antony Kenny, following certain aspects of Ryle and

[20] Hobsbawm calls the "due revolution" "the greatest transformation in human history since the remote times when men invented agriculture and metallurgy, writing, city and state" (Hobsbawm 1996, 1).
[21] He reached a stronger conclusion: there are no natural or human rights.

Wittgenstein's philosophy, argues that the human mind is best understood as a capacity, a comprehensive ability to acquire other abilities, for instance linguistic and symbolic skills.[22] Kenny writes "we may use 'concept' as a term for the specific abilities that are particular exercises of the universal capacity that is the mind. A sufficient, but not necessary condition for a person to possess the concept F is that she shall have mastered the use of a word for 'F' in some language" (Kenny 2010, 105-6). While I think it is very interesting and a plausible thesis to link concepts with abilities, and that it is true that human conceptuality involves a unique kind of ability, I don't think concepts can be *identified* with abilities. It seems implausible to say that the concept of law, for instance, is an ability. Kenny argues that abilities are individuated by their possessors. So the same ability possessed by three different persons will be "three different items with different scopes, items which may vary, or cease to exist, independently of each other" (Kenny 2010, 106). It seems hard to apply this view of ability to concepts. Three people might vary in their degree of ability in grasping the concept of law, but that does not mean that there are three concepts of law, nor does it make much sense to say that *one* of the concepts of law can cease to exist when the person loses his ability to apply the concept of law.[23]

Summary of this Subsection

Let me now summarize this short survey on answers to the question, "what is a concept?"

[22] In the context of criticizing "intellectualism," Noë also develops an account of concepts as a certain kind of ability. See Noë (2015).

[23] This, however, does raise questions of the individuation of concepts.

I have offered reasons not to be satisfied with any of the three contemporary views on what a concepts is. In summary, the problem with all of these is that there are large background assumptions about the mind, language, thought, and an ontology of what there is, etc., built into them. Hence, these theories of concepts can only be accepted on the terms of these assumptions. For example, Fodor accepts RTM as his starting point and he is only interested in questions about the nature of concepts *as they arise in such contexts* (cf. Fodor 1998, 1), while Kenny takes the mind to be a comprehensive capacity and concepts are thus abilities. There is therefore no way to settle the questions on concepts without first making a decision on the questions concerning the nature of the mind.

The historical answers I surveyed, to the extent that they offer intelligible views on what a concept is, give us similar qualms. It is hard to accept that concepts are functions that take objects to truth-values unless some parts of the whole Fregean framework were accepted. Likewise, to agree with Kant involves accepting more elements of Kantian philosophy. For Kant, one essential feature of a concept is that the only way to use it is to be applied in a judgment. Some commentators have pointed out that this is incompatible with his discussion of the objective validity of the categories (what Kant calls "pure concepts of understanding") (cf. Land 2015). A lot of contemporary literature on concepts derived their life from the agenda Kant has set up.[24] But aside from that, there are controversies in understanding basic Kantian terminology

[24] See e.g. Brandom (2009).

as well. For Kant, a concept is a special kind of representation and closely related to intuitions, which are another form of representation. Hence we must understand what a representation is. But this term, put into circulation by Kant, is often used in two senses that are not distinguished at the time and often confused to this day. It has a "sensory" or "perceptual" use that links it back to Locke/Hume. This use is associated with the German term, *Vorstellung*, which is the standard translation of Locke's "idea." There is also a "public" or "linguistic" use which corresponds to the German word *Darstellung* (Cf. Janik and Toulmin 1996, 132-3). Are Kant's concepts Lockean/Humean ideas? Some of them (pure concepts of understanding) certainly are not. On the other hand, justifying the thesis that ideas/concepts are *copies* of impressions along Lockean/Humean lines seems to involve more conviction than reasoning. It is hard to accept, for example, Locke's distinction between two sources of our ideas: perceptions of things and of the operations of our own mind (for aren't perceptions only applied to external objects?).[25]

Therefore, we should not think that answers to the question "what is a concept?" examined above have provided definitive answers to "what is a concept?" They are, more often than not, fragments of larger (sometimes false) philosophical frameworks, and because of that, they are not helpful for our original bewilderment regarding the nature of concepts. However, not siding with any of the accounts above does not mean that these answers are all useless for our purpose of understanding the nature of concepts better. It cannot be denied that they tell us something important about concepts here and there.

[25] Cf. Reid (1785/1969, 8).

What the above survey of historical and contemporary discussion on concepts shows is perhaps that we should not think that there must be a unified, straightforward response to the question "what is a concept?" that eventually *gets things right*. Am I dodging hard philosophical questions by denying the possibility of a straightforward answer to the question "what is a concept?" I do not think so. Why should we think there are straightforward answers? Why should we think that there is one unified account of concept that will satisfy all our qualms, avoid all objections, and tell us what a concept *really* is? Why should we think there is such an account that *get things right*? It becomes unclear what "getting it all right" really means here, because concepts are not like swarms of honeybees that I can keep in a hive and study their nature by running controlled experiments on them. Concepts are *philosophical creations* (Raz 2005, 324). As I pointed out earlier and will argue for later, our sense of puzzlement and confusions change over time in different contexts, and that affects what our (conceptual) investigation can reveal to us, about concepts.[26]

Can we answer the question "what is a concept?" without presupposing a controversial larger theoretical framework? I think we can, and that is what I will attempt to do below.

III. Transforming the Question "What is a Concept?"

In this section, I'd like to start afresh by getting back to a suggestion made earlier: to

[26] The point is: conceptual analysis reveals different aspects of a concept depending on what philosophical questions we have. See Raz (1998, 271).

address the question "what is a concept?"—rather than giving direct answers such as "mental presentation" or "abstract objects," it is perhaps more helpful to address those underlying concerns or worries which prompt such a question. The hope is that such a strategy will clarify those important issues related to the nature of concepts while avoiding the illusion that an ultimate straightforward account of concept can be given.

One concern that naturally prompts the question "what is a concept?" has to do with the differences and connections among words, concepts, and things, broadly construed.[27] For example, we use the word "law," but we also talk about our concept of law, as something related to but distinguished from the social institution, law. How are these three items related to each other? Words are often treated as "strings of linguistic symbols," such that the letters "L-A-W" making up the English word "law" while "Gesetz" is a word in German that translates the English "law." What appears equally uncontroversial is the status of those we call *things*: books, pipes, and pens on a philosopher's desk; trees, grass, and rabbits in the garden; and many other "middle-sized dry goods." What are concepts then? As a first approximation, concepts seem to be somewhere in between words and things. Hence Joseph Raz writes:[28]

Metaphorically speaking…concepts are placed between the world, aspects of

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[27] This way of putting it should not be taken as implying a tripartite metaphysical picture of any kind. What's included under "things" are multifarious: tables and chairs, persons, minds, social institutions, countries, flames, wars, history, psychological states, etc. In Raz's words, these are "aspects of the world." Concepts might be related to these things in very different ways, which is one of the important topics below.

[28] Since I am discussing conceptual analysis in the context of legal theory, the methodological reflections of Joseph Raz provides a natural point of departure. See Raz (2005). It is also to be kept in mind that the term "concept" has nonphilosophical use such as in "product concepts" (which roughly means "ideas of new products). The focus of the discussion is, naturally, the uses that philosophers are interested in, although the distinction between the two kinds of uses is not sharp and there might be a common core to both: they relate to how people *conceive* certain objects and phenomena (cf. Raz 2005, 325).

> which they are concepts of, and words and phrases, which express them (the concepts) and are used to talk about these aspects of the world (Raz2005, 325).

Indeed, on the one hand, concepts "relate to how people *conceive* certain objects and phenomena" (Raz2005, 325), as the common roots of "concepts" and "conceive" might suggest. Things (objects, phenomena, etc.) are *out there*, and are said to "fall under" concepts, to borrow a phrase from Frege, which captures the intuitive idea that concepts have a kind of comprehensiveness.[29] So once I have the concept of a book, my employment of the word "book" will extend far beyond the particular one that happens to be in my hand. On the other hand, words are often said to *express* concepts.[30] There seems to be an element of truth in that: we form the concept of a book by interaction with books in some ways, but without the word "book," it is at least very difficult for me to mobilize my concept of a book. While such a picture of concepts as in between words and things might work out nicely in the case of books and many others, further reflections indicate that matters are more complex than that, in both directions.

III. 1 Words and Concepts

To begin, it is curious how words, understood as strings of linguistic symbols and bits of a language, can on their own express concepts. It might be suggested that it is the *meaning* of words that expresses concepts. Then it is a short step from that to identify a

[29] Indeed, the OED tells us that a concept is "an idea of a class of objects, a general notion or idea." They cover *classes* of things. This idea is captured by Frege's view of concepts, discussed earlier.

[30] If we open any philosophy book, we find that this is what philosophers often say about concepts. This view is pervasive in philosophical literature, though not all of the philosophers are concerned with the nature of concepts. Sometimes philosophers say words *designate* concepts. I will treat it the same as saying words express concepts.

concept with the meanings of the corresponding concept-word. Hence analysis of a concept is analysis of the meaning of the concept-word. However, let me for the moment drop the topic of meaning.[31]

Some words apparently do not express concepts. The English word "ouch" does not express a concept ("pain" does). Nor does the word "Brad" or "Tom". Likewise, "and" is not a concept while "conjunction" probably is. This might appear to be a trivial point, but it certainly implies something significant and interesting about the nature of concepts. On the other hand, some concepts do not seem to rely on specific individual words for their expression or identification. Raz suggests "perhaps concepts need not be associated that closely with words after all." In the OED definition of concept "there is nothing here about necessarily having a distinctive word." This is because:

> The context, rather than the use of a word, may be part of what indicates that the concept of law being talked about is the one we are interested in. The context, rather than any special linguistic device may—or may not—indicate whether the law we are talking about is that of a state rather than a moral law, etc. While we can do little with language without words, we can express concepts and ideas in words for which we have no specific words or phrases (Raz1998, 255).[32]

Raz's point, when applied to those concepts that are "word-sized" and are sometimes called *lexical concepts*,[33] seems to me rather uncontroversial: a concept does not always require that we use the corresponding "concept-words" (*Begriffsworte*) to refer to it or

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31 Clarifying and criticizing this view (and its variants) will be one topic for the next chapter.

32 Raz makes the same point again in the 2005 article referred to above:
> "We could talk of the law by talking of the system of courts and legislature and the rules they endorse in a state, for example. And we could do so in a large number of other ways. Most importantly, we rely on context, linguistic and nonlinguistic, to determine whether we are talking of the right sort of law when talking of law, or whether we are talking of scientific or other laws"(Raz2005, 325).

33 The authors of the *Stanford Encyclopedia of Philosophy* entry for "concepts" adopt this usage. There, lexical concepts are also called "word-sized" concepts. See Margolis and Laurence (2011).

pick it out. The context can sometimes do the job. The more interesting question is whether a stronger reading of his claim that "concepts need not be associated that closely with words" holds: can we have a concept for which there are *no* word(s) that corresponds to it in the existing language of a particular community at a given time? There are two different questions here: 1) can we have a concept for which there are no *specific* words/phrases that corresponds to it? In other words, can we have concepts that are not word-sized, i.e. not lexicalized? 2) Can we have a concept for which there is no word *whatsoever* associated with it for its expression? Or, to put the question differently, can there be concepts whose expressions do not rely on linguistic means at all? I shall argue that the answer to both questions is "yes." Let me approach the first question.

Translating Foreign concepts

Are there concepts that are not lexicalized? One interesting situation in which we encounter such concepts is when we try to translate a foreign word from a foreign culture and face the well-known difficulty of finding the "best fit." When I say it is difficult to translate a foreign word, the difficulty certainly is not finding a "foreign form," but rather, a good way of *expressing* the concept.

Human being use concepts to divide up the world according to their understanding and needs. Naturally, different linguistic communities might divide up things at different joints in different ways based on their different understanding and

needs.[34] For example, the German language has the word "Rechtsgut" to mark the concept of "a significant legally protected interest such as life, liberty, property and health," but in English there is no single word or phrase that can capture the exact idea.[35] This does not mean, however, that the idea of *Rechtgut* cannot be understood by English speakers once explained. It only shows that in German legal discourse, particularly in discussions of the proper aims and functions of the criminal law, there is a concept of *Rechtsgut* that is lexicalized. It has a definite form with more or less stable content and serves a particular purpose. But in English legal discourse, there is not. We either express the same kind of understanding without a specific word in English or, more likely, we divide legal matters differently from the German perspective that we simply don't have such a concept in our legal discourse. Therefore, some English writers simply use the German word in their discussion of German law and there is nothing amiss.[36] For another example, in German, "kennen" and "wissen" are two ways of knowing and hence "Wissen" and "Kenntnis" are different types of knowledge.[37] They are hence two different concepts, while in English we do not make that distinction, at least not at the linguistic level.

Difficulties in translation come from the difficulties communicating between different manners of conceptual demarcations. Adults learn a foreign language, almost

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34 See, generally, de Saussure (1972/1983).

35 Basic legal/constitutional right, perhaps? But then rights are to be understood as interests. The fact that jurisprudents who study German jurisprudence tend to leave "*Rechtsgut*" as it is shows it is hard to be translated exactly.

36 From example, see Marshall and Duff (1998, 8-12).

37 Roughly the distinction can be made in the following way: the word "kennen" is used when expressing (personal) knowledge or acquaintance of a person or place, while "wissen" is used for knowledge of facts.

always, by starting working with words and sentences "translated" into their mother tongue. We use "apple" to translate the German word "Apfel," "table" to translate "Tisch," "time" to translate "Zeit," etc.—uncontroversial. It might appear that we are *mapping* one language onto the other.[38] But to really know a foreign language, we need to move beyond "translations." This partly means "more fluent translation," but more importantly, mastery of those foreign concepts that are at home in that foreign language. Very soon, learners will run into cases like "Geschichte" or "Schuld," where one-one correspondence is not possible, and then, even more subtle cases. One learns that the German word "Bildung" means "education." One might be operating with that translation comfortably for a while. But anxiety grows as we learn further that two other words, "Ausbildung" and "Erziehung," both mean "education" as well. How are they different? The difference here is not something every native German speaker or German teacher could easily tell. What do we do, if we want to tell them apart? We look them up in more comprehensive dictionaries, ask more knowledgeable German teachers, collect German sentences, both spoken and written, where these words are *used*. Eventually we might come to see that, despite a lot of overlaps in these three kind of educations, "Bildung" means education in the broadest sense, or the comprehensive cultivation of a person according to some ideals, and "Ausbildung" means formal education, the kind of education you get from schooling, including vocational programs, while "Erziehung" means education in relation to a

[38] If asked "*in virtue of what* 'Apfel' is translated as 'apple'?" the answer, roughly, would be that "they refer to the same type of fruits." If we ask in virtue of what do we use "time" to translate the German word "Zeit," the answer is already not as straightforward. Translating, for example, "Schuld" into "culpability" in a legal context is an even more complicated matter. But let us let go of this.

person's manner and habituation, closer to the English word "upbringing." At this point, not only have we learned three German words as a part of foreign language acquisition, but we have also grasped some conceptual distinctions the German people make which are not available in the form of specific words or phrases in English.

This example brings out three points. We have here three concepts expressing conceptual distinctions that are lexicalized in German. We can grasp these three concepts, but are unable to find satisfactory translations in English. Any more satisfying way of translating would perhaps slide into *explanation*. This means that there are concepts that do not have lexical expressions in a particular linguistic community, yet that community can *understand* and *have* that concept. This is further shown in that fact that sometimes such a concept, once widely recognized in English, might simply get introduced into English in its original foreign form. "Schadenfreude," which is a German word, expresses the concept of *schadenfreude*. English speakers certainly know all along the phenomenon of deriving pleasure from another person's misfortune. But there was no expression at the lexical level in English. "Schadenfreude" is an English word now. The concept has received a definitive and stable way of expression in English by borrowing its foreign form directly into English. What foreign words/concepts get introduced might be a complicated matter, but there is no reason that the word *Bildung* cannot enter into English.

Second, the three concepts indicate the distinctions and understandings that German people have with regard to education. In general, lexicalized concepts marks

explicit distinctions in the collective understanding of speakers in a particular linguistic community. We can master foreign concepts and in turn learn how the people of a foreign language conceive the world differently from us.[39] We may also ask why in German language there are three word/concepts distinguishing finely among what is generally referred to as "education" in English. It has to do with the fact that the distinctions among three types of educations point to something significant for the German people, their history and culture. The fine distinctions matter and have consequences for the German way of life. Wittgenstein associates the "*Bedeutung*" of concepts with their "*Wichtigkeit*" (importance).[40] The German word "Bedeutung" has a cluster of interrelated meanings: meaning, reference, significance, etc. This indicates that the meaning/significance of a concept goes hand in hand with its importance. The existence of certain concepts mark out what is important and significant in the collective understanding of a linguistic community. Once we have mastered a system of concepts, the world *takes on meaning* for us. It is in this sense that we might say we know the meaning, in its most essential sense, of the three German words, "Bildung," "Ausbildung," and "Erziehung," once we grasp the conceptual differences among the three concepts. But the meaning here goes beyond the linguistic level of knowing how to use these words—a point I shall get back to below.

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[39] It is here we go beyond translation, or in our ordinary discourse, we say that we can now "think" in German. It consists in employing a foreign conceptual system somewhat competently.

[40] "What we have to mention in order to explain the significance, I mean the importance, of a concept, are often extremely general facts of nature: such facts as are hardly ever mentioned because of their great generality" (Wittgenstein 1953, p48). Wittgenstein uses "Bedeutung," which is translated as "significance", in the quoted paragraph, and apparently, as Wittgenstein himself indicates, it is connected with the concept of "importance" (Wichtigkeit).

Thirdly, a point I shall return to, *the nature of concepts has a close connection with that of human understanding.*[41] The necessary conditions for a good translation are the same for understanding a foreign conceptual system, and, in turn, the ability to understand a different form of life. In contrast, proper names like "Brad" or "Tom" are usually the easiest to translate, exactly because generally they do not express concepts, and are not connected with the understanding of a distinctive linguistic community, hence not demanding an effort to understand how the foreign culture carves up the world at different joints. We simply find a different *form* for them in a different language, or leave them as they are. We do not form understanding underneath proper names. I have understanding of the concept of a name, but not of the name "Tom." This is the basic point captured by Mill, in his book *A System of Logic*, that names have denotation but not connotation.[42] I would add, however, that a proper name could have *conceptual use*, for example in "Napoleon of crime." But this precisely reinforces the current point. I have certain *understanding* of features of Napoleon, brilliant strategy and unsurpassable feats, for example, and I use these to understand the criminal at hand because of the generality of concepts.

Can there be Concepts without Words ?

Let me now turn to the second, more radical-sounding question: can we express a concept

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[41] I offer an additional piece of linguistic evidence to support my point that concepts and understanding have a very close connection. In English, we use "concept" to translate the German term "Begriff", which comes from the verb "begreiffen," meaning to *understand*, *grasp*, *recognize*. The same connection, to a lesser extent, might be said to exist between "concept" and "conceive." Raz, in fact, makes a point about that in Raz(2005), 325.

[42] See Kripke (1980, 26). Kripke himself, however, has been characterized as a Millian about proper names (i.e. one who claims that names lack sense and linguistic meaning). See Katz (1994).

without words *at all*? A concept must have some form of expression or sign of its existence. What would be an alternative way of expressing concepts other than linguistic means? A natural candidate suggests itself: human actions. Philosophers have noticed that concepts are not merely a matter of pure intellect. They also guide our *being in the world*: they tell us how the world is, but also how we deal with it and find out way around in it.[43] In *Metaphors We Live By*, Johnson and Lakoff point out:

> The concepts that govern our thought are not just matters of the intellect. They also govern our everyday functioning, down to the most mundane details. Our concepts structure what we perceive, how we get around in the world, and how we relate to other people (Lakoff&Johnson1980, p3).

They then use the following example to illustrate their point:

> It is important to see that we don't just *talk* about argument in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own. We gain and lose ground. We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of things we *do* in arguing are partially structured by the concept of war. (Lakoff & Johnson1980, 4, original italics)

The point they argue for is that our conceptual system is inherently metaphorical in nature. We need not endorse their position. The general point here is that concepts are not merely matters of *words*, they are also matters of *deeds*.

But that our conceptual system guides our actions does not prove the strong thesis that they can exist without any linguistic form of expression at all. In the case of law, people do behave differently with regard to law, rules of a trade union, or regulation of a golf club. But that only shows that once we have the word "law," we do sometimes

[43] Here we are reminded of the position of Antony Kenny discussed above, and my discussion of the enacted nature of hinge proposition in chapter 5.

rely on non-linguistic cues to pick out a lexicalized concept. The question is: can human actions (attitudes, practices etc.) *alone* ground the existence of a concept? Can concepts be embodied in human behavior?[44]

In a context discussing Greek thought in the Homeric period, Bernard Williams writes:

> There is one concept that appears in our everyday theory of action…and for which there is no noun or directly equivalent verb in Homer, and that is *intention*; but, I shall claim…the idea is there. When someone acts in the Homeric world, as in ours, he or she brings about various states of affairs, and only some of them does he or she mean to bring about. That, in itself, is enough to ground the idea of an intention (Williams 2008, 33).[45]

Homeric Greeks did not have anything close to the linguistic form of the concept of intention. But the concept is there, according to Williams, because *features of human actions* ground its existence. Williams goes on to say that concepts like those of intention, belief, desire, and purpose, are *constitutive* of the concept of a human action. Without the presence of such concepts, it would be very hard for us to see how we could understand Homeric poems as speaking of human actions:

> [B]eneath the terms that mark the differences between Homer and ourselves lies a complex net of concepts in terms of which particular actions are explained, and this net was the same for Homer as it is for us. Indeed, if it were not, could we understand Homer as presenting us with human actions at all?...Only if we can understand him as presenting us with actions, can we go on to discover either the similarities or the differences that exist between Homeric ways of relating actions to people, society, and the nonhuman world, and our own ways of doing these things (Williams 2008, 34).

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[44] In a debate over the concept of a right, both Gewirth and MacIntyre agree that "the existence of such expressions [e.g. "a right"] is not a necessary condition for the embodiment of the concept of right in forms of human behavior"(MacIntyre 2007, 67). But since MacIntyre does not think that we can establish a case for the concept of a right being embodied in human behavior, we need to look at other, more concrete examples.

[45] Williams speaks of *concepts*, *notions*, and *ideas* interchangeably, the differences among them do not matter for the point he and I are trying to make.

Here is Williams again:

> We cannot, obviously enough, say that Homer has a certain concept simply because he presents us with an incident that we *would describe* in terms of that concept. It is reasonable, however, to say that there is a certain concept in Homer when he and his characters make distinctions that can be *understood* only in terms of that concept (Williams 2008, 50-51, emphasis added).

So the Homeric Greeks had the concept of intention not because we *would* use that concept to describe their otherwise foreign behavior; but rather, ultimately, because we, as well as they, understand their actions in certain ways that can ground the existence of the concept of intention, even though no Greek word can properly translate our word "intention." There are concepts the existence of which is a logical requirement for understanding human actions at all.

Williams's passages raise questions about the historical (and ahistorical) dimensions of concepts. I will come back to these below. The point I shall highlight now is a more basic one that converges with the third general conclusion from my discussion of translating foreign concepts: *concepts have a very close connection with human understanding*. Let me dwell on this point a bit more. It should be uncontroversial that when we have the concepts of intention, belief, desire, purpose, and the like, we have some understanding of *intention*, *belief*, *desire*, *purpose,* and the like.[46] We can say, then, that to have a concept of X is to understand a concept of X, which, in turn, is to have some understanding of X.[47] This understanding, further, can partially consist in being

[46] In discussing methodological underpinnings of legal theory, Raz assumes that we can explain what concepts are by explaining what it is to *have* and *understand* them (Raz2005, 325). This is a reasonable assumption. What I just said brings out why it is reasonable.

[47] This, in Wittgensteinian terms, is a grammatical remark.

able to use the word "X" correctly,[48] when the linguistic form of the concept is available. Some concepts play a role in understanding some more complex phenomena or higher-level concepts. In this case, for example, we use these concepts to understand human actions. And this is to have a concept of a human action, because these concepts, as Williams points out, are constitutive of the concept of a human action. We form concepts and use concepts to understand the world and ourselves, and that involves having and understanding further concepts. When philosophers give an account of the concept of law, knowledge, mind, etc., it is rarely controversial that they are deepening our understanding of complex phenomena such as law, knowledge, mind, etc.

The conclusion is *not* that concepts are independent of language. "Conceptualization on any considerable scale is inseparable from language" (Quine 1960,3). Much less that concepts are mental symbols in a language of thought. The discussion above shows that concepts and words are closely related, but there is also a certain distance between them. Concepts reflect community members' understanding of the world and themselves by demarcating significant distinctions and delineating important categories. A concept receives explicit form and stable content once lexicalized. A community can have a concept but lack specific words to express it. However, that concept can often be explained by linguistic means. Even when that is not the case, we might be able to look at human actions in which the concept is embedded and attribute a certain concept to the agents of these actions. It is human understanding that links

[48] Antony Kenny makes this a sufficient condition for having a concept, as discussed earlier.

together concepts, words, and our being in the world.

III.2 Concepts, Things, and Nature

Recall Raz's statement that concepts are placed between (aspects of) the world and words. We have travelled quite some distance from the original simple account of the relation between concepts and words. Now let us look at what is lying on the other side. A little reflection shows that on the side of what I have vaguely called "things," things are equally unclear. I have been using "things," "object," "phenomena," etc., to refer to that which a concept is a concept of, and this multiplicity of word choices reflects the difficulty involved in understanding what is on the other side of the tripartition, and its relationship with concepts. If we read "aspects of the world" in a somewhat reified way, as in the case of the concept of an apple, it is unclear what would be those *aspects of the world* lying on the other side of most of the concepts that philosophers are interested in. What are concepts of law, knowledge, truth, mind, happiness, responsibility, necessity, identity, etc., concepts *of*, *in the world*? The aspects of the world they are supposed to be concepts of seem to be less and less tractable as we go from law to identity. But maybe we should not be nervous about that. Maybe we should leave things as they are. After all, concepts of law, knowledge, truth, mind, happiness, responsibility, necessity, identity, etc., are concepts of *law*, *knowledge*, *truth, mind*, *happiness*, *responsibility*, *necessity*, *identity*, etc.

What is the Nature of Nature ?

But the difficulty reemerges in a different form: when philosophers analyze a concept, they usually claim that they are concerned with the *nature* of that which it is a concept of. Gilbert Ryle's *The Concept of Mind* (Ryle 1949/2009) and H. L. A. Hart's *The Concept of Law* (Hart 1961/1994), for example, both purport to be explanations of the *nature* of mind and of law (Cf. Raz 2005, 325). Now, what is the relation between the concept (of X) and the nature (of X)? More importantly, when a philosophical project sets out to give an account of the nature of X, what is it that philosophers are giving an account *of*?

Something needs to be said first about the nature of nature. The thought that there is a very close connection between the concept of X and the nature of X has a long tradition. In Aristotle's writing, the nature (*physis*) of a thing is its inner "source or cause of being moved and of being at rest" (Physics Book II, 1). This account of nature is integrated with Aristotle's doctrine of four causes, or four *explanatory factors* of a thing or event. For example, Aristotle seems to think that the material cause and formal cause provide accounts of nature.[49] In contemporary philosophical context, the use of "nature" seems to follow what Aristotle had in mind about the formal cause of a thing: the essence (the Latin translation of *to ti en einai:* what is it to be) or essential properties of a thing. A thing will cease to be what it is if it does not possess these properties, and these properties in turn *explain* what it is to be that thing. Thus Raz takes a theory of law to provide an account of the nature of law, which is a set of systematically related true propositions that satisfies two criteria: 1) the propositions are necessarily true; and 2) they explain what the

[49] Physics Book II, chapter 1, 193a25-30.

law is (Raz 2005).[50]

But there are two pressing questions here: First, Aristotle used his casual-deductive model to understand the nature of, for example, thunder. Are we doing the same thing with regard to law then, if the methodological framework of discovering the nature of a thing seems to follow that of Aristotle? Is the nature of law like the nature of thunder, so that they can be discovered in the same way? It is not clear it is, given the current division of labor between scientists and legal theorists. Nor is it clear how a casual-deductive or scientific approach to law would work. Second, if philosophers and legal theorists are engaged in doing conceptual analysis, how would analysis of the concept, for example, of law reveal the nature of law? For we do not think analyzing the concept of thunder would reveal the nature of thunder.

According to Raz, Hart and Ryle think that a complete understanding of a concept consists in knowing and understanding all the necessary features of that which it is a concept of (Raz 2005, 326).[51] This line of thought appears unproblematic, given that there is a close connection between having a concept of X and understanding X, as I argued at the end of the previous section. And it can respond to the second question above: a complete analysis/understanding of the concept of X is the same as revealing/understanding all the necessary features of X. But it does not seem to address the first question. We can still ask, if understanding a concept is equated with

[50] This is followed by legal theorist like Julie Dickson in Dickson (2001)
[51] Raz himself made modifications of this view. See his discussion of conditions of minimal possession of a concept (Raz2005, 326).

understanding that of which it is a concept, what is the kind of understanding involved in understanding the nature of law, in contrast, to that of water or thunder—if they are different? Raz, following Hart and Ryle, argues that explaining a concept is *close* to explaining the nature of what it is a concept of (Raz 2005, 326-7).[52] But there is a prior question that Raz did not address: is the knowledge/understanding involved in explaining the concept of X the same as the knowledge/understanding of the essential features of X? Does it partially depend what kind of concept is in question?

This worry can be motivated in a different way. That water is H_2O is taken to reveal the *nature* of water. Since discovering the nature of a thing consists of giving necessary propositions, it is (metaphysically) *necessary* that water is H_2O.[53] Now the question is, again: if there is a *nature of law*, does it resemble the nature of water in the same sense? While there seems to be a *foothold*, namely the chemical structure, for "necessary features" of water, it is unclear that law has that kind of structure. The account of necessity in law I offered in the previous chapter does not look anything like the necessary statement about water. The situation seems to be worse if we consider concepts of knowledge, truth, mind, happiness, responsibility, etc. What constitutes or underpins

[52] Raz thinks explaining the concept of X goes beyond explaining the nature of X, because the former involves setting the minimal condition of possessing the concept of X while the latter does not. For our purposes, Raz's distinction is not important.

[53] While it is a reasonable question whether discovering water is H_2O *is* giving an account of the nature of water, we have to set it aside. I am afraid science has taken over in most of the projects of discovering nature in those cases where there seems to be a concrete thing out there behind a concept. But there is a sense that H_2O is not the nature of water, in that it is not part of what we *do* with water in everyday life. I may have a lot of relevant knowledge of tomatoes (and hence the concept of a tomato) without knowing anything scientific (in terms of chemical composition) about tomatoes.

the necessary features of them?[54] Under this pressure, contemporary philosophers critical of conceptual analysis slide into a particularly harmful direction of thinking. That is, in the debates over the nature of law there is nothing over and above the semantics of "law" and other legal terms. It is here we approach the central confusion in understanding conceptual analysis that contemporary philosophers often succumb to. Before I say more about this confusion, I shall first of all offer a preliminary response to the worries expressed above.

Natural Kind Concepts

I remarked earlier that concepts are not something we can keep in a lab and run controlled experiments on. Nor are they susceptible to be explained by appealing to physical and chemical laws. Adopting that way of studying concepts, or of philosophy in general, would be an example of scientism that Hilary Putnam diagnoses:

> Analytic Philosophy has become increasingly dominated by the idea that science, and only science, describes the world as it is in itself, independent of perspective….[L]eading practitioners sometimes suggest that all that is left for philosophy is to try to anticipate what the presumed scientific solution to all metaphysical problems will eventually look like (Putnam 1992, p. x).

Whether philosophy can successfully resist this kind of scientistic illusion is a topic too big to broach here. But when we see that the concept of mind, for example, is particularly susceptible to a scientistic approach where the mind and the brain are treated equally,[55] it

[54] My account of necessity in law does not and cannot automatically address the nature of necessity claims in these cases.

[55] As a consequence, contemporary philosophy of mind is increasingly treated as a kind of more theoretical and less experimentally oriented branch of neurophysiology. I mentioned Ryle's conceptual analysis approach to the philosophy of mind. Ryle's *The Concept of Mind* first came out in 1949 and was republished in 2009. According to Julia Tanney, who wrote a new introduction for this occasion, Ryle's approach to philosophy of mind is not even one which we have room for in our usual understanding of what the "possible positions" are in contemporary philosophy of mind (Ryle 1949/2009, ix-Ivii).

does remind us that in understanding the relation between a concept of X and the nature of X, it might matter a great deal what *kind* of concept is in question. Aristotle noticed that the treatment of politics and ethics is very different from mathematics and natural objects, where there are demonstrations, by which he means deductive proofs from first principles grasped by intuitive reason (*nous*).[56] So it is plausible to say that political and ethical concepts, for example, are not to be studied in the same way as those of thunder and water. The natures of *political obligation*, *law*, and *virtue*, for example, are perhaps very different from that of water, thunder, and atom. Even if we accept that that water is H_2O is part of the nature of water and constitutes our mastery of the concept of water,[57] we don't seem to have the same kind of nature in the case of the concept of law (and of knowledge, truth, mind, happiness, responsibility, explanation, necessity, identity, etc.). How so? And what is that kind of thing that is the nature of law then?

Part of what is going on here is the suggestion that the concept of law, as a concept of a social institution and human practice, is not a *natural kind* concept. It is not a concept for which "the way the world is" or an underlying structure susceptible of scientific discovery sets the boundaries. While it might be said in the case of water, it is the chemical structure and other environment factors that determine the "nature" of water,

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[56] See Aristotle, *Nichomachean Ethics*, Book I, chapter2; Book VI, chapter 5. It is no wonder that Aristotle prescribes practical wisdom (*phronesis*) as an important intellectual virtue in domains such as ethics and politics, where there is no demonstration. Aristotle, so far as I am aware, seldom speaks of the nature (*physis*) of things like happiness or virtue, although, as pointed out earlier, we inherit his framework of investigation and talk about the nature of all things that are of philosophical interest.

[57] This is obviously open to debate. If Raz is right in saying that concepts are also individuated by their conditions of minimal possession, then someone can use the concept of water correctly without knowing it is H_2O. It is implausible to say that before the chemical structure of water was discovered people did not have the concept of water.

and it is this nature of water that determines our mastery of the concept, there is an important sense in which this is not the case when it comes to the concept of law (Cf. Bix 2007, 2). The study of water belongs to the domain of *factual investigation*, and it is the results of such investigations that determine the boundary of our concept of water. However, when we investigate into the concept of law, it is not only the legal institution but also our *self-understanding* that we are inquiring into: "in large measure what we study when we study the nature of law is the nature of our own self-understanding" (Raz 2005, 331). The concept of law is not introduced for theoretical purposes by social scientists or legal theorists. Like many other concepts such as those of action, responsibility, and happiness, it is part and parcel of the way we conduct our lives and understand things. In this sense, it is we, our concept of law instead of what the world is like, who sets the boundaries for the institution of law. *If* we take the philosophical question of the nature of law in the sense of having chemical structure H_2O is the nature of water, then it is a misguided scientistic project. There simply does not appear to be such a nature when we talk about law (and many other concepts philosophers are interested in).

The discussion so far makes a certain distinction between different kinds of projects, but has not answered the question what kind of thing the nature of law (truth, knowledge, etc.) is. I have already suggested in chapter 5 that understanding the nature of law, in terms of necessary propositions, partially consists in seeing propositions that constitute the hinges of legal discourse and legal practice. It is a conceptual discovery

that has to do with our self-understanding and practice of law, not with some underlying structure or mechanism that is detached from us (like H_2O is the structure/nature of water). My account of the nature of X, where X is a non-natural kind concept, will not be complete until the end of next chapter, where I argue that the nature of X must be established by seeing various connections of the concept of X with other concepts, and therefore is a kind of second-order self-understanding.

Falling Back on (the Meaning of) Words

To conclude this subsection, I shall mention again the mistaken yet influential view that derives from the set of difficulties involved in understanding the nature (of X). The view is that if concepts are in between the world and words, and given that it is unclear what nature there is to be discovered in the case of concepts such as the concept of law—and as the question is more acute if we consider concepts like responsibility and obligation[58]—it follows that philosophical analysis of law (mind, knowledge, etc.) is a *semantic* project and essentially concerned with meaning of terms like "mind" or "law".[59] Raz, for example, points out that some writers "exaggerate [concepts'] proximity to words and phrases and identify them with word—or phrase—meaning" (Raz 2005, 325). The thought is that if there seems to be no *foothold* for "necessary features" or nature of law, unlike in the case of water where something *in the world* explains its nature, it might be thought that explaining a concept X and the nature of X amount to nothing other than

[58] E.g. what are legal scholars talking about when they talk about the nature of legal obligation?
[59] That is a misunderstanding of the so-called Linguistic Turn, a topic I shall touch on below.

the explaining the meaning of the associated concept-words.[60] The view has some history:

> Some may even claim that there is no conflict between these two ways of understanding concepts, a view which dates back at least to the beginning of the twentieth century and the growth of ‘‘conceptual analysis’’ as a prime method of philosophical inquiry, which was often equated with analysis of the meanings of words and phrases (Raz 2005, 325).

We have seen that Leiter essentially commits to this view in his criticism of conceptual analysis in jurisprudence, only a century later.

Trying to distance themselves from this view, some philosophers suggest that they are not asking about meaning, but *use*. For example, Gilbert Ryle thinks that concepts are "functionings of words" (Ryle 1954, 32), or, as Marmor interprets him, "A concept designates the myriad ways in which a word is used by competent speakers of the relevant language in a given language game" (Marmor 2013, 210). This is not helpful since it only postpones the question. We have seen in chapter 3 a criticism of conceptual analysis could be joined with a criticism of the philosophical approach focusing on our use of words. A famous passage from Wittgenstein, where he struggles with exactly this problem, brings out vividly this difficulty:

> One ought to ask, not what images are or what happens when one imagines anything, but how the word "imagination" is used. But that does not mean that I want to talk only about words. For the question as to the nature of the imagination is as much about the word "imagination" as my question is. And I am only saying that this question is not to be decided—neither for the person who does the imagination, nor for anyone else——by pointing, nor yet by a description of any process. The first question also asks for a word to be explained; but it makes us expect a wrong kind of answer (Wittgenstein

[60] This is reminiscent of Dworkin's view that legal positivism is a semantic account of law, a view I shall discuss below.

1951/2003, §370).

Wittgenstein warns that the question "what is the nature of imagination?" makes us expect the wrong kind of answer. What he means, I think, is exactly what I just discussed. While we can point to and describe the chemical structure in figuring out the nature of water, it would be the wrong approach to adopt in studying imagination. If we try to study imagination or other psychological/mental phenomenon by pointing to or describing a process in a person's brain, it will be under the kind of scientistic illusion Putnam speaks of. Wittgenstein's alternative proposal is that we ask how the word "imagination" is used. I fear that this is quite inadequate. He is aware that the matter is not merely about words, but there is not much in what he said to tell us what it is that goes beyond that. Another remark from the *Philosophical Investigations* is equally telling about the inadequacies: We are not analyzing a phenomenon (e.g. thought) but a concept (e.g. that of thinking), and therefore the use of a word (Ibid., §38). But if philosophers are analyzing concepts by focusing on the use of a word, how is that different from analyzing the meaning of the word? Elsewhere, Wittgenstein identifies philosophical investigation with *conceptual investigation* (*begriffliche Untersuchung*):

> Philosophical Investigation: conceptual investigation. The essential thing about metaphysics: it obliterates the distinction between factual and conceptual investigations (*Zettel,* §458).

The spirit of this passage chimes with the ones from the *Investigations*. It contrasts conceptual analysis with factual investigation (the overconfidence of which expresses a kind of scientistic illusion), a distinction made above. But Wittgenstein does not tell us what conceptual analysis consists in over and above "the use of words." The problem still

lingers: if conceptual analysis/investigation is not a factual investigation, that is, analysis of a concept is not aiming at discovering truths such as "water is H_2O," then what is it, *if* it is not analysis of word meanings? That conceptual analysis is often equated with analysis of the meaning of words and phrases is a central difficulty in defending conceptual analysis as a philosophical methodology. I shall suggest in the next chapter that this is indeed the view held by most critics of conceptual analysis. But it is a view that involves some deep misunderstanding and historical confusion, and it is an objection to conceptual analysis we must meet.

IV. Concepts and Conceptions

In the rest of this chapter, I shall examine two more questions concerning the nature of concepts—from a synchronic perspective and a diachronic one: 1) could there simultaneously be more than one concept, of law for example, in a community, competing for people and theorists' allegiance?; and 2) If, as argued in chapter 5, necessary features of law might change, it seems natural to think that we might indeed have different concepts of law *over time*. Does it then mean that law could change its nature? The second question gives rise to further questions about the historical dimensions of concepts. In this section, I deal with the first question. I shall introduce a distinction that can be found in the philosophical literature and explore how helpful it can be as a response to this question. The distinction, I argue, will lead us to some helpful results.

There are legal theorists (notably, Joseph Raz) who imply that there might be multiple tenable concepts of law in a community at a given time. In a 2006 paper revisiting the "service conception of authority," Raz writes:

> I keep referring to "our" concept of authority. But is there such a thing? Are there not several concepts, all of them descending from the very same ancestors? Quite possibly so. *Each person when using the concept of authority uses his concept, and should allow for the possibility that there are several*….Needless to say, if there are a number of concepts of authority prevalent in a single society, they are likely to be competitors. The boundaries between them are fluid, and those who use each claim merit for it, and (when aware, if only dimly, of the existence of the others) find reason to prefer it to the others. This means that each explanation of a concept can also be used in the battle of concepts, where there is such a battle; that is, it can be used to advocate the merits of one concept over its competitors (Raz 2006, 1011, emphasis added).

It is easy to see how one might apply the point made in this paragraph to the concept of law. Raz does seem to use "the concept of law" and "our concept of law" interchangeably.[61] Indeed, it seems to be Raz's own view that he is not committed to there being only one concept of law in a given community at a given time, although Raz adds that "given the centrality of legal institution[s] in our societies it seems likely that most articulate people share a concept of law."[62] What would be a possible ground to claim that there are competing concepts of law in a community at a given time? Pointing to the fact that people have divergent opinions on law is certainly insufficient, since "in the use of concepts we allow that we are ignorant about many aspects of them" (Raz2006, 1011). Raz claims that the boundaries between these concepts of law, if there *were* these competing concepts of law, will be fluid; but more must be said to individuate them as

[61] This was brought out nicely in Bix (2005), discussing methodological dimensions of Raz's work on authority.
[62] Cited in Bix (2005), p. 314.

different concepts of law. This way of putting it almost sounds paradoxical: there might be *different concepts* of law in a given society at a time, but they are still, despite being different, concepts of the *same* thing, that is, *law*.

This paradoxical formulation of the problem has led me to think that perhaps part of the difficulty here could be elucidated by a distinction that is sometimes employed in philosophical literature but not clearly articulated. It is the distinction between a *concept* and a *conception*. It is a distinction made, for example, in John Rawls' *A Theory of Justice*. In the beginning of the book, Rawls posits that part of what makes a well-ordered society is the fact that it is "effectively regulated by a public conception of justice," which means two things: 1) everyone accepts and knows that the others accept the same principles of justice, and 2) the basic social institutions satisfy and are generally known to satisfy these principles (Rawls 1999, 4). Of course, existing societies are seldom like that because people dispute over just and unjust, i.e. which principles should be selected:

> [T]hey each have a *conception* of justice. That is, they understand the need for, and they are prepared to affirm, a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation (Rawls 1999, 5, emphasis added).

Rawls' idea seems to be that there are alternative sets of principles that compete with each other in a given society at a given time. So there are many *conceptions of justice*, those that consist of alternative sets of principles of justice, held by different people, with different degrees of articulateness. The idea of a *conception*, as used by Rawls and in

other philosophical literature, is not just any partial, arbitrary, or mistaken grasp of a concept.[63] It implies a degree of articulateness and systematicity. Theorists articulate, systematize, and defend those conceptions. There are, for example, utilitarian and intuitionist conceptions of justice, as Rawls calls them in the book.

Now if people have competing *conceptions* (of justice), what is the *concept* (of justice) then? Is there still any sense we could give to the idea/concept of a concept to maintain its identity that is distinct from conceptions? Rawls' answer seems to be plausible:

> Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and *as being specified by the role which these different sets of principles, these different conceptions, have in common* (Rawls 1999, 5, emphasis added).

Alternative sets of principles, albeit different and competing with each other, might share elements in common. People holding different conceptions of justice can still agree that an institution is just when "no arbitrary distinctions are made between persons in the assigning of basic rights and duties" and "the rules determine a proper balance between competing claims to the advantages of social life," hence share one concept of justice. Rawls goes on:

> [T]he notions of an arbitrary distinction and of a proper balance, which are included in the *concept* of justice, are left open for each to interpret according to the principles of justice that he accepts (Rawls 1999, 5, emphasis added).

So the concept of justice includes elements such as *no arbitrary distinction* and *proper*

[63] Tyler Burge (1993) seems to use the distinction that way: "One may think with a concept even though one has incompletely mastered it, in the sense that one associates a mistaken conception (or conceptual explication) with it" (Burge 1993, 317). This way of drawing a distinction between concepts and conceptions is not inconsistent with that of Rawls's. But I think Rawls's use of conception is what Raz would probably accept, if he were to accept the distinction. After all, Raz would not take any arbitrary view on law to be a concept of law. He is interested in competing concepts of law. But not just anything could be a competitor.

balance between competing claims, but it is more concrete principles of justice that *specify* which similarities and differences among people are relevant in determining duties and rights, and which divisions of advantages are appropriate. Different conceptions of justice might thus be said to be different specifications of the concept of justice. Of course, a theorist can be mistaken about his conception of law or justice, or it could turn out that her conception of justice or law cannot be defended. But this does not affect her use and possession of the concept of justice or law. There are misconceptions, but no *misconcepts*. Therefore, contra Raz, it is not obviously the case that "each person when using the concept of authority uses his concept." What Raz gives us is a *conception* of authority, as a result of an analysis of the *concept* of authority.[64] And pace Bix, who suggests that we could re-characterize some legal theorists' (e.g. Stephen Perry's) argument that there are more than one tenable theory of the nature of law as asserting that there are alternative *concepts* of law (Bix2005, 314, n.20), we might take these as articulations of different *conceptions* of law while sharing one concept of law.

The distinction between concepts and conception can explain why, even if there *appear* to be multiple competing concepts of law, theorists could have discussions about the nature of law without talking past each other (Cf. Bix 2005, 314). But doesn't something else follow? For, if Rawls is right, it seems to be the case that the concept of justice or law is a structure of elements that leaves something open for interpretation. It is

[64] It is worth noting that Raz's analysis of the concept of authority produces what he calls "a service *conception* of authority" (Raz 1994a, 204).

partly through articulations of conceptions that a concept receives concrete *content*. I think this is right.[65] But the contour of a concept can be of a determinate shape, even if part of its content can be open for interpretation. I remarked earlier that in discussing the nature of concepts, it matters a great deal what kind of concepts are in question. While I do not intend to offer a general categorization of concepts, it is true that *some* concepts, especially political and ethical ones like those of law and justice might be said to possess a structure of interrelated elements that has some openness that concepts like those of tomato, chair (an example Leiter used), and water do not have.[66]

A further question arises: what are the elements included in the concept of law or justice? Is there a definitive list of elements that go into a concept such as those of law and justice? Different theorists might propose very different lists of elements. How, then, can we determine the contours of a concept? While I think it is correct to say that the boundaries of a concept are fluid, the point should not be exaggerated. A concept will not be of a recognizable shape if we remove certain elements. For example, in our own time, the concept of justice will hardly be able to maintain its original contour if non-arbitrariness is removed, i.e. it would be hardly imaginable that we could apply the concept of justice to an institution if it makes a distinction among people based on, for example, skin color or origin of birth, in distributing rights and duties. Likewise, our concept of law will change its character and become unrecognizable if we remove, for

[65] This is not to say that these concepts have no content.
[66] This result is significant in that it foreshadows a point I will discuss in the next chapter: the content of some of our legal, political, and ethical concepts is a historically contingent phenomenon; hence analysis is not sufficient for philosophy.

example, coercion from it. Our current understanding of justice and law, as well as practices concerning them, simply rules them out as instances of law or justice.

This answer might not be satisfactory when we think about, for example, the on-going debate about the relation between law and morality.[67] The notion of contingent necessity discussed in chapter 5 does allow the possibility that necessary propositions/claims about a category changes over time,[68] but how is that going to account for a dispute over necessary connections between law and morality *in our own time*? It does not seem to be a debate between two conceptions of law, rather about the very concept of law, about what is included in the concept rather than interpretations of what's included. As a response to that, I shall offer two points to conclude this section. First, the idea that concepts "include" various elements, as used by Rawls,[69] suggests a certain (perhaps Kantian) picture of concept as *containing* other lower-level concepts. I shall suggest, in the next chapter, that for a concept like law, an alternative picture might be more appropriate: rather than being an enclosed list of elements, the concept of law finds its identity through complex connections with concepts of authority, rule, coercion, reasons for action, etc. Looked at that way, the debate between legal positivists and natural law theorists can be seen as one about the *distance* between law and morality. Second, given that law is such a complex social phenomenon and institution, an

[67] Roughly, while the positivists affirm that there are various connections between law and morality, they do not take law to be an inherently moral phenomenon; and natural law theorists disagree.
[68] E.g. for John Austin, law is necessarily connected with or necessarily includes the notion of a command from the sovereign; we no longer accept that claim. That necessary element has dropped out of *our concept* of law.
[69] Recall Husak's point that the concept of an excuse includes that of wrongdoing (Husak 2008, 72).

understanding of which must include the perspectives of those who live in a legal system,[70] it may not be such a dire situation that our concept of law has a kind of fundamental openness, but rather something to be expected. We shall come to these points again in chapter 7. We are, however, already getting into the second question raised at the beginning of this subsection.

V. Parochiality, Universality, and History

I have been speaking of *our* concept of law (following Raz), in our *own* time, our *current* understanding and practices, and so on. Does this mean that a concept only has a more or less determinate contour at one given time in a particular community, but not so *over time*? Might we have multiple concepts of law, for example, over time?[71] That, to begin with, seems to be less of a disconcerting matter than the previous concern that there might be multiple concepts in a community at a time. This is because some of the concepts, obviously enough, have already dropped out of our realm of interests and won't pose certain questions as they would if they were contemporary alternatives.[72] But the hypothesis that there might multiple concepts (of law) is connected with a more interesting and important question Raz raised: if there are multiple concepts of law in history, and concepts are the proper focus of theories about the nature of law, does this mean that law can change its nature over time? It is a platitude to recognize that law, as a

[70] Cf. Bix (1999)
[71] Raz's 2006 passage also includes the idea that multiple concepts of authority might be descendants of a historical ancestor.
[72] For instance: if there is more than one concept of law, should the theorist select just one, and if so, on what grounds should a selection be made (cf. Bix2010)?

social institution and practice, can change, and historically it has change. So one natural worry in theorizing about law would be: what legal theorists have said is about law "right now and around here;" it will not be discovering the nature of law.

First, it is important to note that the fact that legal institutions change historically, on its own, does not show that law can change its nature or that we cannot speak of essential properties of law. Some historical changes of law did not affect those institutions' having the status of being law while some others may have disqualified them from being law. The question is one about the boundaries of the category: we seem to have criteria to distinguish law from non-law, and it is the task of legal theorists to give an account of what makes one social institution a *legal* system, to uncover the properties without which there can be no law. So it might be said that it is the nature of our inquiry that puts some constraints on how we select our objects of study (Cf. Raz 2005). Second, I have allowed in chapter 5, in my discussion of necessary propositions in jurisprudence, that some necessary claims about the nature of law have dropped out of use or are no longer accepted as necessity.[73] In that sense, law can change its nature, so can necessary truths cease to be necessary. Such a response, however, triggers some other methodological worries in theorizing about law.

If the institution whose nature we are interested in is picked out by a concept that belongs to our society in which a legal theorists lives and writes, does it not render our

[73] It might be said that in John Austin's jurisprudence, law necessarily has to do with a sovereign's command. We no longer think that necessary claim holds.

inquiry *parochial*, in that it is limited to the nature of law as understood in accordance with *our* concept of it? Raz admits that the concept of law is parochial, in that not every society has it or has it exactly as we do. But he argues for two points: first, other concepts are concepts of *law* if and only if they are related, in one way or another, to *our* concept of law. "It is our concept which calls the shots" (Raz 2005, 332). Second, although the concept of law is parochial, the theory of law can be universal in that it applies to law wherever and whenever it exists (Raz 2005, 331-2). Both of the points need clarification and modification. To the first point, one might object: is it then quite an arbitrary matter that we, in virtue of the concept *we* have, rule out certain concepts as concepts of law? And it follows from this worry that the second point about the *universality* of a legal theory, exactly because of its parochial focus of *our* concept, may appear a bit *imperialistic*.

I believe this set of qualms could be alleviated if we see that there might be *universal* features of our concept of law despite its being parochial. And there is nothing arbitrary and imperialistic about it, nor about the theory of law based on it. We could again start by asking why, even if there appear to be multiple concepts of law historically, they are still recognizably concepts of *law*? The distinction made between a concept and conceptions will be helpful. But lest Rawls' discussion be thought idiosyncratic and that it only works for the concept of justice, let me use materials from a different philosopher's discussion of a different concept in historical context. The moral of the discussion shall perhaps illuminate our concerns with the concept of law.

In *Shame and Necessity*, Williams investigates the Homeric Greek's concept of responsibility.[74] After examining two Homeric incidents in *Iliad* and *Odyssey*, Williams points out that we can glean four ideas related to that of responsibility:

> [T]hat in virtue of what he did, someone has brought about a bad state of affairs; that he did or did not intend that state of affairs; that he was or was not in a normal state of mind when he brought it about; and that it is his business, if anyone's, to make up for it (Williams 2008, 55).

Williams goes on to say that these four elements, which he labels "cause," "intention," "state," and "response," are the "basic elements of any *conception* of responsibility." We notice here Williams seems to be employing the distinction between the *concept* and various *conceptions* of responsibility we have discussed, and the way he makes this distinction does not diverge from what Rawls says, since, according to Williams, conceptions of responsibility will be "constructed by interpreting in different ways these four elements and varying the emphasis between them" (Williams 2008, 55). But Williams makes two further points that could shed light on the worries I just raised. First, the four elements are already in Homer, so Homer, along with perhaps many other ancient authors, might be said to possess the *concept* of responsibility.[75] Second, there is no ideal way of arranging and adjusting these elements to one another, i.e. there is no "just one correct conception of responsibility." "We ourselves, in various circumstances,

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[74] As discussed earlier, Williams argues that "Homer had a concept of intention even if he had no word that was related to the general notion at all" (Williams 2008, 51). The same can be said of the concept of responsibility.

[75] Earlier in section III.1, in discussing Williams's writing, we have already recognized that the ancient Greeks had the concept of intention, although no Greek word properly translates "intention." That was because the concept was grounded in human actions. I think here Williams is making essentially the same points with regard to the concept of responsibility.

need different conceptions of it" (Williams 2008, 55).[76]

The first point is directly related to our concerns in this subsection. The fact there were these elements, and hence the concept of responsibility, in ancient writings/societies already, might be explained by the existence of some common features of human actions, or, what Williams calls "universal banalities":

> Everywhere, human beings act, and their actions cause things to happen, and sometimes they intend those things, and sometimes they do not; everywhere, what is brought about is sometimes to be regretted or deplored, by the agent or by others who suffer from it or by both; and when that is so, there may be a demand for some response from that agent, a demand made by himself, by others, or by both… (Williams 2008, 55-6).

Further, some elements in a concept might be more or less prominent, or stand looser or tighter with other elements. Some of the elements might be primary in giving the concept its identity, and the other elements might center around them; this is where we might appropriately speak of "necessity." In the case of the concept of responsibility, "other issues can arise *only in relation to* the fact that some agent is the cause of what has come about. Without this, there is no concept of responsibility at all" and we take "scapegoat and its relatives" to be "on the other side of the conceptual line" (Williams 2008, 56, my emphasis).[77] "Inasmuch as we are still concerned with responsibility, we use the same

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[76] In particular, while some Greek ways of combining these elements, i.e. some conceptions of responsibility, are "different from any that we now have or would want to have," we should rid ourselves of the illusion that we have made progress toward a definitive and appropriate way of combining them (Williams 2008, 55-6). This, I think, is an important point, although tangential to my discussion.

[77] In our own modern world, have we not developed rules of strict liability that seem to introduce responsibility without causality or intention (Williams 2008, 57)? It seems like we have a case where the most central and primary elements are denied. Do we still have a concept of responsibility in that case? In a special domain of dealing with responsibility, i.e. criminal responsibility under the law, we might have a special conception/concept of responsibility, but this does not mean that the concept in general, in other spheres of our life, is affected at all; further, the fact that *mala prohibita* is criticized and controversial, as we saw in chapter 4 on overcriminalization, exactly shows why people might be uneasy with such a concept of responsibility even in this special domain, and the uneasiness partially comes from the fact that concept has changed its shape. A

elements as the Greeks did," i.e. we have the same concept.

Might similar things be said about the concept of law? We need to notice immediately that it is *not* a universal banality that every society has a legal system: some societies might not have had law. Yet when we survey history and other cultures, we might be able to recognize and identify the contours of the concept of law in other societies in other times, because of the existence of a structure of interrelated elements: a system of rules, rules about rules, authority, coercion, morality, and people's reaction to it in term of reasons for action or obligation, etc. Just as in the case of the concept of responsibility, a more or less stable structure of elements may allow the concept of law to be recognized as the concept of *law*, *across time*. Some elements (like the concept of a (sovereign's) command) might drop out, be loosened up, or rearranged, over time. So the elements form a structure that is open. It is open in a further sense: people might have interpreted the elements differently and varied emphasis between them; but the results might be said to be different conceptions of law, arising from different historical practices, responding to the needs of different circumstances, while the concept of law is what those conceptions have in common.

I am not offering a definitive list of elements that go into the concept of law. Nor am I arguing that there is a single unchanging concept of law shared by all cultures and across time (much less advocating the idea that it is grounded in some Platonic realm).

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further interesting point made by Williams is that we deal differently with responsibility when it comes to criminal law, "because we have a different view, not of responsibility in general, but of the role of the state in ascribing responsibility, in demanding a response for certain acts and certain harms" (Williams 2008, 65).

Nothing I have said here is or needs to be conclusive. Some of it certainly depends on historical/archival and anthropological research. What I am suggesting are points at a meta-level: if we think along those directions, we might clarify some aspects of the methodological underpinnings of conceptual jurisprudence. My modest suggestions in this section and the previous one are: 1) we should perhaps hesitate in speaking of *multiple competing concepts* of law in a community at a time or across cultures or over time. Perhaps much could be elucidated by the distinction between a concept and various conceptions of it. The common features of human life, the universal banalities may sometimes ground the existence and identity of some concepts. 2) Although the focus of a legal theory is *our* concept of law, in virtue of that fact alone, it is not therefore parochial, short-sighted, or even imperialistic. I take it that it is no accident that philosophers often speak of *the* concept of such and such, like *the* concept of law or *the* concept of mind. There is a *universalistic pull* when we speak of concepts, albeit they are also, undoubtedly, ours.

VI. Conclusion

To briefly summarize, I have made the following points in this long chapter: 1) A survey of contemporary theories of concepts shows that there is no reason to think that any of them has given an adequate and satisfactory account of the nature of concepts. This is largely due to their unpalatable background assumptions about language, thought, and mind. 2) A fruitful strategy would be to examine those narrower-scoped questions that

give rise to the question about the nature of concepts. My examination takes up Raz's suggestion that concepts are between words and the world, and shows that they are in very complex relations with both sides. On the one hand, while lexicalized concepts receive explicit linguistic form of expression, there could be unlexicalized concepts, some of which are grounded in human actions. On the other hand, concepts seem to have a very close connection with the nature of things they are concepts of, but we need to distinguish different kind of concepts and hence different kinds of inquiry, in particular, between empirical or factual investigation and conceptual investigation. When philosophers try to discover the nature of law or mind, they are not trying to discover an underlying mechanism or structure, but rather inquiring into our self-understanding of these categories, actions, and practices. These two lines of inquiry converge on the point that concepts are categories of human understanding. 3) To the worry that there might be multiple competing concepts of law in a given community at a time, or cross cultures and over time, thus our object of inquiry would be highly selective, arbitrary, or imperialistic, I have responded that we should not be too quick in drawing the conclusion about the plurality of concepts. We need to distinguish a concept from its various conceptions; there might be common features of human society actions and society that might ground the existence of the same concept without being arbitrary or imperialistic. Now, if, as suggested, the question "what is a concept?" is sometimes prompted by other, more concrete concerns and worries, then one of them should be: what it is to analyze a

concept?[78] Now to this question we turn.

[78] Many contemporary writers who discuss conceptual analysis rarely broach the question, "what is a concept?" They appear to think "what is a concept?" and "what is conceptual analysis?" are two independent questions. Likewise, the theorists who develop accounts of what concepts are don't pay attention to what conceptual analysis is. For example, if, as Kenny interestingly argued, concepts are abilities (Kenny 2010), it is not clear what conceptual analysis is. The two questions are apparently related. It is just that we don't need is a theory or a definition of a concept *before* we can discuss conceptual analysis.

Chapter 7 Conceptual Analysis as Connective Analysis

I. Introduction

In this final chapter of the dissertation, I come back to the diagnosis mentioned in the previous chapter: most critics of conceptual analysis have in mind a conception of conceptual analysis that is identified with analysis of linguistic meaning of terms.[1] This is a suspicion which goes back to chapter 2, and was (re)stated in the beginning of chapter 4: if analyticity is understood as Quine did, it seems very straightforward that his attacks on analyticity does not undermine the methodological commitments of many philosophers who employ the method of conceptual analysis, for the simple reason that their analysis does not rely on analyticity. It is puzzling why this is not recognized. My suspicion is that contemporary (mis)understandings of conceptual analysis identify a philosophical explanation or analysis of a concept with a grasp of the (linguistic) meaning of the words. I shall argue this suspicion is indeed well grounded and, further, this view of conceptual analysis is essentially a hangover from logical positivism.[2] It is a major obstacle to understanding conceptual analysis properly and restoring it as a respectable philosophical methodology.

I shall begin in section II with an observation that the term "conceptual analysis" is used in two different ways in the philosophical literature. The fact that there is such a distinction between these two uses, however imprecise and loose, supports my contention

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1 Chapter 6, III. 2.

2 I shall suggest further that this results from a misconstrual of the so-called *linguistic turn* in philosophy. Arguing for that thesis requires much further work that goes beyond this dissertation.

that there is a different conception of conceptual analysis in contemporary philosophy. I shall further point out that the conception of conceptual analysis critics have is a distinctively logical positivist conception. It is a problematic feature of contemporary philosophical literature on conceptual analysis that when this conception (I shall call it a "thin view of conceptual analysis") is attacked from various directions (including works drawing on Quine's "Two Dogmas"), the result is taken to be the demise of conceptual analysis *in toto*. The harm of this misunderstanding is that it mischaracterizes philosophical debates and misses the opportunity to reflect on philosophical methodology, and in turn, the nature of philosophy.

In section III, I take a first step toward reviving, articulating, and defending an alternative (I shall call it "a thick conception of conceptual analysis"). Much attention will be given to the (mistaken) thesis that conceptual analysis is about definition or an analysis of linguistic meaning. Further, I argue that we need to reject the reductive/decompositional model of analysis, which lies at the foundation of the thin conception. I borrow a term of art from P.F. Strawson to characterize the thick conception of conceptual analysis as "connective analysis." I outline the characteristics of this connective model of analysis in relation to intuition, ordinary language, analyticity, a prioricity, experience, and necessity, thus piecing together the elements from previous chapters. I end with a note on the possible limits of conceptual analysis. The goal of such analysis is, broadly speaking, to achieve what Wittgenstein has called "overview" (*übersicht*) of our conceptual tapestry. Since our conceptual tapestry is an important part

of humanity, something we inherit, articulate, discourse over and enrich, philosophical inquiry as conceptual investigation makes important contribution to understanding humanity.

II. Two Views of Conceptual Analysis

I shall argue for the following theses in this section: 1) we can discern two different kinds of "conceptual analysis" in recent philosophical writings. The former—which I shall argue is distinctively a logical positivist notion—rests on the analytic-synthetic distinction while the latter does not. 2) Most criticisms of conceptual analysis are targeted at the logical positivist view of conceptual analysis, yet they are taken to be discrediting conceptual analysis *in general*. 3) It then raises an interesting question: why philosophers tend to conflate these two kinds of conceptual analysis and take, for example, Quine's work, to be undermining conceptual analysis *in toto*? I suspect that critics (and also some of the defenders) of conceptual analysis remain under some logical positivist influence. But speculations aside, we are in dire need of articulating and defending the alternative understanding of conceptual analysis, which somehow has lost its trace in contemporary analytic philosophy. It will then be the task of next section to articulate and offer a defense of what I shall call a thick view of conceptual analysis.

II. 1 Conceptual Analysis in the Eyes of Contemporary Critics

In legal philosophy, Leiter (2007), Patterson (2006), Marmor (2013), Priel (2015), etc.,

have all expressed doubts about the credibility of conceptual analysis. They largely echo skepticism of conceptual analysis in philosophy in general, in the works of Harman (1999), Fodor (2003), Margolis and Laurence (2003), and Williamson (2004, 2007), among others.[3] But when these critics speak of conceptual analysis, they seem to have something quite different in mind from those who advocate it. It is a general phenomenon (hence not limited to legal philosophy and the writings of Brian Leiter) that the critics of conceptual analysis often associate conceptual analysis with the notion of analyticity. Quite naturally, they often take Quine's work to be detrimental to the very idea of analyticity and hence conceptual analysis.

To begin with an example, Laurence and Margolis have maintained that "every analysis of a concept is inextricably bound to a collection of purported analyticities," and they immediately cite Quine's 1951 paper "Two Dogmas" as the origin of skepticism regarding analysis (Laurence and Margolis1999, 18). For a different example, Jerry Fodor, in a book review whose primary target is Kripke[4], describes the post-war Oxford philosophy as "consist[ing]…of the analysis of our concepts and/or of the analysis of the 'ordinary language' locutions that we use to express them."[5] Fodor then presents as a well-acknowledge lesson from Quine's "Two Dogmas" that this kind of conceptual

3 Marmor (2013) is an exception in this regard. He attempts to show that conceptual analysis is not at the core of the methodology of legal positivism, reductionism is.

4 The result follows from Fodor's way of looking at the recent (last 50 years or so) history of analytic philosophy. See also Williamson (2014).

5 Fodor uses the following example to illustrate the way this philosophy is done: we would *say* three, not ten, passengers *survived* after a plane carrying ten people crashed where there were three survivals. So there is not survival after death, QED (Fodor 2004). This is a complete mischaracterization, to the point of frivolity, of the ordinary language philosophy.

analysis is dead:

> Quine argued there is no (intelligible, unquestion-begging) distinction between 'analytic' (linguistic/conceptual) truth and truth about matters of fact (synthetic/contingent truth). In particular there is no a priori, necessary propositions (except, perhaps, for those of logic and mathematics)….[I]f there are no conceptual truths, there are no conceptual analyses either. If there are no conceptual analyses, analytic philosophers are in jeopardy of methodological unemployment….Since Quine, the practice of conceptual analysis has lacked a fully credible rationale (Fodor 2004).

In addition to mixing the analytic, the conceptual, the a priori, and the necessary all together (a problem that also occurs in Leiter's writing, as discussed in chapter 2), there is also something suspect in what Fodor said: he introduces "conceptual analysis" as the methodology practiced by post-war Oxford ordinary language philosophers, but if Quine's work is fatal to conceptual analysis, then the Oxonians' methodological commitment has to be the same as what Quine's work is supposed to undermine, the epistemology of logical positivists (as pointed out in chapter 2). But this is entirely unclear.

Let us take a look at doubts about conceptual analysis in Gilbert Harman's "Doubts about Conceptual Analysis," a piece Leiter relies on. Harman assumes that conceptual analysis "aim[s] to provide *analytic a priori* truths" since accounts of "good," "knowledge," and "refers" do present themselves as accounts of *meaning* (Harman 1999, 138). He then attacks both the a priori part and the analytic part of this conception. He first questions whether results of conceptual analysis are a priori, as in paradigm cases such as principles of logic, which we have "direct intuitive insight into." He argues that philosophical analysis proceeds by formulating tentative thesis and then tests it against

our intuitions (Harman 1999, 139).[6] Such an analysis is defended in the way one defends inductive hypotheses. That is, from the fact that it so far has not conflicted with any test cases, it is expected to fit all possible cases. According to Harman, since the acceptance of a philosophical analysis is based on induction, philosophical analysis is not a priori like principles of logic.

Harman then moves on to claim that philosophical analysis must be understood as involving *hypotheses* about *how we use certain terms* (Harman 1999, 139, emphasis added). This leads us to the idea of meaning, and the analytic-synthetic distinction. Harman takes those who defend conceptual analysis to be assuming and defending the analytic-synthetic distinction. However, Harman writes, "in my view, the distinction was conclusively undermined at least thirty years ago. I am surprised that this fact had not been universally appreciated" (Harman 1999, 140). This, obvious enough, is a reference to Quine. Harman points out that many conceptual claims or a priori truths, ranging from principles of Euclidean geometry to "cats are animals," and "red is color" are found to be problematic. Yet the heart of the problem for the notion of analyticity (and, in turn, conceptual analysis) is its background assumption: certain propositions are true solely in virtue of what is meant by the words used to express them and could be known to be true simply by knowing the meaning of these words (Harman 1999, 140).[7] These are analytic truths. They form a proper or improper set of the truths known a priori, which "was

[6] This is related to the worry discussed in chapter 3: philosophers appeal to intuitions in doing philosophy and intuitions are defeasible.

[7] What is expressed here is a metaphysical as well as an epistemological notion of analyticity. I will not get into the controversies around this distinction.

supposed to be knowledge that was justified without appealing to experiential evidence" (Harman 1999, 141). This notion of justification, Harman continues, required a "foundationalist account":

> Knowledge of P might depend on knowledge of Q, and so forth, eventually culminating in foundations that were either known a priori or deliverences of immediate conscious experience (Harman 1999, 141).

However, such foundationalism goes away when we see that the a priori are merely those propositions that would be harder to give up. They are "more central" in our web of beliefs, but not guaranteed true. "There is no sharp, principled distinction between changing what one means and changing what one believes" (Harman 1999, 141). Once again, one is reminded of Quine's Holism in "Two Dogmas." Harman takes this result to be overthrowing a priori knowledge, and whether the analytic truths are proper or improper subset of the a priori, if the a priori is out, they are out anyways. Even principles of logic could be revised. If analyticity is out—since paradigmatic examples of analyticity are either false or easily imagined false—why would we keep conceptual analysis?

II. 2 Different Voices about Conceptual Analysis

By contrast, let me now turn our attention to uses of "conceptual analysis" that are, on the face of it, at least, very different. I suspect that there are two views of conceptual analysis being conflated, and I shall try to show that my suspicion is indeed correct.

Fodor suggested that it was the post-war Oxford philosophers who first

introduced "conceptual analysis," so let us see what they took it to be. In a 1958 paper titled "Postwar Oxford Philosophy," trying to characterize the methodology of the philosophy then practiced in Oxford,[8] Paul Grice responds to the objection that the kind of philosophizing practiced in Oxford then was a sociological study of people's language habits without doing polls on people, and thus it cannot be distinguished from lexicography (and here one is reminded of Brian Leiter's criticism in more than half a century later). Grice says the following:[9]

> To deal with this double-headed objection, I shall introduce the notion of "conceptual analysis"….It is a very old idea in philosophy that you cannot ask, in a philosophical way, what something is unless (in a sense) you already know what it is….[P]eople who ask philosophically what justice is already are able to apply the word "justice" and its congener "just" in particular cases….But people who are in this position of being more or less adequately equipped to decide, with regard to particular actions of different kinds, whether they are to be called "just" or not may very well be at a loss if one asks them (or they ask themselves) *to give a general account of the distinction between the sorts of actions which they would, and the sorts of actions they would not, call "just."* I hope it will now be fairly clear what sort of thing I mean by "conceptual analysis." To be looking for a conceptual analysis of a given expression E is to be in a position to apply or withhold E in particular cases, but to be looking for *a general characterization of the types of cases in which one would apply E rather than withhold it* (Grice 1989,173-4, original emphasis).

Let us for the moment put aside the question whether Grice got the correct or complete account of conceptual analysis. What one cannot fail to notice, however, is that Grice's uses of "conceptual analysis" is certainly very different from those of Fodor and Harman's accounts. Grice did grant that a conceptual analysis of expression E relies on

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[8] The paper is followed by a 1987 paper on the same topic: "Conceptual Analysis and the Province of Philosophy." See Grice (1989,181-5).

[9] I am not sure how common was the use of "conceptual analysis" when Grice wrote the paper, and whether it was the very earlier instance of its being used. From the tone of Grice's writing, it was at least something not that commonly recognized. But whether it was one of the first needs further research.

one's ability to use our terms (esp. "E") correctly. But he did not treat it as solely consisting in giving an account of the meaning of the expression E, or doing an induction on how E is used, far less as appealing to the notion of analyticity. His idea of conceptual analysis involves, at the least, coming up with *general characterizations*. The idea of *general characterizations* is perhaps unclear, but it is clear that it assumes the meaning of E, and goes beyond an induction on usage. Note that Grice wrote the paper in 1958, seven years after Quine's publication of "Two Dogmas." Neither in this paper nor in his 1987 supplementary piece, titled "Conceptual Analysis and the Province of Philosophy," did Grice mention Quine's work and its possible effect on conceptual analysis. One would hope that Grice, out of intellectual honesty, should at least mention it. However, let us look at some other examples in case Grice was being idiosyncratic.

In 1992, P.F. Strawson, who co-wrote (with Grice) one of the most cogent responses to Quine's paper (Grice and Strawson 1956), speaks of "conceptual analysis" in his book *Analysis and Metaphysics* as the favored description of an analytic philosopher's favored activity (Strawson 1992, 2). Although he immediately suggests that the phrase is unsatisfactory if "taken seriously as a description,"[10] he never gives up the phrase "conceptual analysis." Nor does he mention anything about how Quine's attack on the analytic-synthetic distinction might possibly affect projects of conceptual analysis, the qualms Fodor and Harman, among others, speak of. This is a striking fact, given that Strawson's book devotes two half chapters to Quine. One might think that since Grice

[10] He in fact suggests a different model of understanding it later in the book. See below.

and Strawson were among the people who opposed and criticized Quine's attack on the analytic-synthetic distinction, they might be biased when it comes to conceptual analysis. But still, if analyticity, and consequently conceptual analysis, was "conclusively undermined thirty years ago," as Harman suggested, it is striking that Strawson went on discussing conceptual analysis as if Quine's work is entirely irrelevant.

I suspect it is not that Strawson and Grice thought Quine's critique failed and they thus endorsed and preserved a notion of analyticity, or that they intentionally suppressed a discussion of Quine's "Two Dogmas" in relation to conceptual analysis. There is another entirely plausible possibility, that is, they thought conceptual analysis has not much to do with analyticity. This possibility receives support from the fact that we have other instances of philosophers' using "conceptual analysis" as a characterization of a philosophical method, while not being committed to analyticity either. For example, in a 1975 collection, philosophers (ranging from Herbert Marcuse to W.V. O. Quine) discuss how they saw philosophy. The philosopher Alan R. White defends conceptual analysis in his contribution, "Conceptual Analysis."[11] He even identifies it with philosophy itself. White writes:

> To have a particular concept, e.g., that of justice, recklessness, or mass, is to be able and disposed to assimilate or distinguish in certain ways whatever we encounter. Examining the relations between the various ways we classify things and consequently between the characteristics which things necessarily have in virtue of being what they are, is examining the concepts we use. We can use the traditional word "analysis" for this examination of concepts (White 1975, 105)[.]

[11] Alan White is not a name often heard nowadays, but enjoys high reputation in some circles. He wrote on topics ranging from legal philosophy to modal logic.

White's discussion of conceptual analysis, throughout his paper, shows no scruple about Quine's famous critique of analyticity, even though it is presented in a volume in which Quine is also a contributor. It might be argued that White, Strawson, and Grice all disagreed with Quine's "Two Dogmas," but the fact that there is not even a trace of the thought that Quine's work might be relevant in all of their uses of "conceptual analysis" is certainly something odd and requires explanation.[12]

What can be discerned from the contrast between the two groups of uses of "conceptual analysis" is that the main critics of conceptual analysis have something quite different in mind when they speak of "conceptual analysis," different from those who perhaps first introduced and practiced it. What is meant by "conceptual analysis" in the hands of those who favor it is not entirely clear from the above discussion. What is clear is rather a negative point: it does not treat conceptual analysis as an analysis of meaning, construed narrowly and widely, that is, either as uncovering analytic statements or surveying ordinary linguistic usage. It is clear from Grice and White's views that conceptual analysis relies partly on linguistic meaning or usage, as a prerequisite, but is by no means identified with analysis of linguistic meaning or resulting form induction on

[12] Let me add to this list one further example. When Bede Rundle deplores in his 1997 book that "my predilection for more systematic analysis is in the tradition of Ryle and Austin, a tradition which has largely given way to a scientistic approach in which *conceptual analysis* takes second place to a misguided quest for *theories*" (Rundle 1997, Preface, ix, emphasis added), his use of "conceptual analysis" seems, *prima facie*, different from the one Fodor and Harman were talking about. Rundle did not say that conceptual analysis is doomed and out, but rather that there had been a method, "conceptual analysis," following the tradition of Ryle and Austin, perhaps fine and good in itself, has now been replaced by scienticism. And that this is something we should lament over. The complaint here should ring a bell in light of my previous discussion of scientific tendencies in studying concepts. It is perhaps not an accidental matter that these philosophers are all British while the earlier set of philosopher I cited as critics of conceptual analysis all worked on the other side of the Atlantic. This phenomenon is worth further inquiry.

usage. This is, however, the view held, to various degrees, by the critics of conceptual analysis. I shall first say something about what critics' view of conceptual analysis comes to.

II. 3 The Logical Positivist Conception of Conceptual Analysis and its Dominance

The critics' view of conceptual analysis is a distinctively logical positivist one. Central to this conception of conceptual analysis is the idea that philosophical analysis of concepts, such as that of knowledge, truth, mind, law, authority, etc., are analysis of the *meaning* of the associated concept-words, "knowledge," "truth," "mind," "law," "authority," etc. And the results are analytic truths.[13] To take Quine's attack on analyticity as tantamount to an attack on conceptual analysis as a legitimate philosophical method, is a direct indication that those critics of conceptual analysis take results of such analysis to be analysis of meaning. The very idea of analyticity is "truth in virtue of meaning alone," and it was indeed Quine's original intention to undermine such ideas lying at the heart of the epistemology of logical positivism.

Critics of conceptual analysis don't always make it clear that it is such logical positivist assumptions that were Quine's target. However, Harman's foundationalist account in the passage quoted above, although there was no explicit mention of logical positivism, gives it away: the idea that ultimately, our knowledge is either known from immediately given experience or known a priori through *linguistic meaning*

[13] Underlying this idea of philosophical analysis is one variant of what Quine calls a distinction between language and fact, as I discussed in chapter 2.

(Harman1999, 141). Any knowledge claim that is not traceable to either of the two sources is not credible and should be thrown into flames. It is a descendant of Hume's distinction between "matters of fact" and "relations of ideas," which the logical positivists appeal to.

As will become clear below, the identification of conceptual analysis with analysis of meaning is one, but not the only, feature of the logical positivist notion. The more significant point right now is that this logical positivist notion of conceptual analysis has somehow become the dominant one whenever we think about conceptual analysis now,[14] and when contemporary critics speak of conceptual analysis and criticize it, they almost always have the logical positivist notion in mind, taking it, or its variants (as it easily though mistakenly extends to the ordinary language philosophers), as their target. I have discussed Fodor and Harman's views in details. Let me now illustrate this with one more example.

In a paper titled "Concepts and Conceptual Analysis," Laurence and Margolis review the recent "revival" of conceptual analysis in the hands of Bealer, Chalmers, Jackson, and Lewis, etc., and focusing on Jackson's work, they try to show that the revival does not succeed.[15] That these authors are no exception to the thesis I am espousing can be seen from the central concern of their paper:

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[14] Or, if Grice was really the first one who came up with the term "conceptual analysis," then it should be said that conceptual analysis increasingly received a logical positivist reading over the course of the development of analytic philosophy in the past 50 years.

[15] The reason I picked this paper is that its two authors, being the producers of most recent literature on concepts and conceptual analysis, sign on to the view of conceptual analysis that is, I think, logical positivist. It is in this way very representative.

> [S]ince a substantial portion of philosophy done in the wake of Quine's and Putnam's work has been premised on the rejection of analyticity and a priori methods, the work of contemporary conceptual analysts like Bealer and Jackson constitutes a radical critique of much recent philosophy, especially philosophy of mind (Laurence and Margolis 2003, 255, footnote omitted).

The line here resembles that of Leiter's: it is simply too late not to acknowledge Quine's lesson. The authors' conclusion is, in the last analysis, a rehearsal of a Quinean type of argument:

> We claim that Jackson's account remains susceptible to the sorts of worries raised by Quine and Putnam (though not in precisely the same way as earlier accounts) and that Jackson fails to undermine the familiar naturalistic and anti-a-prioristic views prevalent in contemporary philosophy of mind (Laurence and Margolis 2003, 255).

What sort of worries and what kind of familiar naturalistic views? Laurence and Margolis present two (groups of) arguments, the first of which is directed at Jackson's "serious metaphysics" where conceptual analysis is supposedly playing a role.[16] It boils down to the following: in arguing for the role of conceptual analysis in metaphysics, Jackson has assumed that people have a priori access to a description that picks out the referent of the concept of water in each possible world,[17] while the truth of the matter is that we don't even have that in our own actual world because "nearly every element in a natural kind concept's stereotype is open to revision in light of empirical findings"(Laurence and Margolis 2003, 261). Just like characteristics like being yellow, tart, etc., cannot be thought of as part of the definition of the concept of a lemon, as Putnam has shown, descriptions such as being clear, liquid, drinkable, falling from the skies as rain, etc., do

[16] Laurence and Margolis, following Jackson, present the problem in terms of two-dimensional semantics. For simplicity, I present their views without discussing what that is. But I think we can approach the heart of the matter here without that piece of technicality.

[17] In the terms of the two-dimensional semantics, this is the "A-intension of WATER."

not determine "*the semantic value* of kind terms" (Ibid., 263, emphasis added). Leaving aside the point, discussed above, that our inquiry into the nature of water is a factual one (hence not entirely conceptual), the important thing to notice here is the authors' implicit assumption that conceptual analysis is aimed at the *semantic value* of terms.

The second group of arguments is directed at the supposed use of conceptual analysis in categorization, meaning change, communication, and understanding. I briefly consider two of these since the authors thought the four are "closely related." According to the two authors, Jackson is committed to the view that conceptual analysis delivers the principles based on which we categorize things (the principles also constitute the "*meaning* of a concept"), but the problem with that is "categorization does not require *analytic or a priori* principles in order to operate" (Ibid., 267, emphasis added). The implicit assumption of the criticism is again that conceptual analysis delivers analytic a priori truths. The same idea is rehearsed when they criticize Jackson's argument that communication "of useful information depends on the fact that the words we use and, and the concepts they encode, have analytic entailment" (Ibid., 273). The counterargument is that our words convey information that is often not analytic, nor derived from their meaning, such as in the sentence "London is in England." "Moreover, *even assuming that there are analyticities for conceptual analysis to discover*, it's unlikely that grasping these would be needed for communication anyway." After all, the authors say, conceptual analysis is not easy—one only needs to think about Gettier type cases (Ibid., 274, emphasis added).

Putting aside the question whether this is a faithful reading of Jackson's view, and whether Jackson has presented the best defense of conceptual analysis, the criticisms against conceptual analysis in Laurence and Margolis (2003)—which I take to be very representative of a whole set of contemporary views on conceptual analysis—are certainly directed at a very peculiar conception of conceptual analysis, the conception whose origin I have traced to logical positivism. It is clear from the discussion above that this view takes conceptual analysis to be about semantics or meaning of terms, and delivers analytic a priori truths.

This gets us to other features of the logical positivist notion of conceptual analysis. First, the a priori is reduced to analyticity (Cf. Ayer 1983). Laurence and Margolis, as we notice, use the two interchangeably in their criticisms. Harman was hesitant to equate them, but whether analytic truths are a proper or improper subset of the a priori, he thinks the a priori is unacceptable anyways. We saw that Fodor lumps the *analytic*, the *linguistic*, and the *conceptual* all together and treats them as have been all thrown out in light of Quine's work, in particular the a priori and the necessary (though he thinks perhaps we can still speak of such truths in logic and mathematics).[18] Second, the logical positivist conception does not recognize any notion of necessity other than its being the same thing as analyticity, which in turn is tautologous. Russell calls it the

[18] For a further example, Alasdair MacIntyre has also bought into the idea that Quine's attack casts doubts on the distinction between the *conceptual and the empirical*. See MacIntyre (2007), p.73. One can see how these mixture of terminologies can cause a lot of confusions.

"Linguistic Doctrine of Necessity" of the logical positivists.[19] These features of logical positivism are noticed by e.g. Stephen Toulmin. In an essay about the history of logical positivism and assessing its legacy, Toulmin writes:

> Like March, therefore, the Viennese positivists for the most part were content to operate with an epistemological unit taken over with little change from David Hume's notion of "impressions." Like Hume again, they identified the realm of the "necessary" and the a priori with that of the "analytic" or "tautologous" (Toulmin 1969, 35) [.]

And here we are reminded how critics of conceptual analysis like Brian Leiter conflate these ideas. Recall what Leiter says: "so there is no real distinction between claims that are 'true in virtue of meaning' and 'true in virtue of facts,' or between 'necessary' and 'contingent truths' "(Leiter 2007, 176). Here the necessary is equated with the analytic. Leiter explicitly mentions that the methodological view he is discussing is that of logical positivists. But we ought to ask: does this view accurately characterize conceptual analysis? Do those people like Grice, White and Strawson embrace such logical positivist idea of conceptual analysis? I have adduced preliminary evidence for the negative answer. Now, is this the methodological view of those who Leiter criticizes, e.g. H.L.A. Hart? If Leiter wants to mount a methodological criticism against Hart, and he did indeed, he has to show that Hart was committed to the logical positivist conception of conceptual analysis. But Leiter is certainly wrong, if only as a matter of historical facts, because Hart himself explicitly denied that he signed on to the logical positivist view of philosophical analysis. Let me now add a historical note on H.L. Hart's philosophical methodology

[19] See Russell (2014, 184). Hence the status of necessary propositions becomes problematic. I have discussed this in chapter 5.

before turning to a defense of conceptual analysis.

II. 4 A Historical Excursion: Did H.L.A. Hart Accept the Logical Positivist Conception of Conceptual Analysis?

It is again somewhat surprising that Hart himself seems to have never thought of the possible implication of Quine's work for his project of analytical jurisprudence, given how influential "Two Dogmas" was after it came out in 1951. It is reasonable to think that this can only be the case because Hart, like Grice, Strawson, White, and others, did not think Quine's work was relevant to his project of conceptual analysis in law. Based on matters of historical and intellectual fact, I conjecture that he was aware that when he talks about analysis of concepts, he was not committed to the logical positivist conception of it.[20] What supports my conjecture are three pieces of evidence: first, Hart's methodology was no doubt influenced by J. L. Austin's ordinary language approach to philosophy.[21] In light of the evidence we have of Hart's intellectual development, Hart indeed thought that Austin/Grice type of analysis was that of logical positivism at first. He was initially influenced by his former tutor, Joseph Horace, and thought that the new linguistic approach to philosophy developed in late 1930s was a crude version of logical positivism, drawn from A. J. Ayer's *Language, Truth and Logic* (Ayer 1936), a book he thought poorly of. But he soon realized that there was something subtle and important in

[20] Given that Hart spent most of his academic career in Oxford and his association with J.L. Austin, it is reasonable to suppose that his conception of conceptual analysis followed that of Grice, Strawson, and White. But I do not want to press this speculative point too far.

[21] Below, I shall say more about how this methodological approach is very easily (and mistakenly) identified with that of a logical positivist.

this new approach that intrigued him.[22] The fact that Hart changed his judgment about Austin/Grice type of method shows at least that Hart was aware of the difference between that and the logical positivist methodology.

Two more pieces of evidence from Hart's philosophical writings lend further support to my thesis: in 1957, 6 years after the publication of Quine's work, Hart's explicit defense and clarification of his own conceptual methodology appeared in *University of Pennsylvania Law Review*. There he characterizes his method thus:

> I have advocated in my [inaugural] lecture the application in the analysis of fundamental legal concepts of a different technique. This is in fact a very old technique advocated, as I said there, by Bentham, though the fundamental insight could be found in many philosophers such as Frege. The technique I suggested was to forego the useless project of asking what the *words* taken alone stood for or meant and substitute for this a characterization of the function that such words performed when used in the operation of a legal system. This could be found at any rate in part by taking the characteristic sentences in which such words appear in a legal system, *e.g.,* in the case of the expression 'a right,' such a characteristic sentence as *"X* has a right to be paid *Y* dollars.' Then the elucidation of the concept was to be sought by investigating what were the standard conditions in which such a statement was true and in what sort of contexts and for what purpose such statements were characteristically made (Hart 1956, 961, footnote omitted).

Nowhere in the way he characterizes his methodology does Hart seem to sign onto logical positivist assumptions about analysis. Throughout the paper, nowhere has Hart identified analyzing a concept with "looking for analyticities." This is especially significant because Hart's paper was meant to be a clarification of his methodology by responding to various qualms and objections about it. The confusion of conceptual analysis with looking for analyticities, and hence using the demise of the

[22] For the basis of this discussion, see Lacey (2004), 114-5.

analytic-synthetic distinction to undermine Hart's methodological commitment, is a quite recent phenomenon. More conclusively (my third point), in the preface to his *Essays in Jurisprudence and Philosophy* (Hart 1983), Hart explicitly diagnosed the mistake the logical positivists made and distanced himself from them. The contrast is exactly between logical positivism and the linguistic approach Grice tries to articulate. Hart writes:

> Those seven years [1945-1952] fell within the period when the approach to philosophy which became known as 'linguistic philosophy' was at its most influential both in Oxford and Cambridge. There were important differences of emphasis and aim between the Oxford variant of this form of philosophy, where J. L. Austin was its leading exponent, and the Cambridge variant which flourished under Wittgenstein. None the less both were inspired by the recognition of the *great variety of types of human discourse and meaningful communication*, and with this recognition there went a conviction that longstanding philosophical perplexities could often be resolved not by the deployment of some general theory but by *sensitive piecemeal discrimination and characterization of the different ways, some reflecting different forms of human life, in which human language is used.* According to this conception of philosophy, *it had been a blinding error of much philosophy in the past, and most recently and notably of the Logical Positivism of the pre-war years, to assume that there are only a few forms of discourse (empirical 'fact-stating' discourse or statements of definitional or logically necessary truths) which are meaningful, and to dismiss as meaningless or as mere expressions of feeling all other uses of language which, as in the case of some metaphysical statements and moral judgments, could not be shown to be disguised or complex forms of the few favored types of discourse* (Hart 1983, 2-3, emphasis added).

This quoted passage complements the previous one in that it puts Hart's methodological innovation in a historical context and contrasts it with the logical positivist view from which he wants to distance himself. Leiter wants to characterize Hart's methodology as conceptual analysis, yet the model of analysis Leiter has in mind is a logical positivist one (a point Leiter acknowledges) which Hart explicitly rejects; thus his criticism is simply off the target. Even if Quine has succeeded in undermining the notion of

analyticity, we see that there is another conception of conceptual analysis, suggested by the different uses of the term by Grice, Strawson, White, Hart, etc., that is immune from Quine's critique. What would be a way to characterize this conception of analysis? If, as Hart rightly points out, the logical positivist notion of human discourse and meaningful communication, and consequently its view of conceptual analysis, is too narrow and rigid, then maybe it is time to break from the narrow conception of conceptual analysis and think about it differently.

The first point to be made toward an alternative is that the notion of analysis needs not be monopolized by a logical positivist model. Analysis does not have to be thought of as producing analytic truths. We might benefit from recognizing the plurality of analysis. In a survey of the conceptions of analysis, Michael Beaney writes:

> If we look at the history of philosophy, and even if we just look at the history of analytic philosophy, we find a rich and extensive repertoire of conceptions of analysis which philosophers have continually drawn upon and reconfigured in different ways. Analytic philosophy is alive and well precisely because of the range of conceptions of analysis that it involves (Beaney 2014, Preface).[23]

If analysis can mean very different things, why should conceptual analysis be only one single thing, as represented by the thin conception I have discussed above? But what alternatives do we have?

[23] The very next sentence is equally important: "It may have fragmented into various interlocking subtraditions, but those subtraditions are held together by both their shared history and their methodological interconnections" (Beaney 2014, Preface)

III. An Alternative Model of Analysis: Conceptual Analysis as Connective Analysis

In the previous sections, I have surveyed and identified two views of "conceptual analysis" in contemporary discussions of the methodology of philosophy. The first view, which I have called the "logical positivist view of conceptual analysis," takes conceptual analysis to be an analysis of meaning, or producing analyticities. It is committed to the language/fact or the analytic-synthetic distinction, and consequently identifies necessity and a prioricity both with analyticity. These are features of this view that are shared by the logical positivists and it is these features that make it vulnerable to Quine's criticisms in his "Two Dogmas." I have also pointed out that this view is the focus of much of the contemporary criticisms of conceptual analysis. The second view of conceptual analysis, (probably) first introduced by mid-century Oxford philosophers, did not commit itself to these logical positivist assumptions.[24] Therefore, it survives the contemporary criticisms of conceptual analysis. As it stands, however, it is unclear as to what its features and underpinnings are. In this section, I take a first step toward articulating, developing, and defending an alternative view of conceptual analysis.

III. 1 P. F. Strawson's Connective Analysis

The inspiration for an alternative account of conceptual analysis comes from P.F. Strawson's work. In the passage from his 1992 book "Analysis and Metaphysics" quoted

[24] Although, as I shall point out below, it is easily mistaken with and thought to share the assumptions of the logical positivist view.

above, Strawson points out that conceptual analysis might be thought of as the favored description of a philosopher's activity (Strawson 1992, 2). He immediately adds:

> [P]erhaps that ["conceptual analysis"] will serve well enough as a name. Taken seriously as a description, it may be less satisfactory. An analysis, I suppose, may be thought of as a kind of breaking down or decomposing of something. So we have the picture of a kind of intellectual taking to pieces of ideas or concepts; the discovering of what elements a concept or idea *is* composed and how they are related. Is this the right picture or the wrong one—or *is* it partly right and partly wrong? That *is* a question which calls for a considered response—a response I shall defer till later (Ibid., 2).

I shall get back to Strawson's dissatisfaction with the term "conceptual analysis" below. But let us first look at what he offers as an alternative:

> Let us imagine…the model of an elaborate network, a system, of connected items, concepts, such that the function of each item, each concept, could, from the philosophical point of view, be properly understood only by grasping its connections with the others, its place in the system—perhaps better still, the picture of a set of interlocking systems of such a kind (Ibid., 19).

Unfortunately, Strawson himself never develops this conception of analysis further in his 1992 book, nor is there much discussion of it in secondary literature.[25] Following Strawson's suggestion, I shall try to clarify what connective analysis involves and set out some of its features in relation to what has been discussed in previous chapters. It is worth noting that I am not defending Strawson's account of conceptual analysis—there isn't much of an account to start with. However, I do think the term "connective analysis" is felicitous and fruitful for characterizing conceptual analysis as a philosophical method (employed by many historical philosophers, as I shall show below), and I shall use it to

[25] There has been one paper comparing Strawson's methodological view with that of Aristotle (Byrne 2010), in which the author suggests Strawson's approach bears close affinities Aristotle's conception of analysis. I shall use one example to illustrate this point below. The point echoes the one made by Grice, that conceptual analysis can be thought of as capturing a lot of past philosophies' methodological commitment. In Grice (1989, 178-9). Other mentions of Strawson's connective analysis are, e.g. Glock (2008, chapter 6), Beaney (2014, sect. 8), and (indirectly and in a negative tone) Williamson (2014, 12).

piece together elements I have discussed in the previous chapters and form a picture of what I think conceptual analysis is.[26]

III. 2 Definitions and Connective Analysis

In chapter 6, I pointed out one reason why conceptual analysis of (knowledge, mind, law, etc.) is particularly susceptible to be thought of analysis of meaning of words/terms, and I remarked there that the view that takes conceptual analysis to be an analysis of meaning is a central confusion in discussions about conceptual analysis.[27] Now that I have identified this as a central feature of the logical positivist view of conceptual analysis, and shown that many contemporary philosophers share this view, the first major task would be to show how connective analysis differs from, and/or overlaps with, analysis of meaning. Let us start with a more traditional view of conceptual analysis as providing definitions.

In jurisprudence, it is commonplace to focus on the question, what is law? Indeed, "What is X?" is the most venerable form a philosophical question can possibly take.[28] This way of asking the question may appear that we are demanding a *definition* of X. Providing definitions is the task of traditional (or "classical") form of conceptual analysis, and definitions are necessary and sufficient conditions for something's being so (Margolis & Laurence, 1999, 8-9). Speaking of definitions per se is not problematic.

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[26] Henceforth, I shall use "conceptual analysis" and "connective analysis" interchangeably.
[27] In the last part of chapter 6, section III. 2.
[28] What is piety? What is virtue? What is knowledge? What is art? What is justice? We are quite familiar with these questions from Plato's dialogues.

Socratic questions of the form "what is X (justice, knowledge, courage)?" were meant to elicit "definitions that would disclose the objective and language-independent essence of justice or knowledge" (Hacker 2013, 437). And when Aristotle speaks of definitions, what he was getting at presumably was the *nature*, of thunder, for example, in the modern sense of understanding the mechanism of the phenomenon, not the meaning of the word "thunder." Hence, what Socrates and Aristotle were asking for was "definitions *de re*" (or *real* definitions). In contrast, there are definitions *de dicto* (or nominal definitions), definitions of words, rules for how they are used, or their meaning. As the name "de dicto" suggests, it is definitions of an expression or assertion. The two kinds of definitions/conceptual analysis are obviously related. Definition de dicto could also very well be a part of conceptual analysis: knowledge of how an expression is applied and a sharpened awareness of usage can both be helpful for definitional purposes.

Speaking of definitions in a modern day context, however, has some baleful effects, when almost no one accepts that there is an "objective and language-independent essence" of things like justice or knowledge. Since the scientific revolution, the philosopher-scientists realized that the essence or nature of things were not to be found through conceptual analysis, but rather through scientific methods. We now find essences or natures by discovering the chemical/physical structure of water molecules, or the genetic information of lemons and tigers. Such essences are indeed "objective and

language-independent,"[29] and such investigations are what I have characterized in the previous chapter as factual or empirical investigations. It still makes sense to talk about de re definitions, of thunder or water, for example, in the traditional sense. Now what about the "essence" of things like knowledge, justice, and law? We no longer have a de re definitional project for these, yet we still *talk about* their *nature* or *essence*: we still have the same language for a de re project that no longer makes sense. Wittgenstein enigmatically remarked that "essence is expressed by grammar,"[30] but I have complained in the previous chapter that what Wittgenstein says about methodology is either unhelpful or too elusive, if not misleading.[31] Don't we then only have definitions *de dicto* left, for justice, knowledge, and perhaps law? This consequence directly leads to the view that equates conceptual analysis with meaning of a dictionary type, or, lexicography (recall that Brian Leiter says conceptual analysis might be nothing more than "glorified lexicography" (Leiter 2007b, 177)).

Therefore, this way of asking the question, "What is X?," as if it is demanding a definition, encourages confusion in two different directions.[32] On the one hand, it is easy to mix philosophical questions like "what is piety?" with questions like "what is platypus?" They share the same form, but the background for sensibly asking the first in a de re sense is lost. This is a confusion discussed in the last chapter. It takes a question

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[29] Not in the sense that they might be represented without language, but in the sense that they are to the maximal extent independent of investigators' particular perspectives and methods of representation. In Bernard Williams's words, they are part of the "absolute conception of the world." See Williams (1985/2011, chapter 8, 154).

[30] Wittgenstein (1953/2001, sect. 371).

[31] The talk of grammar might (mis)lead us to think that it is about syntax of our language.

[32] This is one reason I did not ask the question "what is a concept?" in this chapter, only using it as a *title*.

such as "what is piety/mind?" to be an empirical/factual question and approaches it using the method of the sciences. This is especially likely to happen when we have a concept such as the concept of mind, which (unlike the concept of responsibility) seems to straddle between concrete aspects of the world and linguistic constructs, and where a scientific/empirical approach appears to be fruitful. On the other hand, the question can be taken to be merely asking for a *dictionary definition* of words like "law," "art," "justice," and "knowledge," that is, definitions de dicto.

Besides being misleading, there are further problems with the definitional view. There are not many interesting concepts that can be defined in terms of necessary and sufficient conditions. Wittgenstein's analysis of the concept of game shows that even for a garden-variety concept such as game, it is hard to give such definitions. To define, as suggested by its etymology, is to determine, terminate, to end. Definition hence implies a kind of arbitrariness in drawing boundaries (how often we hear a rudimentary way of doing philosophy begins with statement: "it depends on how you *define* it!"). Even if such definition can be obtained at all, it probably would not help. No key concept in philosophy, as a matter of fact, is and can be *a matter of definition*. This is because philosophical problems rarely arise because of lack of definitions. A definition of "law" or "morality" would hardly help us in addressing our original puzzle about the relationship between law and morality. Therefore, Strawson's alternative model of analysis is "more realistic and fertile" in the sense that, formally, it does not attempt to give definitions in terms of necessary and sufficient conditions.

III. 3 Meaning of Words and Connective Analysis

The most harmful effect of taking a philosophical project as a definitional one is that it is taken to be about the meaning of terms, usually of a dictionary type. One of the forerunners of legal positivism, John Austin, throughout his *The Province of Jurisprudence Determined*, characterizes his jurisprudential project of giving an account of the nature of law as one that provides a "definition of positive law".[33] And at places he writes as if his project *is* concerned with meaning of terms:

> Determining the essence of or nature of a law imperative and proper, I determine implicitly the essence or nature of a command….Determining the nature of a command, *I fix the meanings of the terms* which the term 'command' implies: namely, 'sanction' or 'enforcement of obedience;' 'duty' or 'obligation;' 'superior and inferior' (Austin 1832/1998, pp.3-4, Lecture I, emphasis added).

John Austin's intention must have been that his definition captures law's nature or essence, in the sense that goes beyond the meaning of terms. In other words, Austin asked a Socratic question. As contemporary scholars have pointed out, foundational figures in jurisprudence like John Austin were less conscious of underlying methodological issues (e.g. Bix 2007, 1). It is thus hard to decide if Austin was sloppy in choosing his terminology, or he might have misconceived his own project at some meta-level. It does show that if we think conceptual analysis is about definitions, it is a short step to saying that it is about the meaning of terms.[34]

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[33] This exact phrase occurs in Lecture VI of his book. See Austin (1832/1998, 350). But he speaks of definitions of terms (such as "law," "command," and "sovereign," etc.) throughout the text.

[34] A similar doctrine is famously expressed by one of the most influential contemporary legal philosophers, Ronald Dworkin. In *Law's Empire*, Dworkin argues, in a nutshell, that what legal positivists like Hart and Raz offer are what he calls *semantic theories* of law. There are certain shared rules we follow in using words, and these rules set out the criteria that supply a word's meaning. A semantic theory of law is therefore a theory that

The view that, in general, a philosophical analysis of a concept is an analysis of word meaning, or conceptual analysis is merely a *linguistic* matter, is neither new nor idiosyncratic. Bertrand Russell once wrote this about the Socratic method:

> A question such as "what is justice?" is eminently suited for discussions in a Platonic dialogue. We all freely use the words "just" and "unjust," and, by examining the ways in which we use them, we can *arrive inductively at the definition that will best suit with usage.* All that is needed is knowledge of how the words in question are used. *But when our inquiry is concluded, we have made only a linguistic discovery, not a discovery in ethics* (Russell 1945, 93, my emphasis).

What Russell says about Socrates' inquiry should remind us of what Gilbert Harman writes 54 years later about conceptual analysis: it is an induction on linguistic usage. It is true that if we arrive at a definition of the word "justice" by doing an induction on usage, it follows that we will have made a *linguistic discovery* if we ever arrive at such a definition.[35]

Philosophers usually do not claim that what they purport to do is making linguistic discoveries or giving definitions of a dictionary type. What dictionary provides are more usually "simply commonly held beliefs" (Rey1983, 259). They simply don't seem to be adequate to aspire to be the nature of something, in any robust sense of the term. Nor do philosophers claim what they do is analysis of meaning of relevant terms. It

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identifies those criteria that lawyers follow in judging propositions of law (Dworkin 1986, 31-2). He goes on to argue that the concept of law is an *interpretative concept*. Hence, there are no "defining features" common to all instances or examples of that institution. The question which features a legal system has, in virtue of which they *define* a legal system, is an interpretative matter (Dworkin 1986, p.91). Dworkin is not alone in holding this view. Similar views about analysis of concepts in jurisprudence can be found in Marmor (2013). In a paper on the methodology of legal positivism, Marmor comments "when we try to elucidate or analyze a concept, is there anything else to it than figuring out what the word, in its relevant settings, means in the language in question? It is difficult to see how it would be different." For Marmor, what a word means, and therefore a concept, is "the general function(s) of a word in a given type of setting" (see Marmor 2013, 211).

[35] Notice Russell's use of "definition" in the above passage already diverges from Socrates/Plato's original intention, as discussed in section III. 2 of this chapter.

seems obvious that Hart and Ryle are *not* explaining the meaning of the words "law" and "mind" in their philosophical works titled *The Concept of Law* (Hart 1961/1994) and *The Concept of Mind* (Ryle 1949/2009). Raz, in his "Can there be a Theory of Law," dismisses the semantic view of conceptual analysis outright. His argument is, in its essentials, that the meaning of "law" is univocal and clear in varieties of context, and it is simply not the aim of Hart's *Concept of Law* to explain its meaning or part of its meaning (Raz 2005, 325). Although this response has an element of truth in it, it is too simplistic. The element of truth is that to figure out how a philosopher's analysis of a concept differs from the analysis of meaning, we look at what philosophers actually do. The difficulty remains how to give an account of what they do.

Part of the difficulty to be sorted out is that "meaning" is such a philosophically loaded term, with its multiple conceptions entering into various philosophical theories. Narrowly or broadly construed, there could be a wide spectrum of meaning. In the (analytic) statement that "a bachelor is an unmarried man," and in the statement "When I am pained, I do not say that I perceive pain, but that I feel it,"[36] there might be different shades of meaning (of the terms) involved—if we want to treat both of them as true in virtue of meaning. The complexities of the meaning of "meaning" make its connection with, and difference from, conceptual analysis nebulous. Gillian Russell, in an article discussing Quine's "Two Dogmas," distinguishes three kinds of meaning: 1) significance, as a consequence of having a role to play in linguistic practices such that "hello" has

[36] This example is from Thomas Reid, *Essays on the Intellectual Powers of Man*. See Reid (1785/1969, 9).

meaning, "even though there is no object in the world that it is supposed to 'mean' "; 2) referent or extension; and 3) the mechanism or rule that establishes the extension of the predicate (Russell 2014, 186-7).[37] It is unclear if Russell's scheme is the consensus among philosophers; for example, it is controversial if referent or extension can be a kind of meaning.[38] There are of course views that identify meaning with a kind of mental entity, and in turn with concept. Such identification has been associated with the psychologistic views of meaning and concepts.[39] This psychologistic view of meaning and concepts is on the way out even if it still has some supporters.

There are other accounts of meaning in relation to concepts that seem more acceptable. In a 1993 article reflecting on meta-philosophical issues, Tyler Burge equates concepts with "translational meanings," "the meaning of the term that would remain constant even as one definition is replaced by another",[40] while a speakers' articulations of the meaning of the term are what Burge calls "lexical meanings." Burge argues (quite correct I think) that a corollary of this view is:

> [O]ne must distinguish the sort of understanding of a word in being able to use it to express a concept or translational meaning from the sort of understanding that is involved in being able to give a correct and knowledgeable explication

[37] In Russell's interpretation, Quine is saying that "analyticity" only has meaning in sense (1). It has no extension, and its meaning in sense (3) is defective (Russell 2014, 187).

[38] We know that even if all roses in the world have been destroyed, the word "rose" still has meaning.

[39] For example, Putnam once remarked "the doctrine that the meaning of a term is a concept carried the implication that meanings are mental entities" (Putnam 1971 (1996), 284).

[40] Burge writes: "take Dalton's definition of an atom, near enough: 'An atom is the smallest indivisible particle, out of which all other bodies are made'. Dalton assumed that atoms fall into a scheme of atomic weights, in something like the way his experimental evidence suggested. The definition turned out to be false, but the approximately true scheme of atomic weights turned out to anchor the concept" (Burge 1993, 316). This is the kind of definition that goes after "fundamental characteristics," though Burge says his points apply to other kinds of definitions as well. Burge does not seem to flesh out further what translational meaning is in his 1993 article, except the example of Dalton's definition of an atom. In light of what I said earlier about translation, I think "translational meaning" could be understood to be the common understanding that grounds one term to be translated into another in a different language. It is the concept that grounds such translation.

> of it. One may think with a concept even though one has incompletely mastered it, in the sense that one associates a mistaken conception (or conceptual explication) with it" (Burge 1993, 316-7).[41]

Burge seems to think that the two kinds of meanings (what he calls "translational" and "lexical") are associated with two kinds (or levels) of understanding. This intimates that conceptual analysis might be concerned with two kinds of meanings—if we want to talk about meanings at all, and in turn, two kinds or levels of understandings.

I do not have my own account of meaning to offer here. That would be too ambitious, or simply confused, as J. L. Austin reminds us.[42] But I think Burge's distinctions are helpful. It is clear that those who equate concept with word-meaning and/or conceptual analysis with analysis of meaning often have in mind something like lexical meaning (hence conceptual analysis becomes lexicography in Leiter's critique). In what follows, I shall focus on this particular shade of meaning of "meaning" and discuss how conceptual analysis connects with and differs from it. Let me also extend the scope of the term "meaning" a bit more broadly, to include meaning of a dictionary type, articulations of (rules of) correct usage, or expression of common belief by competent speakers, etc., that is, items that are usually referred to as "linguistic meaning" (I shall use it interchangeably with "lexical meaning"). I shall show conceptual analysis goes beyond (linguistic/lexical) meaning. Notice this "meaning" already go beyond the logical positivists' notion of analyticity. But if I can show that philosophical or connective

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41 Burge's view here is very similar to those on concepts in Raz 2005.

42 According to J.L. Austin, the question "what is the 'meaning' of a word" is a specimen of nonsense. See his "The Meaning of a Word" in Austin (1961, 23-4). A comprehensive review of the meanings of *meaning* could be found in Nozick (1981, 574-5).

analysis goes beyond meaning in this more broad sense, then it certainly goes beyond analyticity.

I shall start with two plausible theses: 1) if an English speaker is able to *use* a word, "law" or "authority" for example, correctly in most occasions and contexts—being able to assimilate or distinguish, classify or discriminate, or even to *explain* the usage to some extent ("it is the law, not just some house rule!" "How so?" "Well, the State legislature passed it last Fall!")—then we can confidently say that she knows the *meaning* of the word "law" or "authority." This is linguistic meaning, or, in Burge's term, "lexical meaning,"[43] and it involves "understanding of a word in being able to use it to express a concept or translational meaning." 2) It is a sufficient condition for a person to *possess* a concept when she can use the associated concept word correctly.[44] These two assumptions link linguistic meaning with (possession of) concepts.[45]

Granted, my assumptions about linguistic meaning and concept possession are crude. But they give me enough to address the question: is conceptual analysis the same as analysis of meaning? Or, to put the question differently, is a philosophical thesis about, for example, law and authority (such as the one advanced by Raz), a *linguistic discovery*?

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[43] I take this to be an uncontroversial view. But support for this from philosophers is not hard to find. For example, P.F. Strawson has written:

> [T]o give the meaning of an expression….is to give *general directions* for its use to refer to or mention particular objects or persons….For to talk about the meaning of an expression or sentence is…about the rules, habits, conventions governing its correct use, on all occasions, to refer or to assert (Strawson 1950/1996, 219-220).

[44] I take this to be the central thought behind the concepts as abilities view, which correctly reminds us that concept possession is not entirely an intellectual matter (cf. Kenny 2010, 106). It is a sufficient condition because, as I have discussed, there are cases where we want to say that people in a community have the concept but lack a word for it, i.e. situations where the concept is not lexicalized.

[45] It is often the case that we come to possess the concept of X and hence understand X via a grasp of the *meaning* of the corresponding concept-word.

I shall make four points in response. First, it is one thing to possess the concept and use the associated word(s) correctly, it is quite another to *explain* a concept, explain it in a way that constitutes an adequate response to our qualms or confusions. The former overlaps with the latter, but it is the latter that conceptual analysis aims at. These are two different tasks that involve different abilities. Just like the fact that we can use English correctly does not imply that we can explain English grammar, the fact that we can apply (or withhold) an expression E does not mean we can give "a general characterization of the types of cases in which one would apply E rather than withhold it" (Grice 1989,173-4, original emphasis). One may have the understanding to use a word correctly to express a concept, but not the "understanding that is involved in being able to give a correct and knowledgeable explication of it" (Burge 1993, 317).

Second, one difference in term of the abilities involved in the two tasks is that while we might be perfectly competent in applying concepts, we generally lack *comparative-examinations* of similar concepts. For example, we might be conversant with first-order application of concepts of a voluntary act, that is, we might be familiar with *forward-looking* application of this concept (and hence use the words "voluntary act") in various cases. But often addressing philosophical questions involves, for example, getting clear on the differences and connections among concepts of the voluntary, intentional, uncoerced, spontaneous, etc. Such comparative-examination of concepts

might be called a second-order project.[46] This second-order understanding involves and results from being able to *look sideways*, and is different from,[47] and goes beyond, the understanding involved in applying words, which is what's usually called an understanding of "meaning." This is one reason why the semantic or linguistic approach is inadequate as offering explanations of concepts to address our conceptual bewilderment.

Third, there are more complicated situations and second-order reflections. Raz says "most of the concepts we have and understand we master and understand incompletely" (Raz 2005, 326). There are of course cases where we simply have incomplete information. But I suspect the problem also has to do with the nature of some concepts as well. This is not because a concept such as that of law has by itself a complex structure that only very few people grasp. Most of the times our grasp of a concept appears incomplete because our practical and theoretical concerns demand that we not examine it in isolation, but rather in connection with other concepts. And it is here Strawson's idea of a network (of concepts) comes in: each concept could be properly understood only by grasping its connections with the others, its place in the system. To elucidate a philosophical puzzle sometimes involves more than comparative analysis of concepts in the same vein, but rather plotting through a whole network of conceptual network. Responding to philosophical questions such as "how is legal coercion different

[46] We have seen a concrete example of that in the debates of the nature of law in chapter 2, among others, where I discuss Raz's argument for the Sources Thesis of legal positivism by examining the relations between concepts of law, authority, and reasons for actions.

[47] I shall, at the end of this chapter, call this "understanding of our understanding."

from threats backed up by violence?" and "Are moral criteria should be part of the criteria for legal validity?" requires that we look and examine a network of concepts and the complex relations among them: legal norms, authority, coercion, morality, reasons for action, etc. Furthermore, depending on our particular interests and puzzlement, it reveals different features in different connections.[48] It is hard to see how merely articulating lexical meaning would suffice for these purposes.

Fourth—this is a point that extends beyond Strawson's original intent when he uses "connective analysis"—sometimes, when the connection is not there or not obvious, innovative ways of connecting concepts might be required. We make the connections rather than elucidating the already-existing ones. We have seen in chapter 4 how Husak makes a conceptual maneuver to connect the concept of a penal punishment with that of right to address the problem overcriminalization. That is a philosophical maneuver that can properly be called "connective analysis" and it apparently goes beyond meaning of words or how the words are used.

These four points, taken together, are meant to show my general thesis that conceptual/connective analysis goes beyond meaning and analyticity, and therefore is not lexicography. It is an insidious mistake to equate the two. Echoing Grice and Strawson's account of conceptual analysis discussed earlier, Gilbert Ryle aptly summarizes in what way conceptual analysis goes beyond meaning:

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[48] I shall argue below that that our concepts are naturally connected with others; there is nothing to examine in isolation. Further, conceptual examinations are always motivated by concrete questions, and depending on the nature of the question, we get different results.

> It is, however, one thing to know how to apply such concepts, quite another to *know how to correlate them with one another and with concepts of other sorts.* Many people can talk sense *with* concepts but cannot talk sense *about* them; they know by practice how to operate with concepts, anyhow inside familiar fields, but they cannot state the logical regulations governing their use. They are like people who know their way about their own parish, but cannot construct or read a map of it, much less a map of the region or continent in which their parish lies (Ryle 2009 (1949), ix, emphasis added).

Constructing a map of a region, I suppose, is a very different activity from actually travelling on the roads of a region and knowing one's way around.

III. 4 Ordinary Usage and Connective Analysis

I have argued that connective analysis goes beyond meaning, including meaning in the broad sense of (rules of) correct usage or applications of words, recorded in dictionaries, etc. But my thesis is not to deny that meaning has relevance. My thesis is that it is a mistake to think that this is what philosophy or philosophical analysis is all about. The better way to look at it is that philosophical analysis forms a continuum with analysis of meaning. This is because (linguistic) meaning, understood in the broad, extended way, includes ordinary usage,[49] and as I argued in chapter 3, ordinary usage may very well be philosophically significant. The mid-century ordinary language philosophers were extremely good at discerning philosophically significant usage. And it is they who emphasized (perhaps overemphasized) the role of ordinary usage. Discerning philosophically significant usage requires, in Austin's words, "sharpened awareness of words," but this sharpened awareness may certainly go beyond dictionary meaning or

[49] Pressed to extreme, this is the "meaning as use" thesis.

analyticity and be part of philosophizing.

This was not any new invention in mid-century Oxford. We have many such examples from the history of philosophy. For instance, in *De Anima*, Aristotle wrote:

> We use the word 'to perceive' in two ways, for we say that what has the power to hear or see, 'sees' or 'hears', even though it is at the moment asleep, and also that what is actually seeing or hearing, 'sees' or 'hears'. Hence 'sense' too must have two meanings, sense potential and sense actual. Similarly, 'to be sentient' means either to have a certain power, or to manifest a certain activity (*De Anima*, 417a9).

Here Aristotle is examining familiar uses of words to make a distinction that is philosophically significant. As J. L. Austin points out, our familiar usage may embody important (conceptual) distinctions (Austin 1961, 130). Therefore examining ordinary linguistic usage can be a part of conceptual/connective analysis. A more vivid example of connective analysis comes from Jeremy Bentham, a figure Hart refers to in a quote discussed earlier, on the nature of voluntariness:

> By a voluntary act is meant sometimes, any act, in the performance of which the will has had any concern at all; in this sense it is synonymous to *intentional*: sometimes such acts only, in the production of which the will has been determined by motives not of a painful nature; in this sense it is synonymous to unconstrained, or *uncoerced*; sometimes such acts only, in the production of which the will has been determined by motives, which, whether of the pleasurable or painful kind, occurred to a man himself, without being suggested by anybody else: in this sense it is synonymous to *spontaneous*. The sense of the word involuntary does not correspond completely to that of the word voluntary. Involuntary is used in opposition to intentional; and to unconstrained: but not to spontaneous (Bentham 1787/1948, 82, note1).

Here Bentham is making nuanced distinctions among uses of words. But he is also engaging in connective analysis and clarification of the concept of voluntariness by elucidating its complicated connections (and disconnections) with other concepts in the

adjacent terrain. It may appear, as the first sentence indicates, that the discussion is about what the term "a voluntary act" *means* and the *synonyms* of "voluntariness." But it certainly takes (philosophical) insight to catalogue this array of differences among these different words and concepts. And these resulting distinctions are certainly significant, if only for the reason that they can be used to undermine philosophical theories of action, intention, or motive based on confusions about these concepts. I shall refrain from cluttering this chapter with more detailed examples. The point I want to make is that examining ordinary usage can be part of philosophical/connective analysis. And many philosophers in the history of philosophy have practiced it. Grice is indeed right in saying that much historical work in philosophy can be recast into forms of conceptual analysis (Grice 1989, 179). Connective analysis or conceptual analysis is not a newly invented philosophical method.

Let me end this subsection with a diagnosis. I have mentioned that philosophers like Austin, Grice, Ryle, White, and Strawson were not committed to the idea of analyticity, nor did they think that their analysis was about meaning of terms. Now that we have seen that there are different shades of meaning of the term "meaning," we can see why they are easily misunderstood. Ordinary, familiar, correct usage is properly part of (linguistic) meaning, yet it can embody conceptual distinctions that are philosophically significant. Examining such usage is therefore part of connective analysis. Bede Rundle appropriately calls it "conceptual analysis in the tradition of Austin-Ryle" (Rundle 1997, ix). Unfortunately, ordinary language philosophers' very practice of examining the

nuances of ordinary linguistic usage, or *meaning*, has rendered them liable to be thought of as doing "linguistic analysis," a term that smacks of philosophical insignificance. This explains Fodor's careless treatment, mentioned above, of taking their work and that of Quine's criticism of logical positivism as a forming a dialectic continuum, and the tendency, in contemporary writings on the history of the analytic tradition, to conflate these two strands of thought.

Scott Soames, in his two-volume history of analytic philosophy, summarizes the guiding principles of "ordinary language" school in the following way:

> (i) that philosophical problems arise from the misuse of language and are to be solved by getting clear about the *meanings of words*, (ii) that philosophical analysis consists less in uncovering hidden logical forms and formulating precise necessary and sufficient conditions for the application of a word or concept, than in opportunistically assembling reminders about how philosophically significant words are used in ordinary settings, (iii) that meaning is use, (iv) that the philosophical *study of meaning* is to proceed by informal, case-by-case investigations, and (v) that systematic theories of meaning are not required and are not to be sought (Soames 2003, Vol. II, p. 216, emphasis added).

Given my analysis above, this description does not bring out the central characteristic of ordinary language philosophy and might mislead one into thinking that they are doing the same thing as logical positivists—they are all about clarifying *meaning* after all (except, perhaps, with less emphasis on the use of formal tools and without the ambition of constructing a formal systematic semantic theory). It is therefore no surprise that, in a recent paper on the history of analytic philosophy, Timothy Williamson juxtaposes logical positivists' "verificationist principle of significance" with ordinary language school's "ordinary context of use on which [ordinary words'] meaning was supposed to

depend" (Williamson 2014, 7). This time, they are treated as alike for their common anti-metaphysics tendency and hence form a contrast with the recent resurgence of speculative metaphysics in the analytic tradition.[50]

These are all misguided trends in studies of the recent history of analytic philosophy. An examination of ordinary language is an important method of connective analysis. However, despite the fact that the origin of the term "conceptual analysis" has its root in ordinary language philosophy, it is, I suggest, best not to be thought of as exclusively associated with the Ryle-Austin ordinary language approach. This is because, if we think about the example of conceptual analysis we discussed in previous chapters (by Hart, Perry, Raz, and Husak among others), we can see that although ordinary language does have a role to play, as argued in chapter 2, the method of conceptual analysis does not merely track ordinary usage. It goes beyond analyzing ordinary usage,[51] and it does not have to start with how we ordinarily talk.[52] The more helpful way to think about the relationship between the two is perhaps the other way round: instead of saying conceptual analysis *is* analysis of ordinary usage, we can say that examining ordinary usage is *one* of the ways conceptual analysis proceeds, which often is (and should be) supplemented by other resources and approaches.

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[50] According to Livingston, Kripke's insight into metaphysical necessity has been employed by Soames to criticize ordinary language philosophers, since they treat necessity as essential linguistic phenomenon. See Livingston (2006, 293). So there is a common thread in Soames and Williamson's discussion.

[51] In fact, there is only one argument in Hart's *The Concept of Law* that is explicitly drawing on ordinary language, as Leslie Green points out in Green (1996, 1688, n.1).

[52] Hence I do not sign on to the view expressed in White (1967): "Because we ordinarily think with the help of language, our ways of thinking are embodied in our ways of talking….Hence to discover the relations of one concept to another is to discover the relations of one meaning or use of a word both to other meanings or uses of the same word and to the meanings or uses of other words" (White 1967, 11).

III. 5 Analyticity and Connective Analysis

It should be clear at this point that conceptual/connective analysis does not rely on any notion of analyticity: it is false that "every analysis of a concept is inextricably bound to a collection of purported analyticities" (Laurence and Margolis1999, 18). But are we giving up too much if, in defending conceptual analysis as connective analysis, we give up analyticity? The notion of analyticity seems to be a venerable one and is something that even Quine himself reasserts in some form after all.[53] The point I am going to make in this section is that even if Quine is wrong in his "Two Dogmas" about analyticity and that we can retain the notion for philosophy, it probably cannot do much for us. That is, even if there is an analytic-synthetic distinction, we do not need it for doing connective analysis or doing philosophy—this view, if true, might explain why the advocates of the non-logical positivist view of conceptual analysis do not generally mention how Quine's view would affect their project. Below I shall borrow a few ideas from a 1962 paper by Hilary Putnam, titled "the Analytic and the Synthetic," to argue that the notion of analyticity is not as important as we take it to be.

Putnam argues that Quine is indeed wrong, and that there is such a distinction between the analytic and the synthetic (though Grice and Strawson did not clarify its nature and hence did not answer Quine's challenge). However, such a distinction is a *trivial* one. Paradigm cases of analyticity such as "bachelors are unmarried men" might

[53] In particular in his 1974 book *Roots of Reference*. Quine (1974, sect. 21, 78-80)

be properly called "linguistic conventions" or "rules of language." They strictly belong to lexicography. To think that there are "synonymies and analyticities that cannot be discovered by the lexicographer or the linguist but only by the philosopher" is a mistake (Putnam 1962, 362). The philosophical mistake here, Putnam argues, is to abuse these labels and hence overwork the analytic-synthetic distinction by treating statements as falling neatly into one category or the other. An example of misusing the analytic-synthetic distinction is (to use one of Putnam's examples) to think that the hypothesis that the Earth came into existence five minutes ago is *logically* absurd, for the reason that it violates "rules of language." Putnam argues that such a hypothesis is empirically false, if by "empirically false" one means that it is false to the world. But it is not so if "empirically false" means that it can be refuted directly by *isolated* experiments. It is a pernicious idea that if a proposition is not empirical in the second sense (there is no isolated one-time empirical experiment to falsify or verify the hypothesis in question) then it must be part of the "rules of language," and hence analytic. It is false that "all necessity must be traced down to the obligation not to 'violate the rules of language'" (Ibid., 363).[54] The upshot of Putnam's argument, with regard to such a hypothesis about the age of the Earth, examples like "knowing p implies having or having had experience p"—what Putnam calls "framework principles"[55]—and all law of naturals sciences, is

[54] I have made a similar point in the discussion of necessity in chapter 5. Putnam's discussion of the hypothesis that the Earth came into existence five minutes ago echoes nicely my discussion of the hinge proposition, "the Earth existed log before my birth."

[55] Putnam uses "systematic import" to characterizes this kind of principle. "We can barely conceive of a conceptual system which did not include the idea of a past" (Ibid., 365). These principles are what I spoke of as "hinge propositions" in chapter 5.

that "it is not happy to ask if they are analytic or synthetic." Putnam, like Quine, thinks that "we have a conceptual system with centralities and priorities" (Ibid., 366). To say that a statement is analytic might be reporting some linguistic convention, but to say that a statement is *not* analytic is nowhere near having said something significant yet. This is because between linguistic conventions and clear-cut descriptive statements, there is a diverse group with varying philosophical import, playing different roles in our conceptual system. The notion of analyticity (and hence the analytic-synthetic distinction) is therefore of "overwhelming unimportance." What is of importance is:

> [A]ppreciating the diverse natures of logical truths, of physically necessary truths in the natural sciences, and of what I have for the moment lumped together under the title of framework principles….[C]larifying the nature of these diverse kinds of statements is the most important work that a philosopher can do. Not because philosophy is necessarily about language, but because we must become clear about the roles played in our conceptual system by these diverse kinds of truths before we can get an adequate global view of the world, of thought, of language, or of anything (Ibid., 366-7).

Putnam's 1962 paper is (ironically) often taken to be undermining the notion of analyticity and hence conceptual analysis by contemporary critics of conceptual analysis.[56] But the suggestion in this paper is that 1) there is an analytic-synthetic distinction, but a trivial one; and 2) all the important work lies in clarifying the roles of the diverse group between analytic and clear-cut description in our conceptual system. This is a sensible suggestion that echoes Hart's criticism of logical positivism quoted earlier: the logical positivists, by conceiving "meaning" too narrowly, leave out all the

[56] See e.g. Laurence and Margolis (2003, 254). It only shows that there is something deeply wrong or mistaken about conceptual analysis in contemporary methodological debates.

important matters.

We can see that Putnam understands analyticity very narrowly, as Quine did. An analytic statement is true in virtue of meaning, one that can be translated into a logical truth if we substitute synonyms for synonyms. Discovering such statements, or what Putnam calls "linguistic conventions" or "rules of language," strictly belongs to the work of a linguist or lexicographer. Such a notion of analyticity probably is of not much use for philosophy. There is a very great variety of propositions, with varying conceptual and systematic import, between the kind of narrow analytic statements ("a bachelor is a unmarried man") and directly verifiable empirical statements ("The Mississippi goes through the UMN campus"), that are much more interesting and important. As we saw, going a bit beyond this narrow notion of analyticity, cataloging the usage of a "voluntary act" as Bentham did (though as pointed out earlier it might still be thought of as part of the meaning of these terms) takes insight that goes beyond anything recorded in a dictionary by a lexicographer. The notion of analyticity itself is not harmful—J. L. Austin even reminds us that we might very well benefit from working with an English dictionary[57]—but it will be, if overworked.

Timothy Williamson has argued that the very idea of a network of concepts is committed to some form of analytic-synthetic distinction, and therefore what Strawson is up to is "closed curve of definitions," which is exactly what Quine would reject

[57] See his "A Plea for Excuses," in Austin (1961, 134-5).

(Williamson 2014, 13).[58] What I have said so far shows that Williamson is wrong. It is a mistake to characterize the elucidations of the connections among concepts, those conceptual connections that philosophers are interested in, as *analytic* or *definitions*. We should not extend the notion of analyticity any further than what Quine and Putnam had in mind. Quine's alternative, holistic web-of-belief idea is perfectly compatible with what I have argued for. That said though, I see no reason why the notion of analyticity cannot be accommodated into Strawson's network of concepts. Some concepts are closely placed while others are more distant from what's under analysis. The tightness of conceptual links is, of course, a matter of degree, and sometimes conceptual links can be so tight that they are built into a community's language as a rule. Then analyticity could very well be one kind of conceptual link or connection. Recall that in Husak's analysis, the concept of excuse contains that of wrongdoing. Is the statement "That he is excused implies that he did something wrong" an analytic statement? It might be a borderline case, but I do not see any problem associated with its being a borderline case. The fact remains that there is nothing analytic about the conceptual observation that understanding is not a mental state but more akin to an ability (cf. Wittgenstein 1953/2001, §147-150), any more than the proposition "the Earth existed a long time before my birth" is synthetic.

[58] Williamson writes: "Of course, Strawson's characterization of descriptive metaphysics as the tracing of conceptual connexions relies on some form of the analytic-synthetic distinction, which he had defended with his old teacher Paul Grice against Quine's massively influential critique (Quine 1951, Grice and Strawson 1956). Indeed, the complex closed curve of *definitions* that Quine traced from 'analytic' round to other *semantic terms* and back again in his attempt to show that none of them could be satisfactorily explained was just the sort of explanation the descriptive metaphysician sought" (Williamson 2014, 13, emphasis added).

III. 6 Analysis Thin and Thick: Decomposition vs Connection

The mode of thought lying underneath the logical positivist conception of analysis, the currently dominant conception that takes analysis to be about analyticity/meaning, is essentially *decomposition*, that is, breaking down of a complex into its basic constituents. The very term of "analysis" naturally suggests the idea of breaking things down into smaller components. This decompositional picture of analysis is often associated with the kind of definitional project mentioned earlier, which takes conceptual analysis to be giving necessary and sufficient conditions.[59] It has taken various forms in 20th century in the hands of Moore, Russell, early Wittgenstein, and the logical positivists, though the underlying thrust of the idea has remained unchanged.[60] "[T]he ambition is that analysis will unmask the ultimate constituents of propositions, and thereby the primitive elements of the 'fact' that they represent" (Glock 2008, 156).

What I have called the "logical positivist view" of conceptual analysis has exactly such a mode of thought at its foundation. For example, it tries to break a concept or proposition into its *linguistic* and *factual* components, and then extract the pure linguistic contribution to the truth of a sentence in terms of meaning or analyticity—in the limiting case of an analytic statement, the contribution is made entirely by the linguistic component. Conceptual analysis understood in such a decompositional view is

[59] The idea of decompositional analysis goes back at least to Kant's understanding of analyticity: the predicate's being *contained* in the subject. An analytic statement is thus vacuously true because "the connection of the predicate with the subject is thought through identity" (Kant 1871/1958, A7/B11). Analysis according to Kant's picture is essentially breaking down the concept in the subject into its components.

[60] For a brief account of this, see Glock (2008, 153-9)

indeed anathema to those followers of Quine (Glock 2008, 158).[61] Furthermore, it attracts the kind of trite and arid feeling about philosophy I spoke of earlier. Williamson puts his complaint about conceptual analysis in terms of being only engaged with "words or concepts, or as questions about how we must think about a subject, rather than about *the subject matter itself*" (Williamson 2014, 13, emphasis added).[62]

This decompositional view of analysis forms a contrast with Strawson's view of analysis. We saw in III.1 that when Strawson points out that conceptual analysis is a favored description of a philosopher's activity, he has some reservations about the name "conceptual analysis" exactly because it might suggest a decompositional mode of thought. What's holding him back? Whatever the ultimate simple elements of a complex may be—simple concept/names corresponding to simple object (a line of thought culminates in Wittgenstein's *Tractatus*) or simple impression or sense data (a line of thought from Hume to Russell)—there are notorious problems with them (See Glock 2008, chapter 6). But Strawson points out that even when we conduct such analysis in a modest spirit, that is, we do not aim at finding *absolutely simple* concepts, we may still face the objection that the analysis is circular when supposedly simpler elements might at some point refer back to the original complex for its further analysis. To avoid this kind of objection, Strawson suggests that we abandon the decompositonal model (what he calls an "atomistic" or "reductive" model)—together with the "the notion of perfect

[61] Glock presents the problem for this view in terms of indeterminacy of reference and inscrutability of reference because there is no ultimate component of reality to refer to.
[62] Williamson's complaint is connected with a specific anxiety about philosophy that I shall get back to in the last section of this chapter.

simplicity in concepts" and "the notion that analysis must always be in the direction of greater simplicity"—and instead adopt a connective model which is "more realistic and fertile" (Strawson1992, 19). Thus:

> [T]here will be no reason to be worried if, in the process of tracing connections from one point to another of the network, we find ourselves returning to, or passing through, our starting-point. We might find, for example, that we could not fully elucidate the concept of knowledge without reference to the concept of sense perception; and that we could not explain all the features of the concept of sense perception without reference to the concept of knowledge. But this might be an unworrying and unsurprising fact. So the general charge of circularity would lose its sting, for we might have moved in a wide, revealing, and illuminating circle (Strawson 1992, 19-20).

The fact that Strawson was aware of the circularity problem with decompositional analysis and wanted to replace it with an alternative model shows that Williamson's criticism of Strawson's method as "closed curve of definitions" is misguided. Only when we adopt the decompositional model, which lead us to break one concept into its conceptual elements and *define* the former in terms of the latter, do we run to the circularity problem (when the latter refers back to the former). This is not what connective analysis does. It does not proceed in a manner of definitional analysis. Elucidating the connections between one concept and the neighboring others is not to *define* the concept in terms of the others.

The decompositional view of analysis might be called a "thin view of conceptual analysis." It is *thin* in the following sense: 1) it tries to (traditionally by giving necessary sufficient conditions) break down a concept into simpler or even ultimate components; 2) it therefore presents results of analysis as truth in virtue of meaning—as if they are

contained in the concepts; and 3) consequently, it severs an important component from philosophical reflection, i.e. our experiences. In doing conceptual analysis, what philosophers care about is presented as being about *mere linguistic matters*, such as meaning and ordinary usage. Therefore, they are not engaging *reality*. When the sentence "there is water on Mars," in the hands of philosophers, is not about Mars, that is something worrisome for some thinkers like Williamson.[63] In contrast, the connective model of analysis might be called "a thick view of conceptual analysis": first, it does not analyze a complex by breaking it down to simpler elements, i.e. decomposing the concept and finding its constituents. Rather it treats concepts as being already connected with others and forming a network or system. In other words, it takes a network of concepts to be its starting point and tries to elucidate their relations in responding to our philosophical puzzles. Second, such connective analysis does not produce analytic truths, or mere linguistic truths. And third, it involves human experience, experience condensed in our understanding and concepts. I have argued, in chapter 5 section VI. 3, for a role of experience in conceptual analysis. Concepts are not merely about linguistic matters; they are essentially related to human understanding and also have an enacted aspect; it follows that such analysis, in an obvious sense, is *about* the world and reality as well. A concept is horizontally related to others in a network of concepts, but also vertical to the material and things in the world. This gets us to the question of whether connective analysis is a priori.

[63] I will come back to this at the end of the chapter.

III. 7 The A Priori Nature of Connective Analysis

To address this question, I think Putnam's discussion of what counts as "empirically false" is helpful here. Recall Putnam's discussion of the statement that the Earth only started to exist five minutes ago. Such a statement is not empirically false if "empirically false" means that an *isolated* experiment could straightforwardly refute this statement, while it is, if "empirically false" means false of the world. This distinction suggests two senses of the empirical or experience that echo some of the points I made in chapter 2, 4 and 5.

To the question whether the method of connective/conceptual analysis is a priori, instead of mixing the a priori with the analytic or necessity (as Leiter, Fodor, et al., do), a similarly nuanced reply could be made. If by a priori method it is meant that we do *not* need to engage in checking *particular* bits of experience in deciding a question (such as finding out from which constellation a particular signal was sent to the Earth, what Putnam would call a "clear-cut descriptive statement"[64]) or to run *isolated* experiments to give an answer, then this method is a priori. But if by a priori it is meant that we are looking for analytic truths, linguistic components of language and propositions that can be analyzed from the "meaning" of terms, or "rules of language" that are completely severed from human experience and our engagement with the world, then this method is not a priori. Philosophers do conceptual analysis largely by reflection rather than by running experiments. But their reflection consists in, to a very significant extent,

[64] Putnam (1962, 364).

reflections on human experience. In other words, they are non-analytic in the obvious sense that they are *about the world*. It is important that the experience involved in philosophical reflection is not obtained by checking a particular piece of empirical evidence (as a response to already formulated hypotheses). It is *reflected general experience* (if this phrase helps our point here). That law claims legitimate authority and that there is currently no legal system in parts of Syria are two very different kinds of experience. The jurisprudential insights in e.g. Hart's legal philosophy might very well be grounded in his experience of the legal world, but it is not grounded in experience obtained from checking e.g. how a particular judge would act in a particular set of cases.

Naturalists in philosophy like Leiter and Harman think that philosophical/conceptual analysis is a matter of intuition, and that we arrive at conceptual claims via doing inductions on our intuitions. According to this idea, a jurisprudential thesis is inductively based on a series of particular and isolated intuitive responses to a thought-experiment in law. This is essentially to treat experience in an isolated way, as the piece-by-piece basis for induction. More importantly, there is no way for naturalists to give an account of the kind of experience involved in philosophical/conceptual analysis, experience that is reflected and plays a structural or systematic role in our practices and thoughts. The ignorance of this kind of experience leads them to the following position: (legal) philosophy is either intuition mongering (when they conflict) or it is a *linguistic* matter or lexicography (when induction is made on sufficient amount of same intuitions). The naturalist account of the nature of philosophy, in the last analysis,

is modeled on the sciences.[65] But this obscures the nature of philosophical reasoning and insights, and really has a distorting effect on (legal) philosophy.

III. 8 Conceptual Connections, Nature, and Understanding of Understanding

I have been talking about conceptual connections and different kinds of understandings involved in applying concepts and explaining them. It is time to say a bit more about these and thus clarify the nature of *nature* (as used in the nature of law), as promised in chapter 6.

The term "connective analysis" might suggest that concepts are scattered and philosophers somehow put them together to establish connections among them. But concepts are not discrete entities and separated from each other in the first place. They already form a system or network of some kind, and our conceptual system as a whole is "a set of interlocking systems of such kind" (Strawson 1992, 19). How so? I have said in chapter 6, in my discussion of what a concept is, that concepts are closely related to human understanding. To have a concept of X is to have some understanding of X (which in turn partially consists in being able to use the word "X" correctly), and we learn and use concepts to understand the world.[66] Our understanding forms a system, and new understanding of a subject is possible only when it is incorporated onto the already existing network of understanding and becomes part of the interconnected network (think

[65] It is not, I think, an unfair judgment given that Leiter wants jurisprudence to take the *naturalistic* turn.
[66] That was meant to be a grammatical remark. That is, it is part of the (philosophical) grammar of the word "concept" that *this*, having some understanding of X, is what it is to have a concept of X.

about learning a new concept in biology). If we examine one piece of our understanding of X, the concept of X, we see that it necessarily has various connections with our understanding of other things, and, since it also delimits boundaries, disconnections from still others.[67] There are very straightforward cases. For example, if we think X is a cat, then we must also think that X is an animal, and our understanding of badness, tallness, coldness, etc., cannot be obtained without simultaneously understanding their opposites (goodness, shortness, hotness, etc.). A less straightforward but still clear case is: while it is perfectly fine to say "I *believe* it is raining, but it is not," it is not OK to say "I *know* it is raining, but it is not." Still further, we can ask someone when she first realized that her husband had for years felt pains in his back, but not when she first realized that *she herself* had for years felt pains in her back.[68] Understanding things in a certain way (hence employing one concept rather than another) commits us to further understand other things in one way but not another. In more complex cases like that of the law, our understanding of it, in connections (and disconnection) with rules, morality, authority, obligation, punishment, reason, etc., is much richer, more complex, and sensitive to social/political reality. And any of the concepts just listed has further connections with a set of other concepts and phenomena. The term "morals," for example, is an umbrella term "sheltering many different objects requiring analysis" (Hart 1957, 958). A concept X, therefore, is necessarily connected with other concepts because our understanding of

[67] This is obvious enough, but the point should not be taken to mean that there are always clear-cut, definitive connections and disconnections—a topic I shall come back to below.
[68] This example is from White (1967, 9).

X is necessarily connected with other understanding. Of course, the connections can be tight or loose, depending on whether other concepts are located near to or distant from the concept being examined.

This discussion indicates that the connections among concepts are not philosophers' inventions. They are fabrics of human understanding. To discover a concept of X's connections with (and disconnections from) other concepts is to discover the *logical features* of the concept of X, and this is what philosophers mean, when they say they are inquiring into the nature of X. Alan White puts the point even more strongly by comparing the nature of a concept to the logical features of a mathematical point in the space:

> Just as to discover the spatial or mathematical relations of a point is to discover the identity of that point, so to discover the logical relations of a concept is to discover *the nature of that concept*. For concepts are, in this respect, like points: they have no quality except position. Just like the identity of a point is given by its co-ordinates, that is, its position relative to other points and ultimately to a set of axes, so *the identity of a concept is given by its position relative to other concepts* and ultimately to the kind of material to which it is applicable….[*A*] *concept is that which is logically related to others just as a point is that which is spatially related to others* (White 1985, 8, emphasis added).

For a non-natural kind concept X (such as the concepts of law, mind, rule, authority, responsibility, right, motive, cause, knowledge, belief, truth, and happiness), an inquiry into its nature is an inquiry into its connections with (and disconnections from) other concepts, its necessary features or implications. For example, when we inquire into the nature of knowledge, we inquire its connections with belief, truth, evidence, etc. When we find out that knowledge is not mental state, but aspects of it make it akin to an ability,

we are discovering (part of) the nature of knowledge by coming to see where the concept of knowledge is located in our conceptual web. There is no other nature to be found. And there is nothing strange about the fact that a person may employ a concept X and use it correctly, while bing puzzled about how she does it, and how it is related to other concepts, that is, puzzled about the *nature* of X.

Connective analysis takes as the starting point a network of concepts (e.g. law, rules, morality, authority, obligation, punishment) and tries to elucidate the nature of a concept by examining its complex relations with other concepts in that network. This idea is not anything new. When Hart sets out his project in *The Concept of Law*, he opens his preface by saying: "My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena" (Hart 1994, vi). The entire book is aimed at understanding these complex yet connected social phenomena through analyzing concepts. This connective method is also evident in philosophers' own reflections on what they do. To the suggestion that a good explanation of a concept must take the form of giving the necessary and sufficient conditions for applying that concept, Raz responds by saying that this idea will miss out an important part of the explanatory task. This is because "conceptual explanations not only explain the conditions for correct application of a concept….[B]ut also its connection with others….We explain concepts in part by locating them in a conceptual web" (Raz 1998, 257).[69]

I have made the general point that concepts are closely related to human

[69] Raz's point echoes my discussion of definitional analysis earlier this chapter.

understanding, and following Burge, I have spoken of the kind of understanding that conceptual analysis is after as "understanding that is involved in being able to give a correct and knowledgeable explication of it" (Burge 1993, 317). That is, the kind of understanding involved in looking sideways and doing comparative and explorative examination of concepts, which differs from and goes beyond the understanding involved in being able to apply words/concepts correctly (what is usually called "meaning"). Conceptual analysis, through elucidating conceptual connections, aims at understanding the nature of X. But how shall we characterize such understanding?

Raz points out that "the study of the nature of law as such and of our self-understanding (in as much as it is encapsulated in our concept of law)" come together (Raz 2005, 331). We can now appreciate this point in light of our discussion above: concepts are categories of our understanding. Possessing a concept is to have some understanding of that which it is a concept of, and we use concepts to understand the world, because, in Raz's words, concepts encapsulate our understanding. Studying the nature of X is studying the conceptual connections of X with other concepts. So by inquiring into the nature of law, we are inquiring into our self-understanding. Now, if we distinguish, roughly, two kinds of interests, an interest in understanding the world and an interest in understanding our understanding of the world, then what conceptual/connective analysis, as an inquiry into our self-understanding, gives us, could be understood as a kind of reflective, second-order, *understanding of our*

understanding,[70] a kind of thinking on thinking.[71] It aims to achieve a better understanding of X by investigating how our understanding of X, our concept of X, is related to our understanding of Y and Z, that is, other concepts. However, such an understanding is not static. What conceptual/connective analysis reveals is contingent on a number of things, prominently, history.

III. 9 Conceptual/Connective Analysis: Purpose, Incompleteness, and Limits

A philosopher does not start analyzing concepts for no reason. When Raz took an interest in showing that the Sources Thesis about legal validity is true, he investigates the connections between law, authority, and reasons for action. Alan White's interest in the concept of legal liability leads him to look at related concepts, such as those of act, voluntariness, intention, negligence, recklessness, etc. Likewise, Hart's project in *The Concept of Law* was to understand the nature of law by elucidating its connections with rules, coercion, and morality, among others. Husak's project, as discussed in chapter 4, was prompted by both the theoretical need to find limits for criminal law as well as the social/political urge to lessen the injustice involved in the current US legal system. These qualms, interests, and urge to lessen the injustice, etc., lead philosophers to investigate the relevant concepts. Conceptual analysis is always guided by some *purpose*, either practical or theoretical, or both.

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[70] My discussion is influenced by White (1967), chapter 1.

[71] According to Aristotle, this is what the divine being, the God, is engaged in (See Aristotle, *Metaphysics*, Book Lambda). And when we engage in (philosophical) contemplation (*theoria*), we are most like the God (See Aristotle, *Nicomachean Ethics*, Book X)

This is one reason why there is no definitive analysis of a concept. Conceptual connections are not out there to be revealed in such a way that they will once and for all settle all the future questions. Philosophers' interests and purposes are so diverse, such that they come to investigate concepts from different directions. Joseph Raz notices this point:

> [E]xplanations are of puzzling or troubling aspects of concepts, and they are therefore almost always "incomplete"….[T]here is no uniquely correct explanation of a concept, nothing which could qualify as *the* explanation of the concept of law. There can be a large number of correct alternative explanations of a concept. Not all of them will be equally appropriate for all occasions. Appropriateness is a matter of relevance to the interests of the expected or intended public, appropriateness to the questions which trouble it, to the puzzles which confuse it (Raz 1998, 257, original emphasis).

This point is that in cases where a concept has multiple interesting and troubling aspects (such as the concept of law), philosophers' interests and sense of puzzlement about it can be very different and also change over time. So a conceptual analysis of law is always incomplete. I think Raz is right, but there are also more general reasons for the absence of a definitive and complete analysis of a concept. Some of them come from the nature of concepts, and their complex relations with history.

While the method of conceptual analysis as connective analysis leaves open the possibility that there are other valid philosophical methods, I do think it needs to be supplemented by other resources—if we are to understand what philosophy, as an intellectual activity, can best contribute to making the best sense of our lives. The method of conceptual analysis as articulated and defended above takes the network of concepts we have as a starting point and tries to elucidate the intricate relations among them. But

such an approach largely takes the conceptual network we have to be *static*. That is to say, it generally takes *our* conceptual system to be as *given*, and seldom do we see defenders or practioner of conceptual system discuss the certainly correct idea that our concepts (and the connections between one concept and others) change and evolve over time, and how this implicates projects of conceptual analysis. I shall not foray into this large topic. But one line of thought must be mentioned: conceptual analysis needs *historical understanding*.

In "Philosophy as Humanistic Discipline," Bernard Williams warns us: "Philosophy has to learn the lesson that conceptual description (or, more specifically, analysis) is not self-sufficient" (Williams 2006, 192). Why is that? The point connects back to what I said in discussing concepts and conceptions in chapter 6: the content of some moral, political or ethical concepts might be a *historically contingent* matter. Williams gives one concrete example:

> [I]t is clear that while there is a universal human need for qualities such as accuracy (the disposition to acquire true beliefs) and sincerity (the disposition to say, if anything, what one believes to be true), the forms of these dispositions and of the motivations that they embody are culturally and historically various. If one is to understand our own view of such things, and to do so in terms that are on anyone's view philosophical—for instance, in order to relieve puzzlement about the basis of these values and their implications— one must try to understand why they take certain forms here rather than others, and one can only do that with the help of history (Ibid.).

Williams' discussion points to the fact that a descriptive project of revealing conceptual connection is not sufficient for philosophical purposes. If we want to reflectively understand our concepts and ideas, even *just as they are*, there are cases where we have

to appeal to historical understanding of some kind. The point, of course, will have varying effects in different domains of philosophy. The history of logic might be remotely related to frontiers of logical inquiry. Jurisprudence, however, might very well benefit from some historical understanding.[72]

IV. Concluding Remarks: Conceptual Analysis, not Words, but Things!

Starting from Leiter's criticism of conceptual analysis and an examination of Raz's Argument from Authority, to an articulation and defense of conceptual analysis as connective analysis, we have travelled quite some distance. By way of concluding, let me pose one final question: Now finally, what is the point of all this, i.e. studying concepts and doing connective analysis of concepts? Since my response to this question will also constitute the very last section of the entire dissertation, I hope I am allowed to explore some larger themes in broad strokes.

Why are we interested in studying concepts at all?[73] Wittgenstein once remarked: "Concepts lead us to make investigations. They are the expression of our interest and direct our interest" (Wittgenstein 1953/2001, sect.570). Concepts are important in that they guide our interests and investigations. But, interests and investigations into *concepts*? Why don't we study the *things* of which the concepts are concepts of? We are back to the old question raised in the previous chapter. When we

[72] An example of such study would be Nicole Lacey's work on the historical dimension of the Hart-Fuller debate (Lacey 2008).

[73] This is a slightly different question from the first why question considered above, that is, why philosophers want to analyze concepts—for which the answer is more straightforward.

study concepts, analyze their connection, aren't we one level removed from the *objects/things themselves*? This question has given some contemporary philosophers a particular kind of anxiety. Here is Williamson again:

> Admittedly, Strawson was more prone than Lewis to characterize philosophical questions as questions about *words or concepts*, or as questions about how we must think about a subject matter, rather than about *the subject matter itself* (Williamson 2014, 13).[74]

And in his 2007 book *The Philosophy of Philosophy*, Williamson again spends a lot of times discussing how many philosophical claims are about *things*, and denies there is any value in inquiring into *concepts* (See Williamson 2007, ch.1).

The urge that philosophy is or should be about things, objects, subject matter itself, etc., represents a kind of anxiety, an anxiety springing from the ambiguous status of philosophy among the academic disciplines of our time. In the 19th century, with a lot of branches of studies being separated from philosophy at an increasingly fast speed, it was perceived that philosophy was not *about* the world anymore (the first perception of that was probably in Kant, who felt the crisis of metaphysics).[75] Under the influence of logical positivism in the early 20th century, philosophy was presented as being about linguistic matters (recall Russell's judgment about Socrates's questioning, discussed earlier), which serves as an under-labor for the sciences. On the other hand, the attempt represented by the (re)turn to naturalism and metaphysics in current philosophy and the

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[74] From this quote, we can see that Williams does not even distinguish *words* and *concepts*, a large problem to begin with.

[75] See Kant (1783/2001, *Preface*, 1-8)

slogan "past the linguistic turn"[76] tries to defuse the (linguistic) worry and restore philosophy's ambition of giving a picture of the *world*. What we have learned is that such anxiety lies dangerously close to a vulgar form of scientism or, when leaning toward the other direction, a way of thinking of philosophy as a mere linguistic or semantic enterprise. Contemporary "mainstream" philosophers have rejected the second option and largely have advocated, or already embraced, the first option.

But the rejection of the second option was made at the cost of a wholesale rejection of a lot of valuable philosophical insights—or valuable methods and inquiries that are unprotected against reactions resulting from the anxiety. I am not saying that such anxiety is not justified and that the problem is easy to solve. My complaint is rather against philosophers' reactions when confronted with such anxiety. The anxiety is both the cause and effect of an impoverished, thin conception of conceptual analysis as a philosophical methodology: if it is not about the subject matter of our inquiry—the concrete things and sundry objects themselves—then it must be about mere words. Here, I think H. L. A. Hart's consideration is illuminating. Confronted with the question "Is analysis concerned with words or with things?"[77]—a question that incorporates a most misleading dichotomy according to Hart—he suggests the following analogy as a response:

> 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,

[76] Which is the title of one of Timothy Williamson's recent papers (Williamson 2004).
[77] Hart was responding to an objection mentioned above: conceptual analysis is about *mere words*. But Hart quickly reverts to talking about concepts.

> "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' (Hart 1957, 967).

One is here reminded of Hart's quote from J.L. Austin that we are aiming at a sharpened perception of phenomena through a sharpened awareness of words (Hart 1961/1994, vi). Even a seemingly innocuous distinction between "being obliged" and "having an obligation"—a distinction between *words/phrases*, as one might say—could shed lights on social situations and behaviors that are essential for law, or, the concept of law. Hart goes on to comment on the analogy:

> There is no clarification of concepts which can fail to increase our understanding of the world to which we apply them. The successful analysis or definition of complex or perplexing terms or forms of expression have certainly some of the essential elements of the discovery of fact, for in elucidating any concept we inevitably draw attention to differences and similarities between the type of phenomenon to which we apply the concept and other phenomena (Ibid.).

If concepts are importantly related to human understanding as argued before, then, we are already *dealing with* the world when we deal with concepts, because our understanding is about the world. David Wiggins once remarked "Let us forget once and for all the very idea of some knowledge of language or meaning that is not knowledge of the world itself" (Wiggins 2001, 12). I think we can say very much the same thing about conceptual analysis. Raz reminds us that when we inquiry into our concept of law, we are inquiring into our self-understanding, yet we are simultaneously inquiring into "the typology of social institutions" (Raz 2005, 330). We now see that argument about law and authority is not merely a linguistic discovery. It is, if anything, jurisprudential discoveries about the institutions of *law* and *authority*.

This should strike one as an obvious point. Overall, I shall think that the central theses of this dissertation are nothing new. But I hope my inquiries into the confused or confusing, misled or misleading, baffled or baffling, even if just to find and state clearly what is obvious is worthwhile. Sometimes, in doing philosophy, saying, in a clear and helpful way, what is obvious, what is common sense, what lies open to view, is rather difficult. This is because sometimes, as Wittgenstein reminds us, a philosophical difficulty is not an intellectual difficulty, but rather the difficulty of a change of attitude, resulting from the resistances of the will. I am aware that my inquiries in this dissertation leave far too many questions not merely unanswered but undiscussed. Many of them certainly bear on the question of the nature of philosophy. And it is usually the case that only mature philosophers are fortunate (or unfortunate) enough to reflect on the questions about the nature of philosophy. So my final point is an apology: this dissertation has all the weaknesses (and strengths, if any) that a premature work may have.

Bibliography

Aristotle. *Posterior Analytics*. Translated by G. R. G. Mure, in *The Basic Works of Aristotle*, edited by Richard McKeon. New York: The Modern Library, 2001.

____. *Physics*. In *The Basic Works of Aristotle*. Translated by R.P. Hardie and R.K. Gaye.

____. *The Nichomachean Ethics.* Translated by David Ross, revised by Lesley Brown. Oxford: Oxford University Press, 2009.

____. *De Anima: Books II and III.* Translated with introduction and notes by D. W. Hamlyn, Oxford: Clarendon Press.

____. *Metaphysics*. In *The Basic Works of Aristotle*. Translated by W. D. Ross.

Audi, R. (2004). *The Good in the Right: A Theory of Intuition and Intrinsic Value.* Princeton: Princeton University Press.

Austin, J.L. (1961). *Philosophical Papers*. Edited by J.O. Urmson and G.J. Warnock. Oxford: Clarendon Press.

Austin, J. (1832/1998) *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*. Indianapolis/Cambridge: Hackett Publishing Company, Inc. (first published in 1832).

Ayer, A. J. (1983). The A Priori, in *Philosophy of Mathematics*, 2nd edition. Edited by P. Benacerraf and H. Putnam, 315-329. Cambridge: Cambridge University Press.

____. (1936). *Language, Truth and Logic*. New York: Dover Publications, Inc.

Beaney, M. (2014). Analysis. In *The Stanford Encyclopedia of Philosophy*, edited by E.N. Zalta, http://plato.stanford.edu/entries/analysis/

Bentham, J. (1787/1948). *An Introduction to the Principles of Morals and Legislation*. New York: Hafner Publishing Company.

Bix, B. (1999). H.L.A. Hart and the Hermeneutic Turn in Legal Theory. In *Southern Methodist University Law Review*, Vol. 52, pp. 167-199.

____. (2003). Raz on Necessity. 22 *Law and Philosophy* 537, reprinted in *Law and Morality* (Kenneth Einar Himma & Brian Bix, eds., Ashgate, 2005).

____. (2005). Raz, Authority, and Conceptual Analysis. In *American Journal of Jurisprudence*, Vol. 50, 311-316.

____. (2007). Joseph Raz and Conceptual Analysis. *APA Newsletter on Philosophy of Law*, Vol.6, No. 2, 1-7.

____. (2009). *Jurisprudence: Theory and Context*, 5th ed. Carolina Academic Press.

____. (2010). Methodology in Jurisprudence. In JOTWELL, May 19, http://juris.jotwell.com/methodology-in-jurisprudence/.

Brandom, R. (2009). *Reason in Philosophy: Animating Ideas*. Harvard University Press.

Burge, T. (1993). Concepts, Definitions, and Meaning. *Metaphilosophy*, Vol. 24, No. 4, pp. 309-325.

Byrne. P. H. (2010). Connective Analysis: Aristotle and Strawson. *British Journal for the History of Philosophy*, 9:3, 405-423.

Cappelen, H. (2012). *Philosophy without Intuition*. Oxford: Oxford University Press.

Chalmers, D. (1996). *The Conscious Mind: In Search of a Fundamental Theory*. Oxford: Oxford University Press.

Coleman, J. (1998). Incorporationism, Conventionality, and the Practical Difference Thesis. *Legal Theory* 4: 381-425

Creath, R. (2004). Quine on the Intelligibility and Relevance of Analyticity. In *The Cambridge Companion to Quine*, edited by Roger F. Gibson. Cambridge University Press: 47-65.

De Saussure, F. (1972/1983). *Course in General Linguistics*. Edited by C. Bally and A Sechehaye, translated by R. Harris. Chicago and La Salle: Open Court.

DePaul, M. R. & Ramsay, W. ed. (1998). *Rethinking Intuition: The Psychology of Intuition and Its Role in Philosophical Inquiry*. Lanham, MD: Rowman & Littlefield.

Dickson, J. (2001). *Evaluation and Legal Theory*. Oxford: Hart Publishing

Dummett, M. (1993). *The Seas of Language*. Oxford: Clarendon Press.

____. (1959). Wittgenstein's Philosophy of Mathematics. *Philosophical Review*, 68 (3):324-348.

Dworkin, R. (1977). *Taking Rights Seriously*. Cambridge: Harvard University Press.

____. (1986). *Law's Empire*. Harvard University Press.

Duff, R. A. (2013). *Legal Punishment*. In *Stanford Encyclopedia of Philosophy,* edited by Edward N. Zalta: http://plato.stanford.edu/entries/legal-punishment/#PunCriSta

Finnis, J. (1980/2011). *Natural Law and Natural Rights*. Oxford University Press.

Fletcher, G. P. (1998). *Basic Concepts of Criminal Law*. New York: Oxford University Press.

Fodor, J. (1998). *Concepts: Where Cognitive Science Went Wrong*. Oxford: Clarendon Press.

____. (2004). Water's Water Everywhere. *London Review of Books*, Vol. 26, No. 20, 21, October.

Förster, E. (2012). *The Twenty-Five Years of Philosophy*. Translated by Brady Bowman. Cambridge: Harvard University Press.

Frege, G. (1891). Function and Concept. In *Translations from the Philosophical Writings of Gottlob Frege*, edited by Peter Geach and Max Black, pp. 21-41, Oxford: Basil Blackwell, 1952.

____. (1892a). On Concept and Object. In *Translations from the Philosophical Writings of Gottlob Frege*, edited by Peter Geach and Max Black, pp. 42-55, Oxford: Basil Blackwell, 1952.

____. (1892b). On Sense and Reference. In *Translations from the Philosophical Writings of Gottlob Frege*, edited by Peter Geach and Max Black, pp. 56-78, Oxford: Basil Blackwell, 1952.

____. (1918-9/1956). The Thought: a Logical Inquiry. *Mind*. New Series, Vol. 65, No. 259, pp. 289-311.

Gardner, J. (2008). Review of Douglas Husak's Overcriminalization: The Limits of the Criminal Law. In *Notre Dame Philosophical Reviews*,

https://ndpr.nd.edu/news/23674-overcriminalization-the-limits-of-the-criminal-law/

Genone, J. (2016). Review of *The Conceptual Mind: New Directions in the Study of Concepts* (MIT 2015, edited by Eric Margolis and Stephen Laurence). In NDPR: http://ndpr.nd.edu/news/67095-the-conceptual-mind-new-directions-in-the-study-of-concepts/

Gettier, E. L. (1963). Is Justified True Belief Knowledge? *Analysis* 23: 121–123.

Glock, H-J. (2008). *What is Analytic Philosophy?* Cambridge University Press.

Green, L. (1996). The Concept of Law Revisited. *Michigan Law Review 94*, 1687-717.

Grice, H. P. and Strawson, P.F. (1956). In Defense of a Dogma. I*The Philosophical Review, 65*.

Grice, H. P. (1989). *Studies in the Way of our Words.* Cambridge: Harvard University Press.

Gutting, G. *What Philosophers Know: Case Studies in Recent Analytic Philosophy*. Cambridge: Cambridge University Press, 2009.

____. 'Rethinking Intuition': A Historical and Metaphilosophical Introduction. In DePaul & Ramsey (1998), pp.3-13.

Hacker, P. M. S. (1996). Wittgenstein's Place in Twentieth-Century Analytic Philosophy. Wiley-Blackwell.

____. (2013). *The Intellectual Powers: A Study of Human Nature*. Wiley Blackwell.

Hare, R.M. (1981). *Moral Thinking: Its Levels, Method and Point*. Oxford: Clarendon Press.

Harman, G. (1999). Doubts about Conceptual Analysis. In *Reasoning, Meaning and Mind.* Oxford: Clarendon Press.

Hart, H.L.A. (1961/1994). *The Concept of Law*, 2nd edition. Oxford: Oxford University Press. First Published 1961.

____. (1998) *Introduction* to John Austin's *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*. Indianapolis/Cambridge: Hackett Publishing

Company, Inc.

____. (1957). Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer. *University of Pennsylvania Law Review*, vol. 105, 953-975.

____. (1983) *Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press.

____. (1984). *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Clarendon Press.

Himma, E. K. (2012). A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligations of Citizens. Forthcoming in *The Nature of Law: Contemporary Perspective*, W. Waluchow, S. Sciaraffa, eds., Oxford: Oxford University Press, 2013. SSRN version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141033.

Hintikka, J. (1999). The Emperor's New Intuition. *The Journal of Philosophy*, Vol. 96, No. 3: 127-147.

Hobbes, T. (1651/1994). *Leviathan.* Hackett Publishing Company.

Hobsbawm, E. (1996). *The Age of Revolution*. New York: Random House, Inc.

Hume, D. (1738/1978). *A Treatise of Human Nature*, 2nd edition, edited by L.A. Selbey-Bigge, revised by P.H. Nidditch. Oxford: Clarendon Press.

Husak, Douglas. (2008). *Overcriminalization: The Limits of the Criminal Law*. Oxford: Oxford University Press.

Jackson, F. (1998). *From Metaphysics to Ethics: A Defense of Conceptual Analysis.* Oxford: Oxford University Press.

Janik, A. and Toulmin, S. (1996). *Wittgenstein's Vienna*. Chicago: Ivan R. Dee, Publisher.

Kant, Immanuel. (1783/2001). *Prolegomena to Any Future Metaphysics*, 2nd ed., translated by James W. Ellington. Indianapolis/Cambridge: Hackett Publishing Company, Inc.

____. (1781/1958). *Critique of Pure Reason.* Trans. Norman Kemp Smith. London: MacMillan & Co. Ltd.

____. (1781/1889). *Kritik der reinen Vernuft*. Herausgegeben von Dr. Erich Adickes. Berlin: Mayer & Müller.

Katz, J. (1994). Names Without Bearers. *Philosophical Review 103*, 787-825.

Kelsen, H. (1992). *Introduction to the Problems of Legal Theory*. B, L. Paulson and S. L. Paulson, trans., Oxford: Clarendon Press.

Kenny, Anthony. (2010). Concepts, Brains, and Behavior. *Grazer Philosophische Studien* 81: 105-113.

Kim, M. & Yuan, Y. (2015). No cross-cultural differences in the Gettier car case intuition: A replication study of Weinberg et al. 2001. *Episteme* 12 (3):355-361.

Kripke, S. (1980). *Naming and Necessity*. Cambridge, MA: Harvard University Press.

Kuhn, T (1970). *The Structure of Scientific Evolutions*. The University of Chicago Press, second edition, enlarged, first published in 1962.

Lacey, N. (2004). *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*. Oxford University Press.

____. (2008). Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate. *New York University Law Review*, Vol. 183, 1059-1087.

Lakoff, G. and Johnson, M. (1980/2003). *Metaphors We Live By*. University of Chicago Press.

Land, T. (2015). *Journal of the History of Philosophy*. Forthcoming.

Leiter, B. (2007). Realism, Hard Positivism, and the Limits of Conceptual Analysis. In Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*. Oxford: Oxford University Press, 121-35 [cited as Leiter 2007a]. First published in *Legal Theory* 4 (1998): 533-47

_____. Beyond the Hart/Dworkin Debate: The Methodological Problem in Jurisprudence. In Brian Leiter *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford: Oxford University Press, 153-181 [cited as Leiter 2007b]. First published in *American Journal of Jurisprudence* 48 (2003): 17-51.

_____. (2011). The Demarcation Problem in Jurisprudence: A New Case for Skepticism. *Oxford Journal of Legal Studies*: 1-15.

_____. (2012). Naturalism in Legal Philosophy. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, http://plato.stanford.edu/entries/lawphil-naturalism/

Livingston, P. (2006). Philosophical Analysis in the Twentieth Century—A Review. *Inquiry*, *Vol*. 49, No. 3, 290-311.

Locke, J. (1689/1996). *An Essay Concerning Human Understanding*. Abridged and edited by Kenneth P. Winkler. Indianapolis/Cambridge: Hackett Publishing Company, Inc.

MacIntyre, A. (2007). *After Virtue*. 3rd ed. Notre Dame: University of Notre Dame Press.

Malcolm, N. (1958). *Ludwig Wittgenstein: A Memoir*. Oxford: Oxford University Press.

Margolis, E. and Laurence, S. (2007). The Ontology of Concepts—Abstract Objects or Mental Representations? *Noûs* 41: 4, pp. 561-593.

____. (2011). Concepts. In *Stanford Encyclopedia of Philosophy,* edited by Edward N. Zalta, http://plato.stanford.edu/entries/concepts/

____. (1999). *Concepts: Core Readings*. Cambridge: The MIT Press.

____. (2003). Concepts and Conceptual Analysis. *Philosophy and Phenomenological Research*, Vol. LXVII, No.2.

Marmor, A. (2011). The Nature of Law. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, http://plato.stanford.edu/entries/lawphil-nature/.

____. (2011). *Philosophy of Law*. Princeton and Oxford: Princeton University Press.

____. (2013). Farewell to Conceptual Analysis (in Jurisprudence). In *Philosophical Foundations of the Nature of Law*, W. Waluchow and S. Sciaraffa eds. Oxford University Press.

Marshall, S. and Duff, R. A. (1998). Criminalization and Sharing Wrongs. 11 *Canadian Journal of Law and Jurisprudence* 7.

Moore, G. E. (1925). A Defense of Common Sense. First published *Contemporary British Philosophy* (2nd series), ed. J. H. Muirhead. Reprinted in G. E. Moore *Philosophical Papers*, chapter 2. New York: Collier Books, 1959.

____. (1939). Proof of an External World. *Proceedings of the British Academy*, Vol XXV. Reprinted in G. E. Moore *Philosophical Papers*, chapter 7. New York: Collier Books, 1959.

Moyal-Sharrock, D. (2004). *Understanding Wittgenstein's* On Certainty. New York, Palgrave Macmillan.

Nozick, R. (1981). *Philosophical Explanation*. Cambridge: Harvard University Press.

Noë, A (2015). Concept Pluralism, Direct Perception, and the Fragility of Presence. In *Open MIND*.
http://open-mind.net/papers/concept-pluralism-direct-perception-and-the-fragility-of-presence

Patterson, D. (2006). Notes on the Methodology Debate in Contemporary Jurisprudence: Why Sociologists Might Be Interested. *Law and Sociology*, vol. 8, pp.254-8.

____. (2011). Review of Andrei Marmor's *Philosophy of Law*. *Notre Dame Philosophical Reviews,* http://ndpr.nd.edu/news/24770-philosophy-of-law/.

Peacocke, C. (1992). *A Study of Concepts*. Cambridge: the MIT Press.

____. (2005). Rationale and Maxim in the Study of Concepts. *Noûs* 39: 4, pp. 167-78.

Perry, S (1987). Judicial Obligation, Precedent and the Common Law. *Oxford Journal of Legal Studies*, Vol. 7, No. 2, pp. 215-257.

Priel, D. (2015). The Misguided Search for the Nature of Law. *Osgoode Legal Studies Research Paper No. 34/2015.*

Putnam, H. (1992). *Renewing Philosophy*. Cambridge Ma: Harvard University Press.

____. (1996). Meaning and Reference. In *The Philosophy of Language*, edited by A.P. Martinich. Oxford: Oxford University Press, 284-291. First published in *The Journal of Philosophy*, Vol. 70, pp. 699-711.

____. (1962). The Analytic and the Synthetic. In *Minnesota Studies in the Philosophy of Science, Vol. III*, edited by H. Feigl and G. Maxwell. Minneapolis: University of Minnesota Press.

____. (1981). *Reason, Truth, and History*. Cambridge: Cambridge University Press.

Quine, W.V.O. (1957). The Scope and Language of Science. *The British Journal for the Philosophy of Science*, Vol.8, No. 29, pp. 1-17.

____. (1960). *Word and Object*. Cambridge: the MIT Press.

____. (1961). Two Dogmas of Empiricism. In Quine *From a Logical Point of View*. 20-46. New York: Harper & Row. First published in *Philosophical Review 60* (1951): 20-43.

____. (1974). *Roots of Reference.* Open Court Publishing Co.

____. (1991). Two Dogmas in Retrospect. *Canadian Journal of Philosophy*, Vol. 21, No., pp.265-274.

Rappaport, A. (2014). On the Conceptual Confusions of Jurisprudence. *7 Washington University Jurisprudential Review. 77*.

Rawls, J. (1999). *A Theory of Justice*. Rev. ed. Cambridge: Harvard University Press.

Raz, J. (1994). Authority, Law and Morality. In Joseph Raz *Ethics in the Public Domain*. 194-221. Oxford: Clarendon Press. First published in *The Monist*, 68/3 (1985). [cited as Raz 1994a].

____. (1994). The Problem about the Nature of Law. In *Ethics in the Public Domain*. 179-193. Oxford: Clarendon Press, [cited as Raz 1994b]. First published in *Contemporary Philosophy: A New Survey*, 3 (1983) and in the *University of Western Ontario Law Review*, 21 (1983).

____. (1996). On the Nature of Law. *Archiv für Rechts-und Sozialphilosophie* 82 : 1-25.

____. (1998). Two Views of the Nature of the Theory of Law: A Partial Comparison. *Legal Theory* 4: 249-282.

____. (2005). Can there be a Theory of Law? In *The Blackwell Guide to the Philosophy*

of Law and Legal Theory. Edited by Martin P. Golding and William A. Edmundson. Blackwell Publishing Ltd, pp. 324-42.

____. (2006). The Problem of Authority: Revisiting the Service Conception. *Minnesota Law Review,* Vol. 90, pp. 1003-1044.

____. (2010). *Between Authority and Interpretation*. Oxford: Oxford University Press

Reid, T. (1785/1969). Essays on the Intellectual Powers of Man. Cambridge: the MIT Press.

Rey, Georges. (1983). Concepts and Stereotypes. *Cognition*, 15, 237-262.

Rundle, B. (1997). *Mind in Action*. Oxford: Oxford University Press.

Russell, B. (1945). *A History of Western Philosophy.* New York: Simon & Schuster Inc.

Russell, G. (2014). Quine on the Analytic Synthetic Distinction. In *A Companion to Quine*, edited by G. Harman and E. Lepore, Blackwell Publishing.

Ryle, G. (1949/2009). *The Concept of Mind.* New York: Routledge.

____. (1954). *Dilemmas.* Cambridge University Press.

Segev, R., Gur-Ayre, M., Yaffe, G., Husak, D. (2010). Book Symposium on Douglas Husak's 'Overcriminalization: The Limits of the Criminal Law.' *Jerusalem Review of Legal Studies, Vol. 1, pp. 1-70.*

Schauer, F. (2009). *Thinking like a Lawyer*. Cambridge, Harvard University Press.

Shapiro, S. (2011). *Legality*. Harvard University Press.

Sluga, Hans D. (1980). *Gottlob Frege*. London and New York: Routledge.

Soames, S. (2003). *Philosophical Analysis in Twentieth Century*. Two Volumes. Princeton: Princeton University Press.

Strawson, P.F. (1996). On Referring. In *The Philosophy of Language*, edited by A.P. Martinich. Oxford: Oxford University Press, 215-230. First published in *Mind 59* (1950), pp.320-344.

____. (1992). *Analysis and Metaphysics: An Introduction to Philosophy*. Oxford

University Press.

Stroll, Avrum (1994), *Moore and Wittgenstein on Certainty*. Oxford: Oxford University Press.

Stroud, B. (1965). Wittgenstein and Logical Necessity. *Philosophical Review* 74:504-518.

Toulmin, S. (1969). From Logical Analysis to Conceptual History. In *The Legacy of Logical Positivism,* edited by P. Achinstein and S. Baker. Baltimore: The John Hopkins University Press, pp. 25-56.

Von Wright, G. H. (1983). *Wittgenstein*. Minneapolis, University of Minnesota Press.

Weinberg, J., Nichols, S., Stich, S. (2001). Normativity and Epistemic Intuition. *Philosophical Topics* 29: 429-60.

White, A.R. (1975). Conceptual Analysis. In *The Owl of Minerva: Philosophers on Philosophy*, edited by C.J. Bontempo and S.J. Odell. New York: McGraw-Hill Paperbacks.

____. (1985). *Grounds of Liability: An Introduction to the Philosophy of Law*. Oxford: Clarendon Press.

____. (1967). *The Philosophy of Mind*. New York: Random House.

Wiggins, D. (2001). *Sameness and Substance Renewed*. Cambridge University Press.

Williams, B. (1982). *Moral Luck*. Cambridge: Cambridge University Press.

____. (1985/2011). *Ethics and the Limits of Philosophy*. Routledge Classics.

____. (2008). *Shame and Necessity*. Berkeley: University of California Press.

____. (2006). Philosophy as a Humanistic Discipline. In *Philosophy as a Humanistic Discipline*, edited by A.W. Moore. Princeton and Oxford: Princeton University Press.

Williamson, T (2004). Past the Linguistic Turn? In *The Future for Philosophy*, edited by Brian Leiter. Oxford University Press.

____. (2006). Conceptual Truths. *Aristotelian Society Supplementary Volume*, Volume 80,

Issue 1, pages 1–41.

____. (2007). *The Philosophy of Philosophy*. Blackwell Publishing Ltd.

____. (2014). How Did We Get From Here from There? The Transformation of Analytic Philosophy. *Belgrade Philosophical Annual, Vol. XXVII*, pp. 7-37.

Wittgenstein, L. (1953/2001). *Philosophical Investigations*. 3rd. edition. Translated by G.E.M. Anscombe. Blackwell Publishing.

____. (1969). *On Certainty*. Edited by G.E.M. Anscombe and G. H. von Wright, translated by Denis Paul and G.E.M. Anscombe, New York, Basil Blackwell.

_____. (1970). *Zettel*. Edited by G.E.M. Anscombe and G.H. von Wright, translated by G.E.M Anscombe. Berkley & Los Angeles: University of California Press.

Yaffe, G. (2010). Book Review: Harmfulness, Wrongfulness, Lesser Evils and Risk-Creation: A Comment on Douglas Husak's Overcriminalization. Faculty Scholarship Series, Paper 3736, http://digitalcommons.law.yale.edu/fss_papers/3736.

Yankah, E. (2012), Republican Responsibility and Republican Rights. Paper presentation at the "Criminal Responsibility and its History Workshop," University of Minnesota Law School, Minneapolis, MN, USA, April 2012.

Zalta, N. Edward. (2001). Fregean Senses, Modes of Presentation, and Concepts. *Philosophical Perspective*, 15, *Metaphysics*, pp. 335-59.

Other Resources:

Model Penal Code Annotated
http://www.law-lib.utoronto.ca/bclc/crimweb/web1/mpc/mpc.html