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THE RELEVANCE OF PHILOSOPHY TO LAW

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I. INTRODUCTION: THE NEED FOR PHILOSOPHY OF LAW

A student may wonder why someone interested in learning law needs to study the philosophy of law. He may argue that the law, possessed of a unique perspective, is a self-contained discipline that is best left on its own, free from the intrusions and encroachments of a discipline with a different perspective, like philosophy. He may point out that law is a difficult enough discipline as it is, and that it would be folly to complicate matters by cluttering it up with the alien, abstract, irrelevant and speculative observations emanating from philosophy. Furthermore, he may cap the argument by pointing out that philosophers, not being lawyers, are bound to misunderstand the law, and then cite as evidence how some philosophers in the past have had the audacity to criticize or comment on the law but have only succeeded in exposing their own ignorance by coming up with absurd or inane observations. Thus, he may conclude that law should best be left in the hands only of lawyers, who approach the subject matter from the correct perspective, the legal point of view, and therefore are the only ones capable of truly understanding the law's nature.

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The error in this argument lies in its very root, in the very first assumption made that law is a self-contained discipline. Indeed it is not, nor can it ever be. There will inevitably arise within the law a set of problems the answers to which cannot be found internally. Instead a lawyer has to step outside the law to answer these problems satisfactorily. Hence the resort to philosophy.

In other words, a lawyer or student, intent on studying the subject matter of law fully and well, eventually will have to seek the aid of philosophy. For example, a lawyer, handling a given case, may observe that the applicable statute contains a logical inconsistency, or that the reasoning done in a relevant judicial opinion is logically faulty. In such situations, he, without necessarily forgetting that he is a lawyer, must also become a philosopher and do logic in order to find the correct legal interpretation of the materials relevant to the case. Indeed reasoning is essential to the legal enterprise, which is argumentative in character; the lawyer, if he intends to be a good one, must be knowledgeable not just in law but also in logic. Or a judge may be worried that he is not rendering justice to the parties in deciding a given case. Again, justice is a moral concept, and the judge, to be a great judge, must be well-versed in moral philosophy. Indeed there exist a number of problems in law which need the help of legal philosophy in order to find a deeper, more insightful understanding of the legal problem. Examples of such legal problems, apart from the two mentioned above, concern truth, meaning, validity, right, duty, sanction, coercion, efficacy, responsibility, intent, motive, crime, punishment, tort, property, ownership, possession and the like.

Hence, when philosophical ideas intrude into the realm of law, it is not for the purpose of complicating matters, but on the contrary, for the purpose of clarifying them. Certain problems inevitably crop up in law, and because of the nature of such problems, a satisfactory solution to them cannot be found within law; resort to philosophy is thus necessitated. And if some philosophers have embarrassed themselves by misunderstanding the law, the remedy is surely not the drastic one of refusing to listen to any idea which contains a hint of philosophy, but rather to make sure that the philosopher knows the law at least as well as

philosophy, so as to avoid making inane or ridiculous observations about the law. The law will always be in need of some philosophizing, and philosophizing, in order to be good, must at least be accurate concerning the subject matter it is philosophizing about.

The perspective of philosophy is not just one external to law, or outside it. The philosophy of law is a second-order or meta-discipline which looks at law, a discipline of the first-order, from above. From this vantage point, it analyzes the discipline and subject matter of law.

This vantage point distinguishes the philosophy of law from the sociology of law. Sociology is a science which, in general, involves the study of man in society. The sociologist of law is concerned with law as a social phenomenon, and directs his research towards the discovery of descriptive rules which characterize the relation of law to society or the effect of law on how human beings behave in society. Hence its perspective in studying the law is not from above, but merely alongside the law; although the sociology of law investigates the law, it does so on the same level as the discipline of law, being just as much a scientific discipline as the law is. Unlike philosophy, it cannot claim some sort of superior perspective from which it observes the law.

Apart from the distinction as to perspective, the philosophy of law can be distinguished from the sociology of law in two more ways, that of method and of purpose. The method of the sociologist is that of a scientist — empirical, inductive, and experimental. His purpose is to explain and to predict. In investigating law as a social phenomenon, he aims to understand society or the world better so as to be able to be more in control of it. Needless to say, philosophy employs and includes different methods and purposes, which has been described as metaphysical, justificatory, conceptual, and normative. This leads to a discussion of philosophy.

II. ON PHILOSOPHY

A. Philosophy in general

One definition which serves as a good starting point for discussion characterizes philosophy as "the rational investigation of certain fundamental problems about man and the world he lives in."[1] There are two key words found in this definition: the word "problem," and the word "rational." Accordingly, there are two approaches to philosophy, one in terms of problem and the other in terms of method.

1. The problem-oriented approach to philosophy

A problem-oriented approach to philosophy differentiates philosophy from any other discipline in terms of its subject matter or content, in other words, in terms of the types of problems it deals with. A philosophical problem is said to be general, highly abstract, fundamental and controversial.

Generality, or wideness of scope, is contrasted with specificity or particularity. Philosophy is not concerned with particular objects like *this* pencil, *this* dog, *this* chair, etc. On the other hand, the *set* of pencils, dogs or chairs is general in character, and one can increase the generality or wideness of scope accordingly. For example, one can proceed from the set of dogs to the set of mammals, animals, living things, objects, and so on. It can be said that the more a concept encompasses a greater number of types of objects, the greater its generality.[2]

Abstractness, on the other hand, is contrasted with concreteness. An object is concrete if it is capable of being perceived by the senses. Abstract things, on the other hand, are intangible. How can one perceive

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[1] R. J. HIRST, *Introduction, in* PHILOSOPHY: AN OUTLINE FOR THE INTENDING STUDENT 6 (R. J. Hirst ed., 1968).

[2] Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 838, 855 (1972).

philosophical concepts such as truth, meaning, justice, knowledge, virtue and the like?

Fundamental means foundational. To explain this more adequately, an analogy with a building is most instructive. In order for a building to be built solidly, so as to withstand earthquakes or any other such calamity, it must rest on firm foundations. So too with a discipline, science, or system of knowledge. For a science or discipline to be reliable, the concepts on which it is built must be strong and stable, if not infallible. An error in its very foundations is disastrous in that it infects the entire system of knowledge. The abstract concepts listed in the previous paragraph, being also foundational in character, would certainly be required to be clearly and correctly interpreted and understood, lest the system be built on shaky foundations.

Finally, a philosophical problem by its very nature is *controversial*. This means that there exists no agreed-upon method for determining the solution to such a problem. If such a method existed, then a right or wrong answer to that problem could be found. But if so, that problem would no longer be a philosophical but a scientific one.

Indeed, this is historically how the sciences were born. During the Classical Greek period, there was no such thing as "science" in the contemporary sense of the term. All knowledge was considered philosophy. "Philosophy" etymologically means "love of knowledge." Aristotle, for example, the so-called father of various sciences (like physics, biology, politics and economics), considered himself as engaged in philosophy. Even much later that belief was still prevalent, although with a slight change — the two concepts were deemed synonymous or interchangeable. For example, Sir Isaac Newton, the great physicist, entitled his magnum opus on the science of physics *Philosophiae Naturalis Principia Mathematica* or *Mathematical Principles of Natural Philosophy*. This is from the point of view of a scientist. The same holds true also for a philosopher. Hobbes, in his monumental philosophical work *Leviathan*, referred to knowledge concerning consequences both as philosophy and science. He then divided philosophy into two, natural philosophy and politics, also referred to as civil philosophy.[3]

[3] THOMAS HOBBES, LEVIATHAN 70 (Michael Oakeshott ed., 1962).

From these observations and the subsequent emergence of science as a discipline separate from philosophy, it can be concluded that when a system of knowledge is so abstract and speculative that no accepted method yet exists for determining a right or wrong answer to questions within that system, then such a system of knowledge is still part of philosophy. However, the moment questions within that system of knowledge become capable of resolution by some sort of method, perhaps due to a brilliant insight by some thinker about the nature of the subject matter he is investigating, then these questions cease to be philosophical and become scientific. This is precisely what happened to physics, biology, politics and economics. This has been happening too to other, more recent sciences. The psychology of perception grew out of the studies of Locke, Berkeley and Hume. Linguistics depended on the insights of the philosophers of language of the twentieth century like Wittgenstein and Austin. Computer science owes much to the pioneers in mathematical logic and philosophy of mathematics such as Russell and Frege.

2. The method-oriented approach to philosophy

A method-oriented approach to philosophy, on the other hand, focuses on the word "rational" in the definition. The method of philosophy is rational in character. Nowadays the prevalent or accepted method of doing philosophy is the logical analysis of concepts, and has been described as "analytic," "conceptual" or "linguistic." Clearly, the emphasis is on the use of reason.

a. The three ages of philosophy

The prevalence of the use of the conceptual or analytical method in philosophy today can best be shown historically. It has been said that there have been three ages in philosophy: the age of metaphysics, the age of epistemology and the age of analysis. Although each of these ages characterized philosophy as concerned with a distinct set of problems, it does not follow that in each age none of the other problems were also dealt with. The difference, more accurately, is one of *emphasis*. On the other hand, the *methods* employed by each age in solving these problems can all be sensibly considered "rational" in character. Each differs from

the other in that each age has its own conception of what constitutes "reason" or of what reason is capable of.

The age of metaphysics dates back to the beginnings of philosophy in the Classical Greek times. During that period, philosophers were concerned with Being or with discovering ultimate reality. It was believed that the philosopher was possessed of a certain type of rational insight which enabled him to see into the true nature of things. The ordinary man, on the other hand, was only capable of perceiving the world of the senses, which was thought to be illusory. Hence, Plato maintained that the World of Forms constituted the real world, and Aristotle argued that the ordinary objects were actually substances, composed of matter and form. These metaphysical conclusions were ultimately based, not on authority, myth-making or faith, but on careful and penetrating reasoning and analysis or on cogent logical argument.

Distrust in the conclusions arrived at by the metaphysical philosophers in the use of reason ushered in the next age of philosophy, the age of epistemology. For if philosophers could see into the real world by the use of rational insight or could produce logical arguments establishing what the real world must be like, why did they sometimes arrive at startling conclusions difficult to believe, and why did they themselves disagree among themselves, often coming to radically divergent conclusions, as to the nature of this ultimate reality? Moreover, any person could make the most absurd claims as to the nature of this ultimate reality, and justify his conclusions by insisting that only he was possessed of true rational insight so as to be able to make those claims, as some charlatans or mystics did in the past. Clearly, there arose the need to look into the truth or veracity of the claims philosophers were making. Consequently, the discipline of philosophy changed its emphasis from metaphysics to epistemology or theory of knowledge. In short, the central question of philosophy ceased to be "What is the nature of ultimate reality?" but "How does one know that the claims philosophers are making about that reality are true?"

The age of epistemology begins around the time of Descartes during the early seventeenth century. Deeper studies into the nature and the extent of knowledge, and necessarily into the capacity of human

cognitive powers, were initiated. The limitations of man's two basic faculties for knowing, the senses and reason, were noted. By the nineteenth century, it became increasingly accepted that the faculty of reason was incapable of generating metaphysical knowledge, and that the most reliable method for arriving at knowledge about the world as it really is was that of the sciences.

This meant that if a philosopher wanted to know the real nature of the world, he was not supposed to consult his own powers of rational insight, due to the inherent limitations of reason. Ultimate reality, of the kind philosophers sought, was perceived to be unknowable. Instead, philosophers came to rely on the sciences, which were thought to be best equipped to find out what the world really is like.

The conclusions metaphysical philosophers made concerning reality, based on pure reason, were thus no longer considered to be validly generated. Instead they were considered to be the product of faulty reasoning or logic, or due to errors of language. For example, philosophers in the past have claimed to deduce startling conclusions about the world, like the Parmenidean claim that Nothing exists, or Meinong's insistence that golden mountains subsist, by the use of rational argument. Philosophers would have been unable to do this had they not been caught in the misguided logic of their own reasoning, if only, to use Wittgenstein's point, they were not seduced or bewitched by their own language. "Philosophy is a battle against the bewitchment of our intelligence by means of language."[4]

The fallacy philosophers were guilty of was a type of argument from thought or language to reality. Thought or language is one thing; the world or reality is another. One cannot automatically conclude that the world or reality must have a particular characteristic only from the fact that we speak or think in a certain way. The world does not necessarily have to conform to the structure of our grammar.

It must be noted that not all arguments from language to reality are necessarily misguided. The error of Parmenides was due to a faulty theory of meaning. Parmenides believed that if a word like "nothing"

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[4] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 47e, par. 109 (G. E. M. Anscombe trans., 1953).

can be used significantly, it must mean *something* and not nothing. From there he theorized that what the word means must somehow exist; otherwise we would be unable to understand it, which we obviously do. Hence, he concluded that the Nothing must exist.

As a result of fallacies of this type, philosophers paid closer attention to language. They were dissatisfied with the language previous philosophers had used, because a logically unsatisfactory language led to faulty philosophical conclusions. It was then hoped that some ideal language could be found which would actually mirror the logical structure of reality, and thus prevent errors in philosophical reasoning. This culminated in the search for a final analysis and for a single completely resolved form of every expression, aiming at the state of complete exactness.[5]

Such a goal was eventually abandoned for being misguided, based as it was, among other things, on a faulty theory of meaning. Instead, attention came to be placed on ordinary language.[6] At least, this was an example of a language which worked or enabled people to fulfill their purposes in life in everyday activities. After all, "the *speaking* of language is part of an activity, or of a form of life;"[7] hence, any theory of meaning must be built on this insight into language. It is only when philosophers disregard this insight in philosophizing, which leads to a misuse of ordinary language, that all sorts of philosophical problems arise.

The interest in ordinary language thus had both a therapeutic and a constructive purpose. Its therapeutic purpose, negative in character, was to help the philosopher stop making those errors in reasoning which

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[5] "But now it may come to look as if there there were something like a final analysis of our forms of language, and so a *single* completely resolved form of every expression. That is, as if our usual forms of expression were essentially unanalysed; as if there were something hidden in them that had to be brought to light. When this is done the expression is completely clarified and the problem solved.

"It can also be put like this: we eliminate misunderstandings by making our expressions more exact; but now it may look as if we were moving towards a particular state, a state of complete exactness; and as if this were the real goal of our investigation." *Id.* at 43e, par. 91.

[6] "We want to establish an order in our knowledge of the use of language: an order with a particular end in view; one out of many possible orders; not *the* order. To this end we shall constantly be giving prominence to distinctions which our ordinary forms of language easily make us overlook. This may make it look like as if we saw it as our task to reform language.

"Such a reform for particular practical purposes, an improvement in our terminology designed to prevent misunderstandings in practice, is perfectly possible." *Id.* at 51e, par. 132.

[7] *Id.* at 11e, par. 23.

led to absurd philosophical conclusions. "For philosophical problems arise when language *goes on holiday*."[8] Philosophers were said to be bewitched by language, which caused them to make startling and even absurd claims. The remedy was then to show the philosopher how he was bewitched so as to recognize his error, or, in Wittgenstein's words, "To shew the fly the way out of the fly-bottle."[9]

Wittgenstein believed that there was nothing more to philosophy than its therapeutic purpose. He made this patently clear in various cryptic remarks. "For the clarity that we are aiming at is indeed *complete* clarity. But this simply means that the philosophical problems should *completely* disappear."[10] He then adds: "The real discovery is the one that makes me capable of stopping philosophy when I want to. — The one that gives philosophy peace, so that it is no longer tormented by questions which bring *itself* into question."[11]

There is, however, a further purpose to analysis, the constructive one. This purpose, positive in character, involves an analysis of language so that whatever philosophical conclusions philosophers make are at least guided by the analysis so as hopefully to be error-free or validly generated. Conceptual clarification therefore was but a step, albeit a

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[8] *Id.* at 19e, par. 38.

[9] *Id.* at 103e, par. 309. Other remarks exist which illustrate the same point. "A *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably." (*Id.* at 48e, par. 115.) Wittgenstein continues: "What we do is to bring words back from their metaphysical to their everyday use." (*Id.* at 48e, par. 116).

[10] *Id.* at 51e, par. 133.

[11] *Id.* Other remarks include: "Where does our investigation gets its importance from, since it seems only to destroy everything interesting, that is, all that is great and important? (As it were all the buildings, leaving behind only bits of stone and rubble.) What we are destroying is nothing but houses of cards and we are clearing up the ground of language on which they stand." (*Id.* at 48e, par. 118.) "The results of philosophy are the uncovering of one or another piece of plain nonsense and of bumps that the understanding has got by running its head up against the limits of language. These bumps make us see the value of the discovery." (*Id.* at 48e, par. 119.) "Philosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give it any foundation either. It leaves everything as it is." (*Id.* at 49e, par. 124.) "My aim is: to teach you to pass from a piece of disguised nonsense to something that is patent nonsense." (*Id.* at 133e, par. 464.) "In philosophy, we do not draw conclusions. 'But it must be like this!' is not a philosophical conclusion. Philosophy only states what everyone admits." (*Id.* at 156e, par. 599.)

It does not follow from the above remarks that Wittgenstein considered philosophy trivial or unimportant. "The problems arising through a misinterpretation of our forms of language have the character of *depth*. They are deep disquietudes; their roots are as deep in us as the forms of our language and their significance is as great as the importance of our language. — Let us ask ourselves: why do we feel a grammatical joke to be *deep*? (And that is what the depth of philosophy is.)" (*Id.* at 47e, par. 111.)

necessary one, to successful philosophizing in the form of substantive conclusions.

The domains of science and philosophy were thus clearly delineated. Science is a first-order discipline in that it investigates the world directly. Philosophy, on the other hand, is a second-order discipline which polices the sciences via an investigation of the method and the language of the sciences. Hence it looks at the world indirectly, through the sciences, and determines whether the knowledge-claims made by science satisfy epistemological standards, whether the language the sciences use is not prone to error, whether the deductions scientists make are logically rigorous and whether the conclusions they arrive at are justified.

The analysis of ordinary language serves another constructive purpose, not just that of policing the sciences. By analyzing language, a philosopher analyzes the way we think, and in understanding how we think about the world, we also understand the world better. Hence some valid conclusions about the world can be made from an investigation of language. This was precisely Austin's point when he claimed that "[w]e are using a sharpened awareness of words to sharpen our perception of . . . the phenomena."[12]

Finally, there is another constructive purpose of analysis which involves the use of rational justification.

b. The method of philosophy as distinguished from the method of the sciences

A caricature of the philosopher as distinguished from the scientist will perhaps best demonstrate the difference in method between the two disciplines. The latter investigates the world by the use of observation and experiment. He dirties his hands by actually going out on the field and gathering data. On the other hand, such conduct the philosopher

[12] JOHN L. AUSTIN, *A Plea for Excuses*, *in* PHILOSOPHICAL PAPERS 182 (J. O. Urmson and G. J. Warnock eds., 3d ed. 1979) (herinafter AUSTIN I). This article was first published in 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1(1957-58). Page references will be made to the former.

considers undignified and beneath himself. He will not soil his hands in any sort of field work; he would rather just sit in his armchair, think and ruminate, hoping thereby to solve the problems of the world with his deep and original thoughts.

This does not mean, however, that he does not appreciate and value the results of the work done by the scientist. Without the data gathered by the scientist, what would the philosopher ponder and base his conclusions on? It is simply that to each his own cup of tea. Someone must go out and do the data-gathering; while somebody else, whose interests are different or whose powers of reasoning are beyond the ordinary, must make sense of that data. The philosopher thus interprets the data gathered by the scientist to arrive at novel and even startling conclusions about the world. He is therefore not engaged in discovering more information about the world; that is left for the scientist to do. Rather, he is to interpret this newly-discovered information of the scientist so as to make better sense of the world. In Wittgenstein's words, "[philosophical] problems are solved, not by giving new information, but by arranging what we have always known."[13]

c. The method of philosophy as distinguished from the method of religion

The method of philosophy can be distinguished from that of religion in that the latter places ultimate importance on the role of faith as a source of knowledge. According to religion, there are some truths which are simply beyond human comprehension and are thus

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[13] WITTGENSTEIN, *supra* note 4, at par. 109. The full quote reads as follows: "It was true to say that our considerations could not be scientific ones. It was not of any possible interest to us to find out empirically 'that, contrary to our preconceived ideas, it is possible to think such and such' — whatever that may mean. (The conception of thought as a gaseous medium.) And we may not advance any kind of theory. There must not be anything hypothetical in our considerations. We must do away with all *explanation*, and description alone must take its place. And this description gets its light, that is to say its purpose — from the philosophical problems. These are, of course, not empirical problems; they are solved, rather, by looking into the workings of our language, and that in such a way as to make us recognize those workings: *in despite of* an urge to misunderstand them. The problems are solved, not by giving new information, but by arranging what we have always known. Philosophy is a battle against the bewitchment of our intelligence by means of language." Whereas I agree with the general point made in this quotation concerning the difference between philosophy and science, I disagree (and this Article attests to this) with the limited role ascribed by Wittgenstein to philosophy.

unknowable. Not necessarily warranted by reason, such are nevertheless true, and therefore must be accepted ultimately as a matter of faith. The philosopher, on the other hand, is concerned basically with the extent of knowledge that can be warranted by reason. In so far as some truths cannot be so warranted, such truths, not necessarily untrue, nevertheless cannot be justified philosophically.

3. Philosophy as a second-order discipline

It is time to return to the three distinctions made earlier between the philosopher and the sociologist of law. The distinction as to method has already been made sufficiently clear by the above discussion. It remains to discuss the distinctions as to purpose and to perspective.

It was stated earlier that the purpose of the scientist was to explain and predict. He wants to understand how the world works in order better to control it. The philosopher, on the other hand, aims at a deeper sort of understanding, to go beyond the sciences to answer questions which science appears incapable of answering. Thus, rather than be content with the what and how of things, the philosopher is also interested in the why of things, the ultimate nature and purpose of the universe, if indeed such exist. Moreover, he is concerned with questions of value, the rightness or wrongness and the goodness or badness of things.

Finally, the question as to perspective. It was argued earlier that both shared the external viewpoint, but whereas the sociologist looks at law merely from the outside, the philosopher has a superior perspective and views law from above. This claim is justified by the point made earlier that philosophy is a second-order discipline and is concerned with fundamental or foundational questions concerning the first-order disciplines it investigates, questions about truth, knowledge, value, meaning and the like. As such, in investigating a discipline or system of knowledge like law, philosophy determines whether scientific assumptions about truth, meaning, knowledge and value satisfy philosophical requirements. Insofar as a theoretical discipline is unable to do so, its validity as a system of knowledge is suspect.

4. Philosophy for the purposes of this paper

In terms of characterizing philosophy for the purposes of this paper, it is not necessary to arrive at a rigorously precise definition. The broad definition provided earlier of philosophy as "the rational investigation of certain fundamental problems concerning man and the world he lives in," will suffice. Neither is it necessary to choose between a characterization of philosophy which emphasizes problems or methods. Philosophy may be viewed either from a problem-oriented or method-oriented approach. It is chauvinistic and narrow-minded to suppose that philosophy can be seen from only one perspective, or is concerned only with a certain set of problems, or adopts only one method. In other words, philosophy that was done in previous ages is just as much philosophy as the philosophy done today.

All the above notwithstanding, I will not conceal the fact that I approach philosophy from the conceptual or analytic perspective. This is so, not because I find other ways of doing philosophy as not philosophy, or as worthless philosophy, but because I happen to find conceptual analysis as the superior, if not the correct, approach to doing philosophy. Consequently I will explain law and the philosophy of law from the conceptual perspective.

B. Philosophy of law

Courses in the philosophy of law have been variously entitled "Jurisprudence," "Legal Theory" or "Philosophy of Law" itself. Although some consider these different terms to be roughly equivalent to each other, there are in fact subtle distinctions between them, more significant than the common observation that the term "philosophy of law" is often used in courses handled by the philosophy faculty, while "jurisprudence" or "legal theory" by those in the law faculty.

1. Jurisprudence

"Jurisprudence" has many senses. Originally it meant knowledge of or skill in law, from the Latin *prudentia* (prudence, practical knowledge or skill) and *juris* (law), in the same way as *rei militaris prudentia* signified a knowledge of the conduct of warfare. It has also meant case law, or the body of law built up by the decisions of particular courts, a usage owed ultimately to the French. That usage is generally accepted in Philippine legal circles. Hence, when article 8 of the Civil Code states that "[j]udicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines," these decisions are commonly considered as comprising nothing but Philippine jurisprudence. "Jurisprudence" has also been used to describe the legal connections of any body of knowledge, such as in the term "dental jurisprudence" or "architectural jurisprudence." None of these senses are of interest here.

The sense which is of relevance is that first popularized by Austin. Austin described "general or universal jurisprudence" as concerned with "the study of the principles, notions and distinctions common to various [legal] systems, and forming analogies or likenesses by which such systems are allied."[14] This notion of general jurisprudence eventually became to be considered what jurisprudence was all about, as contra-distinguished from law. Hence the study of jurisprudence is not ultimately interested in knowing, understanding or analyzing the law of a particular country, like say the Philippines, China or the United States. That would correspond to the study of what Austin called "particular or national jurisprudence," or "the science of any actual system of law."[15] Nowadays, that is considered the study of law proper, and not jurisprudence. Rather, jurisprudence investigates what is common to systems of law, the shared features of actual legal systems like the Philippines, China, the United States or indeed any other country.

The above characterization led to a second characteristic of jurisprudence, its interdisciplinary character or the linkage of law with other disciplines, which in turn gave rise to various approaches to

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[14] JOHN L. AUSTIN, *The Uses of the Study of Jurisprudence, in* THE PROVINCE OF JURISPRUDENCE DETERMINED 365 (1954), with an *Introduction* by H. L. A. Hart (hereinafter AUSTIN II).

[15] *Id.* at 372.

jurisprudential study. If one were to investigate what is shared by various legal systems, one should adopt a perspective which is not internal to a particular legal system, but external to it. In other words, the perspective should provide a panoramic vantage point, one capable of giving a bird's eye view in scanning through the various particular legal systems. A course in jurisprudence would therefore need to examine law from an external perspective, and inevitably from any one of this variety of perspectives arising from the different external disciplines, formal or analytic, historical, anthropological, sociological, psychological, economic, ethical or philosophical, which have developed through the course of history.

Austin's approach itself was formal or analytic in character. This led to a school of thought widely known as analytic jurisprudence, and to a host of texts on jurisprudence which focused on the form, structure and logical relations of law and legal concepts, rather than on its specific content. This approach is best exemplified by Professor Joseph Raz's *The Concept of a Legal System*, which characterized the study of a legal system into four basic problems, that of the problems of existence, of identity, of structure and of content.[16] Whereas every theory of a legal system must provide a solution to the problems of existence and identity, it may give a negative answer to the last two problems since there may be no structure or shared content common to all legal systems.

Other approaches, of course, took the historical or sociological perspective, and thus arose the historical or sociological schools of jurisprudence. Some in fact were designed to be based as broadly as possible so as to bring out this interdisciplinary character. Hence law was linked not just with history or sociology, but with other social sciences as well as with philosophy and ethics. In fact, Professor Jerome Hall considered his version of jurisprudence, integrative jurisprudence, as the correct approach since by providing a comprehensive field of knowledge within which all juristic approaches could find their proper place and by taking account of all significant aspects of legal problems, it alone could satisfy the criteria of an adequate jurisprudence.[17]

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[16] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 1-2 (1978).
[17] JEROME HALL, FOUNDATIONS OF JURISPRUDENCE 19 (1973).

This integrative approach to jurisprudence was consistent with Dias' definition of jurisprudence as "thought about law on the broadest possible basis, rather than expositions of law itself,"[18] involving general speculations of all kinds about the law. This definition perhaps captures the sense of jurisprudence best, as it highlights the two characteristics of jurisprudence mentioned earlier, the study of what is common to various legal systems and the linkage of law with other disciplines. Expositions of law represent black-letter law, the legal doctrines found in its standard subjects, like Political Law, Criminal Law, Civil Law, Commercial Law, etc. That is not the concern of jurisprudence. Jurisprudence is concerned not with the law of a particular legal system but with "what is common to various systems of law," and not with knowledge of law in its various branches but with general speculations of all kinds about the law or "thoughts about law on the broadest possible basis," so as to bring out the interrelation between law and other disciplines.

Austin also distinguished between a narrow and a wide sense of jurisprudence, as well as made one other significant distinction. Jurisprudence, in its narrow sense, is different from legislation. Whereas this kind of jurisprudence concerns "the knowledge of law as a science, combined with the art or practical habit or skill of applying it," legislation is "the science of what *ought to be done* towards making good laws, combined with the art of doing it."[19] This is the very same distinction between the knowledge of what ought to be from the knowledge of what is, which Bentham used in what he called "expositorial" and "censorial" jurisprudence. Since the knowledge of what ought to be presupposes the knowledge of what is, Austin considered jurisprudence, in the narrow sense, and legislation to be both a part of jurisprudence, in the wide sense. Thus he considered the latter kind of jurisprudence to include the science of what is essential to law combined with the science of what it ought to be.

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[18] R.W.M. DIAZ, JURISPRUDENCE 1 (4th ed. 1976).
[19] AUSTIN II, *supra* note 14.

2. Legal Theory

Legal Theory, in its narrow sense, is but an aspect of jurisprudence and deals with the specific question "what is the nature of law?" In characterizing law, the aim of the legal theorist is to describe those features that are most significant in distinguishing law from non-law or legal from other systems of social organization. Jurisprudential schools of thought, in placing importance on differing salient features of law, thus provide various kinds of answers to that question, and since it is the central question in jurisprudence, they are classified in terms of their answer to it. Thus there are, as earlier talked about, analytic, historical, anthropological, sociological, psychological, economic, and ethical jurisprudence theories, as examples.

But, as discussed above, there are other aspects to jurisprudence. It is concerned, for example, not just with a rational inquiry into the nature of law but also with investigating other legal phenomena, and this investigation is not conducted solely for the purpose of understanding law or its nature, but also of understanding the nature of these other legal phenomena in their own right. Additionally, jurisprudence deals not just with law as it is (which is the sole concern of legal theory), but also with law as it ought to be, "legislation" in Austin's terminology, or "censorial jurisprudence" in Bentham's.

In that regard, "Legal Theory," as the course has been described by the University of the Philippines College of Law, is strictly speaking a *misnomer*. It is more correctly a course on jurisprudence. It is defined as: "The main schools of jurisprudential thought, with emphasis on the philosophical influences on the varying conceptions of ideal law and material law, and their impact on law as an instrument of procedural and substantive justice." Were it to be a course on legal theory, the course description would be something like: "The main schools of jurisprudential thought with respect to the question 'what is law?'"

With its emphasis on ideal law, as well as on procedural and substantive justice, the course clearly is concerned not just with law as it is but with law as it ought to be. There is nothing wrong with including "the science of what law ought ought to be" in the course. It is an important subject matter which law students should learn. However, it

is not necessarily a part of legal theory, although it is part of jurisprudence.

The University of the Philippines College of Law course actually displays a Natural Law bias with such a description. The Natural Law school of thought believes that concerns about ideal law and justice are part and parcel of or necessary to any adequate definition of law. In other words, to Natural lawyers, law and morality are necessarily or conceptually linked. On the other hand, a course description of legal theory without reference to ideal law, justice or what the law ought to be, is a neutral one. It does not commit itself one way or the other to a characterization of law which either is or is not necessarily linked to morality.

3. Philosophy of law

Philosophy of law and jurisprudence can be considered as roughly synonymous with each other, although there are two subtle distinctions between them. The first is a difference in emphasis. Although they both cover the same subject matter, jurisprudence focuses on two central questions: what the law is, and what the law ought to be. Philosophy of law, on the other hand, also pays considerable attention to questions jurisprudence may regard as peripheral, such as inquiry and appraisal of other legal phenomena, particularly questions normally considered to be part of political philosophy, like those concerning justice, liberty, punishment, etc. Since law is a political phenomenon, philosophy of law is considered to be an aspect of political philosophy.

There is a second difference, one of perspective. The perspective of the philosophy of law is narrower. Whereas jurisprudence was characterized earlier as thoughts about law on the broadest possible basis, the basis for the study of law in legal philosophy is naturally philosophical. In other words, philosophy of law does not assume a sociological, historical, psychological, anthropological, or other scientific perspective in investigating law or in generating thoughts about law, but takes a philosophical perspective both in studying law and in assessing the various sociological, historical, anthropological, psychological, economic or other scientific approaches towards and thoughts about law.

A proposed definition of the philosophy of law, therefore, is as follows: "A rational inquiry into the nature of law, legal reasoning, and other legal phenomena, as well as the rational consideration and appraisal of normative issues related to law, like the obligation to obey the law, the enforcement of morality, the problems of ideal justice, liberty, punishment and the like." This definition clearly situates the philosophy of law as but an aspect of political philosophy.

The proposed definition also highlights the two separate issues in jurisprudence, referred to by Austin as the science of what law is and the science of what law ought to be. The science of what law is corresponds to the first half of the definition. It deals with, for lack of a better term, factual, non-normative or "what is" issues, or with understanding the nature of law, legal reasoning and other legal phenomena. Legal theory, in its narrow aspect, deals only with a specific aspect of the first half, being a rational inquiry into the nature of law. The second half of the definition corresponds to the science of what law ought to be, and deals with normative issues about law and about phenomena which are an aspect of or related to law.

Corresponding to these two different issues or problems in jurisprudence are two approaches to the resolution of the problem. Since the aim of the inquiry is to attain some sort of understanding regarding legal phenomena in factual issues, the approach taken is conceptual analysis. Since the latter issues are normative, evaluative or substantive in character, the approach is that of rational justification.

Conceptual analysis involves nothing but a logical inquiry about concepts.[20] It is a technical philosophical skill and activity, the importance or relevance of which has often been underestimated or misunderstood. It has been castigated as "dry," "dull" or "merely verbal," and as such has been adjudged as trivial or unimportant. In Philippine academic circles, there is an added criticism, its lack of relevance, particularly to the concerns of a Third World country.

Each of these criticisms can be met. As to the criticism that it is dry or dull, that indeed may be true for some, but others with a more logical bent of mind may find it exciting. It is all perhaps a matter of

[20] ANTHONY FLEW, PHILOSOPHY: AN INTRODUCTION 7 (1979).

taste. *De gustibus non est disputandum.* Moreover, such a criticism, if true, does not detract in any way from the fact that it is necessary, important and relevant. Although there is some truth to the claim that it is verbal, since it is after all an inquiry *about concepts*, it is not "merely" verbal, as it has consequences beyond the linguistic world, providing as it does a better understanding of the non-linguistic or actual world, or of the phenomena being investigated. This provides one reason why it cannot be considered unimportant, but there is a second reason. It enables us to deal with the so-called normative or evaluative issues.

Rational justification, on the other hand, is a skill which is neither technical nor intrinsically philosophical. Rather it is an activity engaged in by the layman even in everyday normal pursuits. In a broad sense, it is merely the practice of supporting by means of reasons one's opinion or point of view. With reference to this discussion, it is the practice of supporting by means of reasons one's normative, evaluative, or substantive conclusions concerning issues in the philosophy of law. For example, one may provide an ideal account of justice or an ideal theory of punishment. This requires rational justification, or providing good reasons for one's conclusions. It presupposes that normative debate is not arbitrary or a matter of choice or taste, but that sound reasons can be given in support of the ideal account or theory.

It is this type of philosophical pursuit which is generally considered to be interesting, important and relevant, which gave rise to the dislike or disdain for the dryness, triviality and irrelevance of conceptual analysis. For the kind of problem addressed by rational justification is precisely a problem which a non-philosopher or layman, in his more reflective moments, concerns himself with and can feel for. It is a problem, in other words, which he considers as relevant as it may actually touch and affect his life.

It is because such a problem cannot be adequately resolved without conceptual analysis that there exists a second reason, mentioned earlier, for its importance. Without an adequate analysis, philosophers, engaging in normative debate, may easily fall prey to linguistic confusion or fallacies, thus coming up with unwarranted or even absurd normative conclusions. This is the negative or therapeutic value of analysis mentioned earlier. There is also a positive, constructive value. Analysis

makes possible a deeper understanding and solution to the normative issues being discussed. In other words, analysis is indispensable to justification, and therein lies the second reason for its importance.

Clearly, these points raised concerning the importance and relevance of analysis cannot be fully appreciated without a more detailed explanation of what analysis involves. This is further developed in the succeeding section.

III. ON LAW

A. The nature of law

As mentioned previously, the question "what is law?" or "what is the nature of law?," being the sole concern of legal theory in the narrow sense, is at the same time the central question of jurisprudence and indeed of the philosophy of law. Philosophy attempts to answer this question by means of conceptual analysis, or by a logical inquiry about the concept "law." Wittgenstein, widely recognized as the most dominant figure in the age of analysis, described the activity of analysis thus:

> Our investigation is therefore a grammatical one. Such an investigation sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, caused among other things by certain analogies between the forms of expression in different regions of language . . . Some of them can be removed by substituting one form of expression for another; this may be called an "analysis" of our forms of expression, for the process is sometimes like one of taking a thing apart.[21]

This necessitates a fuller discussion of what is involved in analysis.

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[21] WITTGENSTEIN, *supra* note 4, at 43e, par. 90.

1. The definition of "law"

It has been contended that when a philosopher engages in a conceptual analysis of law, all he is looking for is a definition or a kind of definition. If so, the criticism made against conceptual analysis earlier, that it is merely verbal or linguistic, and thus trivial, appears to be a valid one. For a definition, in the true sense of the word, is confined to the linguistic or conceptual world, and makes no connection or link to the non-linguistic or actual one. It merely substitutes one word or set of words, the *definiendum* or the word-(phrase) to be defined, with another set, the *definiens* or the defining phrase, which is synonymous or equivalent in meaning to the *definiendum*.

Hence, there are two requirements for a definition to be truly a definition: Its purpose and its criterion for logical correctness must both be purely verbal or linguistic. If the definition is to work, or be psychologically satisfactory, then the *definiens* contains words which the reader already understands. Thus the reader never leaves the realm of the linguistic world in his attempt to understand the definition. This satisfies the purpose of defining, which is to allow him to know correctly when to apply the word being defined. There remains the other question of whether the definition is logically correct or not, of whether it is logically satisfactory. For a definition to be a correct one, all that is required is that the *definiendum* and the *definiens* be synonymous or equivalent in meaning to each other. There is no departure, therefore, from the linguistic world.

There are allegedly three kinds of definition: the "essentialist," the stipulative and the lexical definitions, which, as definitions, are intended to fulfill the purpose of definition as well as to satisfy its logical requirement, without departure from the linguistic world. If conceptual analysis were an activity which generates a kind of definition, it has to be one of these three. If so, which one?

a. Is analysis in search of an "essentialist" definition?

Conceptual analysis is not the activity of arriving at "essentialist," also known as "real" definitions. This kind of definition is said to be one that captures the true nature or essence of that which is being defined. It is assumed that every class or group of things has an essential or fundamental nature, common to every member of the class, and that the process of defining consists of isolating or identifying this common nature or "essential" property. Hence, Aristotle defined "man" as a "rational being," for in rationality lies the true nature or essence of manhood, which distinguishes man from all the other beings in the universe. In presupposing that every class or group of things in the universe, be it man, animal, plant, inanimate object, law, liberty, justice, etc., have an essence, the job of the philosopher then is to look for this essence and encapsulate it into words which provide the necessary and sufficient conditions which distinguish members of that class from everything else in the universe. This is its "real" or "essentialist" definition.

Immediately from the foregoing, it is evident that a "real" definition is not truly a definition, but actually an explanation. In other words, one is not defining a word but explaining what a group or class of things is in terms of its essence. No longer is the definer confined to the linguistic world, but he makes a reference to the actual world, and thus links the linguistic world with the actual one. The two requirements for the definition are not met. The purpose of the definition is not simply to know when to apply the word correctly, but actually to reflect the real or essential nature of those things which belong to the class the word refers to. Moreover, the criterion for a logically correct "real" definition is not equivalence in meaning, but trueness of description. "Does the so-called definition actually capture the essence of what the class is?" is the question asked in such a definition.

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Were conceptual analysis an activity that produces definitions therefore, it could not be a "real" definition that it aims to produce. In actual fact, a definition in terms of essence, be it truly a definition or not, is not conceptual analysis at all. It represents the kind of activity which was pursued actively in the age of metaphysics, but was rendered suspect in the succeeding age of epistemology and has been characterized as "meaningless" or "senseless" in this present age of analysis. For, as mentioned earlier, it is now doubted whether philosophers are possessed of that special faculty of rational insight, by which they can see into the true nature or essence of reality and therefore validly arrive at

"real" definitions. This doctrine of essentialism has been characterized as another futile search for a metaphysical entity, the "essence" of a thing. Furthermore, such talk about metaphysical essences has been held to be due to a faulty grammar or a linguistic confusion, and is said to make no sense whatsoever.

The above argues against there being any essences whatsoever. The argument gains in force when a "real" definition of law is attempted. Whereas it might be plausible that human beings, belonging to a natural kind or category, have an essence, it is not so plausible with respect to law, or indeed with respect to other kinds of phenomena, like justice, liberty, courage and the like. There is not one essence to law, but merely various phenomena people commonly refer to as "legal." It is a mistake to suppose that because people are agreed as to the instances of law and use the same word ("law") to refer to these instances, then law must have an essence in reality and correspondingly a defining set of essential characteristics which provide those necessary and sufficient conditions distinguishing law from non-law.[22] Communication is possible without such assumptions. There is neither a unique "essence" to law nor necessarily a unique or defining set of characteristics to law, just various legal phenomena, each with its own set of features, some of which are considered to be salient or significant, and which people categorize in their mind and refer to under a single term "law."

Hence, the philosopher is not interested in an "essentialist" definition of law. This does not mean, however, that he is not allowed to come up with a kind of definition in terms of characteristics which, although not "essential," provides necessary and sufficient conditions distinguishing law from non-law. This will be explained shortly.

b. Is analysis in search of a stipulative definition?

Unlike an "essentialist" definition, a stipulative definition is truly a definition, as it satisfies the two requirements mentioned earlier. Its purpose is the linguistic one of enabling the reader to know when to use the word correctly, that is to use it in the manner proposed; and the

[22] *Id.* at 31e-32e, pars. 65-67.

criterion for logical correctness is confined to the linguistic world. In a stipulative definition, the definer is proposing that two sets of words, the *definiendum* and the *definiens*, be considered or treated as synonymous or equivalent in meaning to each other.

Strictly speaking, however, there is no logical criterion for correctness. A stipulation is nothing but a proposal or recommendation to use a word in a certain way. As such, there is no rightness or wrongness about the definition. This is not because there is no standard of correctness by which to judge such a definition, but actually because the definer creates the standard by which correctness is to be judged. Thus questions of rightness and wrongness are inappropriate. The definer merely declares that from now on he means such-and-such by the word he has just stipulatively defined. Hence the stipulation is there either to be accepted or rejected, and since it is being put forward as an axiom, it can neither be proved or disproved. Such a definition is only a matter of choice of criteria, and this choice cannot be right or wrong, for it is simply arbitrary and therefore the definition is a mere matter of words.

Thus, conceptual analysis cannot be the activity of producing stipulative definitions. Clearly the job of an analytic philosopher cannot simply be to make linguistic recommendations or proposals, although he may in fact engage in some stipulative definition. This will likewise be explained later.

c. Is analysis in search of a lexical definition?

If one were to choose the kind of activity conceptual analysis would be most akin to, it would be that of producing lexical definitions, but the definitions which analysis arrives at is not exactly or fully lexical in character. A lexical definition, which is the paradigm definition, is otherwise called a "reportive" or "dictionary" definition. It is the type of definition that is found in a dictionary, and all it does is merely to report the actual usage of the word. The criterion of logical correctness to such a definition is actual usage. In other words, a definition is a good or correct lexical definition if it truly reflects how people in general actually use the word being defined. But this cannot be the kind of definition the

philosopher is looking for. If so, then he would not be a philosopher but a mere lexicographer.

Clearly then, the philosopher, when he conducts a logical inquiry about the concept "law," is neither looking for an "essentialist," stipulative, nor a lexical definition of law. Rather, he is in search of a definition which partakes of characteristics from all three, but is in some sense more than just a definition. For if producing lexical definitions were all that is involved in analysis, the charge that analysis is merely verbal or linguistic, and thus trivial, would be valid. The answer to this dilemma, of course, is that analysis is more than merely the activity of producing definitions, and although it produces a kind of definition which in some sense is "essentialist," stipulative and reportive, it has significance beyond the verbal or linguistic world.

2. The conceptual analysis of "law"

The conceptual analysis of "law" is a logical inquiry about the concept "law." It seeks to find out what does or does not follow from, what is or is not logically presupposed by and what is or is not compatible with the concept. As such, it engages in a logical clarification of the concept. This is achieved when some sort of definition, which will be referred to as "explication,"[23] is reached. This definition, ideally, is supposed to list down the necessary and sufficient conditions which distinguish law from non-law; and hence the similarity to "essentialist" definitions.

In coming up with an explication, the concept must, of course, first be examined. This is done by looking at ordinary usage, how people actually use the term "law" while communicating with other people. The concept is basically what people generally understand by such a word, suitably purified; and there is no better evidence of this than actual usage. Hence, conceptual analysis begins with and makes use of lexical definitions.

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[23] This term is normally associated with Carnap. The fact that this article also employs it is simply for lack of a better alternative; it does not necessarily express conformity with or agreement to the full implications of Carnap's use of the term.

However, a philosopher does not end his inquiry with the lexical definition, for ordinary usage may be vague, ambiguous, inconsistent, or even misleading about the matter, and philosophical puzzles are generated. He needs therefore to go beyond the evidence of ordinary usage, to discover the implicit logical assumptions or presuppositions of the concept, to discover what is truly meant by the concept in explicating it.

The assumption is that, because of the fact of successful communication, there exists a common or shared meaning actually communicated by that term, which is free from logical impurities, the vagueness, ambiguities, inconsistencies, and puzzlement mentioned earlier. This meaning actually underlies the use of the term, although it is not immediately apparent. Or such a common or shared meaning may not actually exist, but remains to be constructed. The concept has to undergo not just clarification but purification and refinement, and a newer, better concept is created. Since the evidence of ordinary language is not conclusive as to what is really meant by that term, the philosopher has to make a proposal or linguistic recommendation as to how to regard the concept. Hence the affinity with stipulative definitions. Whether the concept is clarified by means of a bald assertion or a proposal like a stipulative definition, is justified by the fact that such an explication provides a deeper and more insightful understanding of the phenomenon being considered.

Hence it is not actually a definition, in the sense provided earlier, that conceptual philosophy is after. Although the second requirement of a definition is met, the first is not. To determine whether the explication of a concept is logically correct, one need merely look into the linguistic world, the world of concepts, and not the actual world. "Does the explication reflect what people generally understand by the use of the word?" is the question that is asked. Or "does the explication provide a better account of people's confused understanding of the concept as reflected in their use?" The second requirement, the criterion for logical correctness, therefore is confined to the linguistic world.

However, the first requirement is not satisfied. The purpose of the analysis is not simply that of enabling people to use the term correctly or in the manner proposed. For analysis assumes that the term

to be analyzed, "law" in this case, is already understood for everyday purposes, in the sense that people can correctly pick out the instances or phenomena referred to by the word. Rather, it is more than just a definition analysis seeks. It is a description of a special kind, of how we use words, which, as mentioned earlier, aims to provide a deeper type of understanding of the world, and not the one which merely informs us how to use the term. For one may correctly know what items are picked out by such a term, but philosophical puzzlement remains. In short, analysis seeks to uncover the underlying presuppositions people make in their use of "law," which is not immediately apparent, thus providing a deeper understanding of the phenomena reflected in the concept.

Thus, the understanding analysis brings is logical in character and involves the perception of logical interrelations of our concepts. "A main source of our failure to understand is that we do not *command a clear view* of the use of our words. — Our grammar is lacking in this sort of perspicuity. A perspicuous representation produces just that understanding which consists in 'seeing connexions.'"[24] But, in making better logical sense of our concepts, we are able to depart the linguistic world so as to correspondingly understand the world better.

For language, to quote Wittgenstein, "is an instrument. Its concepts are instruments."[25] "Concepts lead us to make investigations; are the expression of our interests and direct our interests."[26] On the other hand, Austin uses a similar metaphor. To him, "words are our tools, and, as a minimum, we should use clean tools: we should know what we mean and what we do not, and we must forearm ourselves against the traps that language sets us."[27] Thus, given the similarity in metaphor, the conclusions they make are much the same, albeit with different applications.

Words are used to talk and communicate about the world. They are as much a gateway to the world as ordinary perception is, in that by means of them we understand and make sense of the world. But for words to be fully effective as instruments or tools and rendered better

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[24] WITTGENSTEIN, *supra* note 4, at 49e, par. 122.
[25] *Id.* at 151e, par. 569.
[26] *Id.* at 151e, par. 570.
[27] AUSTIN I, *supra* note 12, at 181-182.

able to serve their logical purpose, they must be cleaned and refined, clarified and analyzed. By so doing, the conceptual philosopher looks at how we think about and understand the world, which not only correspondingly enables him to fulfill philosophy's negative and therapeutic purpose, which is Wittgenstein's point, of avoiding linguistic confusion, but to satisfy as well philosophy's positive and constructive purpose, which is Austin's, of making clearer sense of the world and reality.

Hence, Wittgenstein queried: "Where does our investigation get its importance from, since it seems only to destroy everything interesting, that is, all that is great and important? (As it were all the buildings, leaving behind only bits of stone and rubble.)"[28] To which, he readily replied: "What we are destroying is nothing but houses of cards and we are clearing up the ground of language on which they stand." [29] And "The results of philosophy are the uncovering of one or another piece of plain nonsense and of bumps that the understanding has got by running its head up against the limits of language. These bumps make us see the value of the discovery."[30] On the other hand, Austin stressed: "When we examine what we should say when, what words we should use in what situations, we are looking again not *merely* at words (or 'meanings' whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena."[31]

These explain why although analysis is a verbal or linguistic activity, confined as it is to the world of concepts or the linguistic world in arriving at a definition, it cannot be trivial. For as Wittgenstein pointed out, linguistic confusion can not in any way be trivial:

> The problems arising through a misinterpretation of our forms of language have the character of *depth*. They are deep disquietudes; their roots are as deep in us as the forms of our language and their significance is as great as the importance of our language. — Let us

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[28] WITTGENSTEIN, *supra* note 4, at 48e, par. 118.
[29] *Id.*
[30] *Id.* at par. 119.
[31] AUSTIN I, *supra* note 12.

> ask ourselves: why do we feel a grammatical joke to be *deep*? And that is what the depth of philosophy is.[32]

The eradication of this deep linguistic confusion is thus important and valuable.

Moreover, an inquiry that enables us to understand the world better, which is the point made by Austin, is likewise fundamentally important. In terms of what it is intended to achieve, it is in a way like "essentialist" definition. An essentialist definition tries to capture the essence of reality. But it is doubted whether such can be achieved by the philosopher, and in any case the scientist is better equipped to investigate reality directly. The conceptual philosopher makes no such mistake. He leaves the investigation of the world to the scientist but complements the latter's work by attending to language and concepts, which in providing the former a look at how the world is understood, enables him also to understand the world better.

3. The kinds of law and the senses of "law"

Corresponding to the two kinds of worlds mentioned earlier, the linguistic or conceptual world and the non-linguistic or actual world, is the distinction between the kinds of law and the senses of "law," which should not be confused with each other. When an inquiry concerns the nature of law, one may refer to kinds of law which exist in the actual world; alternatively, when an inquiry is about the concept "law," one may make reference to the senses of "law," whose home is the linguistic world. Ideally every significant kind of law is referred to by a distinct word, but if the same term "law" is used, as it is to refer to various kinds of law, this may pose problems. The reader may understand by the same term a law different in kind from that meant by the speaker.

The two main kinds of law are classified as descriptive laws and prescriptive laws. Unfortunately the same term "law" is used to refer to both of them. A descriptive law, as its name suggests, merely describes uniformities or regularities in the world or in nature. It is merely a statement of how events, as a matter of fact, regularly do happen.

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[32] WITTGENSTEIN, *supra* note 4, at 47e, par. 111.

Moreover, such laws cannot be violated. Being a mere description of a uniformity, when the phenomena being described does not conform to the descriptive law, it merely means that the law has been incorrectly formulated. The law must then be suitably amended to take account of this anomaly and to arrive at a more accurate description of the phenomena. Finally, the relation between one event and the succeeding event which is indicative of the regularity expressed by the law is one of causality or of cause-and-effect. Scientific laws, which are merely expressions of the uniformities of science, provide the best example of descriptive laws. Even the so-called Eternal Law of St. Thomas Aquinas,[33] if indeed such a law exists, is descriptive in character. The Eternal Law is God's providential law, which mandates order and harmony, for the entire universe.

Prescriptive laws on the other hand, do not describe but *prescribe* a type of behavior which is supposed to be obeyed. They are propositions which require the doing or abstaining from certain actions. Therefore, unlike a descriptive law, a prescriptive law can be violated, for an individual can refrain from conforming to the law. Moreover, if it is violated, this does not mean that the law has been incorrectly formulated, thus requiring amendment. Rather it renders the violator subject to some form of sanction. Finally, the relation of imputation,[34] and not causality, exists, since the connection between the violation of the law and the corresponding sanction or punishment is a product of the will, human or otherwise, and not due to cause-and-effect.

Examples of prescriptive laws abound. A command is prescriptive in the sense that it is a rule of action imposed upon men by some authority who enforces obedience to it. A customary law, being any rule of action which is observed by men and not imposed by some authority, in so far as it obligates, also prescribes. So do rules of etiquette, as aspects of custom which embody conventional rules of social behavior. Moral laws, being principles of right and wrong, and practical laws, which are rules for the attainment of some practical end like how to drive a car, both prescribe. International law embodies prescriptive rules which govern sovereign states in their relations and conduct with each other.

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[33] ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 1a2ae, 93:1.

[34] HANS KELSEN, *Causality and Imputation*, *in* WHAT IS JUSTICE? 327 (1957).

The kind of prescriptive law which is the concern of the philosophy of law, legal theory or jurisprudence is, of course, positive law, otherwise known also as municipal law. It is the law of the state, the law which is the product of the reason and will of the authorities of the state, and regulates the transactions and relations between men in their social life. It is the law that defines their rights and duties, civil liability and criminal responsibility, and prescribes the remedies for wrongs and the proper procedure for complaining and setting up defenses. It is the law, in other words, which is required to be studied in the law schools, being the subject of the Bar examinations, which any aspiring lawyer must learn.

4. The kinds of positive law and the senses of "positive" law

There are likewise different kinds of positive law and different senses of "law" as positive law; but unfortunately these are all again referred to by one term. Consequently care must be taken as to which sense of "law" is meant, so as to prevent confusion.

There is "law" in the particular sense, corresponding to one specific law, for example the law on rape, formerly article 335 and currently article 266-A of the Revised Penal Code. Or there is the law which is not particular, in the sense that it embodies a collection of laws, like the law on crimes against chastity, which in its generic sense includes (formerly) the law on rape and currently other kinds of sex-related crimes like adultery, concubinage, acts of lasciviousness, seduction, corruption of minors, white slave trade, abduction, and the like, or indeed the law embodying all of the criminal law. Clearly "law" in this particular sense or even in the above collective sense cannot be the concern of legal theory.

There is "law" as a system of norms, which is law in the ultimate collective sense as it embodies all the laws, criminal, civil, commercial, procedural and the like, of a state. This sense of "law" has sometimes been taken to be the concern of legal theory.

This sense of "law" is still too narrow or restrictive for our purposes. In the foregoing, law has been taken to mean merely some sort

of rule or norm, or a collection of such rules or norms. Rules or norms are but linguistic entities or abstract concepts, and belong to the linguistic world. There is "law" an even more comprehensive sense. In this sense, "law" is meant not only as a system of rules or norms but also as a kind of social institution. "Law," in other words, is not just an abstract concept but a social phenomenon. The focus of interest is not what law is, but what law does, or how it functions as an agency of social control instituted to meet the demands of society. As such, the law includes a great many phenomena besides rules or norms, such as principles, standards, doctrines, processes, and institutions. Such a concept of law brings to mind not an abstract set of norms, but a working process and a vital institution which has many links to and varied fundamental roles of differing significance to play in society.

5. The features of positive law

The law that legal theory attempts to describe, analyze and explain is a complex social phenomenon and practice. Hence any theory, for it to be satisfactory, must abstract from this complexity a particular feature or set of features deemed to be key or essential. This follows from the Weberian insight that reality, or a slice of it in the form of a complex phenomenon, is both extensively and intensively infinite.[35] Its manifestations or instances are limitless in number or variety; similarly a single manifestation can be viewed from innumerable perspectives. No theorist can observe and survey, much less, know the law completely; neither can any description hope to capture all its complexity. Inevitably choices have to be made, as to which of the law's varied and innumerable features are central or significant and as to which are insignificant.

It is not surprising therefore that different legal theories have formulated their own characterization of law, each of which takes a specific feature or set of features to be of central significance. Cicero, for example, mandated that law be based on "right reason in accordance with nature." St. Thomas Aquinas considered law to be an ordinance of reason for the common good promulgated by him who has authority. Locke took law to be a product of a social contract preserving natural

[35] MAX WEBER, MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 72 (E. Shils and H. Finch eds. 1949).

rights. Austin defined law as the general command of the sovereign. Savigny took law to be a product of the common consciousness or spirit of the people. Ehrlich depicted law as the inner order of human associations. Holmes meant by law "the prophecies of what the courts will do in fact, and nothing more pretentious." Frank attacked the common conception of law as a collection of abstract rules, stressing its uncertainty and unpredicability. Olivecrona saw law as mere words which are links in a chain of physical causation, producing certain courses of behavior on the part of human beings. Pound considered law as a kind of social engineering which aims to make the goods of existence and the means of satisfying claims go round as far as possible with the least friction and waste. Kelsen viewed law as a hierarchical system of coercive norms. Fuller saw law as a purposive enterprise for subjecting human conduct to the governance of rules. Hart depicted law as the union of primary and secondary rules. Raz took law to be a social fact and looks at law in terms of a legal system, whose most general and important features are that it is normative, institutionalized and coercive. Dworkin considered law to include not only rules but also principles, stresses the argumentative character of legal practice, and posited that the most significant feature of law is its integrity in response to the central question concerning the force of law. Critical Legal Theorists debunk law as being based on an incoherent or inconsistent ideology. Feminists make use of this Critical Legal Theorist insight into the ideological character of law to expose its gender bias.

These descriptions stress different salient features of law. Thus law has been characterized as rational, objective, protective of natural rights, coercive, authoritative, voluntary, based on common consciousness, social, predictive, formal, hierarchical, processual, normative, sociological, functional, abstract, psychological, uncertain and inconsistent, argumentative, ideological, gender-biased, to mention but a few. Consequently, the answer to the question "what is law?" must somehow take into account this diversity of descriptions, and select which among them provides the correct or ideal characterization of law.

IV. ON APPROACH

The basic approach adopted in conducting a philosophical inquiry into nature of law and into the various legal theories about law is the approach grounded on the analytic tradition in philosophy. In this series of essays, these various legal theories will be analyzed in historical or chronological order, putting special emphasis on the naturalist-positivist debate. Finally, insights generated by adopting the so-called detached internal or participant's point of view in investigating law, an approach developed by but not original with the legal positivists Hart and Raz, will likewise be made use of.

A. The analytic approach

Since I belong firmly in the tradition of analytic philosophy, the approach to dealing with issues in this series of essays, be they factual or normative ones, cannot be other than that of the tradition. This means that in dealing with factual issues, the method of conceptual analysis will be used; and in dealing with normative ones, the method of rational justification will mainly be availed of. It is not to be forgotten however that even with respect to rational justification, preliminary conceptual analysis is required.

1. Factual issues: The method of conceptual analysis

Conceptual analysis is the method used in dealing with the central issue "What is law?" As argued earlier, the logical analysis of the concept "law" provides the key to the solution of that problem. It does not follow, however, that law will not be investigated from other perspectives nor that other approaches to law will not be scrutinized. Each of these different jurisprudential theories provide a perspective to law which embodies a valuable contribution to knowing and philosophizing about law. Hence they cannot be ignored, and will in fact be made use of in answering the central question. It is simply that,

ultimately, these theories will be analyzed and assessed, as well as the law itself viewed, from the perspective of analytic philosophy, and not from that of other jurisprudential theories.

The same holds true in dealing with other non-normative issues. The concepts of "right," "duty," "responsibility," "property," etc. will be analyzed in answering the questions concerning the nature of legal phenomena corresponding to these concepts.

2. Normative issues: Conceptual analysis prior to rational justification

With respect to the solution of normative issues, the method of rational justification is the method correspondingly used by the analytic tradition. This does not mean, however, that conceptual analysis does not play any role whatsoever. It is simply that conceptual analysis by itself cannot solve such problems. The tradition acknowledges that it would be a mistake to expect such problems to be solved by analysis. Such a claim is not made by the tradition, and it would therefore be unfair to characterize analysis as trivial and unimportant for its failure to arrive at an adequate solution to normative problems.

Although conceptual analysis cannot solve such problems on its own, it actually plays a preliminary and significant role in dealing with them. Concepts need to be clarified first before addressing normative issues. Take, for example, the normative issue of the moral obligation to obey the law. Before an adequate resolution of the problem can be made, the meanings of "moral," "obligation," "obedience" and "law" need to be defined and adequately understood. All philosophers, not just analytic ones, acknowledge this and attend to it. It is simply that the clarification provided by analysis has several distinct advantages.

a. The advantage of the correct identification of the philosophical issue or problem

First, it correctly identifies the issue or problem to be solved. The word or concept by which the philosophical problem originated, is,

in the beginning, the word or concept that was used by the ordinary person in its everyday sense. They were just imported a different or new meaning by some philosophers or these philosophers arrived at puzzling, or at least controversial, philosophical conclusions about them that were considered to be correct or logically proper. Or the vagueness, ambiguity, inadequacy or inconsistency of this concept was demonstrated, and they proposed a truer or more significant meaning of it, by means of which the world will be better understood or at least logical mistakes avoided. Thus there is a need to refocus on this concept in its original, everyday sense, where the philosophical problems originated or from which the many controversial, puzzling and significant philosophical conclusions were generated. This will not only enable the philosopher to analyze and determine if the philosophical conclusions generated from these premises indeed logically follow or how these philosophical problems arose, but also ensure that the precise philosophical issue or problem is addressed, and not some other philosophical problem. That other problem may even be a more important issue which also requires even more urgent addressing. However, that problem is a separate one, not the one associated with the word or concept, because it does not reflect how the philosophical problem came about.

b. The advantage of successful communication and constructive debate

Secondly, successful communication is better ensured and the foundation for a constructive debate is laid. Since the ordinary meaning of the word or concept is attended to, it is now possible for the philosophers to understand each other for the reason that there is a basis upon which they can argue or reason with each other, and that is the ordinary meaning of the word or concept. Some of these philosophers, by means of this method, may reach the conclusion that the concept in its ordinary sense, is ultimately logically unsatisfactory, for the reason that it is vague, ambiguous or inconsistent. They may even recommend another sense by which the word should be understood or used. Even then, in order that their proposed new meaning or sense be satisfactory, there is a need to show that it is superior to the ordinary everyday meaning. But in order to reach that conclusion, they must first focus their attention on the ordinary meaning of the word or concept, so as to

be convinced of the new meaning's superiority. Thus there is still the need to attend to ordinary meaning and to engage in conceptual analysis. In other words, that conclusion will not be logically acceptable unless ordinary meanings and conceptual analysis provide the basis upon which that conclusion is generated.

The alternative to this method is for the philosophers to proceed with their discussion or debate, despite the fact that they are using the same words in different senses. If so, no meaningful discussion or debate will ensue for the obvious reason that they will not be communicating on the same wavelength. They will simply be talking at cross-purposes with each other.

c. The advantage of avoiding philosophical error and confusion in general

Thirdly, the linguistic exercise of prising words off the world, of holding them apart and against it in order to clarify them by means of ordinary use avoids philosophical error and confusion. It enables the philosopher to see the words' or their meanings' inadequacies and arbitrariness, and readies him against linguistic traps.[30] It prevents him from being so bewitched by these words as to be convinced that he is making novel and profound philosophical discoveries, when in actual fact he is merely using words in a meaningless or senseless fashion, which to use a metaphor of Wittgenstein is but a case of "engine-idling."[31] This is the same kind of error mentioned earlier in discussing the third age of philosophy which Parmenides and Meinong made.

[36] AUSTIN I, *supra* note 12, at 181-182.

[37] WITTGENSTEIN, *supra* note 4, at 51e, par. 132. "The confusions which occupy us arise when language is like an engine idling, not when it is doing work."

d. The advantage, in particular, of avoiding unwarranted normative or substantive conclusions through persuasive definitions

In particular, it avoids the generation of unwarranted normative or substantive conclusions, a type of logical error or mistake endemic to philosophy which, in turn, prompted the need for analysis. A philosopher guilty of this mistake defines a word not in terms of the common understanding of the word, but supplies what he considers to be its "real" definition. Thus, he may be guilty of establishing by means of definition what should be a matter of proof. In other words, he defines words in such a way that the desired conclusion necessarily follows from his definition, which is a logical fallacy known as *petitio principii*. Hart refers to this phenomena as "theory growing on the back of definition,"[38] which, to use Russell's words, "has all the advantages of theft over honest toil."

A device of this type which is commonly used not just by philosophers is known as "persuasive" definition. Some words have the effect of producing either favorable or unfavorable reactions on the part of the hearer or reader. This has been referred to by Stevenson as its "emotive meaning," which he has defined as "the aura of favorable and unfavorable feeling that hovers about a word."[39] Thus "freedom," "democracy," and "culture" evoke a favorable reaction, while "violence," "fascism," and "tyranny" evoke unfavorable ones. This emotive meaning is a kind of secondary meaning different from its cognitive meaning which is primary. Persuasive definitions take advantage of the emotive meanings of terms, to generate logically unwarranted conclusions.

For example, "democracy" has a favorable emotive meaning. A Marxist may make use of this and define true democracy as a kind of government which is governed by the masses in the form of dictatorship of the protelariat. Thus a Marxist government, which has just been shown to embody true democracy by virtue of the definition, is consequently a good one, a normative conclusion based on the favorable

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[38] H.L.A. HART, *Definition and Theory in Jurisprudence*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 25 (1983).

[39] Charles L. Stevenson, *The Emotive Meaning of Ethical Terms*, MIND (1937).

emotive meaning of "democracy," which conveniently overlooks the fact that no elections are held in the country and no procedures are instituted to determine what the people or masses want, which are supposed to be features of a democracy. Moreover Western democracies are now shown to be undemocratic and therefore bad. This sleight-of-hand was accomplished by means merely of a definition and not by virtue of actual argument.

Alternatively, "violence" has an unfavorable emotive meaning. Hence some philosophers may, in their desire to denounce certain acts as objectionable or condemnable, immediately characterize them as violent by means of definition. For example, "violence" has been defined by Newton Garver as some sort of violation of a person's rights to autonomy and to dignity.[40] This definition enabled him to differentiate between different kinds of violence, and, in particular, between overt and covert or quiet violence. While overt violence, the overt physical assault of one person on the body of another, is the most obvious kind of violence, there are, he claims, covert kinds of violence, which may involve intimidation, threat, undue influence, fraud, and the like.

Violence, on the other hand, is defined in the dictionary as "the unlawful exercise of physical force," and at times has been extended to cover situations involving the threat of the exercise of physical force.[41] In other words, according to the general understanding of the term, the key ingredient in violence is physical force.

Garver, by his definition, disputes this dictionary definition. Instead, he stresses that the violation of one's rights is the essential or defining characteristic of violence. As a result, an act may be violent so long as it violates a person's rights to autonomy or dignity, even if no physical force was exerted or no threat of physical force was present. Thus a demonstration or strike, otherwise peaceful in the sense that no confrontations involving overt physical force were existent, may be considered violent. Or a priest or professor by using undue influence in the seduction of a parishioner or student may be guilty of a violent act. This is all because the employer or government or parishioner or student

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[40] NEWTON GARVER, *What Violence Is?, in* TODAY'S MORAL PROBLEMS 416 (Richard Wasserstrom ed., 1975).

[41] THE CONCISE OXFORD DICTIONARY.

may be intimidated into doing what he or she does not want to do and thus his or her right to autonomy is violated.

The effect of such a definition is apparent. Since the word "violence" provokes unfavorable reactions, defining "violence" in this way would automatically result in the condemnation of certain acts, instances of covert and institutionalized violence, which to him are repugnant and just as harmful as overt violence. But this is unacceptable. For this ready characterization prevents a more thorough examination of the nature of the act to determine whether it is indeed condemnable.

By calling the act "violent," because of the negative emotive meaning of the word, the act is immediately considered condemnable and wrong. Moreover, the definition blurs the many distinctions ordinary language and law has made with respect to the manner in which acts are committed. Thus there is a distinction between physical force normally associated with violence, on the one hand, and psychological force, which is linked to intimidation and threat on the other.[42] In other words, violence has been distinguished from intimidation, undue influence and fraud.[43] To have used psychological force or intimidation, undue influence or fraud in violating a person's rights is indeed wrong and condemnable. For example, a peaceful strike or a demonstration may be insensitive, intimidatory and economically harmful, or seduction by undue influence is morally wrong. But it is not wrong because it is violent since obviously there was no use of violence, but because it violated another person's rights.

e. The advantage of availing of the wisdom of generations

Fifthly, there is a lot to learn from ordinary language. As Austin succinctly explained:

> [O]ur common stock of words embodies all the distinctions that men have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations: these

[42] REV. PEN. CODE, art. 12, pars. (5) and (6).
[43] CIVIL CODE, art. 1330.

> surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, then any that you or I are likely to think up in our arm-chairs in an afternoon — the most favoured alternative method.[44]

Moreover, as mentioned earlier, these distinctions are not meaningless or senseless or a case of mere "engine-idling," since ordinary language, the language in which these distinctions are expressed, has a form of life behind them.[45]

f. The advantage of neutrality

Finally, analysis has been claimed to enjoy the virtue of neutrality. For analysis is said to be but conceptual or logical, and hence neutral to political theory. No theory is said to grow on the back of a mere logical or conceptual analysis of words. This claim has in fact been challenged not only by philosophers of law, but by political philosophers or even philosophers in general. For, it has been pointed out that "the distinctions that men have found worth drawing and the connections that they have found worth marking," which are found in ordinary language, far from being neutral, in fact reflect or embody the prevailing or dominant philosophy or the philosophy of the *status quo*.

In jurisprudential theory, Professor Dworkin, the Critical Legal Studies Movement, and Feminist Jurisprudence attack the claim of neutrality on separate grounds. Dworkin asserts that conventional conceptual analysis of law is subject to the "semantic sting" and that therefore all legal interpretation must be constructive.[46] Critical Legal Studies, on the other hand, asserts that ordinary language is so immersed in the political theory of liberalism, that it cannot be neutral.[47] Feminist Jurisprudence, meanwhile, points out that ordinary language reflects

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[44] AUSTIN I, *supra* note 12, at 182.

[45] WITTGENSTEIN, *supra* note 4, at 11e, par. 23: "[T]he *speaking* of language is part of an activity, or of a form of life." See also, *id.* at p. 8e, par. 19: "And to imagine a language means to imagine a form of life."

[46] RONALD DWORKIN, LAW'S EMPIRE ch. 3(1986).

[47] See, for example, R. W. Gordon, *Law and Ideology*, TIKKUN 3, no. 1 (January/February 1988) and Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHILOSOPHY AND PUBLIC AFFAIRS 3 (1986).

nothing but the ideology of a male-dominated society.[48] Sadly, challenges of this sort require a deeper understanding of the issues in philosophy of law than what is necessary to an introductory Article. Hence a more comprehensive discussion of this issue awaits the subsequent essays on Dworkinian Legal Theory, Critical Legal Studies and Feminist Jurisprudence.

B. The historical approach

The different schools of jurisprudential thought will be introduced in this series of essays chronologically. This is because the proper understanding of the many issues in the philosophy of law cannot be fully understood without its historical background and setting. Although philosophers deal with abstract problems, the way these problems arose and became felt and understood were due to concrete situations. They were often in answer to pressing problems of the times, which required a deeper inquiry into and investigation of all the issues associated with those problems. Moreover, many of the observations philosophers make are in response to conclusions made by other philosophers, and cannot be appreciated without knowing what these earlier philosophers claimed.

C. The naturalist-positivist debate

Although there are many prominent jurisprudential theories other than Natural Law and Legal Positivism, the debate between the two will be a recurrent theme in this series of essays. After all, they represent the two main schools of jurisprudential thought and every other jurisprudential theory can in the end be classified in terms of having a naturalist or positivist orientation. Moreover, there are many strands of Natural Law Theory or Legal Positivism each of which deserve

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[48] See, among others, Robin West, *Jurisprudence and Gender*, 1 U. CHI. LAW REVIEW 55 (1998), and Margaret J. Radin, *The Pragmatist and the Feminist*, S. CAL. L. REV. 63 (September 1990).

full treatment. Finally, these two theories are grounded on the two most basic and fundamental insights into the nature of law, the first that law is the product of reason, from which arises the rationalist tradition in the philosophy of law as exemplified by Natural Law Theory, and the second that it is the product of human will, the voluntarist tradition as championed by Legal Positivism.

D. The detached internal point of view

Earlier in the Article, it was noted that philosophy is a discipline which looks at law from above, and not just from outside it as the sociology of law does. However, this vantage point does not prevent a philosopher, in his attempt to understand fully the nature of law, from assuming also the internal or the participant's point of view, that is, putting himself in the shoes of a lawyer or someone immersed in the practice of law and observing law from that perspective.

The importance of the internal point of view has been recognized by the sociologist. Failure to adopt it results in an incomplete appreciation of the nature of phenomena. Take for example, a Martian visiting the earth and observing the behavior of humans. In doing so, he adopts the external perspective. He watches cars at a stoplight, and notices that whenever the light turns red, the cars stop and whenever green, they go. From this he erroneously concludes that a red light causes the cars to stop and the green light to go. The error arises because the Martian in his observations fails to take the internal point of view or the point of view of a participant in the practice. Were he able to put himself into the shoes of the driver and thus adopt his internal perspective, he would soon realize that the red light does not cause the car to stop but is used merely as a signal for him to stop. The internal perspective provides an insight into the nature of phenomena, not provided by an external one.

Hart acknowledged the importance of the internal point of view, and used it in his analysis of the concept of law.[49] Many fertile observations and rich insights into the nature of law were thus generated.

[49] H. L. A. HART, THE CONCEPT OF LAW ch. 5 (1961).

Since then, a distinction has been made between the committed and the detached internal point of view. The former point of view is one that accepts or endorses law in a way that entails moral approval of it.[50] Such a point of view is exemplified by a reactionary fanatic, who presupposes that because something is the law it must be just or morally right. Obviously, this is not a point of view which will generate an objective study of the law for the purposes of jurisprudential study. The latter point of view, on the other hand, is exemplified by that of the legal scholar.[51] He accepts the normativity of law, but does not necessarily endorse its moral authority. He can therefore objectively describe the law without being committed to its justice or moral rightness.

In investigating the nature of law and in assessing various jurisprudential accounts as to its nature, this series of essays will therefore not ignore the many important insights into law generated by making use of the detached internal or participant's point of view.

V. ON RELEVANCE

The study of legal theory, as discussed in this series of essays, has relevance both for philosophers and lawyers.

A. For philosophers

The relevance to philosophy students or philosophers being evident, discussion of it will be brief. In fact, there is no need to justify the subject to a philosopher as he automatically assumes it to be relevant for his purposes. Its relevance is in terms of method and content. The methods of conceptual analysis and rational justification are tools that a philosopher must acquaint himself with in order to be a competent philosopher. Hence the application of those methods with respect to problems about law will hone his philosophical skills. As to its content, the philosophy of law belongs to the broader category in philosophy

[50] JOSEPH RAZ, *Legal Validity*, *in* THE AUTHORITY OF LAW 155 (1979).
[51] *Id.* at 156.

known as social and political philosophy. Hence, he will deepen his understanding of moral, social and political issues in philosophy by such a course.

B. For lawyers or aspiring lawyers

The claim that the study of legal theory is relevant to a lawyer or an aspiring lawyer requires a lengthier justification. For whereas the relevance of legal theory to philosophers can be taken for granted, it cannot be so with respect to lawyers or aspiring lawyers. In fact, lawyers have expressed distrust, if not disdain, for legal theory or legal philosophy. Isn't it the distinguished Professor A. V. Dicey who once remarked "Jurisprudence stinks in the nostrils of the practicing barrister"?

Indeed, this attitude to philosophy is due to the fact that it has no immediate practical relevance. Law students may acquire sufficient knowledge of the law to pass the Bar Exams and to be skilled practitioners of their craft with nary an acquaintance with the issues in the philosophy of law. A law student, for example, who is taking a law exam or a lawyer who is about to write a pleading or argue a case in court need not concern himself with deep and abstract philosophical questions. He simply takes them for granted and proceeds directly with the issue at hand. To paraphrase Aristotle, he would do well to aim only for that degree of precision and profundity as the nature of the proceeding requires. To do otherwise is to risk offending the professor or judge, who may either consider his observations irrelevant, fail to understand or appreciate them, suspect him to be bluffing or assume him to be a pompous fool.

This does not mean, however, that because an activity is not immediately relevant it has no relevance whatsoever. Professor G. H. Hardy once remarked, with respect to pure mathematics, that an abstract idea, although perhaps not of immediate practical value, may nevertheless be of ultimate importance.[52] Professor Whitehead presupposed that idea when he showed how an abstraction or large generalization can have

[52] G. H. HARDY, A MATHEMATICIAN'S APOLOGY 60 (1941).

greater practical relevance, maintaining that it "is the large generalization limited by a happy particularity, which is the fruitful conception."[53]

What is true of mathematics is no less true of philosophy in relation to law and lawyer Sir Francis Bacon noted the disparity between the philosopher's interest in an abstract and ideal law and the lawyer's preoccupation with concrete, existing law, thereby implying the need to supplement the lawyer's narrow and confined outlook by the philosopher's wider and deeper perspective in the proper understanding of law.

> All those which have written of laws, have written either as Philosophers of as Lawyers, and not as Statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the States where they live, and what is received by law, and not what ought to be law . . . .[54]

A little more than two centuries later, another equally renowned philosopher and lawyer, Mr. Jeremy Bentham developed and elaborated upon this theme, by means of a picturesque metaphor.

> Between us two might the philosopher and the lawyer say, there is a great gulph. I have endeavored to throw a bridge over this gulph: so that on it, as on Jacob's ladder, if not Angels, man, however, may continually be henceforth seen ascending and descending.
>
> The Lawyer immersed in the muddy ditch of his *particulars* scarce dares to think of mounting to the regions of Philosophy. The philosopher delighted and captivated by his *generals*, deigns not to sink into the gross world of law . . .
>
> Philosophy for want of more substantial stuff spinning with Cobwebs — Jurisprudence piling up in wide confusion a huge heap of odds and ends for want of spinning. Should I be found so happy as to succeed in bridging these celestial artizans into a more close acquaintance, what a rich and serviceable manufacture may not be hoped for and from their united labours.[55]

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[53] A. N. WHITEHEAD, SCIENCE IN THE MODERN WORLD 46.

[54] SIR FRANCIS BACON, *The advancement of learning*, II WORKS 539 (Mallet ed.).

[55] Jeremy Benthan, Elements of Critical Jurisprudence 14-16 (on file with Box 27 University College Collection, London).

Indeed, the foregoing has been nothing but a long argument justifying the non-triviality as well as the general importance and relevance of philosophy. It remains only to direct the argument specifically towards the concerns of lawyers and aspiring lawyers. Its relevance to them is twofold: in terms of being a better lawyer and in terms of being a better human being.

1. A better lawyer

A course in the philosophy of law enables a lawyer or aspiring lawyer to be better in his profession because it will enhance his skills and deepen his understanding of the law. Analysis is a skill that is required of lawyers, who engage in it when they interpret legal materials. Thus, lawyers in practicing law have been likewise engaged in the practice of analyzing legal concepts, like rights, duty, possession, intent, act, cause, et cetera.

The difference between legal analysis and general philosophical analysis is simply that in the former attention is paid not to the ordinary use of the concept in ordinary contexts, but in its use in legal contexts. Moreover, the depth of analysis is simply carried further in the latter. Hence, when a lawyer applies the latter method, he simply directs his focus on legal textbooks, statutes, judicial opinions, or legal materials while engaged in a deeper analysis of concepts. As a result, the insights a lawyer gains when applying this method will enhance immeasurably his understanding of these concepts and of law.

Even the skill of rational justification has practical value. For rational justification is nothing but the use of moral and other persuasive arguments in justifying one's position towards normative issues. This skill can be applied to the legal context, since moral and persuasive arguments are definitely important ingredients in advocacy and in adjudication.

2. A better human being

A deeper understanding of normative issues in the philosophy of law, like justice, liberty, the rule of law, punishment, the obligation to obey the law, etc., will also help a person to become a better human being. But he becomes a better person not in the same way a religious sermon or a session with a psychiatrist enables him to be one. It is not the role of philosophy to give a lawyer spiritual solace or practical advice. Rather the function of philosophy is to give him a better rational understanding of certain normative issues. Of course, this does not automatically translate to wiser choices as a human being. For, with due respect to Socrates, knowledge is not necessarily virtue. However, an understanding of these issues in the form of knowing the myriad and complex arguments for and against a given position is definitely invaluable in making any rational choice involving these issues.

The importance of being a better person, it is said, is so much more important for lawyers than it is for members of other professions. Johathan Swift, in *Gulliver's Travels*, describes lawyers as "a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid." Indeed, literature is full of derogatory asides against the profession.

No less than St. Luke in the *New Testament* remarked: "Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers." Shakespeare did not spare the profession either, as he suggested in Henry VI: "The first thing we do, let's kill all the lawyers." Jonathan Swift, again in *Gulliver's Travels*, engaged in an extended vicious diatribe against lawyers:

> In all points out of their own trade they were the most ignorant and stupid generation among us, the most despicable in common conversation, avowed enemies to all knowledge and learning, and equally disposed to pervert the general reason of mankind in every other subject of discourse as in that of their own profession.

Jean Giradoux, in *Tiger at the Gates*, put it this way: "There's no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth." Then, in *The Madwoman of Chaillot*, he added: "You're an attorney. It's your duty to lie, conceal and distort everything, and slander everybody."

This popular belief is also evidenced by the many, sometimes cruel, jokes made at the expense of lawyers directed at their lack of morals. One such joke concerns the difference between a lawyer and a sperm. It is said that a sperm, as distinguished from a lawyer, has at least one chance in hundreds of millions to become human. If somehow this essay manages to increase the chances of lawyers to become human so as to equal or even surpass by a fraction that of the sperm, then the lecturer will be one with Benjamin Franklin in exclaiming: "God works wonders now and then:/ Behold! a lawyer, an honest man!" And he will consider his efforts to have been infinitely rewarded.

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