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Methods of Legal Reasoning

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42. Beside the nonmonotonic logics, the so-called formal theories of belief revision have also been used to solve the “Tweety problem”.
43. Cf. H. Prakken, G. Vreeswijk, “Logics for Defeasible Argumentation”, in D. Gabbay and F. Guentner (eds.), *Handbook of Philosophical Logic*, Kluwer Academic Publishers, Dordrecht, 2002, 2nd edition, vol. 4, pp. 219–318.
44. The presentation will be based on the idea of a defeasible logic as developed by H. Prakken in *Logical Tools for Modelling Legal Argument*, Dordrecht, 1997.
45. This premise could also be reconstructed with the use of the material implication \rightarrow , which naturally is still at our disposal. The resulting formalization would be easier, as every argument that is based on \rightarrow prevails over an argument based on \Rightarrow (see below).
46. As this presentation is elementary, we apply here a simplified definition of attack.
47. See H. Prakken, *op. cit.*
48. In order for this formalization to “work” we need additional information that Article 2 is “higher” in the ordering than Article 1, with the result that, in the case of a conflict between both articles, it is the argument based on Article 2 that prevails.
49. Here, one has yet to update the ordering between the defeasible implications.
50. One can presumably formalize those provisions in classical logic with the use of a smaller number of formulas. However, even this alleged formalization would be much more complex than the one in DL.
51. Cf. R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977.

CHAPTER 3

ANALYSIS

3.1 INTRODUCTION

It is difficult to define analysis. The main reason for this is that there are many procedures labeled “analysis”. Here, of course, we are concerned only with a few of them; for instance, chemical analysis will not be considered. We shall be preoccupied only with those analytical tools which can be used in reasoning, interpretation or argumentation.

In what follows three basic meanings of the notion of analysis will be identified and a short history presented of each. Then two methods of analysis, which play an important role in the philosophy of law will be described. These methods are linguistic analysis and economic analysis.

3.1.1 The Notion of Analysis

Historically speaking, a plethora of definitions of analysis have been offered. It is convenient to start with three paradigmatic examples. The Ancient Greek mathematician, Pappus, says:

For in analysis we suppose that which is sought to be already done, and we inquire from what it results, and again what is the antecedent of the latter, until we on our backward way light upon something already known and being first in order. And we call such a method analysis, as being a solution backwards (*anapalin lysin*).¹

Descartes, in turn, in the 13th of his work “*Regulae ad directionem ingenii*” remarks:

If we are to understand a problem perfectly, we must free it from any superfluous conception, reduce it to the simplest terms, and by a process of enumeration split it up into the smallest possible parts.²

Several hundred years later B. Russell put forward yet another definition of analysis:

We start [the analysis] from a body of common knowledge, which constitutes our data. On examination, the data are found to be complex, rather vague, and largely interdependent logically. By analysis we reduce them to propositions which are as nearly as possible simple and precise, and we arrange them in deductive chains, in which a certain number of initial propositions form a logical guarantee for all the rest.³

The quoted definitions seem to describe distinct, albeit not entirely different, procedures. In the first definition analysis is a search for logical reasons (let us label it analysis₁). In the second it is “decomposition” (analysis₂). Finally, in the third definition, analysis is a translation into a certain language, which meets specific conditions, like simplicity or precision (analysis₃). Of these three conceptions⁴ – analysis as a search for logical reasons, analysis as decomposition and analysis as translation – it is analysis₂ that seems best to correspond with our intuitions. In the dictionaries of various European languages “analysis” is usually understood as a method that leads from complex concepts to more simple ones. Analysis – thus defined – is usually contrasted with synthesis, which is a process of building complex entities from simple elements.

Let us note that analysis₂ differs from the two other conceptions as it has as its subject concepts – which are to be decomposed into simpler concepts. Analysis₁ and analysis₃, on the other hand, concern sentences or propositions. Only propositions can have logical reasons and only sentences can be translated into other sentences (sentences can also be decomposed but then they are treated as syntactic phenomena and not as bearers of meaning). It has to be noted that this difference is not as important as it may seem at first sight. One of the members of the Vienna Circle and a great representative of analytic philosophy, R. Carnap, defined logical analysis in the following way: “The logical analysis of a particular expression consists in the setting-up of a linguistic system and the placing of that expression in this system”.⁵ The expression in question can, of course, refer to a specific concept. Therefore, there may exist very close links between analysis₂ and analysis₃.

3.1.2 *History of the Concept*

Ancient thinkers applied different methods of analysis. It is of special interest to observe the procedures of searching for proper definitions. This method is usually tied with the name of Socrates and is illustrated well in many of Plato’s dialogues. The Socratic method is an example of analysis₂. Analysis₁, in turn, can be found in those fragments of dialogues where Plato puts forward a hypothesis and seeks reasons for its acceptance. Analysis₁ is also carried out in Aristotle’s “Analytics”, the work that founded logical research. It is interesting to note that, in antiquity, only analysis₁ was theoretically described (especially in the already quoted work of Pappus).

In the middle ages, especially after the “renaissance” of the twelfth century, analytical methods were widely used, as witnessed in the achievements

of the scholasticism. One can easily agree with J.M. Bochenski,⁶ that analysis of a comparable level of precision recurred not earlier than the twentieth century. The middle ages, by contrast, did not offer any new, fully developed methods of analysis (with the exception of some theories of John Buridan).

The works of Descartes constituted the next important step in the methodological discussion of analysis. In “Discourse on method” one finds a passage, which distinguishes between four principles of reasoning and describes one of them as follows:

Divide each of the difficulties I examined into as many parts as possible and as may be required in order to resolve them better.⁷

There are few doubts what Descartes has in mind here: analysis as decomposition (analysis₂). This conception of analysis was popularized in the famous “Logic of Port Royal”, a book written in Cartesian spirit by Arnauld and Nicole. The work, published in 1662, was used as the basic textbook on logic as late as the nineteenth century, influencing the common acceptance of analysis₂. The methods of analysis₂ can be found in the works of the greatest philosophers of modern times: Leibniz, the British empiricists, and Kant.

The third of the meanings given to analysis – analysis as translation – started to enjoy the status of an important methodological concept after the so-called linguistic turn in philosophy, which occurred with the publication of the works of Frege, Moore, Russell and Whitehead. It is convenient here to devote a few words to the reasons why the “linguistic turn” caused a change in how the notion of analysis was understood. Speaking somewhat boldly, philosophers before the linguistic turn, and at least since Descartes, were interested in what constitutes thinking or reasoning. “The inner discourse” or as the author of the “The discourse on method” would put it, “the chain of ideas in the human mind”, constituted the subject of the philosophers’ interest. This interest was supplemented with a peculiar understanding of reasoning, which was based on a metaphor of seeing: for Descartes “to think” means “to see ideas with the mind’s eyes”. It is not surprising then that, in such a framework, what interests philosophers are ideas or concepts and the method of analysis leads to decomposing the complex images into simpler ones. After the linguistic turn the situation changes: sentences now occupy the central place that had been reserved for concepts (even though concepts play an important role in some kinds of analytic philosophy).⁸

This is not to say, however, that the idea of analysis as decomposition is completely unknown to philosophers of the linguistic turn. B. Russell wrote:

Analysis may be defined as the discovery of the constituents and the manner of combination of a given complex. The complex is to be one with which we are acquainted; the analysis is *complete* when we become acquainted with all the constituents and with their manner of combination, and know that there are no more constituents and that that is their manner of combination (. . .).⁹

This passage suggests that it is not always possible to differentiate between the three kinds of analysis outlined above. One can even say that there are not three kinds of analysis, but three aspects of the same process and that the different aspects play more or less important roles depending on the aim of the analysis, the philosophical assumptions accepted, etc.¹⁰ However, such a solution – simple as it may be – makes a precise definition of analysis impossible.

To sum up: analysis cannot be easily defined. That said, one can identify three models of analysis and any given method is likely to resemble more or less one of those models. For example, mathematical analysis is first and foremost connected with the search for logical reasons. Anyway, the three presented models can serve as a basis for characterizing any applied (or postulated) methods of analysis.

3.1.3 *Analytic Philosophy*

In the twentieth century there emerged a philosophical movement that is usually referred to as “analytic philosophy”. It would be inappropriate to characterize analytic philosophy as a school of thought that uses analysis as its method; there are numerous other philosophical traditions making use of analysis. The problem is that because of the diversity of schools labeled “analytic” it is difficult to establish the necessary or sufficient conditions for referring to someone as an “analytic philosopher”.

J.M. Bocheński maintains that there are four keywords pertinent to analytic philosophy: analysis, language, logic and objectivism.¹¹ Bocheński understands analysis as opposed to philosophical synthesis; the task of a philosopher is not to construct all-embracing systems but to solve concrete problems. The keyword “language” refers to accepting language as the basic medium of philosophizing. “Logic”, in turn, underlines analytic philosophers’ trust in formal tools. Finally, “objectivism” is opposed to any kind of subjectivism.

The above mentioned principles are realized to varying degrees in different schools of analytic philosophy. For instance, members and

followers of the Vienna Circle put special emphasis on applying logical methods. The Oxford School of Ordinary Language, by contrast, dismissed logic as useless and concentrated on painstaking analysis of how words are actually used in ordinary language. Bocheński's proposal is not, therefore, a definition of analytic philosophy but only indicates the principles important to analytic philosophers.

Analytic philosophers are usually divided into two "wings" (camps). The first wing is occupied by the reconstructionists, whose aim is to reform ordinary language using logical tools. The second wing – the descriptionists – aims only to describe how ordinary language functions and uses methods of an informal character. The methods of reconstruction are often referred to as "hard", whilst descriptive techniques are called "soft". Therefore, we have "hard" (formal) analytic philosophers on the one hand, and "soft" (anti-formal) on the other.

Today the above mentioned division is questionable. But in the middle of the twentieth century there were good reasons to justify it. The "formal approach" was represented then by members and followers of the Vienna Circle (who, after the Second World War stayed in the United States or in the United Kingdom). On the other hand, the "anti-formal" methods were applied by Wittgenstein in Cambridge and by the Oxford School of Ordinary Language. The differences between the two approaches were clearly visible then, as was the animosity between the representatives of both wings of analytic philosophy.

G.E. Moore is considered the "founding father" of analytic philosophy. His *Principia Ethica* (1903) marks symbolically the beginning of a philosophy that – being in opposition to neo-Hegelianism – concentrated on conceptual analysis based on common sense. Moore can easily be classed as a representative of the anti-formal wing of analytic philosophy. The same may be said of the "second" philosophy of L. Wittgenstein or the Oxford School of Ordinary Language.

Around the time Moore "founded" anti-formal analytic philosophy, the "formal" wing began to emerge. German logician G. Frege is usually regarded as the first representative of this way of philosophizing. In addition to Frege's work, as a milestone in the history of logic – and of "hard" analysis – one should also mention Russell's and Whitehead's *Principia Mathematica*, published in 1910–1913. In the spirit of *Principia* L. Wittgenstein wrote his first major work, *Tractatus Logico-Philosophicus*. The idea of applying logical methods in philosophy was radicalized by the Vienna Circle, founded by M. Schlick in 1920s. Among members of the Circle one should mention O. Neurath, R. Carnap and F. Waissmann. Less radical, but still logically oriented, was another

distinguished philosophical school: the Lvov-Warsaw School, with its founder K. Twardowski and famous members: J. Łukasiewicz, S. Leśniewski, K. Ajdukiewicz, A. Tarski, T. Kotarbiński and others.

More contemporary methods of analysis, represented mainly by American and British philosophers, cannot easily be classified as formal or informal, although in some cases such a classification is to a certain extent justified. For instance, W.V.O. Quine can be labeled a representative of “hard” analysis; J. Hintikka likewise. G. Evans, on the other hand, used rather “soft” methods. However, some first rate philosophers, such as H. Putnam, M. Dummett and D. Davidson, do not easily qualify as representatives of either of the two groups.

Of the many approaches employed by analytic philosophers we examine below only linguistic analysis, which is characteristic of the Oxford School of Ordinary Language. There are several reasons for this. First, the methodological richness of analytic philosophy makes it impossible to present everything. Second, linguistic analysis is a method that is relatively well defined. Third, it has played an important role in legal theory and the philosophy of law. Finally, it is a model example of anti-formal analysis.

In Chapter 2 we also wrote about hard analysis; the chapter is devoted to presenting different attempts at the logical reconstruction of legal reasoning. The logical systems presented there are tools of “hard analysis”. This formal analysis consists in translating (paraphrasing) natural language expressions into certain logical systems and in drawing conclusions from the obtained formalizations. Although in Chapter 2 we did not pay proper attention to the actual process of paraphrasing, in all those places where legal arguments are logically reconstructed a paraphrase has been employed. The development of logical methods presented in Chapter 2 is also an illustration of another kind of analysis. The logical systems we described constitute the analysis₂-definition of a legal norm, and some of them – of the concepts of obligation, permission, etc.

The decision to devote separate chapters to logic and analysis is not designed to exaggerate the differences between “soft” and “hard” analysis. What we had in mind was the coherence of the presentation. An historical approach to the logical reconstruction of legal reasoning enables one to show the development of formal methods and identify the key logical problems of legal reasoning. From this perspective mixing up “hard” with “soft” methods would make less clear the picture of logical research in legal theory.

We have to add one terminological remark. Below we will describe linguistic analysis which – in its purest form – was applied by the members of

the Oxford School of Ordinary Language. As already indicated, it is a model example of “soft”, anti-formal analysis. Instead of “linguistic analysis” one can also say: “linguistic philosophy”. Linguistic analysis (philosophy) has to be distinguished from the philosophy of language. Linguistic philosophy is identified by a certain method, whilst philosophy of language is identified by a certain subject. Philosophy of language can therefore be developed with the use of linguistic analysis but also of formal methods, phenomenology, etc. Linguistic philosophy, in turn, is not confined to developing a theory of language; it may concern any philosophical problem.

3.2 LINGUISTIC ANALYSIS

We would like to look now at the basic assumptions of linguistic analysis, in particular the special role it attaches to ordinary language. Then several important legal-theoretic conceptions that have grown out of linguistic analysis will be presented.

3.2.1 *History and Basic Assumptions of Linguistic Analysis*

Philosophical analyses which are labeled “soft” can be found in the writings of one of the “founding fathers” of analytic philosophy, G.E. Moore. In such works as *Principia Ethica* (1903), Moore developed a common sense philosophy, which made extensive use of analysis of the ordinary meaning of words. Similar methods were applied by other philosophers belonging to the Cambridge School of Analysis such as J. Wisdom, M. Black and S. Stebbing.

In reference to linguistic analysis one cannot fail to mention the “second” philosophy of L. Wittgenstein. Wittgenstein claimed to have solved all the major problems of philosophy in *Tractatus logico-philosophicus* and, after publishing it in the early 1920s, decided not to follow any “academic career”. He returned to Cambridge and to philosophical thinking at the beginning of the 1930s. He developed then a new conception, which – in opposition to the one employed in *Tractatus* – abandoned logic in favor of analyzing ordinary language in its diverse forms.

Linguistic analysis in its classic form was developed in Oxford by J.L. Austin and his followers. Austin, the author of *How to Do Things with Words* (1962), put ordinary language at the center of philosophical attention, maintaining that analysis of the subtle ways in which ordinary language functions is the proper way to approach philosophical problems. Among other representatives of the Oxford School one should mention P.F. Strawson and G. Ryle. One should also add to this list J. Searle, although he did not regard himself as a linguistic philosopher.

Strawson devoted much attention to linguistic analysis as a method and showed that it can be applied to all traditional philosophical disciplines, including metaphysics (*Individuals*, 1959). Ryle was a highly influential figure in British philosophy from the 1930s. His main work is *The Concept of Mind* (1949), in which Cartesian dualism is attacked. Searle, before turning to the problems of the philosophy of the mind, developed further in *Speech Acts* (1969) the Austinian conception of illocutions, which we describe below.

Among the legal philosophers making use of linguistic analysis one should mention H.L.A. Hart, and some elements of this kind of analysis can also be traced in the works of R. Dworkin or J. Raz. It is not improper to mention K. Opalek, who in his monograph “Z teorii dyrektyw i norm” (1974) applied both “hard” and “soft” methods to analyze such concepts as “directive”, “norm” or “imperative”.

It is difficult to state precisely what linguistic analysis consists of. One could say that it is the analysis of concepts that are used in ordinary language; this, however, is neither precise nor adequate. We will begin our attempt to describe linguistic analysis by looking at what Strawson has to say on the matter.

The most characteristic feature of linguistic analysis is the special role of ordinary language. Strawson says that concepts which are basic from the philosophical point of view – if there is such a thing – are to be looked for in non-technical, ordinary language and not in specialized languages.¹² Those specialized languages, which include the language of sciences, are secondary relative to ordinary language, for getting acquainted with the theoretical concepts of various sciences assumes earlier familiarity with the pre-theoretic notions of everyday practice. Strawson says that ordinary language is based on the so-called conceptual scheme, a general structure of our every day and scientific thinking¹³; the aim of philosophizing is to discover and analyze this structure. This is, naturally, a very strong assumption, although some reasons backing it can be formulated. For instance, one can observe with Austin that

our common stock of words embodies all the distinctions men have found worth drawing, and the connections they have found worth marking, in the lifetimes of many generations: these 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, than any that you or I are likely to think up in our arm-chairs of an afternoon – the most favored alternative method.¹⁴

What is striking in this passage is the phrase “the survival of the fittest”, which allows us to call Austin’s argument that ordinary language has a special status – the “evolutionary argument”: if ordinary language

results from a very long evolution, one can conclude that it “fits” the world well. In other words: if it is an efficient tool, it surely encodes some knowledge about the world.

The evolutionary argument – as persuasive as it is – is not sufficient for Austin to claim that ordinary language is the “last word” in philosophical thinking. As the author of *How to do Things with Words* observes himself:

[The ordinary language] embodies, indeed, something better than the metaphysics of the Stone Age, namely, as was said, the inherited experience and acumen of many generations of men. (. . .) [But] certainly, ordinary language is not the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it is the *first* word.¹⁵

What Austin says does not only weaken the conclusions of the evolutionary argument. In this quoted passage one can find much more: a certain idea of linguistic analysis, which is an alternative to that of Strawson. According to Strawson, the analysis of the conceptual scheme, which is hidden beneath the ordinary language is the final aim of philosophy. Austin, on the other hand, suggests analyzing the way ordinary language functions; but the analysis in question is designed only as a point of departure for philosophy and not as its final aim. Only through an analysis of language can one prepare the ground for serious philosophical undertakings. From what has been said we can label Strawson’s idea of analysis the maximalist approach, and Austin’s the minimalist.

Below we will see examples of both minimalist and maximalist approaches. Hart’s analyses presented in Section 3.2.2 are maximalist rather than minimalist. Speech acts theory, presented in Section 3.2.3, is an example of the minimalist program.

The most important objection to the program of linguistic analysis can be formulated as follows: philosophy which confines itself to describing how concepts function in ordinary language is a caricature of what it ought to be, namely the serious pursuit of important problems. Anti-formal philosophers reply to this with the following metaphor, which may be labeled “grammatical”. Most of us are able to use our language without making many serious mistakes. This does not mean, however, that we are aware of all the rules of grammar. Like a linguist, who discovers the rules of grammar, a philosopher analyzes rules that govern our experience, but of which we are not (and do not have to be) aware. Such analysis cannot be termed a mere “caricature”.

Another problem is connected to a specific feature of linguistic analysis that is very strongly stressed by Strawson. The aim of linguistic

analysis is not to discover “elementary factors”. It is rather, speaking metaphorically, an attempt to draw a map of the conceptual scheme. The author of *Individuals* appeals to us to abandon the idea that analysis has to lead towards simplicity. He suggests, instead, imagining a model of a net, a system of interconnected units such that every unit can be understood properly from the philosophical perspective only when its interconnections with others are captured.¹⁶

It is plain to see that this philosophical method does not fit any of the three models of analysis we identified above. It has nothing to do with searching for logical reasons, or translating from a complex language into a simpler one. Moreover, Strawson expressly states that it does not assist in achieving greater simplicity. We believe, however, that one should not take for granted what Strawson says. Is not it true that the Strawsonian conceptual scheme is something basic? It is the task of a philosopher to discover the scheme, but also to relate philosophical problems to it. For instance: Strawson addresses the problem of Cartesian dualism – a serious philosophical issue by any standards – by determining that, in the conceptual scheme, there exists a concept of a person which differs in some important respects from the concept of a thing. The problem of dualism can now be analyzed against the background of this reconstructed fragment of the conceptual scheme of ordinary language. Therefore, the aim of analysis according to Strawson is not only to discover (describe) the conceptual scheme, but also to deal with philosophical problems by relating them to that scheme (this will be illustrated below, especially in Section 3.2.2). One can say therefore that linguistic analysis in its maximalist form is an example of analysis₃. We will come back to this controversial issue later.

The proponents of linguistic analysis are aware of the many objections raised against their method, and they have formulated various responses. In order to assess more accurately the benefits and limits of applying linguistic analysis to law, it is necessary to look more closely at how the method works in practice.

3.2.2 *Legal Conceptual Scheme*

Let us look more closely at how H.L.A. Hart used the methods of linguistic analysis in order to elucidate “the concept of law”. Hart’s undertaking can be seen from the maximalist perspective as an attempt to show how the concept of law functions in our conceptual scheme. Consequently, one will not find in Hart’s analysis a definition of law that characterizes it by reducing it to more elementary elements. Moreover, in *The Concept of Law* Hart adapts an anti-definitional approach. This

approach is connected to the diagnosis of ordinary concepts of language that was popular in J.L. Austin's school.

Such concepts are necessarily vague. Accordingly, every concept has a core of determinate meaning and a penumbra of indeterminacy; in other words, there are objects that are certainly covered by the concept's denotation, but there are also many borderline cases – objects which cannot easily be placed inside or outside the concept's denotation. In the case of such concepts, defining – understood traditionally, as determining the set of necessary and sufficient conditions for predicating the given concept of the given object – is pointless for it leads to the elimination of borderline cases, and therefore creates a false picture of how the concept functions in ordinary language.

This anti-definitional approach does not, however, mean that one cannot say anything about ordinary language concepts. On the contrary: the principle of the primacy of ordinary language enables the subtle analysis of various concepts and interrelations between concepts. As a result, however, we never arrive at a simple definition. As Hart puts it himself in his *opus magnum*: "(...) this book is offered as an elucidation of the *concept* of law rather than a definition of 'law'".¹⁷

Hart commences his discussion by criticizing the definition of law proposed by a nineteenth century English philosopher, J. Austin, the author of *The Province of Jurisprudence Determined*¹⁸. Austin's definition is usually reduced to the following slogan: "law is an order backed by a threat of sanction". In order to illustrate how Hart attacks Austin's definition by means of linguistic analysis, let us quote a longer passage from *The Concept of Law*. Considering in which situations the word "imperative" is appropriate, the English philosopher writes:

[They] can be illustrated by the case of a gunman who says to the bank clerk: 'Hand over the money or I will shoot!' Its distinctive feature which leads us to speak of the gunman *ordering* not merely *asking* still less *pleading with* the clerk to hand over the money, is that, to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. If the gunman succeeds, we would describe him as having *coerced* the clerk, and the clerk as in that sense being in the gunman's power. Many nice linguistic questions may arise over such cases: we might properly say that the gunman *ordered* the clerk to hand over the money and the clerk obeyed, but it would be somewhat misleading to say that the gunman *gave an order* to the clerk to hand it over, since this rather military-sounding phrase suggests some right or authority to give orders not present in our case. It would, however, be quite natural to say that the gunman gave an order to his henchman to guard the door.¹⁹

This passage typifies the way in which "anti-formal" philosophers argue. Hart presents a simple counter-example to challenge Austin's definition.

The sentence uttered by the gunman – “Hand over the money or I will shoot” – can be called an order backed by a threat of sanction, but it is not “law”. In this way Hart shows that Austin’s definition over-simplifies how the concept of law functions in ordinary language.

By developing many similar distinctions, Hart continues his analysis of Austin’s definition. He shows that even if we changed the definition, saying that the orders in question must be general and commonly obeyed, we would still be far from determining how the concept of law operates. This can easily be observed when norms which confer powers, or determine proper procedures, e.g., for the writing of a will, are taken into account. These are *legal* norms, but they are not general and commonly obeyed orders backed by the threat of sanction.

This analysis of how the word “law” is used leads Hart to claim that law consists of a union between primary and secondary rules. Primary rules are rules that confer powers or state obligations. Secondary rules are *about* the primary rules: they determine how to introduce, change and interpret the primary rules. Among the secondary rules there is also the rule of recognition, which enables us to say which legal rules are valid.

This hypothesis of the concept of law is then analyzed by Hart in various contexts; the problems of the sovereign, justice, morality, and international law are addressed with the goal of elucidating the concept of law in mind. The last of these issues is of special interest for, reflecting on the question whether international law can be labeled “law”, Hart applies a method sometimes called “argumentation from paradigms”.²⁰ The method involves determining whether a given phenomenon can be called “X” by showing either that the phenomenon fits well a paradigm, a “model” X, or that it differs from it and in what respects. Applying this strategy, Hart asks whether international law is an exemplary incidence of the union of primary and secondary rules. His answer is, for various reasons, negative. Having analyzed the problems of international law, such as the lack of sanctions and lack of a uniform rule of recognition, Hart concludes that there are some analogies between international law and state law, which is a paradigm of the union of primary and secondary legal rules. International law is, therefore, a phenomenon which displays some, but not all, of the features of a “model” law.²¹ Let us note that Hart’s method does not demand a conclusive answer to the question of whether international law is law. It is sufficient to say that it is a borderline case. This, of course, stems from the fact that Hart does not aim to give a precise definition of law, but only to demonstrate how the concept of law functions in ordinary language. This approach is different from the one proposed by Austin in *The Province of Jurisprudence Determined*. Having

defined the “positive law”, Austin does not hesitate to claim that international law is not positive law for it is not enacted by a sovereign.²²

The above example can lead to the false conclusion that linguistic analysis cannot help to deal with “authentic” problems and can only serve to criticize other approaches. Leaving aside the fact that – as Wittgenstein would put it – many authentic problems are just pseudo-problems resulting from our lack of understanding of how language works, linguistic philosophy is filled with attempts to solve old philosophical problems. Such attempts can also be traced in Hart’s work. For instance, the Oxford philosopher considers the concept of obligation, criticizing the so-called predictive theory thereof. In short: being obliged means that there is a sufficiently high probability of sanction if the obligation is not fulfilled. Hart puts forward two arguments against this sociological conception. First, he observes that the validity of a rule should not be confused with its applicability, as it is only applied because it is considered valid.

Second, he says in the “linguistic” spirit:

If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g., to report for military service but that, owing to the fact that he had escaped jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.²³

It is characteristic that, in addition to criticizing the predictive interpretation of obligations, Hart proposes his own solution to the problem of the relationship between the concept of obligation and statements concerning the efficiency of legal system. He claims that those statements can be regarded as presuppositions of statements, which refer to the validity of legal norms. In order to grasp this conception it is necessary to say a few words about the concept of presuppositions.²⁴

The phenomenon called “presupposition” was mentioned initially by Frege but it was given the status of a full-blown philosophical problem in Strawson’s paper “On Referring”.²⁵ Strawson’s idea was a reply to Russell’s solution of a certain logical puzzle. The puzzle was connected with the sentence: “The present king of France is bald”. Because of the fact that France is a republic, and there exists no king of France, the quoted sentence should be deemed false. For the same reason, however, its negation: “It is not the case that the present king of France is bald” also seems false. And here we encounter a real problem, for accepting that both sentences are false we break the basic law of logic, i.e., the principle of the excluded middle.

Russell solved the problem by saying that the logical structure of the two sentences is significantly different from what their grammatical form suggests. The sentence “The present king of France is bald” is logically a conjunction of three sentences: “There exists x , and that x is king of France” and “ x is bald” and “there is only one x ”. This sentence is false because the first of the conjuncts is false (“There exists such x , that x is king of France”). Analogously one can deal with the sentence “It is not the case that the present king of France is bald”.

Strawson criticized Russell’s solution mainly because of the artificial distinction between grammatical and logical structures of a sentence.²⁶ He suggested instead that the concept of presupposition be used. We say that a sentence p is a presupposition of a sentence q (or, in other words, that q presupposes p), if the possibility of ascribing any logical value to q and $\neg q$ depends on p being true. We are able to say that q (or $\neg q$) is true or false if and only if the presupposition of q – the sentence p – is true. The analyzed sentences “The present king of France is bald” and “It is not the case that the present king of France is bald” can be established as truth or false under the condition that their presupposition – the sentence “There exists the present king of France” – is true. If the presupposition is false – as is the case in our example – the analyzed sentences cannot be designated as either true or false. Usually it is maintained that sentences which cannot be given the value of truth or falsehood are senseless.²⁷

Let us return to the problem of the relationship between statements concerning obligations and statements concerning the efficiency of law. Hart suggests that the latter are presuppositions of the former. He does not use here, presumably, the notion of presupposition in its exact meaning. Rather, he intends to say that a full meaning of statements concerning obligations can be grasped only under the assumption that statements concerning law’s efficiency are true.²⁸

We would like to add one observation here. It seems that the entire method of linguistic analysis, especially the maximalist approach, is a search for “loosely” understood presuppositions. In trying to discover the elements of the conceptual scheme one asks what concepts are presupposed by the given linguistic phenomena.

3.2.3 *Speech Acts Theory*

One of the most important achievements of linguistic philosophy is the analysis of various aspects of language. It explores not only how certain concepts, like “law”, function in language, but also what these “ways of functioning” are. An important thread in this research is the analysis

of practical discourse (both ethical and legal) and the demonstration of the role rules play within it.²⁹ The concept of a rule is one of the central subjects of Wittgenstein's *Philosophical Investigations*. Other authors analyzing this subject are, *inter alia*, A. Ross,³⁰ K. Opalek³¹ or R. Dworkin.³²

Another important aspect of linguistic philosophy is the theory of speech acts. Let us look more closely at this. The conception of speech acts was developed initially by J.L. Austin and later developed further by J. Searle and others.

Austin developed first the theory of performatives. He analyzed a class of linguistic expressions that had been disregarded by earlier philosophers. Some favorite Austinian examples of expressions belonging to the class are, for instance: "I name this ship 'the Queen Elizabeth'" (uttered in circumstances when a bottle of Champagne is smashed against the helm of a ship); "I give and bequeath this watch to my brother" (in a will); "I do" (as an answer to the question "Do you take this woman as your wife?"). Austin observes that such expressions play a different role than the sentences which we use to describe the world: they are uttered with the aim of changing the world. The utterance (in specific circumstances) of the first expression causes a specific ship to be called "Queen Elizabeth" from that moment on; of the second – that the will as regards a specific watch has been expressed; and of the third (assuming the same answer from the woman) – that a marriage has been concluded.

Those and similar expressions Austin labels performatives and characterizes them in the following way. They:

- (A) do not 'describe' or 'report' or constitute anything at all, are not 'true or false'; and
 (B) the uttering of the sentence is, or is a part of, the doing of an action, which again would not normally be described as, or as 'just', saying something.³³

Performative expressions cannot be ascribed truth or falsehood, they can be however described as successful (fortunate, happy) or unsuccessful (unfortunate, unhappy). For instance, if the will is not written in the legally correct way, then the sentence "I give and bequeath this watch to my brother" will be unsuccessful – in other words, it will be an unfortunate performative. Similarly, the "I do" of the prospective husband uttered in the presence of a person who has no power to conduct a marriage ceremony would be an unhappy performative.

What is characteristic of the given examples is that there exists a certain conventional procedure which determines the necessary conditions of a successful action (and therefore of the happiness of a performative). In the case of the will and the marriage, the procedure is regulated by legal norms; in the case of the naming of a ship, the rules of custom set

the procedure. Those performatives which do not follow the procedure are unfortunate.

However, as Austin observes, not every performative is tied to a conventional procedure. If one says: “I promise to come tomorrow”, the very uttering of those words – independent of any external circumstances – results in the making of a promise, and hence changes the world; the expression “I promise to come tomorrow” is therefore a performative expression, for it fulfills the Austinian specification of such expressions. The only thing that can “go wrong” in this situation, and result in the performative being unfortunate, is my intention: if I uttered the words “I promise to come tomorrow” with no intention of fulfilling the promise, one would be in a position to say that it is an unfortunate performative.

Austin pays a lot of attention to situations in which performatives turn out to be unfortunate (so-called infelicities). These considerations are of special interest for us. Austin developed a typology of infelicities. It has to be stressed, first, that we are addressing a typology and not a classification (logical division). This shows that Austin does not want to simplify the described phenomena and intends to present mechanisms governing the use of language in the full richness of the complicated and sometimes vague connections between them. It may seem surprising and unnecessary to dedicate so much effort to a typology of infelicities. In fact, however, it is sufficient to observe that a description of “what can go wrong” is a *modo negativo* analysis of the phenomena that obey the rules, i.e., the typology of infelicities helps us to draw the boundaries of the set of happy performatives.³⁴

The way Austin develops his typology requires our special attention, for the method characteristic of linguistic philosophy manifests itself clearly in this process. We have already observed this in referring to Austin’s desire to pay the richness of ordinary language its due. Another typical analytic maneuver Austin applies in his work is to present a long list of examples in favor of, or against, the proposed hypothesis. The use of simple linguistic intuitions is visible even in the way Austin labels different kinds of infelicities. Those cases in which a performative is unhappy because a certain procedure has not been followed, Austin calls *misfires*; the situations, in which “something went wrong” because of the attitude of the speaker, are termed *abuses*. This distinction is commented upon as follows:

When the utterance is a misfire, the procedure which we purport to invoke is disallowed or is botched: and our act (marrying etc.) is void or without effect etc. We speak of our act as a purported act, or perhaps an attempt – or we use such an expression as ‘went

through a form of marriage' by contrast with 'married'. On the other hand, in the (...) cases [of abuses] we speak of our infelicitous act as 'professed' or 'hollow' rather than 'purported' or 'empty', and as not implemented, or not consummated, rather than as void or without effect. But let me hasten to add that these distinctions are not hard and fast (...).³⁵

What strike us in the quoted passage are not only the numerous linguistic examples, but also Austin's abstention from introducing exceptionless distinctions.

Among the misfires Austin distinguishes errors regarding the invocation of a procedure and the execution of a procedure. The first class includes situations in which there exists no proper convention and situations in which an existing procedure is wrongly applied. In the second class there are flaws (the procedure is partially wrongly executed) and hitches (the procedure has not been completed). Austin distinguishes also between different kinds of abuse, identifying insincerities (where I give a promise but do not intend to fulfill it) and infractions or breaches (where I promise something but do not fulfill it later). Naturally, for each category Austin presents a long list of examples. For instance, in considering insincerities he distinguishes between "not having the requisite feelings" (e.g., "I congratulate you" said when I do not feel at all pleased), not having the requisite thoughts (e.g., "I find you not guilty" when I do believe you are guilty), or "not having the requisite intentions" (e.g., "I promise" when I do not intend to do what I promise). Austin comments in detail on the distinctions, pointing out various features of insincerities and observes: "the distinctions are so loose that the cases are not necessarily easily distinguishable: and anyway, of course, the cases can be combined and usually are combined. For example, if I say "I congratulate you!", must there really be a feeling, or rather a thought, that you have done or deserved well?"³⁶

As in the case of other above mentioned distinctions, Austin points out the limitations of the introduced typologies, underlining their vagueness, etc. This arises, once again, from the philosopher's conviction that his aim is not to offer a simplified sketch of language, but to record all the nuances thereof. There are numerous other examples of vague or uncertain conceptions in Austin's works. The most striking, probably, can be found in the very structure of *How to Do Things with Words*. The work is constructed in a very peculiar way: the first part of it introduces the concept of a performative and distinguishes between performatives and constatives (expressions describing reality); the second part, in turn, questions the usefulness of the notion of a performative and introduces a new theory of the expressions with which we "do something in the

world". It is interesting to look closer at the reasons (and the method) that led Austin to abandon the concept of a performative: those reasons are as important as those that prompted the development of Austin's initial theory.

Austin observes, first, some similarities in the behavior of performatives and constatives. Let us inspect the following sentence: "John's children are bald", uttered in a situation when John has no children. The presupposition of the sentence "John's children are bald" – i.e., the sentence "John has children" – is false. According to the theory of presuppositions we discussed earlier, a sentence, whose presupposition is false, can be ascribed neither truth nor falsehood; we say such a sentence is senseless. According to Austin the sentence "John's children are bald", even if John has no children, cannot be called senseless; it should rather be described as "void".

This observation allows us to see the similarity between the described situation and, for instance, a situation in which a bridegroom's "I do" is uttered but some procedural conditions have not been fulfilled, i.e., a situation of a misfire. In this context Austin suggests that the sentence "John's children are bald", uttered in a situation where John has no children, should also count as a misfire. The same can be said of the sentence "A cat is on a mat", uttered even though I do not believe that a cat is on a mat. This situation is similar to the one in which I say "I promise", although I do not intend to keep the promise. Both can be labeled "abuses".

Austin summarizes these remarks in the following way: "[It] suggests that at least in some ways there is danger of our initial distinction between constative and performative utterances breaking down".³⁷ This conclusion leads us to the essential question: is it possible to develop a precise criterion for distinguishing between performatives and constatives? Austin considers first a grammatical criterion: performatives are expressions that use verbs in first person singular present indicative active (e.g., "I promise", "I give", etc.). This criterion will not do, however. In performatives one can use verbs in the third person (e.g., "You are hereby authorized to pay . . .", "Passengers are warned . . ."), in plural ("We promise . . ."), in various tenses ("You did it" instead of "I find you guilty"), in passive ("You are obliged. . .") and in different moods ("I order you. . .").

Consequently, instead of a purely grammatical criterion, Austin proposes a criterion that can be labeled "a paraphrase criterion": a performative is every expression that is "reducible, or expandable, or analyzable into a form or reproducible in a form, with a verb in the first person

singular present indicative active”.³⁸ But in such a case we are entitled to say that the sentence “I read a book” is a performative, although it seems not to be. The above definition should therefore be augmented with the condition that performatives are expressions that include (or their paraphrase includes) some special verbs; “to promise” is such a verb, but “to read” is not.

Austin observes that those special verbs display a certain asymmetry as regards their use in first person singular present indicative active and their use in different persons and tenses. For instance, the utterance of “I promise” is certainly an extra-linguistic action but “You promised” or “He promised” are only descriptions of such actions. Similar things can be said of such verbs as “to bet”, etc. The asymmetry cannot be observed, however, in the case of such verbs as “to read” or “to walk”.

There exist verbs, however, that show the futility of Austin’s attempt. For instance, the verb “to state” exhibits the asymmetry in question (“I state . . .” as opposed to “You state, that . . .”) but to call this a performative verb is problematic (similarly with the verb “to classify”). On the other hand one can insult someone with verbs but the paraphrase “I insult you” seems inadequate.

It turns out, then, that all the attempts to formulate a criterion differentiating performatives from constatives fail. Neither the grammatical criterion nor the paraphrase criterion with the addition of the class of “asymmetrical” verbs can do the work demanded. This result causes Austin to rethink the problem. It is helpful to pause here for a moment and ask what the reasons are that caused Austin to abandon his initial theory, and what role the assumptions underlying his method played in his decision. We should ask why Austin even cares that the distinctions he introduced are not exceptionless. Is not it true that vagueness is something natural for ordinary language, and that the fact that some divisions are not exclusive and precise does not mean they are wrong or useless? The only answer that is in compliance with the method of linguistic analysis, is to say that the distinction between performatives and constatives presents wrongly the function of ordinary language. The next natural question: how do we know that this theory is *wrong*, has the following answer: the analyzed examples show a more adequate and elegant conception. The conception in question is the theory of speech acts.

A speech act is a basic unit of linguistic communication. The examples that motivated the abandonment of the distinction between performatives and constatives show that every speech act can be viewed from different perspectives; thus one can say that every speech act has at least two “dimensions”: performative and constative. Austin proposes that speech

acts be looked at from three different angles: one can treat them as expressions that have certain meaning, as utterances that have certain conventional force and as expressions that cause a certain result which is not determined conventionally.

Pursuing this argument, Austin distinguishes between three aspects of a speech act: the so-called locutionary act, illocutionary act and perlocutionary act. A speech act as a locutionary act is the act of saying something; at the same time, as an illocutionary act, it is performing some other thing (e.g., asking, ordering, sentencing, apologizing); finally, as a perlocutionary act it is bringing about some consequence in the actions, thoughts or feelings of the listeners or the speaker. Let us revert to an Austinian example. A speech act in which someone says to me “Shoot her” is:

- a locution: he said to me “Shoot her” meaning by “shoot”, shoot, and referring by “her”, to her;
- an illocution: he urged (or advised, or ordered) me to shoot her;
- a perlocution: he got me to shoot her.

Austin’s analysis does not stop at this distinction. The philosopher considers the adequacy of his conception, paying attention to the relations between locutionary, illocutionary and perlocutionary acts, and the criteria for distinguishing between them. We will not follow these analyses in detail, although they constitute a good example of the application of the method of linguistic analysis. We would like to mention, however, that the Austinian theory is not “the last word” of linguistic philosophy as regards speech acts. There were numerous philosophers that tried to develop it further. Of special interest is J. Searle’s work, *Speech Acts*.³⁹ Searle criticizes the differentiation between locutionary and illocutionary acts, pointing out that it is not unusual that meaning constitutes illocutionary force (as is the case with “I promise to do this”). In such cases it is impossible to distinguish between locutionary and illocutionary acts.⁴⁰

Searle set out to replace Austin’s theory with one of his own. Searle treats speech acts as units of linguistic communication that consist of an *utterance act*, a *propositional act*, an *illocutionary act* and a *perlocutionary act*. The utterance act is the act of uttering certain words. The propositional act is the act of expressing a certain proposition. Both illocutionary and perlocutionary acts, as described by Searle, can be broadly compared to their Austinian counterparts. We will not analyze in detail Searle’s conception. The conception is another illustration of how linguistic analysis operates and of the problems it encounters. The richness of ordinary language makes it easy to find counter-examples to any hypothesis. This does not mean, however, that such fallible

hypotheses and theories are useless; it is certain that they say something important about language and about how we use it.

Another illustration of this fact is the so-called typology of speech acts. In the last chapter of *How to Do Things with Words* Austin identifies five general classes of speech acts labeling them with “the following, more-or-less rebarbative names”⁴¹: *verdictives*, *exercitives*, *commissives*, *behabitives*, *expositives*. Verdictives are typified by the giving of a verdict; a list of verbs characteristic of those acts includes: “acquit”, “convict”, “find (as a matter of fact)”, “calculate”, “measure”, “analyze”. Exercitives are the exercising of powers, rights or influence (“nominate”, “dismiss”, “order”, “vote for”, etc.). Commissives are typified by promising or otherwise undertaking (“promise”, “contract”, “declare intention”, etc.). Behabitives, in turn, concern attitudes and social behavior (“welcome”, “bid farewell”, “toast”, “condole”, etc.). Finally, expositives – difficult to define, as Austin admits himself – locate our utterances in a structure of argumentation or discussion (“I reply . . .”, “I give as an example . . .”, “I assume that . . .”).

It is not surprising that a closer analysis of the relationships between the mentioned categories reveals that this is not an exhaustive classification but only a typology. It is equally unsurprising that Austin’s typology was subjected to severe criticism, notably by Searle, who proposed his own taxonomy of speech acts.⁴² To date, there have been developed several such typologies, sometimes employing very complicated conceptual structures. Research concerning speech acts is carried out today not only by philosophers, but also by linguists and jurists. Of special interest are pragma-dialectical analyses, i.e., analyses of argumentation structures consisting of numerous speech acts.⁴³

At the end of our analysis of the application of linguistic methods to the conception of speech acts we should observe that this theory has special import for legal theory and the philosophy of law. One does not need to go to great lengths to show that the notion of illocution (or performative) is necessary for an adequate account of legal language.

3.2.4 *The method and Its Limits*

Methods. From what has been said so far, we can formulate several remarks about the methods of linguistic analysis. First of all one can say that those methods are based on a general directive that may be expressed in the following way:

Put forward hypotheses concerning the problem that interests you, and test them on examples motivated by intuitions regarding the use of ordinary language.

This directive is formulated in a very general way, which is inevitable if one wishes to state a directive that embraces both maximalist and minimalist approaches to linguistic analysis. The general directive can be applied in particular cases using different “procedures”. In the course of our presentation we have identified and described some of them. One example is developing typologies, a method often applied by proponents of the minimalist approach. The fact that they construct typologies rather than logical divisions is rooted in features of ordinary language, such as vagueness. Other procedures of linguistic analysis include argumentation from paradigms and – especially interesting – the method of presuppositions. It has to be stressed that the list of methods covered here does not exhaust the list of methods serving the realization of the general directive of linguistic analysis. The examples are highly characteristic, but they do not comprise the whole list.

It is appropriate to consider which of the models of analysis is represented by linguistic methods. This question can be troublesome, especially in the case of Austinian “minimalism”. We have analyzed Austin’s conceptions of language, but these do not aim to solve a particular philosophical problem, they try only to capture some features of the “basic medium” of philosophizing. Austin’s method is, however, also capable of dealing – at least initially or on a preparatory basis – with extra-linguistic problems. For instance, in “A Plea for Excuses” (1956) the philosopher considers the problem of freedom. Strawson’s maximalist method, on the other hand, aims to discover the conceptual scheme. This “discovering” is, however, connected with reducing or relating analyzed problems to the scheme. Therefore, one can call it, as well as Austin’s approach, analysis₃.

In linguistic analysis there are also methods of reasoning that may count as instances of analysis₂. A good example is found in Austinian typologies. Finally, some methods used by “soft” analytic philosophers can be labeled analysis₁. Recall the method of presuppositions that we described above. It displays a striking resemblance with analysis₁. The difference is that, whereas in analysis₁ one seeks logical reasons for the analyzed sentences, the method of presuppositions consists in looking for sentences presupposing the given ones. In both cases the relationship between what is given and what is searched for has a logical character.

Our considerations inevitably lead to the conclusion that a precise definition of linguistic analysis is impossible. Moreover, one should not really speak of linguistic analysis as one, unique method. Rather, what we have here are different strategies for dealing with philosophical problems that each aim at realizing the general directive we formulated: put forward

hypotheses concerning the problem that interests you and test them on examples motivated by intuitions regarding the use of ordinary language.

The limits. Our discussion of linguistic analysis was centered on the legal-theoretic problems. The discussion has shown that this method can serve legal philosophers well. It is not surprising then that linguistic analysis has been used to investigate numerous problems, ranging from legal language, discourse and the ontology of law, to more specific problems, like the validity of norms. It is not difficult, either, to envisage applying this kind of analysis in the field of legal dogmatics and legal practice.

An interesting relationship between the methods of linguistic analysis and the interpretation of law was observed by R. Sarkowicz, who developed a three-layer conception of legal interpretation.⁴⁴ Among the three layers of interpretation, he identifies the level of presuppositions, on which the interpreter reconstructs the worldview, the system of values, and the conception of social institutions as assumed by the legislator. These pieces of information are presuppositions (in a loose sense of the word) of legal text. Therefore, in Sarkowicz's conception, one of the characteristic methods of linguistic analysis becomes an important component of the process of legal interpretation.

Summary. In summarizing our presentation we would like to underline three issues.

First, the method of linguistic analysis is based (especially in the maximalist version) on a very strong defense of the distinguished role of ordinary language. From this assumption important consequences follow in the results of the analyses. In particular, features of ordinary language, such as vagueness and imprecision, are "inherited" by the results of linguistic analysis.

Second, it would be difficult today to find any theorists who apply linguistic analysis in its pure form. Despite this, many fruitful analyses do take advantage of linguistic methods.

Third, some of the conceptions of "soft" analytic philosophers have profound importance. Historically speaking, one cannot overlook the fact that linguistic analysis highlighted a sphere of language that was not properly analyzed in a philosophical world dominated by theories of the Vienna Circle. This sphere includes practical discourse and the pragmatic dimension of language. From a more contemporary perspective, "soft analysis" has given rise to achievements, such as speech acts theory, which are regarded as highly important contributions to legal theory and the philosophy of law.

3.3 ECONOMIC ANALYSIS OF LAW

3.3.1 *Law and Economics*

Economic analysis of law – i.e., applying economic tools to the analysis of what the law should be – is not a new idea. Some elements of this approach can be traced in the writings of Machiavelli, Montesquieu and the representatives of the German historical school. Economic analysis of law *par excellence* originated, however, in the Anglo-Saxon world. This is hardly surprising, given that the Anglo-Saxons built the foundations of economics itself, as witnessed by the Scottish Enlightenment and the philosophies of Bentham and Mill.

Already in 1897, one of the greatest representatives of American realism in legal theory, O.W. Holmes, wrote:

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.⁴⁵

Holmes' prophecy had already become reality by the beginning of the twentieth century, when American, German and Scandinavian jurists attempted to apply economic methods to the analysis of law.⁴⁶ Economics was not, however, the only perspective they adopted. Economic tools were only part of the theoretical arsenal used by legal realism.

Out of this tradition the Chicago School of Law & Economics originated. It is usually held that the school was established in the 1970s. However, by the end of the 1950s, research on the borderline between law and economics was undertaken. Amongst the seminal articles of those times one should mention R. Coase's "The Problem of Social Cost" (1960), A. Alchian's "Some Economics of Property Right" (1965) and G. Calabresi's "Some Thoughts on Risk-Distribution and the Law of Torts" (1961). In 1972 R. Posner published his *Economic Analysis of Law*, defending the thesis that the traditional institutions of common law are economically effective. In this way the Chicago School was fully established in the mid-1970s. Posner is regarded as its main representative. The idea of applying economic tools to law proved useful enough to prompt research in various academic centers in the United States and around the world. Today it is difficult to count the many schools carrying out their research under the heading of the economic analysis of law.⁴⁷ Both the variety and number of enthusiasts of the economic analysis of law make it impossible to talk about a unified research program. It seems however that all the representatives of Law & Economics share a basic thesis, which says that the law is (or should be) economically effective (i.e., it leads or should lead to economically effective allocation of goods).