1. Introduction: The Rule Conception of Institutional Action

There is an influential, and in a sense paradigmatic view in legal philosophy according to which being a participant in a legal system entails adopting a specific *internal* point of view. This conception, which traces back to H.L.A. Hart, connects our participation in a given legal practice with the acceptance of, and abidance to, a given system of rules. As Hart has famously argued, these rules are of two kinds. The first kind is that of primary norms, which simply state the forms of behavior that citizens must follow; the second kind is that of secondary norms, which define the competence to enact rules of the first kind and which set forth the criteria of validity of the other rules of the system (Hart 1994, 80–1).

According to Hart, the adoption of an internal point of view on the part of officials (and possibly also common citizens) is something shown by some typical behavioural clues. In particular, the officials’ acceptance of the rules of the legal system does not simply emerge from the fact that they abide by those rules, but also from their reaction to deviant behavior (Hart 1994, 57). This is, among other things, a matter of linguistic practice, an inferential practice in which breaking a primary rule is considered as a good reason to justify the application of sanction. But there is another linguistic practice that, according to Hart, is made possible by the combination of primary and secondary rules, and this is the practice of speaking in terms of legal validity, powers, jurisdiction—terms which define the boundaries of what is and what is not legal and which, outside the legal practice, are devoid of any meaning. This connection between the internal point of view and a linguistic

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practice—this metaphor, we could say, according to which a given set of rules define a conceptual field in terms of boundaries and thus create a dichotomy “internal vs. external”—is clearly shown by this famous passage of *The Concept of Law* in which Hart summarizes his view:

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist. [...] Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but use the rules as standards for the appraisal of their own and others' behaviour. This requires more detailed attention in the analysis of legal and political concepts than it has usually received. Under the simple regime of primary rules the internal point of view is manifested in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. [...] With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view for their analysis. These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers, private and public. (Hart 1994, 98–9)

The same connection we find in Hart among (1) institutional action, (2) treating the rules as reasons, and (3) the creation of new, rule-constituted concepts can be found in another paradigmatic view regarding institutional action, namely, John Searle's theory of institutional reality. In his book *Making the Social World*, of 2010, Searle clarifies that complex institutions can be analyzed as sets of constitutive rules, and that these rules define status functions connected with deontic powers such as obligations, rights, and duties.1 He also provides a theory of how “institutional reality locks into human rationality” (Searle 2010, 128), a theory based on the concept of “desire-independent reasons for action” emerging from deontic powers. His idea is basically that the status functions connected with institutional facts entail deontic powers which can motivate human beings

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1 In this book, Searle explicitly distinguishes between institutional facts without institutions—and so without constitutive rules (or “standing declarations,” in his new terminology)—and institutional facts that require constitutive rules (see Searle 2010, 93ff.). In this paper, I will confine myself to discussing this latter kind.
by transforming reasons for acting in a certain way into desires to act in that way (Searle 2010, 129). Hence, according to Searle, acting in accordance to a given institutional reality means to assume that the rules which define status functions are reasons to act consistently with the deontic powers connected with those functions, and thus to engage in the new conceptual domain which is constituted by those rules. This conception is similar to that advocated by Hart.

The idea that acting internally to a given institution is simply a matter of treating rules, and in particular constitutive rules, as reasons for action I will call the Rule conception of institutional action. I want to argue that this conception, if taken alone, limits our capacity to describe the complexity of institutional phenomena, and thus that it must be complemented in order to achieve a full explanatory potential, particularly because the very idea of being internal or external to a given institution—an idea which, as we have said, is first of all a metaphor—is much more fuzzy and shaded than it can appear at first sight.

The structure of this paper is as follows. In Section 2 I will argue that, if we complement the Rule conception of institutional actions with an analysis aimed at bringing out the pragmatic dimension of these actions, a phenomenology will emerge which is broader and more shaded than that shown by the simple, binary internal/external distinction. For this purpose, I will resort to a simple example of institutional action taken from chess and I will apply it to the analytical framework of speech acts theory. In this way, I will arrive at a distinction among seven different kinds of institutional agents in terms of different degrees of internality and externality with respect to the institutional practice. Then, in Section 3, I will apply this analysis to a legal example drawn from criminal procedure. Finally, I will draw some conclusions.

2. Institutional Agents—Seven Ideal types

2.1. Speech Acts Theory as a Paradigm for Institutional Action: Chess Players vs. Chess Beginners

Let me start with a very simple example. Imagine I am an expert chess player and I am playing a match of chess against a friend. I decide to castle and move the king and the rook in accordance with the constitutive rule regarding castling, namely, “Moving the king and the rook in this and that way counts as castling in chess.” I am acting according to the rules, I certainly consider the rules as reasons for action and, of course, if my friend declared his intention to castle but moved the king and the rook in an irregular way, I would consider the rules as a good reason to criticize his behaviour and correct him. Moreover, part of my knowing the rule on castling is that I can now meaningfully speak of “castling”: The concept of castling is part of my linguistic practice when I play and speak about chess. This is basically all that matters according to the Rule conception of
in institutional action. These conditions are sufficient to state that this action is a move in chess, and that I am playing the game because I have an “internal point of view” in regard to it.

Now suppose that I am a little child and that my father is playing chess with me. He taught me how to castle: “If you have not already moved the king and the rook, you can swap them in this and that way. This is called **casting**.” According to the Rule conception of institutional action, when the little child castles all the elements of his action are the same as when I castle as an expert chess player: first, he knows the rule and considers it as a reason for action; second, he would certainly criticize his father’s behaviour if he did not castle in the right way; and, third, he possesses the concept of castling and includes it in his linguistic practice when playing chess. Hence, according to the Rule conception, these two actions should be analyzed as the same kind of action, and moreover both of them would be **internal** to the same extent. This strikes me as an extremely poor result. If we asked the children why he decided to castle, he would probably say that this is how he wanted to move the king because he knew the rule. If we asked the chess player why he decided to castle, he would probably reply that this was an effective way to defend the king at that point of the match. The child has not already realized that castling can be a good way to defend the king, whereas the expert chess player knows that, and he also knows several different situations in which it is advisable to castle in defending the king. The child is a beginner, he has just started his path to play chess and be internal to the game.

I think that this difference should be taken into account by an accurate analysis of institutional action and, in order to explain it, I will borrow some concepts from speech acts theory. Basically, I want to put forward the conjecture that the difference between a beginner’s and an expert player’s move can be treated in a way roughly analogous to that between a child who knows the meaning of a statement but not the various ways in which that statement can be used, on the one hand, and an expert speaker who knows not only the meaning of a statement but also how to achieve different illocutionary points with it, on the other hand. In particular, just like a speech act can be analyzed as **F(p)**, where **p** is the propositional content of a given sentence and **F** the specific illocutionary force that can be attached to that sentence, I conjecture that an institutional action can be analyzed in terms of **F(a)**, where **a** is the performance of an act according to a given constitutive rule and **F** is the specific use, or strategy, I am implementing by way of that performance. This analogy becomes more acceptable if we realize that the element **p** in a speech act can also be understood as a performance in its own turn, namely, the utterance of a given sentence, and that **F** therefore denotes what we are doing by uttering that sentence, just like **F** in the chess example denotes what we are doing by castling, namely, defending the king.

In this way we can describe the difference between the beginner’s and the expert player’s moves. While the expert player defends his king by castling, thus making a complete
institutional action, the child simply castles without giving his move the force of a defense (or, for what matters, an attack) in chess: He perfectly knows what it is to castle, but he does not have any real idea of what it is to defend or attack in chess. In a sense, the child knows perfectly the “semantics” of chess moves, but he has a very rough idea of their “pragmatics,” and this pragmatic dimension is exactly that which is missing in the description made according to the Rule conception of institutional action. Let me summarize the difference as follows:

**Chess player:** Defense (castling)

**Beginner:** (castling)

The main reason why I think that this reconstruction can be correct is that it introduces a pragmatic dimension which accounts for different degrees of internality to the institutional structure—the beginner’s and the expert’s—, whereas the Rule conception frames the metaphor according to a strictly binary logic: internal or external, in or out. This seems to open the possibility of specifying Hart’s internal point of view and Searle’s institutional acts on pragmatic grounds, so as to identify more kinds of institutional players depending on their commitment to these pragmatic features.

Let me now explain how this specification can proceed. If we are to understand pragmatic force as important not only for speech acts but more in general for institutional actions, then we should consider at least some of the dimensions that are relevant to analyze speech acts and try to apply them to our example. According to Searle and Vanderveken (1985, 12–20), these dimensions are the speech act’s (a) illocutionary point (along with its degree of strength), (b) its mode of achievement, (c) its propositional content conditions, (d) its preparatory conditions, and (e) its sincerity conditions (along with its degree of strength). Let us try to apply this framework to our example. The illocutionary point is that which is most essentially connected with the speech act, the purpose that is achieved if the speech act is performed successfully: Now, what is (a) the pragmatic point of a defense? That of countering the other player’s actual or potential attacks so as to improve our possibilities of winning the game: Trying to win the game is therefore essentially connected with the concept of a defense. Further, is there (b) a specific procedure, or mode of achievement, that we must follow in order to defend in chess, or are there (d) specific preparatory conditions? There is no single, defined way to defend which is essentially connected with defending in chess, but there are several kinds of defenses described in chess theory, each with their own modes of achievement and preparatory conditions. Moreover, there are obvious necessary (c) conditions on the acts we can perform when defending in chess, the
analogous of propositional content conditions: We cannot defend, for example, by moving the king in a way that leaves it exposed to checkmate, and we should defend by performing institutional acts correctly, namely, according to the constitutive rules of chess. Finally, when it comes to sincerity conditions, it seems that (e1) a sincere defense is one performed by a player who really intends to win, and thus to counter the opponent’s attacks in the most effective ways. Let me summarize these parallelisms in the table below:

<table>
<thead>
<tr>
<th>Speech act: F(p)</th>
<th>Institutional action: Defense (Castling)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Illocutionary point</strong></td>
<td>Pragmatic point</td>
</tr>
<tr>
<td>In the case of defense, countering the opponent’s possible attacks so as to improve our possibilities of winning the game</td>
<td></td>
</tr>
<tr>
<td><strong>Mode of achievement</strong></td>
<td>Procedures to perform the action and conditions that make that action possible.</td>
</tr>
<tr>
<td><strong>Preparatory conditions</strong></td>
<td>In the case of defense in chess, they vary depending on the kind of defense as codified by chess theory</td>
</tr>
<tr>
<td><strong>Propositional content conditions</strong></td>
<td>Content conditions</td>
</tr>
<tr>
<td>Restrictions on the rule-constituted acts and facts that we can instantiate by making that action.</td>
<td></td>
</tr>
<tr>
<td>You cannot break the constitutive rules of chess in defending.</td>
<td></td>
</tr>
<tr>
<td>You cannot expose the king to checkmate in defending.</td>
<td></td>
</tr>
<tr>
<td><strong>Sincerity conditions</strong></td>
<td>The player’s intentions as they are shown by performing the act</td>
</tr>
<tr>
<td>The player really intends to counter the opponent’s attacks in the most effective way in order to win</td>
<td></td>
</tr>
</tbody>
</table>

Note that I have simply substituted “illocutionary point” with “pragmatic point” and “propositional content conditions” with “content conditions”: The other expressions are directly drawn from speech acts theory. I will now show that, depending on the way agents comply with these conditions, different kinds of institutional players emerge with different degrees of internality or externality to the game. Hopefully, the final result of this process will be that of adding further shades to our institutional phenomenology, something that, as I have stressed, the Rule conception lacks.

2.2. Skipping the Pragmatic Point: Chess Players vs. Chess Teachers

Consider first the case of someone who wants to teach you how to play chess. He plays a game with you and then, when the occasion arises, castles. Then he starts to explain to you
why this move is a good defense, and how you could counter it effectively. After that, he takes all the chess pieces and starts playing on the basis of a different configuration of them. As in the case of the beginner vs. the expert chess player, according to the Rule conception of institutional action the chess teacher is doing something which is not substantially different from what the chess player does in castling. He is following the constitutive rules of the game, and of course he would correct you if you made a mistake (after all, it is his job). Castling is part of his conceptual universe and he is perfectly able to make use of this concept in discourses around chess: We could even say that he is much better in doing so than average chess players. But, despite these considerations, we would not say that in the example above the chess teacher is really playing the game: Rather, he is teaching you how to play. What is, then, that which is missing in the chess teacher’s action, is present in the chess player’s action, and inclines us to say that the former is not really playing the game? It seems to me that the analysis in terms of speech acts can answer this question quite straightforwardly. The chess teacher’s action is not aimed at achieving the typical pragmatic point of defense: This agent is not defending to win, but rather to explain how a good defense is performed by castling in chess.

**Chess player:** Defense (castling)

**Chess teacher:** Defense (castling) *not to win* [No pragmatic point]

Now, is the chess teacher external or internal to the game? I would say that, when teaching how the game of chess is played, the chess teacher has a non-extreme external point of view in Hart’s sense, namely, he is able to understand, reconstruct and explain the norms followed and accepted by chess players, without necessarily adopting and practicing those norms in his own turn (Hart 1994, 89–90). He is not really playing but rather explaining the game to people who want to play it. On the other hand, the chess teacher is a really borderline case of external behaviour: It is an external behaviour which is functional to full internal behaviour because, under normal circumstances, teaching the game would be a meaningless effort if we did not conceive our activity as useful for the institutional practice. The explanation of chess rules and strategies is made by the teacher exactly in view of making it possible for agents to become good chess players, and hence in the perspective of forstering and perfecting compliant internal behaviour with respect to the institution.

Chess teachers are therefore external despite their typically being functional to the institutional practice’s internal point of view. And here a problem arises for the Rule conception. The Rule conception can explain the externality of those chess teachers who teach the institution’s rules without considering those rules as binding reasons for action—
teachers who think, for example, that playing a competitive game is a stupid and inherently evil activity but find themselves forced to teach chess in order to live—, but not the externality of teachers who teach the rules because they consider them to be reasons for action. In this last case, according to the Rule conception, chess teachers should be considered as internal. And yet it seems to me that chess teacher are external even in this last case: Their castling is not an instance of playing the game. They perform a different kind of activity, even though they typically consider the rules as reasons for action and for criticism.

Chess teachers are therefore different from chess players because, even though they perform a correct defense, their action is not aimed at countering any opponent’s attacks but rather at explaining the game. Should we conclude from this that trying to achieve victory in defending is that which makes the action, and the player who performs it, internal to the game? The answer is no.

2.3. Skipping Content Conditions: Chess Players vs. Cheats

Cheats are the obvious counterexample that can be raised against someone who argue that trying to win is sufficient to have an internal point of view in chess. Suppose that I am cheating and that I defend my king by castling even if castling is not allowed at this point of the match (suppose, for example, that I have already moved my rook). Certainly, in this case, my aim is that of winning the game and countering the other player’s moves: This is exactly what drives me. But I am not internal to the game in Hart’s (or Searle’s) sense, because I do not take chess rules to be good reasons for compliance, even though I would criticize the other player’s behaviour in case of noncompliance. What is lacking in my action in order to become the action of a genuine chess player is not the pragmatic point—again: I am really trying hard to win—but rather the content condition (the analogous to propositional content conditions in speech acts theory) according to which this pragmatic point must be achieved by making valid chess moves, in compliance with the constitutive rules of chess.

**Chess player:** Defense (castling)

**Cheat:** Defense (*not* castling) [No content condition]

Externality here is not a matter of disregarding the pragmatic point of the institutional action but rather of not complying with other conditions that are conceptually necessary to perform that action. Just as I cannot promise using sentences referring to past actions, I cannot defend the king in chess by castling in an irregular way. One could object that
cheats are not sincere players, and thus that what is really broken here is the sincerity condition of the act, rather than the content condition. It seems to me, however, that the cheat is sincere in his trying to defend the king: He really intends to counter his opponent's attacks in order to win. But he does not fulfill the content conditions of his institutional actions.

2.4. Skipping Sincerity Conditions: Chess Players vs. Chess Masochists

There is another way of “being external” to the game which is connected with sincerity conditions and which in a sense is the exact opposite of cheats: agents who play the game correctly but who, for some reasons, want to lose. I will call them “chess masochists.” Suppose I am playing the game with a friend who has just received very bad news. He is sad and I know that winning the game against me—suppose I am a very good player—will somewhat light his burden tonight. Being an expert player accustomed to play against my friend, I know very well which strategies he is very quick to resort to and effective in performing. Hence, I castle to react to my friend’s attack, but I perfectly know that my defense, which is seemingly effective, in reality leaves open a possibility for my opponent to checkmate in two moves. I defend my king, but in reality I do not intend to defend it because I want to lose this game. What is lacking in this action is compliance with the sincerity condition: I do not intend to achieve the pragmatic point of the action even though I am performing it correctly.

**Chess player:** Defense (castling)

**Chess masochist:** Defense (castling) intending to lose [No sincerity condition]

Am I internal to the game when acting in this way? It is interesting to note that, according to the Rule conception, while cheats are not internal to the game because they do not take the constitutive rules of the game as good reasons for behaviour and compliance, chess masochists should be qualified as internal agents. In fact, in my example, as a chess masochist I certainly consider the rules as good reasons for action, I act according to these rules, and I would certainly criticize my opponent if he played incorrectly. I am also perfectly able to use the concepts constituted by the rules, because I am an expert chess player. But, again, it seems to me that I am not internal to the game: The Rule conception is mistaken here. As a chess masochist, I am even more external to the institution than in the case of cheats. In fact, if all chess players cheated in playing chess, thus systematically breaking the rules of the game but disguising their violations successfully, the practice of chess would still be possible: Games could be played and there would be a winner, this being the player who has broken the rules of chess and disguised his actions in the most
effective way for the purpose of winning. On the other hand, if in a chess match both players were chess masochists, we would be faced with a strange pantomime of chess, an almost neverending enterprise in which both players would avoid victory at all costs and perform actions progressively less understandable from the point of view of correct playing. Hence chess masochists are more external to the game than cheats even though, unlike cheats, they intend to follow all the rules of the game.

2.5. Skipping Modes of Achievement and Preparatory Conditions: Good vs. Bad Chess Players

Chess masochists can be moderate or extreme, depending on how they want their masochism to be explicit. In the example of me and my friend given above, I was a moderate chess masochist: I performed a good chess defense but in reality knew that my opponent was perfectly able to break that defense. However, if for some reasons my friend were not able to exploit my weaknesses, I could become more explicit in my intention to lose, for example by trying to perform a defense but willingly not doing it in the proper way. In addition to the lack of sincerity conditions in my actions, in this case I would give up with the proper modes of achievement or preparatory conditions for defense in chess: I would perform a bad defense without fulfilling the modes of achievement envisaged for good defenses in chess theory.

In this example, lack of compliance with both the sincerity conditions, modes of achievements, and preparatory conditions makes for a behaviour which is extremely external with regard to the institution. We can, on the other hand, imagine a player who complies with the sincerity conditions but not with modes of achievement or preparatory conditions. This is the case of bad chess players: They try to defend their king by castling but do not really fulfill the modes of achievement of any good defense in chess, and hence their defense is not really successful.

**Chess player:** Defense (castling)

**Bad chess player:** Defense (castling) [Not properly complying with the modes of achievement or preparatory conditions of defense in chess]

The Rule conception considers bad chess players as internal to the game: They treat rules as reasons for action and for criticizing deviant behaviour, and they have good command with chess’s conceptual structure. And indeed this consequence of the Rule conception holds also intuitively: Bad chess players, after all, are chess players. If you ask them what is castling, how checkmate is performed, how the bishop moves, they will certainly be able to answer—and of course they are really playing the game. But they are not really able to set
up good attacks and defenses in chess: They can even know how to perform them in theory but not be able to perform them in practice. Here, too, it seems that the question of degrees of internality or externality comes up. Even though we consider bad chess players as chess players, it is important to note that they do not realize in full what kind of game chess is. They do not really understand the flow of the game, nor would they be good judges for its potential development, because if you were to decide which rule of the game you had to change, you would have to know which rule is potentially dangerous for the game in practice—that is, when all kinds of strategies are employed by players. This requires good players, not simply knowledge of the rules. Thus, although bad players are internal to the practice of chess, they are less internal than expert players: There is still a lot of theory they must learn, and practice they must make, in order to become expert chess players and hence to fall under the kind of paradigmatic agents the practice needs to unlock its full potential. And yet bad players are not beginners. When playing the game they know what it is to attack and defend in chess, differently from children. Their moves are meant to be forms of attacks and defenses, again differently from children. They simply do not perform these actions properly, whereas children limit themselves to following the rules and do not even try to attack or defend.

2.6. Simply Skipping the Whole Pragmatism: Chess players vs. Spoilsports and Chess Aliens

Finally, we come at the most extreme case of external behaviour: The case of spoilsports. Imagine that I am playing with a friend who is a much more better chess player than me, and that I realize I could not win against him even if I tried for the whole night. I certainly do not intend to spend my saturday night in this hopeless enterprise, so I ask whether he would like to have a beer together instead of playing chess. He refuses and insists he wants to play. His answer irritates me and I decide to ruin the match by breaking the rules, making odd moves, and the like. In a particular case, I castle even though I would not be allowed to do so because I have already moved my rook, and this move is entirely nonsense as a defense because it opens the possibility for my opponent to checkmate trivially. I am breaking all the conditions and modes of achievement for making a good defense, I am not sincerely intending to win, I am not really trying to counter my opponent’s moves, and finally I do not even follow the rules of chess.

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2 The distinction between cheats, chess masochists, and spoilsports owes much to Bernard Suits’s distinction between cheats, triflers, and spoilsports: “It may be said that triflers recognize rules but not goals, cheats recognize goals but not rules, and spoilsports recognize neither rules nor goals” (Suits 1979, 47).
It is important to note that a similar behaviour can also be due to simple ignorance on my part. If, for example, I did not know anything about chess—nor even the fact that it is a competitive game—and someone put me in front of a chessboard with a chess player on the other side, I would probably behave as a spoilsport without really being a spoilsport. In this case I would be a chess alien, someone who simply knows nothing about the rule or the point of the practice he is asked to engage with. In this case, all I could do is to register the moves of my opponent in merely behaviouristic terms—I could note, for example, that every time I move a piece on the chessboard he then proceeds to move a piece on his part—without being able to understand the meaning of those behavioural regularities.

**Chess player:** Defense (castling)

**Spoilsport and chess alien:** not Defense (not castling) [Not to win, not intending to counter my opponent’s moves, not properly complying with the modes of achievement or preparatory conditions of defense in chess]

It goes without saying that both spoilsports and chess aliens behave externally to the game in the most extreme sense, because they basically refuse or ignore the whole pragmatics and semantics of chess moves. There is no element of the institutional practice that they accept and comply with. And their behaviour is external even from the point of view of the Rule conception, because they are not treating rules as reasons for action and for criticizing the other player’s behaviour. On the contrary, spoilsports would be glad if their opponent started to play in an odd way—“we can finally go outside and have a beer?,” they would think—, while chess aliens would not be able to understand that a given behaviour of their opponent is deviant with respect to the rules.

2.7. *External and Internal Institutional Actions: Adding Some Shades*

Let me summarize the results I have obtained so far. By applying the analytical tools of speech acts theory to the institutional action of castling, I have identified seven kinds of institutional agents: (i) expert chess players, (ii) beginners, (iii) chess teachers, (iv) cheats, (v) chess masochists, (vi) bad chess players, and (vii) spoilsports or chess aliens. I have assumed that expert chess players are the paradigm of internality, and then I have argued that, in comparison, bad players are internal but not to a full extent, and beginners are internal in the least possible degree. On the other hand I have tried to show that, while chess teachers are external in the more moderate sense, cheats are more external than teachers and less than chess masochists, and spoilsports or chess aliens are external in the most extreme sense. On this reconstruction, there are at least three degrees of internality of chess players and four of externality, and hence seven different idealtypes of institutional agents:
How does the Rule conception cope with these seven different idealtypes of institutional agents—paradigmatic, defective, beginner, describer, dishonest, masochist, and alien? It seems to me that it has two kinds of problems in this regard: one of categorization and one of shading. On the one hand, it cannot explain why some behaviours are external rather than internal. On the other hand, it seems unable to explain the different degrees of externality and internality among these archetypes.

Let me recall again that the Rule conception of institutional action traces the action’s “internality” to the fact that the institution’s rules should be (1) a reason for that action, (2) for criticizing deviant behaviour and (3) for adopting a given conceptual framework in linguistic behaviour. Now, while the Rule conception can categorize dishonests among external agents, because cheats do not take rules as reasons for action and occasionally break them, it cannot explain why masochists are external, because they instead take rules as reasons for action and for criticism and simply want to lose by following the rules. The same happens for chess teachers, who describe the institutional system from the outside — that is, without actually playing the game—but typically consider the rules as reasons for action and criticism and perfectly master the institutional structure’s conceptual system: These describers adopt an external stance but they are internal according to the Rule conception. Hence, at least in some cases, the Rule conception seems defective for what regards categorization: It classifies as internal behaviour what seems to be better described as external.

Further, there is a broader problem regarding shading, namely, the question of how to describe different degrees of internality and externality. The Rule conception cannot explain why children and bad players are less internal to the game than expert players: After all, they all follow the rules and take them to be reasons for action and criticism of deviant behaviour. And it cannot explain why spoilsports are more external to the game than cheats: After all, they both break the rules and do not consider them as reasons for action. Finally, it cannot explain why chess teachers are less external to the game than chess
masochists: Both consider the rules as reasons for action and for criticism. More in general it seems that, by ignoring the pragmatic dimension of institutional acts, the Rule conception is not able to bring into light how varied, multi-faceted, and shaded a phenomenology of institutional agents can be.

3. Standing in a Legal Game: Seven Ways

In the previous section I have tried to show that, if we apply the framework elaborated in speech acts theory for the pragmatics of language to the pragmatics of institutional actions in general, a phenomenology of institutional agents emerges that is more complex than that provided by the Rule conception in terms of the “rules as reasons for action” criterion. I have resorted for this purpose to a very simplified example regarding castling in chess, but now we should consider whether this phenomenology bears some explanatory power with regard to more complex institutional frameworks. For this reason, I will try in what follows to apply the foregoing discussion to a legal example, so as to see whether the idealtypes identified above can be relevant just as they seemed to be relevant in the chess example.

Applying the chess analogy to the domain of law is a tricky matter, even though it has been done several times by authoritative authors, among which Hart himself (see for example Hart 1994, 56–7). The main source of difficulty is that, if we want to compare law to games, it will quickly appear that law is not a game but rather a cluster of games: some of them cooperative, like legal transactions; some of them competitive, like trials (at least under an adversary conception of trials); some of them more similar to solitary games, like in the case of administrative procedures. Now, I assume that the pragmatics of institutional actions traces back to the nature of the institutional practice these actions are part of: Hence, for example, the pragmatic point of defense by castling is, as we have seen, connected with the idea of countering the opponent’s attacks and eventually to win the game—it is connected with the competitive nature of chess playing. Thus, a direct transposition of the idealtypes identified in the previous section should work better if made toward a competitive legal practice in the first instance. For this reason, in order to test in the legal domain the idealtypes so far identified I have chosen the example of trials, and in particular criminal trials.

This does not mean that the idealtypes cannot be applied to other, non-competitive, legal institutions. On the contrary, I believe that the distinction among good players, bad players, beginners, describers, dishonests, and aliens can hold for non-competitive institutional practices as well. For example one could say that, even in the case of legal transactions, agents can be good or bad strategic actors, beginners who do not even know that a given contract can be framed in a more or less advantageous way, describers who teach private law, dishonests who insert fine print in a contract, and aliens who simply do not believe in
contracts or cannot understand the whole practice of making private legal transactions. Even when it comes to masochists, who typically do not comply with sincerity conditions because they do not intend to achieve the pragmatic point of the action and rather want to achieve exactly the opposite, we can think of foolish persons who try to find the worse possible legal transaction the agents can make in a given situation.

But let us come to the example of criminal trials, which can be conceived (at least under the adversary conception) as the legal practice which most closely approximates a competitive game like chess. And let us imagine the simple situation in which a defendant is accused with the charge of voluntary murder. Who are the legal actors in this situation? The defendant’s lawyer beside him, the public prosecutor, the judge, and the jury in front of him, and possibly some observers in the courtroom behind him. Now, according to the Rule conception of institutional action, we are faced with a quite binary way of describing the attitudes of these actors toward the institutional framework of criminal trials.

We suppose that, under normal conditions, judges and public prosecutors are officials in Hart’s sense, and thus that they hold that kind of internal attitude toward the institution which allows a given “rule of recognition” to be in place: For sure they consider the rules of criminal law (and procedural rules in criminal trials) to be reasons for action, they are dispositionally inclined to criticize and sanction any kind of deviant behaviour, and they master the conceptual framework of criminal law and criminal procedure, as is apparent when they speak in legal terms.

But what about members of the jury? They can either be internal or external, depending on the degree of commitment they have to the legal system: Given that they are typically enrolled by the State and cannot typically refuse to participate, they can try to decide the quaestio facti in good faith even if they do not consider the rules of criminal law as binding reasons for action. It can even be that they are external to the system of criminal procedure simply because they do not have any idea of its rules. And the same can be said of the others observers in the courtroom, and even of the defendant himself. These persons can either consider the rules of criminal law and criminal procedures as binding reasons for action and for criticizing deviant behaviour, and also have a clear idea of the conceptual framework connected with these institutions, or they can be, at least to a certain degree, quite unaware of what is happening and play as part of a machinery that simply proceeds without needing their consent and understanding. Hence these agents, too, can be either internal or external.

The case of lawyers is a little bit more complex. Lawyers must know the rules of criminal law and criminal procedures, otherwise they could not be part of this game as players and could not defend their clients effectively. And to criticize the behaviour of the public prosecutor in case he did not properly abide by the rules of criminal procedure is part of
their job. Moreover, they must know very well how to make use of the relevant conceptual framework, and show this competence in their linguistic behaviour. However, this does not mean that lawyers must consider these rules as binding reasons for action: At least to a certain extent, they can consider them as guidelines to predict the behaviour of officials and the application of sanction. In Hart’s view, at least on a certain interpretation of it (see Perry 2000, 161ff.), in this case lawyers are “bad men” in Oliver Wendell Holmes’s (1897) sense and thus have an external point of view, because they treat the rules simply as theoretical guidelines to predict the judge’s behaviour and not as binding reasons giving rise to obligations (see Hart 1994, 40 and 90–1). Again, however, according to the Rule conception there are only two options here: Either a lawyer is internal to the system or he is an external “bad man.”

It seems to me that, like in the case of castling, the Rule conception disguises the fact that several distinct shades of internality and externality can be identified among the different legal actors during a criminal trial. Lawyers can be good or bad, a defendant can have studied a little bit of criminal procedure while in jail waiting for his trial and have an at least superficial acquaintance of what happens, both lawyers and public prosecutors can try to dishonestly manipulate the rules, students and professors in law can sit among observers in the courtroom. All these persons are internal or external actors with respect to the institution, but are such in different degrees and for different reasons. And, as in the case of the castling example, the same action can be made by playing different institutional roles on pragmatic grounds.

I will now try to identify these institutional roles, in analogy with the idealtypes provided in the previous section, with reference to a specific example which is modelled on the castling example. In this way, I hope to show that the same conclusion drawn for chess players can be drawn for legal actors as well, namely, that by analyzing the institutional action on pragmatic grounds we can appreciate different degrees of internality and externality. Imagine I am a lawyer and that, during a trial, I decide to ask the judge to allow the testimony of a psychiatrist. This institutional action can be analyzed as a form of insanity defense, namely, the strategy under which I intend to show the jury that my client, the defendant, is in reality mentally ill and thus cannot be considered as responsible for murder. This is an action that an expert lawyer can perfectly perform when needed, and if the public prosecutor is an expert lawyer in his own turn, he will be able to understand his opponent’s strategy, possibly trying to undermine the testimony from the beginning. Here, again, the framework of speech acts theory proves to be useful, because the action can be described as instantiating a given rule-constituted act (asking for admission of a given testimony) with a specific pragmatic purpose or force (setting up insanity defense). And, just as in case of the castling example, the description is as follows:

Insanity defense (Asking for admission of a psychiatrist’s testimony)
Now, suppose that I am a young assistant of the defendant’s lawyer and that I am substituting for him because he cannot attend the session. The judge asks whether I want to ask for admission of a psychiatrist’s testimony and I reply in the affirmative, even though I do not have an idea of why I have been instructed to do so. I perfectly know how to ask for a given testimony, but I do not understand that asking for the testimony of a mental illness professional can be part of insanity defense. Here we have the case of a beginner, a person who is only partially internal to the game, like children learning to play chess. What is missing here, like in that case, is the pragmatic point of the action, the idea that we are trying to counter the public prosecutor’s charge of responsibility by showing that the defendant is mentally ill. If all lawyers had only this degree of acquaintance with the institutional practice, then it would be impossible to set up a defense for their clients: This is why beginners must be borderline cases of institutional players, both in chess and in the practice of criminal trials.

Another possible situation is that in which I ask the judge to admit a psychiatrist’s testimony only after it has become apparent that I have no other options to defend my client. This is a bad instance of insanity defense because it shows clearly to the jury and the judge that I am appealing to this as a last resort, and hence instrumentally. In this case I have perfectly clear what insanity defense is and I intend to perform insanity defense, but I do so defectively because, after all, I am not a very good lawyer. As in the case of bad chess players, I have missed something in the preparatory conditions and mode of achievement of that kind of defense.

Further, suppose that I ask for admission of a psychiatrist’s testimony and that the person whose testimony I am asking for is not really a psychiatrist but an impostor, who has been bribed with money provided by my client. In this case, I am certainly performing an instance of insanity defense, but I am not really resorting to a specialist’s evaluation. Like in the case of cheats, I am not fulfilling here the content conditions of insanity defense, because the person who is going to testify will not be able to really attest the defendant’s mental illness, though the jury may be misled to believe that he has actually done so. I am playing deceptively like a good lawyer, but in reality I am playing dishonestly.

I can also be a masochist lawyer, and for good reason. Suppose I am defending a mafioso from the charge of a terrible murder, and that in the course of the trial I realize that my client has really committed that crime and suddenly start to hate him. I perfectly realize that, according to lawyers’ deontology, I should resign from my position, but I also know that in doing so I will probably get shot, because I know too much of my client’s private business. Suppose also that I am very well acquainted with the public prosecutor’s capabilities in court. Then I decide to go with a risky strategy: I ask for a psychiatrist’s testimony in order to seemingly defend my client by way of insanity defense, but I know that the public prosecutor will be able to dismantle the defense quite easily and that this
will result in conviction for my client. I am really performing insanity defense here, but only because I know that this kind of defense will be easily countered and hence that I will lose. I do not really intend to defend my client in this case, even though I am playing by the rules and I am performing a defense that another public prosecutor might not be able to counter. What is missing here, like in the case of chess masochists, is compliance with the sincerity condition.

An even more extreme case is that of a Marxist lawyer who simply wants to make apparent that criminal trials are nothing more than void bourgeois rituals functional to capitalism. Such a “lawyer” would not be interested in asking a psychiatrist’s testimony at the right moment, nor in setting up a real insanity defense. All he wants to do is to mess things up with the trial to the greatest possible extent, in order to show that trials are nothing more than arbitrary formalities. As in the case of chess aliens, the Marxist lawyer does not simply violate one element or condition of insanity defense, but rather skip the whole pragmatics of the institutional action: its pragmatic point, its modes of achievement and preparatory conditions, its content conditions, and of course the sincerity condition of a proper lawyer. And of course the Marxist lawyer is not a lawyer at all: He is behaving like someone who is completely alien to the legal system—he simply intends to get rid of the entire institutional practice—, an attitude that can entail more or less serious reaction on the part of the legal system itself.

Finally, suppose that the trial is not a real trial but rather a simulation made in a classroom at a law school. The “lawyer” asks for admission of a psychiatrist’s testimony, the “judge” asks for further clarification, and then the “lawyer” stops the simulation and asks the student what kind of answer they would give in that situation. Then he proceeds by explaining how his asking the judge for admission of the psychiatrist’s testimony can count as a good or bad insanity defense, depending on the circumstances and on the way it is performed. Here the “lawyer” is, of course, nothing more than a teacher in criminal law who performs the action of insanity defense without really intending to achieve its pragmatic point—there is no “real” client to defend, after all, and the public prosecutor is in his own turn a teacher. As in the case of chess teachers, the agent here performs the action only as a way to describe its point and structure, not as a way to really achieve its point.

It should be clear at this point that the difference among good players, bad players, beginners, describers, dishonests, masochists and aliens holds for lawyers in the case of criminal trials in the same way as it held for players in the castling example. And it should also appear how this pragmatic analysis makes it possible to identify several different ways of being internal or external to the institutional practice, thus shading and specifying the simple external/internal distinction maintained by the Rule conception. I will then conjecture that the same degrees of internality and externality holding among the seven
idealtypes in the chess example will also hold among the seven kinds of legal actors in the criminal trial example. Let me examine briefly whether this conjecture is plausible.

<table>
<thead>
<tr>
<th>Degree of Internality/Externality</th>
<th>Internal 3</th>
<th>Internal 2</th>
<th>Internal 1</th>
<th>External 1</th>
<th>External 2</th>
<th>External 3</th>
<th>External 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paradigmatic</td>
<td>Descriptive</td>
<td>Beginner</td>
<td>Describer</td>
<td>Dishonest</td>
<td>Masochist</td>
<td>Alien</td>
<td></td>
</tr>
<tr>
<td>Expert lawyer</td>
<td>Bad lawyer</td>
<td>Lawyer's assistant</td>
<td>Teacher in criminal law</td>
<td>Bribing lawyer</td>
<td>Mafioso's lawyer</td>
<td>Marxist lawyer</td>
<td></td>
</tr>
</tbody>
</table>

That lawyer's assistants are less internal to the practice than full lawyers (be they bad or good) seems to be a plausible conclusion. They simply do not understand in full the consequences and motivations of institutional actions performed during trials, and hence are not really “playing the game” as it is meant to be played. They are at the initial stage: They know the rules and consider them binding, often they are even better than expert lawyers in finding some faults in formalities, but we would hardly qualify them as real lawyers.

The case is different for what regards bad lawyers. They play the game and know its basic strategies: They know that insanity defense can be a viable way to effectively defend their clients. However, they typically perform these strategies in a bad way, either because they do not recognize when proper preparatory conditions occur or because they make a mistake in the process. As in the case of bad chess players, they are certainly internal to the game, but they are less internal than expert lawyers, because the practice of criminal procedure cannot unlock its full potential—and also show all its defects—if it is played only by bad lawyers. In our example, if all lawyers were bad lawyers, resorting to insanity defense would be considered as a bad strategy from the start, independently of circumstances, and the very question of the relation between insanity and responsibility would be perceived in a very instrumental way—basically as the last hope of defendants who are clearly guilty. But, if this were the case, the problems connected with acquittal of agents who are socially perceived as criminals while not being responsible from a legal point of view would not even emerge.

What about teachers? It is clear that teachers of criminal law describe the system from the outside and do not really participate in a trial when making their simulations. However, as in the case of chess teachers, they are the “less external” among external agents, because their teaching is typically functional to those persons who are willing to become internal
institutional agents. Every institutional practice must be taught, and hence it needs describers who, although they explain the rules and the practice from the outside, consider those rules and that practice as the ground for binding reasons for action, to the point of being not only reasons for institutional action but also reasons for teaching how institutional action is performed.

Also the difference in degree of externality between dishonest and masochist lawyers can be framed in analogy with the chess example. Simply put, dishonest institutional behaviour does not hinder the possibility of an institutional practice, when properly disguised. Given that the dishonest lawyer aims at reaching the point of a defense in a criminal trial, if he disguises properly his cheating he will eventually win or lose, and the practice will in any case come to a result. We could even say that, if both the defendant’s lawyer and the public prosecutor were dishonest agents, the practice of a criminal trial under the adversary conception would amount to the game of “cheating in the most effective way without being caught by the jury or the judge.” If, on the other hand, both the defendant and the public prosecutor were masochists and tried to lose, we would come up with a sort of paradoxical trial, something which the judge would quickly dismiss as irrelevant both for question of legal truth and for the purpose of ensuring a defendant’s rights.

Finally, when it comes to evaluate the behaviour of the Marxist lawyer, I take it to be clear that we face here, as in case of chess aliens, the most extreme case of external institutional agents. The point of the Marxist lawyer, in fact, is neither that of winning by breaking the rules, like in the case of dishonests, nor that of losing by following the rules, as in the case of masochists, but rather that of not following the rule and not trying to win or to lose, so as to dismiss the whole practice as conceptually and socially mistaken or irrelevant.

4. Conclusion

The main point I have tried to argue for in this paper is that the Rule conception of institutional action should be complemented with pragmatic considerations in order to improve its explanatory power. I have analyzed this pragmatic dimension in terms of Searle and Vanderveken’s speech acts theory, but there is no reason to deny that, in principle, other pragmatically-oriented analysis of language could not prove to be significant as well. In a sense it is striking that, even though Searle’s analysis of speech acts has provided the grounds for his social ontology and theory of institutional facts since *How to Derive ‘Ought’ from ‘Is’* (Searle 1964), when it came to specify this theory in *The Construction of Social Reality* (Searle 1996) Searle decided not to apply the framework developed in speech acts theory to the broader category of institutional actions. And this is even more striking in *Making the Social World*, considering that, in this last work, Searle’s theory of constitutive rules is strictly
linked with the pragmatics of declarations (Searle 2010, 13–4). Be as it may, this is the direction in which this paper goes.

I have provided two examples of this tentative shading of the external/internal distinction on pragmatic grounds. This, of course, does not show that the seven ideal types of institutional agency I have identified must necessarily be relevant for every institutional practice, nor that there cannot be more. As stressed above, I believe that the competitive or cooperative nature of a given institutional practice can have an impact on the phenomenology of institutional agents connected with that practice. However, given that these ideal types stem from the connection between a system of rules constituting kinds of institutional actions, on the one hand, and the pragmatic dimension of those actions, on the other hand, they should be relevant for all the contexts in which this connection can be identified, independently of the competitive or cooperative nature of the practice.

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5. References