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*The Concept of Law* as Ordinary Language  
Philosophy

A thesis submitted to the University of  
Kent in the subject of Law for the degree  
of Doctor of Philosophy

By Marta Almeida

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## **Abstract**

The subject of this thesis is H.L.A. Hart's *The Concept of Law*. Two main arguments are made, firstly that there is a perspective through which Hart's seminal work can be purposefully read as an exercise in Ordinary Language Philosophy, which will dissolve many of the problems Hart's commentators encounter with his work. Secondly, that Hart's work is an exercise in Ordinary Language Philosophy applied to the problems of general jurisprudence. To effectively demonstrate the arguments, this thesis is divided into three main sections. Section A provides an overview of Ordinary Language Philosophy, grounding the thesis in its historical context. Section B is the main and most substantive section of the thesis, where the arguments are cultivated through an analysis of the main contributions in this area. Here, contradictions in the existing literature are highlighted, even amongst those who attempt to take the philosophy in Hart's work seriously. The final section, Section C, draws together my arguments and suggests scope for future research. The thesis advocates for a reading of *The Concept of Law* which would render it more relevant and immediate to the source text; something that has been lacking in the extensive contributions to the analysis of Hart's book since its publication in 1961.

## Acknowledgements

I would like to express a special thanks and gratitude to my supervisor, Dr. Stephen Pethick. Through all the numerous challenges, rewrites and deadlines, he never lost faith and has always been there to encourage me, offer his support, insightful knowledge and advice.

I want to acknowledge a special debt to my close friend and colleague Marie Kerin for her unwavering support. Marie reviewed several drafts of chapters of my thesis, provided me assistance and invaluable comments, and kept me sane throughout this journey.

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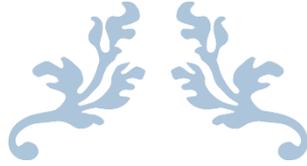
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# SECTION A

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Introduction

Section A

Chapter One

We run, as a rule, worse, not better, if we think a lot about our feet. So let us, at least on alternate days, speak instead of investigating the concept of *causation*. Or, better still, let us, on those days, not speak of it at all but just do it.<sup>1</sup>

Gilbert Ryle, 1953

This thesis attempts to address and relieve an intellectual burden that has been placed upon philosophers of law<sup>2</sup>, to better understand Hart's seminal work in jurisprudence, *The Concept of Law*<sup>3</sup>. The motivation to better understand Hart's book comes from the growing fear amongst commentators that it is presently understood poorly, with little attention paid to some of its key features<sup>4</sup>. The significance of the project is captured in (though not exhausted by) the worry that it is difficult even to assess how seminal the work is, or if it is, in the absence of the sought-after understanding of these key features. At the same time, the project raises the exciting prospect that new understandings of Hart's work might be possible, showing the book

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<sup>1</sup> Gilbert Ryle, 'Ordinary Language' (1953) 62 *The Philosophical Review* 167.

<sup>2</sup> Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'the Concept of Law'* (Oxford University Press, USA 2001), 61. Nicos Stavropoulos, whose work is the subject of chapter six of this thesis, claims that due to Hart's explicit thoughts about the relevance of linguistic philosophy, we have an intellectual burden to try and understand any semantic views that drive Hart's work.

<sup>3</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012).

<sup>4</sup> See, for example, Kevin Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689; A Brian W Simpson, *Reflections on 'the Concept of Law'* (Oxford University Press 2011).

to be richer, more sophisticated, more useful and less prone to criticism than has hitherto been thought to be the case. Though the ambition is not for a complete and final conspectus of Hart's book, the present thesis aims to make and defend several robust claims that together amount to a significant re-evaluation of Hart's masterwork.

### **The Rationale of the Thesis**

As it happens, the thesis occupies a place at the intersection of the two most obvious phenomena concerning the reception of Hart's monograph. These are its routine (though scarcely universal) acclamation as the towering work in legal theory of the last one hundred years<sup>5</sup>, and the similarly commonplace lack of interest in, or awareness of, what is actually in the book. Strikingly, these two phenomena are often found together, in the views and attitudes of individual theorists<sup>6</sup>. This requires both demonstration and explanation, and the space occupied by the present enquiry enables the evidence to be considered and at least one type of explanation given. Relevant explanations might reasonably be found, for example, in an enquiry into the

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<sup>5</sup> See, for example, Brian Bix, *Jurisprudence: Theory and Context* (London, Sweet & Maxwell, 2009), 36; Nagel Thomas, "The Central Questions" *London Review of Books* 27/3 (2005), 4; Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, USA 2006), 224.

<sup>6</sup> For a clear example of a legal theorist who acknowledges *The Concept* as the towering work in legal theory, but who raises doubt over its contents, please see A Brian W Simpson, *Reflections on 'the Concept of Law'* (Oxford University Press 2011), 183-206. This aspect of the reception and understanding of Hart's work will be further explored in Chapter 2, where reference will be made to the literature surrounding the reception of *The Concept* and the conflicting opinions and interpretation that followed.

social and professional history of academic jurisprudence since the mid-century, or in the location of Hart's book as the best but also last expression of a jurisprudential paradigm whose time was up. These enquiries and others deserve exploration, but they are not the focus here. Instead, the approach will be to consider Hart's book from *within* the philosophy of language, as both an expression and application of philosophy of language, for it is in this regard that scholars have begun to worry that something has been missed. The approach therefore depends principally upon an engagement with the philosophical ideas expressed by Hart and his commentators, rather than upon wider matters of social and intellectual history or critique. However, as the ideas I deploy have developed over the last fifty years in arguments about the content and status of *The Concept of Law*, my analysis necessarily draws upon the evolution of these ideas in their intellectual context. In turn this attention might (and, I will show, *does*) help to explain the strange asymmetry in the phenomena of responses to it. So, the present enquiry is offered in philosophy of law; as an enquiry, that is, into one area of applied philosophy. But as that philosophy will require some excursion into the development of arguments over time, it requires some attention to the history of those ideas. It can seem, then, as if I aim to answer two distinct questions: first, whether something of significance is indeed missing in our understandings of the book, and, second, why this has occurred, if it has. But in the present thesis the second question is engaged just in support of my analysis and argument regarding the first.

With this in mind, I make two main claims: firstly, that there is a perspective through which Hart's seminal work can be resolutely read as an exercise in Ordinary Language Philosophy, which will prove more illuminating and enlightened, rendering

Hart's work more relevant and immediate to the source text. I also make a second claim likely to be more contentious. This is that Hart's work is an exercise in applied Ordinary Language Philosophy and that the extensive literature which presently cites, references, reviews and deploys the ideas in Hart's book goes wrong (sometimes substantially wrong) in its failure to perceive the book in the way that I suggest. Now, the first claim as I say is likely easier to defend than the latter and indeed I hope that there is sufficient matter in the first claim alone to support a lively PhD thesis. Certainly, if I do not make a compelling case at least on the first claim then my argument will have failed. As to my second more ambitious claim my aim here is at the very least to make the contention robustly, and to cause even the sceptical reader to take seriously the argument that I propose. I take it that this is the minimum condition for the success of my second claim; however plainly my wish is to make a case that is compelling against existing, and in my view impoverished, reading of Hart's text. Whilst it may be that further research proves necessary to make an absolute case, at the very least my aim in this work is to prompt serious minded reflection in a way that I claim has hitherto been overlooked. And, in light of existing literature this is a considerable ambition in its own right.

There are however a number of matters that the thesis argues for which, whilst subsidiary, are nonetheless significant. Amongst these are the importance of chronology and history of ideas in seeing what otherwise could be missed, a view on the benefit of employing a proper philosophical approach to matters of legal theory, and highlighting the problems that are produced where theorists attend only to sections or parts of a jurisprudential source text or where only fragments of a philosophical or other approach are deployed, particularly where that philosophy is

properly or explicitly holistic. Moreover, the thesis will also highlight the importance, missed by many, of attending with care and precision to what the source text has to say about a particular issue, and the danger of imputing to a source text matters that are not expressly there. The thesis will also highlight the contribution that legal theory (such as legal scholarship) can make to an understanding of a wider body of philosophical knowledge which it is part of (my thesis stands as an argument for reading *The Concept of Law* as an important text in Ordinary Language Philosophy, though this thought will remain mostly implicit in what I have to say). The thesis will also show the extent to which a work in general jurisprudence may be enlivened by tracing its intellectual sources in a way which might have been overlooked. In the present case, for example, the relation between *The Concept of Law* and Gilbert Ryle's *Concept of Mind*<sup>7</sup>; other connections will emerge in the course of this thesis. And, as will be seen, my thesis also stands, in a grander way, as a contribution to the recent revival of linguistic philosophy as a core element in approaches to the philosophy of law<sup>8</sup>.

Though I argue for a better way, a more illuminating way, of reading *The Concept of Law*, demonstration is difficult. There is no scope sentence that says what

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<sup>7</sup> Gilbert Ryle, *The Concept of Mind* (HarperCollins Publishers 1986).

<sup>8</sup> For contributions regarding the employment of linguistic philosophy in philosophy of law see, for example, Dennis Patterson, *Law & Truth* (Oxford University Press 1996); Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University press 2007); Susan Haack, *Putting Philosophy to Work: Inquiry and Its Place in Culture - Essays on Science, Religion, Law, Literature and Life* (Prometheus Books 2008); Julie Dickson, *Evaluation and Legal Theory, Or, How to Succeed in Jurisprudence without Moral Evaluation* (Hart 2001) to name but a handful of relevant material in this field.

I am arguing for is right. If this aspect of my thesis has merit it will be shown in the extent to which I am able to persuade the reader of such. Final demonstration is beyond this thesis, or even perhaps any thesis. The striking matter (and this I do demonstrate) is that the existing literature fails completely in its attempt to conceive Hart's work in the manner I suggest. I cannot conclusively prove that what I am arguing for is *right*, but will demonstrate that the widespread disagreements and difficulties in the existing literature are largely owed to the failure I pick out, which so far no one has attended to. The demonstration of such failure stands as a significant research conclusion in its own right. This thesis is not the attempt to fully demonstrate how a reading of *The Concept of Law* could be done through Ordinary Language Philosophy, but it is intended as a strong argument for the attempt.

### **The Structure of the Thesis**

The structure of the thesis has been chosen to best support the argument that I make, and so I will give advance indication here of what that argument will be. Through enquiry into the philosophy in question, both Hart's and his commentators', I will argue that the philosophy of language present in *The Concept of Law* has been missed or misunderstood by many (indeed, most, and perhaps all) academics. Much of value can be gained by examining the initial reception of *The Concept of Law*, as well as its second and third editions (to the last of which the second chapter of this thesis is principally dedicated). So, Chapter Two examines the reception of *The Concept of Law*, and highlights the surprising fact that even though some early

reviews, Robert Summers<sup>9</sup> in particular, mention the impact of Ordinary Language Philosophy in *The Concept of Law* most others entirely disregard the philosophical background of Hart's book. Thus I begin to build the case, drawn from the relevant evidence, that Hart's critics have paid insufficient attention to the place of Ordinary Language Philosophy in framing, informing and motivating the work. In light of the continuing prominence of Hart's book in undergraduate reading lists and in secondary literature, it is unsurprising that at least some other scholars have attempted to address the gap I pick out above. However, these scholars are notably few in number, and a researcher has to look diligently and hard for their contributions. Moreover, the few who have ventured in this area have, I aim to show, misconceived Hart's approach. Section A concludes with this enquiry into the book's reception over time.

In view of these several related arguments brought into focus in section A, the main argument and analysis of the thesis will be presented in one section: section B, comprised of six chapters, which together amount to a review and comprehensive analysis of the jurisprudential literature in this area. This last point deserves emphasis, because section B provides a comprehensive comment on the works of *all* of those who have taken the philosophy of language in Hart's work seriously. The minimal amount of literature available in this area allows me to do this. However, an additional reason for looking at these works as a set in section B lies in the fact that each of the legal theorists in question provides a different interpretation of *The Concept of Law*. This will subject my thesis to a stern test since it is one of my argumentative aims to show that even though these philosophers all say different things, they all end up

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<sup>9</sup> Robert S Summers, 'Professor H. L. A. Hart's "Concept of Law"' (1963) *Duke Law Journal* 629.

committing similar mistakes, and these not only of omission. In light of the potential scope of my topic – Hart’s jurisprudence - it is necessary to adopt a very clear and well-defined structure. However, the precise and particular focus of my research imposes a structure itself. It is for this reason that section B is divided into six chapters. The first of these chapters, Chapter Three, deals with the newest, and perhaps most important contribution, to literature surrounding Hart’s book; Leslie Green’s introduction to the third edition of *The Concept of Law*. Leslie Green is the only legal theorist whose work is analysed in depth in this thesis who does not believe that Hart’s work has a foundation in philosophy of language. Though his view is not unique, due to the prominence of his contribution it simply cannot be disregarded. The third edition of *The Concept of Law*, currently the only one in print, includes a long and detailed introduction to Hart’s book. Green’s introduction, far from being impartial, reads as his own assessment of Hart’s thesis, where Green tries to “forestall some misunderstandings” that have arisen since the book’s publication<sup>10</sup>. Based on an article published by Green after the publication of the second edition of *The Concept of Law*<sup>11</sup>, Green’s introduction establishes “how little linguistic analysis there is in *The Concept of Law*”<sup>12</sup>, and puts forward the view that some aspects of Hart’s theory were simply mistaken. The importance of Green’s introduction, and his views on *The Concept of Law* cannot be underestimated. Though arguably of little importance and relevance when simply published as an article on the Michigan Law Review, his view has gained canonical status by being published at the beginning of *The Concept of Law*,

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<sup>10</sup> Hart (n 3) xi.

<sup>11</sup> Leslie Green, ‘The Concept of Law Revisited’ (1996) 94 Michigan Law Review 1687.

<sup>12</sup> Hart (n 3) xlvii.

ensuring that for many years to come most new readers of *The Concept of Law* will read his interpretation of the book first; that is, before the book itself is read. Moreover, a new edition of *The Concept of Law*, bearing in mind that the previous edition included a never-before seen postscript written by Hart, carries with it some momentum and sets Green as a pre-eminent scholar on Hart's work. It is for all these reasons that the first chapter in section B is dedicated to Green's introduction to *The Concept of Law*. Throughout the chapter I argue that Green is wrong to claim that *The Concept of Law* had "little linguistic analysis", and aim to show that his view of Hart's work is misleading and misinformed.

Following Green's chapter, chapters Four and Five deal with the literature detailing Ludwig Wittgenstein's influence on *The Concept of Law*, looking at the work of Brian Bix and Andrei Marmor respectively. Both Bix and Marmor pursued doctorates in jurisprudence at Oxford, completing their doctorates a mere year apart, under the supervision of Joseph Raz. Their works in the area of concern to this thesis, Bix's *Language and Legal Determinacy*<sup>13</sup>, and Marmor's *Interpretation and Legal Theory*<sup>14</sup> are products of these doctorates. The two authors may differ from one another over certain refinements and minutiae, but they make many of the same analytical claims (and, I hold, mistakes) in their approach to *The Concept of Law*. Brian Bix, whose work was published in 1993, aims to study the relationship between law and language and for this purpose selected Hart's *The Concept of Law*, amongst others, as a key piece of literature for analysis. The publication of Brian Bix's work

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<sup>13</sup> Brian Bix, *Law, Language, and Legal Determinacy* (Oxford University Press 1995).

<sup>14</sup> Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing (UK) 2005).

marks the end of a prolonged gap, from the 1960's up to its publication, during which no Anglo-American literature can be found on semantic analysis in Hart's work, and this is why his work constitutes the second chapter of section B. He starts by putting forward the view that *The Concept of Law* is a work in the area of judicial interpretation. Despite the fact that he provides no evidence, references or interpretations of Hart's text that would support this claim, his supposition persists throughout his work and it is clear that this inevitably influences the way he interprets *The Concept of Law*. Bix's Chapter on Hart focuses solely on Chapter VII of *The Concept of Law*, entitled "Formalism and Rule Scepticism", and his comments focus on the three main areas of judicial interpretation, the 'open texture of language', judicial discretion and rule-following considerations.<sup>15</sup> Brian Bix supports this proposition utilising comparisons between Hart's ideas and the work of Wittgenstein.<sup>16</sup> Andrei Marmor, on the other hand, undertook a study in interpretation and legal theory, and chose to analyse *The Concept of Law* from the perspective of how judges, according to Hart, interpret law. The discussion of Andrei Marmor's work takes place in Chapter Five. The core idea on which he elects to base his analysis is the distinction between "Easy" and "Hard" cases, the difference between cases where the law can be

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<sup>15</sup> Bix (n 13) 7-35.

<sup>16</sup> Wittgenstein is considered one of three major figures of Ordinary Language Philosophy. Wittgenstein championed Ordinary Language Philosophy at Oxford, whereas J. L. Austin and Gilbert Ryle instigated the movement at Oxford. Much debate ensued as to whether Wittgenstein was the "father" of Ordinary Language Philosophy, or whether J. L. Austin championed the movement. Others still, argue that Gilbert Ryle was the founder of Ordinary Language Philosophy. This discussion, alongside short historical background of Ordinary Language Philosophy will be addressed in chapter two, "A Case for Ordinary Language Philosophy".

understood simply and those that are not pre-determined by legal standards.<sup>17</sup> This ultimately leads Marmor to an analysis of rule following, where he will also, like Bix, support his remarks by utilising the work of Wittgenstein. Both of these legal theorists, then, engage with and explore the philosophy of Wittgenstein. However, it is my intention to argue that despite their best efforts they have both adopted an approach to Wittgenstein that prevents them from reaching a comprehensive understanding of his philosophy. Both these authors seem to be more concerned with how judges apply rules, rather than how rules are followed. They therefore completely miss, or fail to appreciate the essence of Ordinary Language Philosophy. In short, they do not engage with Wittgenstein's and Hart's way of doing philosophy. Moreover, and because of this, they both fail to understand Hart because they fail to understand Wittgenstein. I will seek to demonstrate this failure on their part through a thorough and careful analysis of both these authors' works, and through extensive recourse to the texts concerned. But the study of the works of Bix and Marmor will also help demonstrate another important mistake that some legal theorists have committed in their approach to *The Concept of Law*. To fully understand what it is that an author is trying to put across in a piece of work, it is generally unwise to analyse any part of that work in isolation, because of the ready prospect that something will be missed or that the whole will be underestimated. Whereas this is trivially true of all publications, it is perhaps more detrimental in the case of *The Concept of Law* than in many other work because of the holistic approach made by Hart to his subject there, and this for reasons that attach to the philosophical style in question. By choosing to focus on one

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<sup>17</sup> Marmor (n 14) 97.

chapter, or one thought, expressed in *The Concept of Law*, Bix and Marmor leave themselves vulnerable to misunderstanding Hart's whole work, and do in fact do so.

The fourth chapter of section B, Chapter Six, provides an analysis of Nicos Stavropoulos' work. His work is of an entirely different nature. Stavropoulos' work on *The Concept of Law* was published in Jules Coleman's *Hart's Postscript: Essays on the Postscript to The Concept of Law*<sup>18</sup>. As the title suggests, *Hart's Semantics* is indeed an investigation into the semantic doctrines that emerge in *The Concept of Law*. As mentioned above, it is Stavropoulos' claims that we are under an "intellectual burden" to find "the precise relation between semantic and legal theory in Hart's thought, and identify the substantive semantic views that drive it"<sup>19</sup>. As with the others, he recognises that Hart was influenced by both Wittgenstein, and, to a lesser extent, J.L. Austin, both prominent Ordinary Language Philosophy philosophers<sup>20</sup>. It will become apparent from my analysis of his work that Stavropoulos' views are tendentious. His key assertion is that semantics were important to Hart, and in support of this looks in depth at Hart's semantic influences. His overarching claim throughout the paper is that Hart was looking at the *nature* of law, and Stavropoulos is of the opinion that Hart used a semantic approach which is consistent with this enterprise. It should be noted

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<sup>18</sup> Nicos Stavropoulos work, an article entitled *Hart's Semantics*, is featured in the book *Hart's Postscript* edited by Jules Coleman. Coleman, J. (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (New York: Oxford University Press, 2001) 58-98.

<sup>19</sup> Coleman (n 2) 61. Cf text to footnote no. 1.

<sup>20</sup> Cf footnote no. 16 above. As mentioned, J. L. Austin is considered a prominent figure of Ordinary Language Philosophy, and was Hart's close friend and colleague. J. L. Austin's relationship with Hart, as well as his role in Ordinary Language Philosophy at Oxford, will be discussed further in the next chapter, chapter two.

however, that nowhere does Hart say that he is looking into the nature of law. Despite this fact, Stavropoulos is not alone in attributing this idea to Hart. Scott Shapiro, for example, also claims that *The Concept of Law* is a study of the nature of law. Stavropoulos' work provides us with a framework with which to discuss important, yet arguably mistaken views that several legal theorists have on *The Concept of Law*. In fundamental terms, Stavropoulos attempts to convince the reader that since Hart is exploring the *nature* of law, he must be pursuing a metaphysical enquiry<sup>21</sup>. I argue that this assumption is mistaken and leads to rather damaging consequences, both for Stavropoulos's argument and for our understanding of Hart's book. Perhaps the first of these consequences is that the position is completely inconsistent with the philosophy of both Wittgenstein and J.L. Austin. Thus, I believe that whilst Stavropoulos' account is an ambitious one, it is seriously flawed at its base and so ultimately falls short of its promise.

The fifth chapter of section B, Chapter Seven, is dedicated to the only legal philosopher who has attempted to look seriously at the influence *J.L. Austin* had on *The Concept of Law*. In his unpublished paper entitled "Doing Jurisprudence Historically: Interpreting Hart through J.L. Austin"<sup>22</sup>, Tony Cole proposes to analyse *The Concept of Law* through J.L. Austin's philosophy. He claims that, "once Austin's

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<sup>21</sup> Coleman (n 2) 64. Stavropoulos is convinced that Hart is looking for the nature of law, he writes: "Hart claims in this passage that, at least concerning expressions 'in current use', the quest for definitions is not exclusively about language, but is meant to provide metaphysical knowledge: we want to define 'law', for example, so that we learn what counts as legal, and thereby so that we discover certain important properties of things legal..."

<sup>22</sup> Cole. A., "Doing Jurisprudence Historically: Interpreting Hart through J.L. Austin" (unpublished paper).

work is understood correctly, its influence can indeed be traced in Hart's jurisprudence"<sup>23</sup>. Cole believes *The Concept of Law* to be a "vague and arguably inconsistent book, in which impressive theoretical insights are buried in the midst of rambling digressions, and prominent praise of the importance of analytical clarity stands uncomfortably alongside an obscure and barely explicated methodology"<sup>24</sup>. The existence of these uneasy relationships was why he attempted to clarify both Hart's methodology and the extent to which J. L. Austin influenced Hart's theory. Cole speculates that the reason for Hart's "obscure and barely explicated methodology", might have been that he wanted to maximise the acceptability of his arguments<sup>25</sup>. I argue that Cole is wrong about almost all of this, and indicate that his misreading arises from too light an appreciation of the debt owed by Hart to J. L. Austin and Ordinary Language Philosophy. Yet though I disagree with Cole's view, there are other legal theorists who plainly express an opinion similar to his, albeit without Cole's theoretical engagement (as we shall see in Chapter Seven). Cole presents the reader with a single quotation from J. L. Austin's "A Plea for Excuses"<sup>26</sup>, and based on this single quotation schematically lays out how J. L. Austin's influence on Hart can be traced throughout *The Concept of Law*. Of course, other works than those of J. L. Austin are mentioned.

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<sup>23</sup> Cole (n 22) 1.

<sup>24</sup> Ibid, 3.

<sup>25</sup> An earlier theorist, Matyas Bodig, makes a very similar argument regarding Hart's theory. Bodig's argument, and how it relates to Cole's work will be explored in chapter seven of this thesis. *Hart's Jurisprudence: Its relation to Philosophy* (Matyas Bodig, *Hart's Jurisprudence: Its relation to Philosophy* (2011) 41 *Acta Juridica Hungarica* 1.

<sup>26</sup> JL Austin, 'A Plea for Excuses' (1971) *Philosophy and Linguistics* 79. The same passage was quoted by Hart in *The Concept of Law*, Hart (n 3) vii.

I examine Cole's method critically and in detail. Cole's work will perform as my main point of reference for the development and staging of my own commentary on J. L. Austin and his influence on Hart's work. Indeed, Cole appears to have been the only academic to focus solely on the impact that J.L. Austin's philosophy had on *The Concept of Law*, and even then, in an unpublished paper.

The final chapter of section B, Chapter Eight, entitled "Beyond the Anglo-Saxon Realm", explores the reception of *The Concept of Law* in Spanish speaking countries. Interestingly, a number of legal theorists in Spanish speaking countries have had an interest in Hart's *The Concept of Law* since its publication. Ignacio Sánchez Cámara published a book entitled "Law and Language: the philosophy of Wittgenstein and Hart's legal theory"<sup>27</sup>. Cámara says that:

Even though Hart only quotes Wittgenstein once in *The Concept of Law*, he is, without a doubt, one of his biggest inspirations.<sup>28</sup>

As the title suggests, Cámara's book is devoted to exploring *The Concept of Law* alongside Wittgenstein's philosophy. It is surprising that *The Concept of Law* has not been perceived in Anglophone countries, at least by the majority of its academic readers, as an exercise in the philosophy of language, but on the Continent legal theorists seem to have no doubt of Wittgenstein's influence in Hart's work. This

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<sup>27</sup> There is no English translation of the book available. Cámara, I.S., *Derecho y Lenguaje* (Coruna, Universidade de Coruna, 1996). Since official translation of Cámara's work is available, there will be few quotations of his work provided in this thesis. Where quotations are provided, please note that they have been translated by me and the reference will direct the reader to the original material, written in Spanish.

<sup>28</sup> *Ibid*, 49.

intriguing fact alone merits some investigation, indeed demands it - since Cámara does not put forward a reason for believing that Wittgenstein was one of Hart's biggest inspirations. Throughout his book, Cámara simply takes for granted that the reader knows this connection to be an indisputable fact. Furthermore, Cámara reads the same words in *The Concept of Law* in an entirely different light to the majority of Anglo-American legal theorists. A key example of this is his reading of Hart's statement of law as the union of primary and secondary rules. According to many who take Hart to be 'just' a rule theorist, this is just one example of how Hart believed law to be merely a "system of rules". However, Cámara's understanding of Hart's "system of rules" is that it simply followed Wittgenstein's conception of rules, and so Hart sees rules as either custom or an institution<sup>29</sup>. Cámara might have been the only one to publish a book on this matter, but there are other legal philosophers who have published articles on the subject<sup>30</sup>. A further two Spanish theorists who have published relevant literature are Pablo Navarro and Hernan Bouvier<sup>31</sup>. These two authors focus their attention on the rule-following considerations in *The Concept of Law*. However, it is interesting to note that they also take for granted that Wittgenstein was one of the main influences in *The Concept of Law*. They write,

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<sup>29</sup> Cámara (n 27) 36.

<sup>30</sup> J.M.Rodríguez Paniagua, "La filosofía lingüística y la teoría del derecho analítica: H.L.A. Hart", José Antonio Ramos Pascua, *La teoría del reconocimiento en la teoría jurídica de H.L.A. Hart*.

<sup>31</sup> Navarro, P. and Bouvier, H. "Controversias jurídicas y seguimiento de reglas".

Wittgenstein's thoughts on the existence and nature of rules flowed rapidly to legal theory, in the shape of a book, published in 1961, *The Concept of Law* by H.L.A. Hart.<sup>32</sup>

Once again, one thing worth noting about the Spanish literature is that, much like its English equivalent, it makes reference to J.L. Austin but devotes little attention to his influence in *The Concept of Law*. In essence, it is *acknowledged* that he played a vital role in Hart's work, but nothing more is said. Moreover, legal theorists in Spanish speaking countries were not the only ones to think that Hart was influenced by Wittgenstein. Intriguingly, in 1965 Justus Hartnack, a prominent Danish philosopher, wrote that Hart is a disciple of Wittgenstein<sup>33</sup>. Hartnack is credited with introducing Ordinary Language Philosophy to Denmark. He believed that Wittgenstein "holds the key to modern philosophical activity"<sup>34</sup>, and in 1962 he published "Wittgenstein and Modern Philosophy"<sup>35</sup>, which aimed to shed a greater degree of light on Wittgenstein's later philosophy. Hartnack dedicated the last chapter of his book to, in his own words,

hint – but do nothing more than hint – at something I believe to be of great importance, namely that Wittgenstein's later philosophy can throw light on a very wide and diverse range of problems<sup>36</sup>.

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<sup>32</sup> Ibid, 8.

<sup>33</sup> Hartnack, J. *Wittgenstein and Modern Philosophy* (London: Butler & Tanner, 1965), 112.

<sup>34</sup> Ibid, 112.

<sup>35</sup> Ibid, 112.

<sup>36</sup> Hartnack (n 33) 113.

He holds that Herbert Hart's article "The Ascription of Responsibilities and Rights"<sup>37</sup> is demonstrative of the application of Wittgenstein's philosophy to the area of Law. Not only is this chapter a good addition to the thesis since it provides an overview of the key aspects of *The Concept of Law* from legal theorists who did not study at Oxford<sup>38</sup>, but it also provides an opportunity to further explain and explore the theory of J.L. Austin. Whereas in other chapters, namely Chapters Four, Five and Six, on the work of Bix, Marmor and Stavropoulos respectively, the focus was on the work of Wittgenstein (particularly due to the fact that it is argued that their understanding of Wittgenstein's later philosophy is flawed) and there is little opportunity for discussion of J.L. Austin's work, this chapter will provide us with the scope to fully argue for an understanding of J.L. Austin's philosophy. In this chapter it is argued that the legal theorists understood the theory of Wittgenstein, and applied it correctly, but the absence of J.L. Austin's way of doing philosophy was still notable. This chapter therefore reinforces the view that even when Wittgenstein's philosophy is understood correctly, its analysis alone is not enough to shed light on *The Concept of Law*. The chapter highlights and puts a strong case forward for the understanding of Hart's work in a holistic way, taking into account not only Wittgenstein's philosophy but also J.L. Austin's way of doing philosophy.

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<sup>37</sup> HLA Hart, 'XI.—The Ascription of Responsibility and Rights' (1949) 49 Proceedings of the Aristotelian Society 171.

<sup>38</sup> It is interesting that all other legal theorists whose work is discussed in this thesis were students at the University of Oxford during the same decade. This will be discussed further in the next chapter of this thesis, chapter two.

The final section of this thesis, Section C, comprising just Chapter Nine, provides a short conclusion in which I aim to summarise and consolidate the argument put forward throughout Section B, by providing the reader with a concise review of the ground covered. It will also offer several comments on the possible ways in which the research offered in this thesis connects to other research in the field, and the extent to which it might prompt, and serve as a platform for, future research. But it is to the very beginning, and the initial reception of *The Concept of Law*, that we must now turn.

# The Case for Ordinary Language Philosophy

Section A

Chapter Two

“In *The Concept of Law* we find the influence of Oxford “linguistic” philosophers.”<sup>1</sup>

*Robert Summers, 1963*

“For all that, what is most striking is how *little* linguistic analysis there is in *The Concept of Law*.”<sup>2</sup>

*Leslie Green, 2012*

Most theorists to have expressed a view agree that Herbert Hart changed the face of Anglo-American jurisprudence with the publication of *The Concept of Law*. On publication he received praise from all over the world for the production of a masterpiece at a time which had witnessed the level of interest in jurisprudence gradually wane<sup>3</sup>. For many, *The Concept of Law* marked an exciting new dawn in the history of jurisprudence. Among those to have praised *The Concept of Law* recently are Brian Simpson in *Reflections on The Concept of Law* who says of *The Concept of Law* that, “it has to be conceded that this book is the most successful work of

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<sup>1</sup> Robert S Summers, ‘Professor H. L. A. Hart’s “Concept of Law”’ (1963) 1963 Duke Law Journal 629.

<sup>2</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012).

<sup>3</sup> On this issue, Nicola Lacey writes: “In the decades preceding Herbert’s election to the Oxford Chair, the jurisprudence taught in Britain tended to consist in a rather dry offshoot of technical legal analysis: writers picked apart, with minute attention to detail, legal concepts such as ownership, possession, or the corporation. No attempt was made either to link this analysis to any broader idea of the nature of law, or to consider how technical legal concepts assisted law to serve its various social functions. Questions about what purposes law *ought* to pursue were confined to the realm of moral and political philosophy, the latter itself a relatively arid field at the time.” Nicola Lacey, *A life of H. L. A. Hart: The nightmare and the Noble Dream* (Oxford University Press, USA 2006) 224-5.

jurisprudence ever to appear in the common law world”<sup>4</sup>; Jules Coleman, in *Hart’s Postscript: Essays on the Postscript to The Concept of Law*<sup>5</sup>, who writes that, “H.L.A Hart’s *The Concept of Law* is the most important and influential book in the legal positivist tradition”<sup>6</sup>; and Nicola Lacey, in *A Life of H.L.A. Hart – The Nightmare and the Noble Dream*<sup>7</sup>, who states that *The Concept of Law*, “has had a distinctive impact on the development of the judicial culture in Britain and beyond”<sup>8</sup>. These comments about Hart’s work reflect those made in the initial book reviews, when *The Concept of Law* was first published. For example, in *Positivism and Fidelity to Law – A reply to Professor Hart*<sup>9</sup>, Professor Lon Fuller remarks that “the issues he discussed will never again quite assume the form they had before being touched by his analytical powers”<sup>10</sup>. Lon Fuller’s prediction of Hart’s lasting impact is confirmed in a multitude of writings since. Thus Brian Bix writes, “H.L.A Hart’s significance comes from the way he moved positivism in a different direction”<sup>11</sup>, whilst B.E. King believes Hart’s work to be “an outstanding contribution to legal theory”<sup>12</sup>. Philosopher Thomas Nagel adds detail, regarding Hart as “the founder of jurisprudence as a field for analytic

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<sup>4</sup> Brian Simpson in *Reflections on The Concept of Law* (New York: Oxford University Press, 2011), 1.

<sup>5</sup> Coleman, J. (ed), *Hart’s Postscript: Essays on the Postscript to The Concept of Law* (New York: Oxford University Press, 2001).

<sup>6</sup> *Ibid*, 1.

<sup>7</sup> Lacey (n 3), 232.

<sup>8</sup> *Ibid*, 232.

<sup>9</sup> Lon L. Fuller, 'Positivism and fidelity to law: A reply to professor Hart' (1958) 71(4) *Harvard Law Review* 630.

<sup>10</sup> *Ibid*, 630.

<sup>11</sup> B. Bix, *Jurisprudence: Theory and Context* (London, Sweet & Maxwell, 2009), 36.

<sup>12</sup> Lacey (n 3) 232.

philosophy (...) he re-created the subject, posed the central questions, and started a great flood of work by others which has not ceased with his death"<sup>13</sup>. Nagel sums *The Concept of Law* as a "superb and accessible book"<sup>14</sup> which embodies Hart's contribution to the field. However, despite all the express respect and admiration for this supposed masterpiece in the field, there were many who regarded Hart as just another rule theorist and a slightly underwhelming expositor of a misconceived formalism about law. Indeed, it should be recognised that *most* legal philosophers who comment on Hart's work portray him as a rather wooden rule theorist, and indicate that Hart's work lacks the sophistication and nuance present in the works of the legal scholars who followed him. A good example can be found in John W. Van Doren's<sup>15</sup> article, "Theories of Professors H.L.A. Hart and Ronald Dworkin – a critique"<sup>16</sup>. He writes:

Hart's legal system postulating that rules are easily found and applied in solving legal problems does not adequately reflect the legal process. His limited analysis overlooks the human spirit which refuses to be bound by rules deemed unfair.<sup>17</sup>

It is common to see Hart's name quoted alongside Kelsen's, not only due to their proximity in time, but also for the similarity of their ideas. Thus: what Hart has done

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<sup>13</sup> N. Thomas, "The Central Questions" *London Review of Books* 27/3 (2005), 4.

<sup>14</sup> *Ibid*, 4.

<sup>15</sup> John W. Van Doren is a Professor of Law in Florida State University. He graduated of Harvard law school, and has his LLB from Yale Law School.

<sup>16</sup> J.W.Van Doren, *Theories of Professors H.L.A.Hart and Ronald Dworkin – a critique* (1980) 29 Clev St. L. Rev 219.

<sup>17</sup> Doren (n 16) 287.

for Anglo-American jurisprudence, Kelsen did for the Continent<sup>18</sup>. Hart was not enthusiastic about the connection, however. Brian Simpson, when commenting on Hart's response to Bodenheimer<sup>19</sup>, remarked:

There is a passage emphasizing the importance of identifying the varied ways in which legal rules function in a legal system and the manner in which this is reflected in language. But the only earlier writers whose work is discussed in any detail whatever are Hohfeld and Kelsen. Both receive pats in on the back for their contributions to jurisprudence, but Hart is at pains to differentiate his theory from that of Kelsen.<sup>20</sup>

This thesis will stand against the conventional, rather simplistic, view of Hart as rule theorist (regardless of whether contemporaries such as Kelsen could be so described). It is undeniable that the theory of rules plays an important role in Hart's work; throughout *The Concept of Law* Hart explores the nature of social rules and the role they play in our legal system. So, it should be clarified that the objection to the view of Hart as a rule theorist pertains to the way this term has been used in the wider literature on Hart. There could be no objections to referring to Hart as a rule theorist if legal philosophers simply meant by this that rules play a vital role in Hart's theory.

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<sup>18</sup> Simpson (n 4) 96.

<sup>19</sup> Simpson (n 4) 96. Brian Simpson is referring to the article "Analytical Jurisprudence in Mid-twentieth century: A reply to professor Bodenheimer", published in 1957. Of this he says that it "is the closest he ever came to publishing a prolegomenon to his analysis of *The Concept of Law*, and a legal system". He claims that this article sets out some features that play a vital role in *The Concept of Law*, such as the limitations of the definition *per genus et differentiam*.

<sup>20</sup> Simpson (n 4), where Brian Simpson writes "The one concept which he (Hart) did add to the canon was what he called a rule, in Kelsen's theory a similar notion appears as a norm".

However, it is my claim that legal theorists who label Hart as a “rule theorist” attach to this label negative connotations, as exemplified by Doren’s quotation above. Another good example can be found in Raymond Wacks’ “Very Short Introduction to Philosophy of Law”<sup>21</sup>, when he writes that:

The nucleus of Hart’s theory is the existence of fundamental rules accepted by officials as stipulating procedures by which the law is enacted. The most important of these he calls the rule of recognition which is the fundamental constitutional rule of a legal system, acknowledged by those officials who administer the law as specifying the conditions of criteria for validity which certify whether or not a rule is indeed a rule.

Legal theorists who refer to Hart as a “rule theorist”, much like Wacks, tend to focus solely on Hart’s distinction between primary and secondary rules, and the rule of recognition, ignoring the wider insights and philosophical nuances present in his work. Given the belittling way in which the term ‘rule theorist’ has been used in the literature, for clarity let’s avoid it altogether. In this way the thesis runs against jurisprudential orthodoxy, for as has already been recognised, this is a common view amongst legal theorists. So Section B, rather than focussing principally on the works of legal academics who, in the same vein as John Van Doren, regard Hart merely as an adherent of rule theory (on which position I expand in later chapters), I will place my analytic focus on the few works that have been published regarding Hart’s *The Concept of Law* as a work in the philosophy of language, and Ordinary Language

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<sup>21</sup> R. Wacks, “Philosophy of Law: A Very Short Introduction” (New York: Oxford University Press, 2006), 28.

Philosophy in particular. It is therefore important to first clarify Hart's involvement Ordinary Language Philosophy, and its potential relevance to how *The Concept of Law* can be understood.

### **Hart and Ordinary Language Philosophy**

*The Concept of Law* was published during a time of great excitement not only for law, but also for philosophy. Halfway through the twentieth century a new approach to philosophy had emerged. This approach claimed that much of the philosophical debate that had come before had been fruitless, and instead offered a new and fresh approach<sup>22</sup> that came to be known as Ordinary Language Philosophy. Ordinary Language Philosophy, also sometimes called Oxford Philosophy, is a philosophical movement that avers that most philosophical problems can be solved by looking at the everyday *use* of words; that is, by looking at the ordinary ways in which we do things with words<sup>23</sup>. Ordinary Language Philosophy came as a late phase in the history of analytical tradition, and differed from previous analytical approaches since it claimed that you did not have to apply formal logic; for Ordinary Language Philosophy philosophers ordinary language is the base, and everyone has this knowledge base just by virtue of being a speaker of the language. Ordinary Language Philosophy holds the view that words and sentences are meaningful by the ways in which they are put to use. Interestingly, and even though we used the word "movement" above, it is not clear whether Ordinary Language Philosophy

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<sup>22</sup> A. Baz, *When words are called for: A Defense of Ordinary Language Philosophy* (Cambridge: Harvard University Press, 2012), 5.

<sup>23</sup> R. Audi (ed), *The Cambridge Dictionary of Philosophy* (Cambridge: Cambridge University Press, 2<sup>nd</sup> Ed, 1999), 634.

philosophers would consider themselves to be a coherent group of philosophers<sup>24</sup>. In 1953, Ryle published an article on Oxford Philosophy where he stated that there was much misconception about what Ordinary Language Philosophy stood for<sup>25</sup>. As mentioned in the introductory chapter, Wittgenstein was seen as the leading Ordinary Language Philosophy philosopher at Cambridge University, with J. L. Austin and Gilbert Ryle heading the movement at Oxford University. However, one question that is often asked, and has yet to be answered, is where Ordinary Language Philosophy started and who was its founding father. Weitz, writing in 1953 at the height of the Ordinary Language Philosophy movement in Oxford, remarks that the extent to which Wittgenstein was influential, and influenced, Oxford Philosophers is questionable. According to Weitz, some philosophers claimed that Oxford Philosophy developed quite independently from Wittgenstein until after the war, and others claim that Wittgenstein was heavily influential<sup>26</sup>. Irrespective of whether or not Wittgenstein was

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<sup>24</sup> Morris Weitz, who spent a year in Oxford trying to understand Ordinary Language Philosophy, claims that Ryle himself would have been against the use of the term “movement”. Morris Weitz, ‘Oxford Philosophy’ (1953) 62 *The Philosophical Review* 187.

<sup>25</sup> Gilbert Ryle, ‘Ordinary Language’ (1953) 62 *The Philosophical Review* 167. Ryle starts by clarifying what is meant by the term “ordinary”, which he claims is potentially misleading. According to Ryle, ordinary is not used as a contrast to extraordinary, but rather has a contrast to “formal” and “logic”.

<sup>26</sup> Weitz (n 23) 189. It is important to note that, as mentioned, Wittgenstein led the Ordinary Language Philosophy “movement” at Cambridge, and J. L. Austin and Ryle were its biggest instigators at Oxford. According to Julia Tanney, Ryle was part of the Ordinary Language Philosophy School from the beginning, and his contributions to this area of philosophy date as back as 1932, but still some of his work is now attributed to Wittgenstein. Tanney discredits Wittgenstein as the founder of Ordinary Language Philosophy, and claims that Ryle was already publishing in this area before Wittgenstein’s return to philosophy. Julia Tanney, Professor of Philosophy at the University of Kent, participated in a BBC programme on

the “father” of Ordinary Language Philosophy, what Weitz claims is indisputable is the recognition of J. L. Austin’s unique contribution to this area of philosophy, namely through his striking way of doing philosophy<sup>27</sup>. As an aside, it is important to note that even though J. L. Austin and Wittgenstein’s approach was broadly similar, their way of doing philosophy was very distinct. The importance of the difference in approach, and the way in which the approach of these two philosophers varied, will be discussed in depth in the chapters to follow.

In Oxford, Ordinary Language Philosophy was promoted in J.L. Austin’s famous Saturday morning meetings<sup>28</sup>, which were held at the university. These meetings have

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“Ordinary Language Philosophy” alongside Stephen Mulhall (Fellow and Tutor in Philosophy at New College, Oxford) and Ray Monk (Philosophy Professor at the University of Southampton) where she expressed these views. BBC, ‘Ordinary Language Philosophy, in Our Time - BBC Radio 4’ (BBC, 7 November 2013) <<http://www.bbc.co.uk/programmes/b03ggc19#in=collection:p01f0vzr>> accessed 24 January 2016.

<sup>27</sup> Weitz (n 23) 189.

<sup>28</sup> J.L. Austin’s Saturday morning meetings have been the subject of much discussion. Geoffrey Warnock gives an account of these sessions in his article titled “Saturday Mornings”, published as part of a collection of essays on J.L. Austin. See I. Berlin et al, *Essays on J.L. Austin* (Oxford: Clarendon Series, 1973) 31. See also, Richard Sørli, *The Philosophy of J. L. Austin* (Martin / Gustafsson and Richard Sorli eds, Oxford University Press 2011) 11; Mary Warnock, *A Memoir: People and Places* (Duckworth, Gerald & Company 2002) 17. Interestingly, in an interview with David Sugarman, Hart mentions the Saturday Morning meetings and credits them with helping him settle in when he first arrived at Oxford. According to Hart he had “tremendous cold feet” and attending these meetings made him more certain of his decision to return to academia. Sugarman, D. “Hart Interviewed: H.L.A. Hart in conversation with David Sugarman” *Journal of Law and Society* 32/2 (2005), 274. A recording of this interview is also available online Oxford Academic (Oxford University Press), ‘H.L.A. Hart Interview Part One: Childhood and Early Career (audio)’

been widely publicised, with Brian Simpson describing them as the “home of Oxford linguistic philosophical analysis”<sup>29</sup>. Interestingly, they were not restricted geographically to Oxford, with George Pitcher once recalling that during a visit to Harvard “Austin conducted a series of his famous ‘Saturday Mornings’”<sup>30</sup>. Whatever the location, the purpose of these seminars led by J.L. Austin was always the same: a group of philosophers would meet to discuss longstanding philosophical issues. Geoffrey Warnock famously said that “the object was to reach consensus, if possible, because if a “dozen professional arguers” could reach agreement on something it stood a good chance of being right”<sup>31</sup>. Both in Oxford and Harvard not only did J.L. Austin lead these meetings but they were also arranged by him, and attendance was solely at his express invitation<sup>32</sup>. Amongst the attendees were George Paul, Jim Urmsen, Tony Woozley, Richard Hare, Peter Strawson, Mary and Geoffrey Warnock, Philippa Foot, Tony Honoré, Friedrich Waissmann, and, of course, Herbert Hart<sup>33</sup>. Hart

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<<https://www.youtube.com/watch?v=xgigb36aC7Y&list=PL3MAPgqN8JWiLdUqgmrQMzhao6b-RrS49>> accessed 10 January 2016.

<sup>29</sup> Simpson (n 4) 49.

<sup>30</sup> I. Berlin et al, *Essays on J.L. Austin* (Oxford: Clarendon Series, 1973), 21. George Pitcher recalls that the Saturday Morning sessions in Harvard had the same format as those in Oxford, with Austin inviting his colleagues (and a couple of graduate students) to discuss a topic during that term. The topic discussed in Harvard was sense-data. Once again, not much insight is given into this Saturday Morning Meetings since, akin to those in Oxford, no one felt the need to take notes or even a sketch of what happened at those meetings.

<sup>31</sup> Gustaffson and Sorli (n 27) 96.

<sup>32</sup> Lacey (n 3), 31. See also Warnock (n 27) 17. Mary Warnock recalls: “The dominant figures were Gilbert Ryle and J.L. Austin, who held an informal meeting every Saturday morning for invited members of the faculty, all of them younger than he, and all of them full-time teaching fellows. It was some time before women were admitted to this meeting...”

<sup>33</sup> Lacey (n 3) 45

was very much involved with the new philosophical approach being developed at Oxford, and was regarded as part of the group. Not surprisingly, it has been speculated that parts of Hart's *The Concept of Law* might have developed through the course of these meetings, for the meetings often explored rules, a theme which is prominent in Hart's book. Indeed, in an interview with David Sugarman, Hart mentioned J.L. Austin's Saturday morning seminars, and remarked that Austin had a "direct effect on his jurisprudence"<sup>34</sup>.

In addition to their discussions during the Saturday morning meetings, Hart and J.L. Austin ran a series of philosophy seminars together on "Excuses" in the 1950s<sup>35</sup>. These two prominent philosophers joined forces to conduct a seminar that in many ways was linked as much to philosophy as to law. The seminars were intended to serve as a forum for exploration of the concept of human action, about the differences between "doing something deliberately, intentionally and on purpose, doing something recklessly, heedlessly, and thoughtlessly, doing something absent-minded, inadvertently and unwittingly – and so on and on"<sup>36</sup>. J.L. Austin continued to run this seminar without Hart after the latter was appointed to the Chair of

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<sup>34</sup> Sugarman (n 27) 274. During this interview, Hart acknowledged that the discussions on rules and how rules were used was highly influential and spurred him to write *The Concept of Law*. Moreover, Hart himself ran a weekly seminar with staff and students where these issues and their relation to law were often discussed.

<sup>35</sup> K.T.Fann (eds), *Symposium on J.L.Austin* (London: Routledge & Kegan Paul, 1969), p.37 where Stuart Hampshire talks about J.L. Austin's work with Hart. He writes: "Austin begun this kind of investigation in a class with Professor Hart in 1948, concentrating on legal concepts associated with action and responsibility. He had found a rich vein of "facts" in the legal statements".

<sup>36</sup> Berlin et al (n 27) 19.

Jurisprudence at Oxford. According to Pitcher, a great many of J.L. Austin's examples in this seminar derived from his discussions with Hart. Indeed, Pitcher went as far as to argue that "Hart must have strongly influenced Austin's views about the meaning of many excuses-terms"<sup>37</sup>.

Ordinary Language Philosophy thrived in the 1940s, and would come to dominate philosophy at Oxford for decades to come<sup>38</sup>. Together the prominent members of the group, Gilbert Ryle, Geoffrey and Mary Warnock, John Wisdom, Peter Strawson, and H. L. A. Hart, all professed the importance of Ordinary Language Philosophy, and all went on to produce work accredited as significant, and even ground-breaking, in their respective fields<sup>39</sup>. With the publication of *The Concept of Mind*<sup>40</sup>, Gilbert Ryle's contribution included a challenge to mind/body duality, a view

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<sup>37</sup> Berlin et al (n 27) 20.

<sup>38</sup> Despite the interest and reach of Ordinary Language Philosophy, Summers notes that some used the term "linguistic philosophers" pejoratively. Summers writes, "There are those who think less of "linguistic philosophy." Thus, one writer has recently warned of the possibility that "the sharp outlines of American thought are being gradually eroded into more pleasing shapes by the gentle yet persistent flow of 'ordinary' language across the Atlantic. Erosion being what it is, we may all sink into the sea together." Peterson, Book Review, 12 THE PHIL. Q. 377 (1962)." Summers, R.S. "Professor H.L.A. Hart's *Concept of Law*" *Duke Law Journal* (1963), 662.

<sup>39</sup> Interestingly Avner Baz argues that Ordinary Language Philosophy is better justified and understood when applied to different areas of philosophy. He writes: "Ordinary Language Philosophy's approach, as I understand it, is better justified by the philosophical fruits it yields when applied to particular areas of philosophical difficulty than by any set of general arguments." Baz (n 21) 5.

<sup>40</sup> G. Ryle, *The Concept of Mind* (New York: Routledge, 2009). Gilbert Ryle was one of the leading figures in Ordinary Language Philosophy. We will provide a further insight into his philosophy and potential areas of overlap with Hart's own *Concept* later on.

previously championed by Descartes, and having a place as a ruling metaphysic of the last three hundred years. John Wisdom, having been a student of Wittgenstein's at Cambridge, was an adherent of his Professor's later philosophy. He is regarded as an Ordinary Language Philosopher, having extended the work of G.E. Moore, Wittgenstein and Freud<sup>41</sup> in the direction mapped by J.L. Austin in his meetings. Peter Strawson is credited with being largely responsible for establishing metaphysics as a worthwhile direction in the field of analytic philosophy<sup>42</sup>. It is worth noting that Strawson was one of the few people whom Hart thanked in *The Concept of Law*, for reading his work prior to publication, and providing him with his advice and criticism<sup>43</sup>. Finally, H. L. A. Hart himself published *The Concept of Law*, a book on legal rules that was received by most in the academic community as Hart's striking re-conception and updating of Legal Positivism. Yet Hart's contribution to philosophy, through the publication of *The Concept of Law*, seems minor when compared to the achievements of those other philosophers who attended the Saturday Morning Meetings. Granted, Hart's book is a book about law, but even then it is seen to add little to the *philosophy* of law. After all, and despite his rich philosophical background, Hart's contribution was a book on rules. This perceived lack of philosophical sophistication in *The Concept of Law* is particularly odd considering what Ryle said of Hart in his reference as supplied in support of Hart's application to the Chair of Jurisprudence in Oxford, where Ryle

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<sup>41</sup> I Dilman, Obituary: John Wisdom, *Philosophical Investigations* (1994) 17, 471.

<sup>42</sup> Audi (n 22) 634.

<sup>43</sup> Hart (n 2) vii. Dr Rupert Cross and Peter Strawson were the only two people Hart thanked for reading *The Concept of Law* prior to publication. Sir Rupert Cross was a prominent English lawyer and academic. It is important to note that Hart asked both a philosopher and a lawyer to cast their eyes over *The Concept of Law* prior to its publication.

begins by noting that the field of philosophy of law had been quiet for some time, and almost nothing of interest to philosophers had been produced for many years<sup>44</sup>. Ryle's recommendation letter then speaks warmly of Hart's interest in philosophical issues connected to law, and since Ryle was a devoted practitioner of Ordinary Language Philosophy we can only assume that he was referring to Hart's work in this area. Ryle went on to recommend Hart for the Chair of Jurisprudence at Oxford both for his philosophical background, and for his potential to produce something interesting for philosophers and lawyers alike. But to many commentators the disappointing result appeared to be that Hart produced a book merely modernizing the idea of law as a system of rules; feted, yes, but still just a version of legal positivism for all that<sup>45</sup>. Hart's

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<sup>44</sup> Lacey (n 3), Ryle wrote: "There is a general point on which I must explain my opinion. The philosophy of law is, in this country, in the doldrums. With one or two exceptions hardly anything of interest to philosophers has been produced here for a very long time. The subject has advanced in Germany, Scandinavia and the United States – but not very much, noticeably. We are not helping it to advance. My chief concern is for the subject of philosophy itself."

<sup>45</sup> See B. E. King, 'The basic concept of professor Hart's jurisprudence' (1963) 21(O2) The Cambridge Law Journal 270, 270 where King writes: "If Professor Hart now reveals himself as conceptual pragmatist as well as linguistic philosopher the writer's gratitude to Professor Hart in the latter capacity is only tinged with regret that he does not display greater boldness in the former. Despite his claim to have contributed "an essay in descriptive sociology", it is clear that jurisprudence remains for him under the theoretical umbrellas of logic and philosophy rather than those of "the still young sciences of psychology and sociology" in which a general theory of action is being developed." See also L.J. Cohen, 'Critical Notices: The Concept of Law' [1961] Mind 395, where Jonathan Cohen writes: "Hart's thesis is that the difference between rules which impose obligations or duties, and rules which confer powers, is of crucial importance in jurisprudence. Rules of the former kind he calls primary, and of the latter kind, he calls secondary. (...) Hart claims that law can be best understood as a union of these two types of rule. (...) Unfortunately, however, the large claims that Hart makes on behalf of his

product was therefore surprising and deflating, yet little sustained work has been undertaken to investigate whether the popular reception of Hart's book has it right. Specifically, few have tried to understand to what extent philosophy of language influenced *The Concept of Law*. Fewer still have attempted to detail the extent to which Ordinary Language Philosophy runs through *The Concept of Law* or to deliberate the status of Hart's book as an exemplar of Ordinary Language Philosophy itself.

Interestingly, this lack of interest in the philosophy of language present in *The Concept of Law* seems to stem from its early reception. Upon its publication, though many writers acknowledged Hart's affiliation with Ordinary Language Philosophy, not many book reviews mention Hart's use of Ordinary Language Philosophy<sup>46</sup>. This is particularly surprising in Jonathan Cohen's highly critical review of *The Concept of Law* for the philosophy-based academic journal *Mind*, where no mention is made of Hart's employment of Ordinary Language Philosophy<sup>47</sup>. There are however some who have

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distinction between primary and secondary rules do not seem altogether justifiable. The distinction seems to be scarcely able of playing the role for which Hart casts it."

<sup>46</sup> For early book reviews of *The Concept of Law* please see Morris Ginsberg and HLA Hart, 'The Concept of law' (1962) 13 *The British Journal of Sociology* 64; BE King, 'The Basic Concept of Professor Hart's Jurisprudence' (1963) 21 *The Cambridge Law Journal* 270; LJ Cohen, 'Critical Notices: *The Concept of law*' [1961] *Mind*; Herbert Morris, 'The Concept of law' (1962) 75 *Harvard Law Review* 1452; Alf Ross, 'The Concept of law' (1962) 71 *The Yale Law Journal* 1185.

<sup>47</sup> Cohen is highly critical of Hart's distinction between primary and secondary rules and addresses this issue at length in his book review. To sum up, Cohen writes: "In short, it is not at all clear how anyone could successfully defend Hart's claim to have found the key to the science of jurisprudence in his distinction between primary and secondary rules." Cohen (n 45) 410. In the last paragraph of his book review he acknowledges that Hart made other impressive remarks, but these were not covered by his review. Nonetheless, he still writes of

approached the influence of Ludwig Wittgenstein's *Philosophical Investigations*<sup>48</sup> in *The Concept of Law* with sophistication and philosophical nous. The legal theorists who rightly advocate the connection have done so in short papers or essays. Perhaps the first person to document his analysis of this connection was Robert Summers who, according to Nicola Lacey<sup>49</sup>, became a close friend of Hart. The connection between Hart and "linguistic" philosophy was made clear in his review of *The Concept of Law* published in 1963 in the *Duke Law Review*<sup>50</sup>, with Summers writing that:

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Hart's book that it "made a considerable number of profoundly important contributions to the philosophy of law". Cohen (n 45) 412.

<sup>48</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967).

<sup>49</sup> Lacey (n 3) 165. Nicola Lacey writes: "Another significant but initially less likely friendship was with Bob Summers, later a well-known American legal theorist and Professor at Cornell. (...) Herbert seems almost to have regarded Summers as a surrogate intellectual son: he later organized sabbaticals for him at Oxford and showered both him and his family with kindness"

<sup>50</sup> Summers (n 37) 629-670. Summers' comprehensive review was considerably longer than many others. Summers' review provided an in-depth, and well considered, analysis of Hart's *The Concept of Law*. In section VI of his review, entitled "Professor Hart's Methods of Analysis", Summers notes that, perhaps due to his philosophical background, Hart uses the same methods of analysis that can be found in the work of many of his philosophy colleagues. He remarks: "Although some scholars have noted this similarity of method, no one has heretofore attempted to explain the methodological ideas, techniques and distinctions involved (...) Since these methods have not gained currency in field of legal philosophy, their importance may not yet be widely understood amongst legal philosophers". Summers (n 49) 661. It is remarkable how fifty-five years latter legal philosophers are still grappling with these same issues. As an aside, it is interesting to note that Summers praised Hart for "unlike many of his philosopher colleagues at Oxford", he published his views. This remark might have been directed at his fellow linguist philosophers, many of which, like Austin, were not driven to publish their work. Summers (n 37) 670.

In *The Concept of Law* we find the influence of Oxford “linguistic” philosophers. Professor Hart not only puts to good use some of their characteristic techniques of analysis, but also stresses the importance of rules in social life.<sup>51</sup>

For Summers, it was clear that Hart was influenced by the linguistic philosophy movement at Oxford, and that proof of this influence is to be found in his analysis of the legal system. In the last section of his article entitled, “Professor Hart’s method of analysis”, he describes Hart’s methods which, he says, “no doubt account in part for the high quality of his work”<sup>52</sup>. According to Summers, only by understanding Hart’s philosophical background and methodology, could one properly and effectively study Professor Hart’s work<sup>53</sup>. In 1999, Anthony Sebok published an article entitled “Finding Wittgenstein at the Core of the Rule of Recognition”<sup>54</sup>, where he comments on the extent to which Hart’s notion of rule following was directly influenced by

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<sup>51</sup> Summers (n 37) 631.

<sup>52</sup> Summers (n 37) 629.

<sup>53</sup> Summers (n 37) 662. Summer writes: “... an understanding of several of these methodological notions is valuable background for those who wish to study Professor Hart’s work.” Later, in another article about Hart’s work, he writes: “The intrinsic quality of the book is, of course, a major factor accounting for its extraordinary reception. This quality is informed by Hart’s methodology. Hart and I, and others, have written extensively on this methodology elsewhere. I will only observe here that Hart was a professional lawyer and a professional philosopher, and brought the sophistication and techniques of both fields to bear. It may also be noted that he was a personal friend and collaborator of the influential Oxford philosopher John Langshaw Austin.” Robert Summers, 'H.L.A. Hart’s *The Concept of Law*: Estimations, Reflections and a Personal Memoir' (1995) 45 *Journal of Legal Education* 587–596

<sup>54</sup> Sebok, A. “Finding Wittgenstein at the Core of the Rule of Recognition”, *S.M.U.L. Review* (1999), 75-109.

Wittgenstein's later philosophy. Sebok was not writing about *The Concept of Law*, but rather on what has become widely known as the Hart-Fuller debate. Hart's Holmes Lecture at the Harvard Law School in 1957, later published in the Harvard Law Review, entitled "Positivism and the Separation of Law and Morals"<sup>55</sup>, marked the beginning of this famous debate. My work is dedicated to *The Concept of Law*, and the focus of the thesis is on the literature concerning this work directly. However, it cannot be ignored that the Holmes Lecture introduced the notion of "core" and "penumbra" of concepts which was later developed in *The Concept of Law*. Sebok's article is an important addition to this area of Jurisprudence, and it offers a new perspective on the famous debate. In particular, he comments on the issue of Easy and Hard cases, professing that:

One might be tempted to think that what made a "core" or "plain" case "easy" was that it more clearly fit into the coherent scheme of the legal system's values than a "hard" case, so judgment between available options just seemed automatic. But Hart clearly rejected that approach in *The Concept of Law*, stating that the only difference between a core and penumbral case is that the former is "familiar" and had been learned as a result of recurring experience.<sup>56</sup>

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<sup>55</sup> Hart, H.L.A. "Positivism and the Separation of Law and Morals" (1958) 71(4) Harvard Law Review, 593-629.

<sup>56</sup> Sebok (n 53) 91.

It will be recalled that Andrei Marmor's work focuses on the same issue of "easy" and "hard" cases, and it is very interesting to see how their views on the issue differ. Andrei Marmor says of the difference between "easy" and "hard" cases that:

Legal positivism is committed to the thesis that a distinction exists between (so-called) 'easy cases', where the law can be simply understood and applied straightforwardly, and 'hard cases', where the issue is not determined by existing legal standards.<sup>57</sup>

Sebok and Marmor's divergence of opinion, which will become clearer throughout the analysis of Marmor's work, stems from their different understanding of the work of Wittgenstein. Indeed, it will be argued that it is Marmor's misunderstanding of Wittgenstein's work that leads him to a different conclusion to that of Sebok. This will be approached in full in Chapter 5. As an aside, on the matter of the Hart-Fuller debate, it is interesting to note that of the seven articles published in the New York University Law Review for the Symposium marking 50 years since it took place<sup>58</sup>, not

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<sup>57</sup> Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing (UK) 2005), 95.

<sup>58</sup> To mark the fifty-year anniversary of the Hart-Fuller debate, Jeremy Waldron and Benjamin Zipursky organized a conference in New York where leading Hart scholars re-addressed the issues raised at the famous debate. The NYU Website writes about the conference, "The conference addressed the substance of the debate, of course, in a series of papers of extraordinary depth and sophistication. But they also repeated aspects of the mood and tempo of the original confrontation, building from cool analysis to a crescendo a insistent feeling in Waldron's final remarks. On Friday, the conference heard from Leslie Green, professor of philosophy of law at Oxford University; Jules L. Coleman, Wesley Newcomb Hohfeld Professor of Jurisprudence and professor of philosophy at Yale Law School; Liam Murphy, professor of philosophy and professor of law at New York University; Frederick Schauer, Frank Stanton Professor of the First Amendment at the Kennedy School at Harvard

one of the contributors approached Hart's work in a manner similar to that of Sebok's. A good example of this is the article by Leslie Green<sup>59</sup> in which he argues that Hart's objective was to promote a slogan: 'Positivism is about the separation of law and morals'. Of this he writes,

The victory of Hart's lecture in promoting this slogan was virtually total.

People who know nothing else about jurisprudence know that legal positivists are those who maintain the separability of law and morality.<sup>60</sup>

Sebok's ambition is to see past the "slogan" and elaborate on what Hart's discussion was about at a deeper level, as well as to provide a number of useful and enlightening insights on the issue.

Another legal philosopher who has published in this area is Alexandre Lefebvre<sup>61</sup>. His work, "Law and the Ordinary: Hart, Wittgenstein, Jurisprudence"<sup>62</sup> is a

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University; and Zipursky. They focused, for the most part, as Coleman put it, on "the philosophically interesting relationships between law and morality." New York, 'NYU conference celebrates 50th anniversary of Hart-Fuller debate' (2016) <[http://www.law.nyu.edu/news/hart\\_fuller\\_debate](http://www.law.nyu.edu/news/hart_fuller_debate)> accessed 13 March 2016 Following the conference, the New York University Law Review published a special edition containing all eight contributions.

<sup>59</sup> Green, L. "Positivism and the Inseparability of Law and Morals" (2008) 83 *New York Law Review*, 1035-1058. More recently, Green re-iterates his view of Hart's interpretation of Law and Morals in his article, *The Morality in Law*, published as part of Luis Duarte d'Almeida, James R. Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's 'the concept of law'* (Hart Publishing 2013) 177-207.

<sup>60</sup> Ibid, 1037.

<sup>61</sup> Alexandre Lefebvre is a lecturer in the School of Philosophical & Historical Inquiry (SOPHI) and the School of Social & Political Sciences (SSPS) in the University of Sydney.

<sup>62</sup> Lefebvre, A., "Law and the Ordinary" (2011) 154 *Telos*.

short piece that analyses how *The Concept of Law* embraces Wittgenstein's philosophy on a more holistic level. As Lefebvre points out, and has been mentioned earlier in this work, the commentaries on Hart and Wittgenstein have mainly been focused on the issues of rule-following and open-texture in law<sup>63</sup>. Lefebvre intended to demonstrate how,

Hart's vision of jurisprudence, as found in chapter one of *The Concept of Law*, is a powerful adaptation of the relationship between ordinary and metaphysical language. In other words, I argue that Hart's conception of jurisprudence is representative of Wittgenstein's conception of philosophy.<sup>64</sup>

As the author points out, his focus is uncharted territory, and this is precisely why his article proves to be of importance for this thesis. It is the purpose of this work to understand the philosophical influences in *The Concept of Law*, and Wittgenstein's influence can be traced *throughout* Hart's *The Concept of Law* and is not limited to his commentary on rule-following and open-texture. However, it is important to note that Lefebvre is not interested in whether or not J.L. Austin's philosophy also played a part in Hart's *The Concept of Law* and, apart from a minor reference, there is no mention of his philosophy and how it might have impacted on Hart's thoughts. This should not be taken as a criticism of Lefebvre's work, since his enterprise sought to demonstrate the connection between Hart and Wittgenstein, but it is nevertheless an intriguing omission worthy of mention. This also raises the question of how influential

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<sup>63</sup> Ibid, 100-101 where he says: "To date, commentary on Hart's debt to Wittgenstein has almost exclusively focused on the question of rule-following and the open-texture of law".

<sup>64</sup> Lefebvre (n 61) 100.

Wittgenstein's work was in *The Concept of Law* once we take into account J.L. Austin's impact. It may prove to be the case that Wittgenstein's contribution was much smaller than hitherto thought as this comparison is developed. Lefebvre can be added to the list of those who have briefly looked for the philosophical influences in *The Concept of Law*, but are apparently not interested in the philosophy of J.L. Austin<sup>65</sup>.

In light of Hart's history, associations and intellectual sympathies it is unsurprisingly then, that, as mentioned in the first chapter, Nicos Stavropoulos claims we have an "intellectual burden" to understand this connection. He writes:

Hart's explicitness regarding the relevance and importance of semantics to the theory of law places upon us an intellectual burden: we should try to work out the precise relation between semantics and legal theory in Hart's thought, and identify the substantive semantic views which drive it.<sup>66</sup>

It remains striking that this burden has been discharged, at best, on a partial and scant basis, particularly in light of the fame of Hart's book and the collection of

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<sup>65</sup> A more recent comment on Hart's *The Concept of Law* can be found in Brian Simpson's work, *Reflections on The Concept of law*, published in 2011. Simpson's merciless account of *The Concept of Law* offers some interesting insights, and perhaps the most useful, for the purposes of this thesis, can be found in Chapter 4 where he traces "The elusive sources of Hart's ideas in *The Concept of Law*". Simpson mentions Wittgenstein, Peter Winch and even Max Weber, but surprisingly, nowhere does he mention J.L. Austin. This is of particular interest since, more than once, he refers to J.L. Austin as one of the philosophical figures that had a great impact on Hart's work, but nonetheless he does not feature in this "elusive" list of sources. Simpson (n 4) 89.

<sup>66</sup> Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of law'* (Oxford University Press, USA 2001), 61.

notices that have appeared since its publication that point to the importance of linguistic philosophy in its production. Thus J.L. Austin has been cited by most, if not all, legal theorists as having been a major influence on Hart's ideas. Indeed Hart himself, in the interview with David Sugarman previously referred to<sup>67</sup>, acknowledged that J.L. Austin had been very influential in his work. When asked about his intellectual influences he replied, "Well, Austin certainly. Wittgenstein to some extent..."<sup>68</sup>. It is therefore surprising indeed that not more literature has been published about Ordinary Language Philosophy's influence on *The Concept of Law*, and about J.L. Austin's influence in particular. Whilst some might argue that J.L. Austin's ideas are nowhere to be found in *The Concept of Law*, no such conclusion can be reached without first looking at the evidence, and this project has not so far been undertaken. And this is because almost everyone (including Stavropoulos, who *has* attempted to make good on the exhortation to understand the relation between semantics and legal theory in Hart's thought) focuses in detail only on the influence that *Wittgenstein* had on Hart's philosophy.

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<sup>67</sup> Sugarman (n 27) 274.

<sup>68</sup> Sugarman (n 27) 274. Hart's appreciation for J.L. Austin's work comes across much more clearly in the recording than in the transcript of the interview. Naturally, there are emotions that cannot be transcribed onto paper, and one such case was clearly when Sugarman asked "You mentioned Austin, how influential was he?" and even before he had finished the question Hart simply replied "very, very". Moreover, when asked if one was to construct a league table of his influences, who would come at the top of that list he replied, without hesitation, "J.L. Austin". Oxford Academic (Oxford University Press), 'J.L. Hart Interview Part Two: Major Philosophical Influences (audio)' <<https://www.youtube.com/watch?v=NVUGRLxRb58&index=2&list=PL3MAPgqN8JWiLdUqgmrQMzhao6b-RrS49>> accessed 10 January 2016, starting at minute 1:45.

It is of course no secret that Hart was fascinated by Wittgenstein's second great philosophy, *Philosophical Investigations*. Nicola Lacey, in her biography of Hart, recounts how "Mary Warnock remembers him 'clutching Geoffrey Warnock and saying, "I've been up all night! I've been up all night! I can't think of anything else" after reading *Philosophical Investigations*<sup>69</sup>. According to Robert Summers, in conversations Hart referred to *Philosophical Investigations* as "our bible"<sup>70</sup>. However, despite Hart's interest in Wittgenstein's philosophy, Wittgenstein only visited Oxford once for a lecture, and it is not known that they ever even exchanged a word. That said, it is widely known that Hart despised Wittgenstein's arrogance, and it is likely that he would never have established the philosophical rapport with Wittgenstein that he did with J.L. Austin, even if they had met.<sup>71</sup> This may well provide one reason behind why he is keen to credit J.L. Austin as a philosophical influence on his work, but less willing to identify Wittgenstein's impact<sup>72</sup>. Again, these matters will be the subject of exploration in subsequent chapters. Notwithstanding the reason, however, the fact remains that Hart credits J.L. Austin, not Wittgenstein in *The Concept of Law* and this must surely then beg the question why it is that most legal philosophers focus on Wittgenstein's influence on *The Concept of Law*, and almost none of them dedicate the same - or indeed any - attention to the philosophy of J.L. Austin.

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<sup>69</sup> Lacey (n 3) 140.

<sup>70</sup> Summers, R.S. "H.L.A. Hart's *The Concept of Law*: Estimations, Reflections and a Personal Memorial" 45/4 (1995), 589.

<sup>71</sup> Lacey (n 3) 218-219.

<sup>72</sup> Sugarman (n 27) 268.

It is notable that it is J.L. Austin, and not Wittgenstein, who is the only philosopher to merit a quotation in *The Concept of Law*. Throughout his entire book, Hart does not quote anyone else. Intriguingly however, it is Wittgenstein who prompts the greatest degree of speculation regarding the influence he had on *The Concept of Law*. Without wishing to presage subsequent chapters unduly, we can at least offer some opening speculation as to why this state of affairs exists. First, it is rare to find a book about the Great Philosophers that does not mention Wittgenstein, and he will always, at the very least, warrant a chapter in any book about 20<sup>th</sup> Century philosophy<sup>73</sup>. The Cambridge Dictionary of Philosophy says of Wittgenstein that he was “one of the most original and challenging philosophical writers of the twentieth century”<sup>74</sup>. However, J.L. Austin has not been afforded the same kind of recognition and his work has not hitherto achieved the same status as that of Wittgenstein, and far fewer people are familiar with his philosophy. Wittgenstein published one work on philosophy, the *Tractatus Logico-Philosophicus*<sup>75</sup>, during his lifetime, and this text became the primary influence for the Vienna Circle. But after abandoning philosophy for ten years, Wittgenstein saw grave flaws in the *Tractatus*, and conceived a new

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<sup>73</sup> See, for example, Magee, B., *The Great Philosophers* (BBC; London, 1987), Dialogue 15; James Garvey and Jeremy Stangroom, *The Story of Philosophy: A History of Western Thought* (Quercus Publishing Plc 2012); Stephen Law, *The Great Philosophers: The Lives and Ideas of History's Greatest Thinkers* (Quercus Publishing Plc 2013); Jeremy Stangroom and James Garvey, *The Great Philosophers* (Arcturus Publishing 2008).

<sup>74</sup> Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (2nd edn, Cambridge University Press 1999) 976.

<sup>75</sup> Ludwig Wittgenstein and Luis Valdés M Villanueva, *Tractatus Logico-Philosophicus* (2nd edn, Tecnos 2003).

philosophy which he set out in *Philosophical Investigations*<sup>76</sup>, published posthumously. J.L. Austin, on the other hand, did not publish much during his lifetime. His way of developing philosophy involved debates and discussions, and he was rarely ready to engage in writing<sup>77</sup>. Most of the works of J.L. Austin, to which we now have access, have been compiled by his students or colleagues. Even though the later Wittgenstein and J.L. Austin were both supporters of the same school of philosophy, Ordinary Language Philosophy, they had very different approaches to the practice and role of philosophy. It might therefore be argued that it is harder to engage with the philosophy of J.L. Austin, which is based around philosophical debates collated after his death than the work of Wittgenstein, which is presented in the form of a book with certain philosophical conclusions that serve to frame the narrative. This might well be why legal philosophers tend to focus their attention on the work of Wittgenstein, and not many engage with the philosophy of J.L. Austin. However, the purpose of this work

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<sup>76</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967).

<sup>77</sup> Fann, on the Preface to *Symposium of J. L. Austin*, writes, "He (J. L. Austin) completed no books of his own and published only seven papers, which he was obliged to publish as condition of their being delivered. (...) Soon after his death, the published papers, together with three previously unpublished, were collected as *Philosophical Papers* by J.O. Urmson and G.J. Warnock." K. T. Fann, *Symposium on J. L. Austin* (Routledge & K. Paul 1979), ix. Matson argues that one of the reasons for J. L. Austin's wide reach and influence "was that he was so much more thorough. On the first day of the term he would read out the first two pages of Ayer's *Foundations of Empirical Knowledge*, in which the Argument from Illusion is summarized. Then he would begin to scrutinize it, sentence by sentence, often word by word, sometimes devoting three or four lectures to a single word. Two months later he might still be commenting on these two pages. So went the most exciting and entertaining, as well as most important, philosophical lecture course of the twentieth century." Matson, Book Review, *Northwst* rev. 127 (1962).

is not to offer speculation as to why Wittgenstein has received *more* attention than J.L. Austin. Regardless of this enquiry, the plain fact remains that the literature in respect of Hart's connection to Ordinary Language Philosophy is still strikingly thin on the ground, and it is on this that the present research places its attention.

There is, then, a remarkable gap in the current literature, and one that my thesis will attempt to fill. Indeed, as mentioned in the introductory chapter, this is precisely what I will offer in this thesis; that is, a round examination of Hart's philosophical influences, enabling an examination of the extent to which Ordinary Language Philosophy's teachings can be found in *The Concept of Law*. I intend, that is, to help satisfy the "intellectual burden" that Hart (and now Stavropoulos) has placed upon us. The thesis will also provide a unique insight into J. L. Austin's influence in *The Concept of Law*. As mentioned, other theorists have tried to trace Wittgenstein's influence in *The Concept of Law*, but the same cannot be said for J. L. Austin's work. In the end a conclusion might be formed to the effect that that even though J.L. Austin aided Hart's philosophical development through their discussions in the Saturday morning group, and they even taught a seminar in Excuses together, he did not influence Hart's *The Concept of Law* in any significant way. If this is the case, then this work will serve to eliminate the commonly held (though little discussed) suspicion that J.L. Austin played a part in *The Concept of Law*. However, it might come to light that not only is *The Concept of Law* a work influenced by Ordinary Language Philosophy generally, but tenets of J.L. Austin's philosophy are present in *The Concept of Law*. Ordinary Language Philosophy cannot be seen as narrowly as only comprising Wittgenstein's philosophy, since we will come to see that whilst both Wittgenstein and J. L. Austin's work come under the umbrella, they both offer unique

methodological insights. Moreover, this is an exciting time to rediscover *The Concept of Law* in light of J.L. Austin's philosophy, for it seems that there is a renewed interest in Austin's work throughout the philosophical community. Whilst many proclaim Ordinary Language Philosophy to be dead<sup>78</sup>, Martin Gustafsson, editor of the recently published book *The Philosophy of J.L. Austin*<sup>79</sup> seeks to question such proclamations by noting,

More importantly, the received view helps to confirm and strengthen a widespread view of Austin's work as effectively obsolete. For we all know – don't we? – that Ordinary Language Philosophy, once so influential was methodologically flawed. And we all know – don't we? – that even if *How to Do Things With Words* was a great achievement, the developments and revisions made by latter-day speech act theorists have made this pioneering effort outdated. Of course, no one denies that Austin's work is of considerable historical significance. We have to study it if we want to understand one important phase in the development of analytic

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<sup>78</sup> See T. P. USCHANOV's article, "The Strange Death of Ordinary Language Philosophy", Article Death of Ordinary Language Philosophy, <http://www.helsinki.fi/~tuschano/writings/strange/> (last accessed 7/0812), this article has never been published since the author is not yet fully satisfied with it. See, Baz (n 21) 5, where Avner Baz writes: "Within the mainstream of analytic philosophy, it is now widely held that Ordinary Language Philosophy has somehow been refuted or otherwise seriously discredited, and that it may therefore philosophically legitimately and safely be ignored".

<sup>79</sup> Gustafsson and Sorli (n 27).

philosophy. But is there really anything philosophically important to learn from him *today*?<sup>80</sup>

Gustafsson concludes that if there was nothing to learn from J.L. Austin, all the authors that contributed to this new book would not have proclaimed otherwise in the numbers that they did. It is surprising that Gustafsson's book is the first collection of essays on J.L. Austin to have been published in the past 40 years. Around the same time Avner Baz published his book, "When words are called for: A defence of Ordinary Language Philosophy"<sup>81</sup>, which again focuses on the philosophy of J.L. Austin. Baz offers his view of Ordinary Language Philosophy and argues that the criticisms raised against it are unfounded. He identifies Searle, Grice and Soames as the three main philosophical opponents of Ordinary Language Philosophy, and he dedicates a few chapters to demystifying their criticisms. In his concluding remarks, Baz writes, "Rather than succeeding in undermining Ordinary Language Philosophy, the three arguments we have considered have turned out to call, each in its own way, for an Ordinary Language Philosophy intervention." Moreover, Routledge Editors, as part of their Routledge Revivals series, republished the Symposium on J.L. Austin, which was originally published in 1979. This book is a collection of essays from well-known philosophers, many of whom knew Austin personally.

It is not clear however, why it was that Ordinary Language Philosophy stopped being a "legitimate intellectual option for philosophers"<sup>82</sup> in the first place. The

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<sup>80</sup> Gustafsson and Sorli (n 27) 2.

<sup>81</sup> Baz (n 21).

<sup>82</sup> Ushanov (n 77), where Ushanov writes: "Currently, however, Ordinary Language Philosophy is not generally viewed as a legitimate intellectual option for philosophers, analytic or

question needs to be asked: why did Ordinary Language Philosophy “die”? Whatever the answer to that question (and there will be some attention paid to it in the following chapters), it seems that Philosophy is at a stage where it is willing to revisit Ordinary Language Philosophy, and my research fits neatly within this revival. My investigations will undoubtedly lead me to explore the ancestry of the ideas that dominated Oxford in the second part of the 20<sup>th</sup> Century, but this thesis is not intended as a work in legal history. Nor is it intended as a work in jurisprudence, even though I will cover the changes that were seen in doctrinal jurisprudence after the publication of *The Concept of Law*. Although I will touch upon these different areas, this thesis is ultimately a thesis on an aspect of philosophy applied to the subject of law, and so, in this sense, in the philosophy of law, focusing on whether Ordinary Language Philosophy was applied to law through *The Concept of Law*.

### **The Circumstantial Case**

But what of the more general question, whether Hart’s book is a contribution made within a new philosophical movement, or whether it is *just* a contribution to and development of the, then prevailing, theory of legal positivism? An initial few thoughts can be mentioned here to establish the ground for my detailed enquiry in later chapters. For example, there is circumstantial reason for crediting the philosophical status of Hart’s work. As mentioned above, Rupert Cross and Peter Strawson were chosen by Hart to review *The Concept of Law* prior to publication. Peter Strawson was

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otherwise. In fact it’s safe to say that, with the possible exception of Bergson’s and Driesch’s vitalism, Ordinary Language Philosophy is the most deeply unfashionable of all the main currents of twentieth-century Western philosophy.”

a renowned philosopher, and Rupert Cross a distinguished lawyer. The choosing of these two academics to review the final draft of *The Concept of Law* fits well with Hart's aim to provide us with a book designed for the student of jurisprudence, but which would also be of use for those who are interested in the study of philosophy<sup>83</sup>. The circumstantial case is that, on a rudimentary level, if *The Concept of Law* is indeed just a book on rules, then there would have been no need to consult Peter Strawson prior to its publication. But the circumstantial case is, of course, stronger than this. Thus the view has been expressed that *The Concept of Law* intended for law what *The Concept of Mind* set out to provide for philosophy of mind. Gilbert Ryle published *The Concept of Mind* in 1949, and many speculate that Hart named his work in a display not only of homage but also intellectual unity<sup>84</sup>. Thus Brian Simpson wrote:

Hart's title for his book, *The Concept of Law*, echoed Ryle's *The Concept of Mind*, and so a starting point must be the assumption that *The*

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<sup>83</sup> Hart (n 2) vi. In the Preface, Hart writes: "Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law". In the interview with Sugarman (n 21) Hart mentions an amusing anecdote about how *The Concept of Law* came to be. According to Hart, soon after he was appointed as the Chair of Jurisprudence at Oxford his students threw a party which he attended. At said party, his undergraduate students said to him: "What we want is a book about law...what law is. You could write that book". And so, said Hart, he did. Whether or not it was the comment from his undergraduate students that prompted Hart to write *The Concept of Law*, he maintained throughout his life that his main audience were the students of jurisprudence as well as future, and current, lawyers.

<sup>84</sup> Lacey (n 3) 132, where she writes: "Ryle was the dominating figure in shaping the turn to linguistic philosophy before the war, and his influential *The Concept of Mind* (1949) was echoed in his own *The Concept of Law* (1961).

*Concept of law* is both what the book is about and what makes it a philosophical enterprise<sup>85</sup>.

A good deal of Ryle's work concerns philosophical methodology and the ratification of the theory that philosophical problems arise from misunderstandings about language. *The Concept of Mind* intended to prove that issues of *ordinary* language have in fact transcended the philosophy of language, and are now also dealt with in the philosophy of mind. Ryle has been immortalized by his attacks on Cartesianism. *The Concept of Mind* is an attack on the mind-body duality insofar as Ryle wanted to expose the "dogma of the ghost in the machine"<sup>86</sup>, and show that the metaphysical theory that people are composed of two separate and distinct entities is wrong. However, this was not his starting point. Ryle, who had long advocated and practiced Ordinary Language Philosophy, started with the intent of applying the principles of Ordinary Language Philosophy to a particular area, and for this he chose Mind. As Julia Tanney, a leading Ryle scholar, wrote:

Having produced various papers, responses, articles and discussion notes on philosophy's proper goals and methods, Ryle decided (...) the time was right to 'exhibit a sustained piece of analytical hatchet-work demonstrating some notorious and large sized Gordian Knot'. Thus, Ryle went straight to *The Concept of Mind* demonstrating the method he had long, in his early papers, described and defended.<sup>87</sup>

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<sup>85</sup> Simpson (n 4) p.77.

<sup>86</sup> Ryle (n 39) 30, Ryle writes: "I shall often speak of it, with deliberate abusiveness, as "the dogma of the ghost in the machine".

<sup>87</sup> R. Gilbert, "Collected Essays 1929-1968" (New York: Routledge, 2009), p. xiii.

These relationships naturally prompt the question whether Hart's "essay in descriptive sociology"<sup>88</sup>, insofar as it presents "an inquiry into the meaning of words"<sup>89</sup>, is the application of a determinate programme in the philosophy of language to law. It is intriguing, once again, that this has not hitherto been the subject of any sustained academic enquiry. Instead, it is clearly implied by most of Hart's critics, and even supporters, that *The Concept of Law* is Hart's attempt to defend legal positivism. Now, if it is true that Hart was engaged in applying Ordinary Language Philosophy to law, the received view is surely a partial account of the project at best. It is thus my intention to investigate whether Hart was, like Ryle, taking the principles of Ordinary Language Philosophy and showing them in application, in the area familiar to him – which in Hart's case was the law.

Of course, many of those who read *The Concept of Law* are unaware of Hart's philosophical background, and have likely never taken an interest in his earlier essays. In fact, Hart made his affiliations with Ordinary Language Philosophy clear throughout many of his papers, even though he does not mention this in *The Concept of Law*. Ordinary Language Philosophy is a way of *doing* philosophy, and if *The Concept of Law* was indeed an application of Ordinary Language Philosophy to Law, then he would not feel the need to explain this, in just the same way as Ryle, who did not explain in *The Concept of Mind* that such was his intention. Interestingly, according to Julia Tanney, Ryle faced the same conundrum. She wrote,

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<sup>88</sup> Hart (n 2) vii.

<sup>89</sup> Hart (n 2) vii.

Though many read *The Concept of Mind*, far fewer heard his papers or read his articles. Had the readers of the book had a clear sense that Ryle's method of analysis was a type of 'conceptual cartography' they would have realised that Ryle did not construe the task of analysis as did the early Russell or Moore.<sup>90</sup>

The same might be said of Hart's masterpiece. *The Concept of Law* has achieved worldwide recognition, but his earlier papers have not been elevated to the same status. Many readers, including most students of jurisprudence, are neither exposed to his earlier works nor made aware of his philosophical background. It might be the case that if the readers were aware of Hart's active involvement with Ordinary Language Philosophy, they would seek to engage with the philosophy of language employed in *The Concept of Law*.

### **Concluding Remarks**

Though acclaimed throughout the legal world, Hart's work has been the subject of intense criticism since its early reception. From Alf Ross' review of *The Concept of Law* for the Yale Law Journal where he criticizes Hart for not understanding his (i.e. Ross') work<sup>91</sup>, to B.E. King's criticism of Hart for not volunteering a definition of the concept of law itself<sup>92</sup>, the early reviews though generally positive are highly

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<sup>90</sup> G. Ryle, *Collected Essays 1929-1969* (Oxon: Routledge, 2009), vii.

<sup>91</sup> Ross (n 45) 1190. Ross concludes his review by writing: "That the appreciation is not mutual is no reason why I should not express my high esteem for his work and my belief that we are following the same path".

<sup>92</sup> B.E. King (n 45) 272. King goes as far as to enquire: "Why does he (i.e. Hart) consider a definition so unnecessary".

critical of some aspects of Hart's theory. What is perhaps surprising is that, even at the time of initial publication, many of the criticisms of Hart's theory could perhaps have been dissolved had the reviewers had an appreciation of Hart's philosophical background. It is important to recall that this view is supported by Summers who claims, in his review of Hart's work, that an appreciation of Hart's philosophical context is essential to a proper understanding of *The Concept of Law*<sup>93</sup>. Though Hart continued to defend many of the views that he expressed in *The Concept of Law* for years to come, as can be read (and now listened to) in David Sugarman's interview<sup>94</sup>, the lack of an official response to many of the criticisms is seen by many as an admission that Hart himself believed that his theory had flaws<sup>95</sup>. The publication of the *Postscript*, and its subsequent analysis and intense scrutiny by the leading legal theorists on Hart<sup>96</sup>, did, in many ways, muddy the waters with legal theorists providing different interpretations of Hart's final words. Though some, not many, discussed the importance of Ordinary Language Philosophy and (mainly) Wittgenstein's influence in *The Concept of Law*, this is not the standard, established, understanding of Hart's work. More recently, the publication of the third edition of *The Concept of Law*, with its introduction by Leslie Green, brings with it the risk of further cementing the view of Hart as rule theorist, who, despite his philosophical background, did not employ

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<sup>93</sup> Cf Summers (n 37) 631.

<sup>94</sup> Sugarman (n 27). When asked about this philosophy, Hart articulated his views on *The Concept of Law* and claimed that they remain unchanged.

<sup>95</sup> For example, see Lacey (n 3) 233 who writes: "In late interviews (...) he was only too willing to admit that the book had its flaws".

<sup>96</sup> An in-depth analysis of Hart's *Postscript* can be found in Coleman's book, where a collection of essays from prominent legal theorists is presented. Coleman (n 5).

linguistic philosophy in *The Concept of Law*. As noted in the Introduction to this thesis, it is for this reason that the first chapter in section B will address the work of Leslie Green. Before discussing the work of other legal theorists who did indeed believe that Hart employed linguistic philosophy principles in *The Concept of Law*, it is important to start by confronting the latest, and perhaps most prominent, contribution to the literature opposing the view that Hart's book employed Ordinary Language Philosophy. Not only will this focus our minds on the importance of understanding Hart's work through Ordinary Language Philosophy, but it will allude to the disservice to Hart's work that is the inclusion of this new introduction.

This section, section A, has served the purpose of introducing the thesis and giving some context to the time of publication and the reception of *The Concept of Law*. A case for Ordinary Language Philosophy has been put forward, and even those who disagree that Hart employed Ordinary Language Philosophy in *The Concept of Law*, must at least agree that there are considerable disparities in the literature and that no agreement has yet been reached. The views are in fact so varied and dispersed, that an account of all the different views on *The Concept of Law* would quite probably not be possible. What is however possible is to narrow this investigation into the disagreement regarding Hart's application of Ordinary Language Philosophy, for there are few who have commented on and investigated the extent to which Hart applied the teachings of J.L. Austin and Wittgenstein in *The Concept of Law*. It is to this investigation that we must now turn, starting with the first chapter of section B, on Leslie Green and the Introduction to *The Concept of Law*.



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## SECTION B

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# Green and the Third Edition of *The Concept of Law*

Section B

Chapter Three

In 2012, fifty one years after the original publication, Oxford University Press (henceforth OUP) published a new edition, the third edition, of *The Concept of Law*<sup>1</sup>. This latest edition includes a preface, extensive introduction and notes all written by Green<sup>2</sup>. As mentioned in section A, *The Concept of Law*<sup>3</sup> was first published in 1961. Thirty-four years later, OUP invited Penelope A. Bulloch and Joseph Raz to review the notes that Hart had written before his passing and from it develop a postscript to *The Concept of Law*. The second edition of *The Concept of Law* with the added postscript edited by the two aforementioned legal theorists was published in 1994. This third edition is therefore the first edition of *The Concept of Law* without any new original material written by the author. In other words, it was Green's substantial contribution that justified a new edition. For obvious reasons, it would be negligent not to mention his work or his contribution. In the context of this thesis Green's work is however rather unique since he is the only legal theorist whose work is analysed in this thesis

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<sup>1</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012). This edition was arguably published to mark the celebration of the 50<sup>th</sup> anniversary of the original publication of Hart's book, as per Green's Preface to *The Concept of Law*. Hart (n 1) xi. Alongside the Third Edition, OUP also released a digitalized and re-mastered version of David Sugarman's lengthy interview with Hart. Though parts of the interview had been transcribed, a full audio version had never been released. For further details please see David Sugarman's blog post for OUP: 'In His Own Voice: H.L.A. Hart in Conversation with David Sugarman | OUPblog' (\*Featured, 4 December 2012) <<http://blog.oup.com/2012/12/h-l-a-hart-in-conversation-with-david-sugarman/>> accessed 16 January 2016.

<sup>2</sup> Green is the Professor of Philosophy of Law at Balliol College, Oxford.

<sup>3</sup> Hart (n 1).

that does not support the claim that *The Concept of Law* was embedded within Ordinary Language Philosophy. Nonetheless, assessment of his contribution will however provide greater depth to my argument, since the inclusion of such work will clearly demonstrate how vital it is to read *The Concept of Law* in light of Oxford Philosophy. Furthermore, the prestige associated with being credited with an introduction to what is arguably still the most important book in Anglo-American jurisprudence, cannot be overlooked<sup>4</sup>. Indeed, because of this, in the future Green (as Nicola Lacey upon the publication of Hart's biography<sup>5</sup>) may well be regarded foremost as a scholar of Hart's work. Given the importance of Green's contribution, and its relatively recent publication, Green's work is the subject of the first chapter in this section. Though analysis of Green's "notes" to *The Concept of Law*, where he directs the reader to different papers published about each section of Hart's book, would make a very interesting research project, it would not add much to the subject of this thesis. His notes will therefore be disregarded, and this chapter will mainly focus on Green's extensive introduction to Hart's work<sup>6</sup>. The publication of the third

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<sup>4</sup> It is of note that in the cover of the new edition of *The Concept of Law* the sentence "With an introduction by Green" has now been included. This is particularly relevant since the postscript, edited by Bulloch and Raz is not mentioned on the cover.

<sup>5</sup> Nicola Lacey published Hart's biography in 2004 and has since published numerous articles on Hart's philosophy. For Hart's biography, please see Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, USA 2004).

<sup>6</sup> As an aside, it is of interest that Green writes regarding Hart's notes to *The Concept of Law* that "many of those readings have now been superseded and many later books and articles take up his arguments." Hart (n 1) xi. It seems that Green has misunderstood the purpose of Hart's note. Whereas Hart provides Notes to *The Concept of Law* for the reader to have further guidance as to the philosophical and legal background to his arguments, Green has apparently understood these notes to be solely pointers for further reading. It is therefore unsurprising

edition of Hart's book, particularly its extensive introduction, begs the question of why it is that OUP felt the need to include an introduction to such a renowned and well-known book. Green, who also contributed a new Preface<sup>7</sup> to *The Concept of Law*, answers this question by stating that enough time has passed for *The Concept of Law* to need an introduction, and he intends to "forestall some misunderstandings<sup>8</sup>". Green's Preface emphasizes the value and relevance of his long introduction, and highlights his work as of major importance in this new edition of *The Concept of Law*. As mentioned, Green's introduction is the major selling point of the new third edition of *The Concept of Law*. Even those who already own a copy of *The Concept of Law* might be tempted to purchase this new edition with a 41 page-long introduction

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for Green to claim that these readings have now been superseded. What should have been made clear however is that unlike Hart's suggested readings, which provide further background to his own arguments, Green's suggested readings are a good source of further reading into different interpretations, and criticisms, of *The Concept of Law*.

<sup>7</sup> Hart's preface is one of the most well-known and quoted prefaces in jurisprudence. OUP's decision to add a preface by Green alongside it was an interesting one. It is also of note that a Preface is generally written by the book's author. It is therefore surprising to include a Preface by someone other than the author, unless Green's introduction is considered so substantial to amount to a co-authorship of the book (which is doubtful). Furthermore, it should be noted that Raz and Bulloch wrote added an "editor's note" (rather than a Preface) to the second edition. For information regarding the purpose of a Preface please see, 'Anatomy of a Book: The Contents' <<http://www.barbaradoyen.com/book-publishing/anatomy-of-a-book-the-contents>> accessed 16 January 2016; Joanne Bolton and others, 'Book Design' <<http://www.thebookdesigner.com/2009/09/parts-of-a-book/>> accessed 16 January 2016.

<sup>8</sup> In his preface, Green writes: "Although *The Concept of Law* needs no apology, after half a century it is no longer true that it needs no introduction. In the one that follows I highlight some main themes, sketch a few criticisms and, most important, try to forestall some misunderstanding of its project<sup>8</sup>". Hart (n 1) xi.

explaining Hart's theory. As Green states in the Preface, his introduction is an adaptation of an article published as a review of the second edition of *The Concept of Law* in the Michigan Law Review<sup>9</sup>. Green's original article presented a tough critique of Hart's work, with Green's interpretation raising some serious questions regarding Hart's methodology and his conception of social rules (to be discussed in section II and IV of this chapter respectively). OUP's selection of Green as a contributor to *The Concept of Law* was therefore surprising. Despite his criticism of Hart's theory, Green claims that he is not going to provide the reader with an assessment of Hart's work, but rather merely highlight the areas where people tend to go wrong<sup>10</sup>. According to Green, there are three main reasons why people are led astray: firstly, Hart is writing in a philosophical manner, and as with many philosophical works, the problems he addresses are complex and the difference between truth and falsehood is easily missed. He gives as an example the distinction between "law and morality are separable" from "law and morality are separate". Just because Hart claims that they are potentially "separable" does not mean that he argues that they *are* "separate"<sup>11</sup>. Secondly, Hart's examples are now outdated, and the book's language feels "remote"<sup>12</sup>. Thirdly, the audience's expectations are not realistic. Green attributes this

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<sup>9</sup> Green, 'The Concept of Law Revisited' (1996) 94 Michigan Law Review 1687.

<sup>10</sup> Hart (n 1) xvii.

<sup>11</sup> Hart (n 1) xvi.

<sup>12</sup> Ibid. Timothy Endicott appears to agree with Green's assertion that Hart's examples are outdated. He writes, "The book is durable in another way: its arguments are not dated. The tone is dated. It is the sound of 1950s England. If you want a guide to the era milieu in which Hart was writing, you can find Jennifer Hart's autobiography, *Ask Me No More*". Luis Duarte d'Almeida, James R. Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's 'the concept of law'* (Hart Publishing 2013) 15.

to the fact that Hart wrote *The Concept of Law* with a particular audience in mind: the philosophically savvy person, who is intrigued by the nature of our major political institutions, and intrigued by the relation between morality and coercive force. However, this might not always be the actual reader nowadays. Green explains that the actual reader might be slightly confused, he writes:

They imagine that a book on the theory of law will stand to law as a book on the theory of catering might stand to catering – a general “how-to” applicable to a range of different occasions<sup>13</sup>.

Green’s first comment is a fair one, insofar as there is still some confusion as to what Hart’s thoughts on the separation of law and morality are. As will be seen further discussed in section IV of this chapter on social rules, Hart is writing in a philosophical manner and some of his commentators, indeed including Green, have not understood the breadth of Hart’s argument. As will be discussed in the next section of this chapter, Green tries to address this issue but given his own inattention to or dismissal of Hart’s philosophical perspective, his advice creates tensions in Hart’s work that could be easily dissolved if one was to take into account Hart’s intellectual background. Green’s other two comments raise some doubts as to their validity. It is not clear what Green considers to be “outdated” examples. Certainly Hart’s example of a “no vehicles in the park” rule, or the case of the grudge informer, cannot be considered as “outdated”.<sup>14</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Hart’s example of the rule “no vehicles in the park” will be discussed at several points throughout this thesis. For Hart’s explanation of this rule in *The Concept of Law* please see Hart (n 1) 129. The example of the grudge informer can be found in HLA Hart, “Positivism and the Separation of Law and Morals”, reproduced in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49.

Moreover, Hart's book was published a mere 50 years ago, perhaps too soon for the language to be considered genuinely "remote". Books published by other philosophers around the same time, such as Ryle's *The Concept of Mind*<sup>15</sup>, Wittgenstein's *Philosophical Investigations*<sup>16</sup> and J. L. Austin's *How to do Things with Words*<sup>17</sup>, have been understood so far without the need for an in-depth introduction explaining the author's intent. Moreover, it is not clear how the audience's expectations might have contributed to the muddled versions of Hart's message. It is perhaps accurate to say that someone who was expecting Hart's book to give a concise explanation of how judges must act, or propose a theory of adjudication, might be disappointed when faced with a book that analyses *The Concept of Law*.<sup>18</sup> However, no direct connection can be ascertained between their disappointment at Hart's "lack of practical help"<sup>19</sup> and the misconceptions of Hart's theory that Green identified.

It is with all these problems and misconception in mind that Green drafted this introduction to *The Concept of Law*. He aims to examine Hart's views on law and social rules, coercion and morality, and briefly look at some methodological issues. The first and third sections of this chapter will address issues identified by Green but which also happen to be recurring issues regarding Hart's methodology, namely the extent to which Hart relied on and was influenced by, OLP. The issues discussed in this section,

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<sup>15</sup> Gilbert, R. (2009). *The Concept of Mind*. Routledge.

<sup>16</sup> Wittgenstein, L., & Cumming, M. (1958). *Philosophical investigations* (Vol. 255). Oxford: Blackwell.

<sup>17</sup> Austin, J. L. (1975). *How to do things with words* (Vol. 1955). Oxford university press.

<sup>18</sup> Though it begs the question of whether a reader could really be disappointed when that is the title of the book.

<sup>19</sup> Hart (n 1) xvi.

regarding Hart's methodology will be the subject of further discussion in all other chapters in this thesis. The final section of this chapter will focus on a criticism that is particular to Green; that is, his view of Hart's conception of "justice".

### **Hart's Methodology in *The Concept of Law***

The issue of methodology is raised often regarding Hart's *The Concept of Law*. Interestingly, even those who agree that Hart's book was influenced by philosophy of language, such as Tony Cole and Nicos Stavropoulos<sup>20</sup>, question Hart's methodology. Even those who support the view that Hart was influenced by philosophy of language, disagree on the extent to which Hart applied its principles in *The Concept of Law*. It should therefore come as little, or indeed no surprise that this is one aspect of Hart's theory that Green's introduction explores in some detail. One particular aspect that is widely controversial is Hart's description of *The Concept of Law* as an "essay in descriptive sociology". Hart famously writes that the lawyer would regard his book as an essay in analytical jurisprudence, but that it may also be regarded as an essay in descriptive sociology<sup>21</sup>. This is an assertion that many people have taken issue with, dating back to the first publication of *The Concept of Law*, for the lack of sociological work in its strictest sense. Green exemplifies this well when he writes:

It is a funny sort of sociology that presents no fieldwork, no statistical modelling, and even few legal cases.

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<sup>20</sup> See chapters five and six, on Stavropoulos and Cole respectively.

<sup>21</sup> Hart (n 1) xi.

However, Green explains exactly why Hart's method is *like* descriptive sociology:

...Hart's method, *like* descriptive sociological methods, holds itself responsible to the facts without taking any moral or political stand about them. Time and time again he appeals to his reader to use an informed person's knowledge of the legal world to test the claims of legal philosophy. Are there really such things as legal rules? Look and see. Does every legal system have an illimitable sovereign? Look and see (...) The empirical basis of the book is no more sophisticated than that; but like descriptive sociology, it has an empirical basis. It does not begin with definitions or axioms and purport to derive necessary truths about law. It does not begin with moral claims about how law should be and infer conclusions about how law really is.<sup>22</sup>

This lengthy quotation is important to fully illustrate Green's point. He makes a very good argument that Hart's comment of *The Concept of Law* being an "essay in descriptive sociology" was not to say that his book is to be regarded as a traditional work in sociology. As Green rightly points out Hart undertakes no fieldwork or statistical modelling. What Hart intends to show is that he is going to look at different types of "social situations"<sup>23</sup> where the complicated relationships are best illustrated by looking at the words and expressions that we use to describe them. In that particular sense, where we are looking at social situations and their complex

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<sup>22</sup> Hart (n 1) xlv.

<sup>23</sup> Hart (n 1) vi.

relationships, Hart's book may be regarded as an essay in "descriptive sociology"<sup>24</sup>. However, Green's understanding of *The Concept of Law* as offering us a deepened understanding of our practices, is at odds with his denial of the existence of Ordinary Language in *The Concept of Law*. He writes:

Hart often tries to elicit our ordinary knowledge by asking how we would judge or classify certain things, and sometimes he does *that* by asking what we would *say* about them. Does that make his jurisprudence a branch of semantics?<sup>25</sup>

Green continues by acknowledging that Hart was influenced, and saw himself as being part of, the philosophy of language that dominated Oxford in the 1950's. It is given Hart's involvement with Ordinary Language Philosophy, that Green is surprised at the lack of linguistic analysis present in *The Concept of Law*<sup>26</sup>. He writes:

A few points are reinforced with linguistic distinctions. (Hart claims there is a difference between being "obliged" to do something and being "obligated" to do it, between doing something "as a rule" and "having a rule".) That's about it.<sup>27</sup>

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<sup>24</sup> It should be noted that Hart's claim that his book could be regarded as "an essay in descriptive sociology", was so heavily criticized that in an interview with David Sugarman Hart clarifies that he should have said that "it provides the tools for descriptive sociology, not that it is descriptive sociology. Sugarman (n 1) 289.

<sup>25</sup> Hart (n 1) xlvi.

<sup>26</sup> Hart (n 1) xlvi. Green writes: "For all that, what is most striking, given its vintage and provenance, is how *little* linguistic analysis there is in *The Concept of Law*".

<sup>27</sup> Hart (n 1) xlvi. Green did acknowledge that that linguistic philosophy "colours the rhetoric of the book", and that the title of Hart's book pays homage to Gilbert Ryle's *The Concept of*

This assertion thereby stands in stark opposition to the position I argue for in this thesis. What is more, it should not be forgotten that Green's remarks form part of the introduction to *The Concept of Law*, and will in all likelihood be taken at face value by new readers. As argued above, and in all other chapters in this section, Hart was indeed a great advocate of OLP, and its teachings are present in *The Concept of Law* and go far beyond the difference between being "obliged" and "obligated" (which is nonetheless an important distinction, and one which Green overlooks and misunderstands as will be seen in the paragraphs to follow).

One of the arguments used by legal theorists who wish to dismiss OLP and its influence in *The Concept of Law*, is that Hart himself pointed out the futility of the OLP enterprise<sup>28</sup>. Unsurprisingly, Green makes the same argument. Green argues that Hart believes that if we were to employ linguistic analysis to try and answer the question "What is Law?" it would prove useless. He writes: "Time and time again Hart warns us

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*Mind*, but he claims that any good historian would be able to see past this and concentrate on the true meaning of Hart's words<sup>27</sup>. He writes:

"...a good historian of ideas needs to look beyond the style to substance. There is a difference between what a philosopher thought he was doing, what he said he was doing, and what he was actually doing."

<sup>28</sup> For an example of a legal theorist who makes a very similar argument see Stephen Guest (ed), *Positivism Today* (Dartmouth Publishing Co 1996), 29-44. Guest writes: "But we should be careful. If we leap to Chapter 9 we find him saying such things as the choice between two conceptions of law (a 'narrower' natural law theory and a 'wider' positivist theory – the latter being his one) saying that the choice should not be determined as a matter of linguistic property. He says 'Plainly we cannot grapple adequately with this issue if we see it as one concerning the properties of linguistic usage'" Guest (n 28) 30.

of the futility of a linguistic approach.”<sup>29</sup> Green’s “time and time again” appears to be reduced to one instance where Hart pointed out that linguistic analysis would not provide a required answer. Green’s example are limited to the one instance in *The Concept of Law* where Hart writes that linguistic analysis could not help us choose between a narrow and a broad concept of law. He writes:

To try and choose between a broader and a narrower concept of law we need more than semantics; “we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage” (209).<sup>30</sup>

This example is particularly relevant since it is used time and time again by those wishing to dismiss the claim that Hart was influenced by OLP. Taken out of context it would seem, as Green argues, that Hart is admitting that Ordinary Language Philosophy is “useless”. This assertion, out of context, is so powerful that it seems to validate the claim that Hart did indeed dismiss OLP. It is perhaps for this reason that Green, and others, do not fully explain and contextualize Hart’s assertion. The argument for a “broader” or “narrower” concept of law arises from Hart’s discussion of Morals. What Hart is trying to convey is that even though there needs to be an understanding of morals in order to comprehend some of the existing laws, it should not be a prerequisite for all laws to be moral. He intends to make it clear that even though historically there has been a connection between law and morality, there can be legal rights and duties that have no moral justification or force<sup>31</sup>. For Hart, there is an imminent danger in adopting the view that there is a necessary connection

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<sup>29</sup> Hart (n 1) xlvi.

<sup>30</sup> Hart (n 1) xlvi.

<sup>31</sup> Hart (n 1) 206-209.

between law and morals. According to Hart this comes from the choice we have to make between adopting a 'wider' and a 'narrower' concept or way of clarifying rules<sup>32</sup>. Foremost the difference between a 'narrow' and a 'wider' concept of law must be made clear. The 'narrow' concept of law encompasses the views of Natural Lawyers, those who believe (according to Hart) that iniquitous law is not law, excluding therefore morally offensive rules. The 'wider' concept of law considers 'law' to be all rules that are valid by the formal tests of a system of primary and secondary rules, even if some of them defy the moral standards accepted by a society. He asserts that the 'narrower' concept includes the 'wider' concept, and therefore the adoption of a 'wider' concept of law will lead us to fields of enquiry which will ultimately make us more capable of dealing with the dangers of morally iniquitous law. He ultimately holds that his concept of law is wider than its rival because everything that can be expressed with the rival can be expressed with his, but not *vice versa*. Hart writes,

If we adopt the wider concept of law, we can accommodate within it the study of whatever special features morally iniquitous laws have, and the reaction of society to them. Hence the use of the narrower concept here must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules. Study of its use involves study of its abuse.<sup>33</sup>

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<sup>32</sup> Hart (n 1) 209.

<sup>33</sup> Hart (n 1) 209.

Nevertheless Hart claims that the stronger reason for preferring the wider concept of law is that we are able to think and say “This is law but it is iniquitous”<sup>34</sup>, whereas otherwise we would be oversimplifying the multifarious moral issues that they give rise to. Older writers like Austin and Bentham, when they devised the separability thesis were worried with the danger of anarchy. Hart finds this worry to be overrated, but he believes that there is another form of oversimplification. If we narrow our point of view and think only about the question of individual obedience we will overlook the bigger picture: the question of submission. This issue will give rise to important questions, which are too dangerous to be ignored<sup>35</sup>, like the question that confronted the post-war German Courts “*Are we to punish those who did evil things when they were permitted by evil rules then in force?*”<sup>36</sup> Hart assumes that having a ‘wider’ concept of law will allow us to deal with these crucial issues, whereas the adoption of a ‘narrower’ concept of law will simply blind us to them. Hart then gives the example of German Informers who punished people for morally iniquitous reasons. They did something that went against all standards of morality. However, he says, it may be argued that morality also requires the punishment of people who did something forbidden by the state<sup>37</sup>. “This is the principle of *nulla poena sine lege*”<sup>38</sup>. It follows that if there needs to be a breakthrough in order to avoid something to be a greater evil than its sacrifice, the issues should be clearly identified. In other words,

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<sup>34</sup> Hart (n 1) 210.

<sup>35</sup> Hart (n 1) 211.

<sup>36</sup> Hart (n 1) 211.

<sup>37</sup> Hart writes, “It may be conceded that the German informers, who for selfish end procured the punishment of others under monstrous laws, did what morality forbade; yet morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbade.” Hart (n1) 211.

<sup>38</sup> Hart (n 1) 211.

if the German Courts need to apply retrospective laws to *punish those who did evil things when they were permitted by evil rules*, then it is better for the issues to be clearly dealt with, than to ignore them completely. The adoption of positivism, with its theory that iniquitous law is still law, would offer no disguise for situations where choices between evils may have to be made. Hart writes,

At least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made<sup>39</sup>

It is here worth recalling that linguistic philosophy is a philosophical school that approached traditional philosophical problems as rooted in the misunderstandings that people develop by forgetting what words actually mean in a language. Hart believes that many legal problems arise from a failure to identify the way in which some particular use of language deviated from some tacitly accepted paradigm, or where radically different forms of expressions were mistakenly assimilated to some familiar form. He emphasises this point in the Preface of *Essays in Jurisprudence and Philosophy* where he says that:

(...) however sophisticated or profound, the workings of language could only yield significant results for jurisprudence where difficulties had arisen from a failure to identify the way in which some particular use of language deviated from some tacitly accepted paradigm or where radically different forms of expression were mistakenly assimilated to some familiar form<sup>40</sup>

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<sup>39</sup> Hart (n 1) 211.

<sup>40</sup> H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 5.

Hart's argument is that linguistic philosophy is only significant when the confusion lies in the meaning of a word. There is no confusion concerning the meaning of 'narrower' and 'wider' concept of law, therefore linguistic philosophy will not be useful in solving this issue. According to him, what is in play are the *merits* of both theories. It is because of this that, when suggesting and defending the adoption of the 'wider concept of law', Hart takes into account the merits of both theories before making his informed judgement. By taking the sentence '*Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage*' out of context, Green bowdlerised Hart's words with the result that his own argument becomes more coherent. So, if we leap into Chapter IX, we can understand Hart's explanation for the properties of linguistic usage being inadequate in this case; thus:

Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical enquiries, or advance and clarify our moral deliberations, or both<sup>41</sup>

So, in this particular case linguistic analysis cannot provide any assistance. Yet still in Chapter IX Hart explains that he finds linguistic philosophy important for it gives even skilled lawyers the map they were longing for – indeed, it helps to clarify “the realities

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<sup>41</sup> Hart (n 1) 209.

we use the words to talk about"<sup>42</sup>. However, they are not adequate for solving any kind of legal problem which arises for any *other* reason, such as a difference in values or legal theory. Hart then explains that in these cases it is essential to identify the present conflicting points of view, for there then to be a reasoned argument directed to establishing the merits of the conflicting theories. This can be linked with the reference made above to the 'wider' and 'narrower' concept of law. Linguistic philosophy could not yield great significance in solving the conflict between those two concepts given that the conflict did not arise because of a misunderstanding of the meaning of the word, but rather from a disparity in points of view. Therefore Hart took into account the merits of both theories, to reach the conclusion that the 'wider' concept of law would be more adequate.

Surely no-one imagines that Hart thought linguistic analysis could settle the question of whether he should dine in college this evening, or settle the question of what legislators should aim to achieve in drafting new statutory provisions, or even settle the question of who should succeed in judgment in a tort case before the courts: only by misrepresenting Hart's text through over-generalization could Green establish that Hart admitted linguistic philosophy to be useless for the study of jurisprudence. Moreover, as we shall see in subsequent chapters, the idea that Hart's jurisprudence is more richly detailed, pluralistic and contextual than commentators allow is a further feature that unites Hart's comments in the book with the philosophy that I contend it exemplifies.

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<sup>42</sup> Hart (n 1) 1.

## The Issue of Law, Morals and Justice.

Related to the “wider” and “narrower” concepts, Green makes an interesting connection in Hart’s theory concerning law and morals. He proceeds to criticize Hart’s theory on the basis of his understanding. It should be noted that this particular aspect of Hart’s theory is not discussed in future chapters, since it was not addressed by any of the other legal theorists commented on in Section B. It is however an area that is often challenged by legal theorists, and therefore of importance. According to Green, the connection between law and morality can be seen in Hart’s argument that rule-following is associated with “justice”, since like cases have to be treated alike<sup>43</sup>. According to the practice theory, for there to be a social rule there needs to be conformity and constancy in the rule’s application. He argues that Hart defends that constancy is in itself a form of justice:

Though the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice<sup>44</sup>

Green argues that according to the practice theory, there needs to be a constancy in application for general rules to exist. From this it follows that, according to Hart, the mere fact that there is constancy of application (irrespective of how “odious” the law might be) is in itself a form of justice. It also covers every law, even those that are “hideously oppressive”<sup>45</sup>. According to Green, this is one of Hart’s biggest mistakes since constancy in application might be seen as “just” in the case of laws that are

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<sup>43</sup> Hart (n 1) xxxvi.

<sup>44</sup> Hart (n 1) xxxvi, citing Hart (n 1) 206.

<sup>45</sup> Hart (n 1) xxxvi.

mildly unjust, but not laws that are “over – or under – inclusive with respect to their justifying aims<sup>46</sup>”. He concludes:

After all, not everything that has *the form of* justice is *a* form of justice, any more than everything that has the form of a camel is a camel. Worse, norms of justice and norms of injustice need not differ in their forms. The norm “men and women are to be paid equally for work of “equal value” is a norm of justice. The norm “men and women are to be paid unequally for work of equal value” is a norm of *injustice*. They have the same form. (...) It seems clear that we can’t tell whether a norm is a norm of justice, or injustice, or neither, on grounds of its form alone<sup>47</sup>.

So, Green claims it is not enough for there to be “justice” – there are norms that, even if they are applied with constancy are not “just”. Hart’s work can however be interpreted in a different way. Even though these *contingent connections* between law and morality exist, it cannot follow from it that the legal validity of particular laws must observe any reference to morality or justice. There is no necessary connection between the content of law and morality, which will ultimately mean that ‘*morally iniquitous provisions may be valid as legal rules or principles*’<sup>48</sup>. In Chapter IX Hart illustrates his point of view:

Sometimes what is asserted is a kind of connection which few if any have ever denied; but its indisputable existence may be wrongly accepted as a sign of some more doubtful connection, or even mistaken for it. (...) But it

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<sup>46</sup> Hart (n 1) xxxvi.

<sup>47</sup> Hart (n 1) xxxvi.

<sup>48</sup> Hart (n 1) 268.

is possible to take this truth illicitly, as a warrant for a different proposition: namely that a legal system must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it.<sup>49</sup>

Hart's idea is that even though there needs to be an understanding of morals in order to comprehend some of the existing laws, it should not be a prerequisite for all laws to be moral. He intends to make it clear that even though historically there has been a connection between law and morality, there can be legal rights and duties which have no moral justification or force. For Hart, there is an imminent danger in adopting the view that there is a necessary connection between law and morals. According to Hart this comes from the choice we have to make between adopting a 'wider' and a 'narrower' concept or way of clarifying rules. As discussed above, the adoption of a "wider" concept of law will allow us to clearly and openly deal with unjust or morally iniquitous issues.

### **Hart's conception of Social Rules**

One aspect of Hart's theory that Green focuses on, and is highly critical of, is Hart's account of social rules. This aspect of Hart's theory will be discussed further in all future chapters, since all other legal theorists focus on one aspect or other of Hart's discussion on social rules<sup>50</sup>. Law is constructed of social rules, and these social rules

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<sup>49</sup> Hart (n 1) 185.

<sup>50</sup> This view of social rules has attracted a lot of criticism, particularly by Ronald Dworkin who argued that the practice theory of rules failed to deliver. See Ronald M Dworkin, *Taking Rights Seriously* (Universal Law Publishing Co 2005), 48-58.

arise through social practice. According to Green, there are three main problems pertaining to social rules: there are rules that are not social practices (individual's rules), there are accepted social practices that are not rules, and finally, citing a rule can be offered as a reason for one's behaviour. According to him, none of this fits the practice theory. He adds that the conception of social rules is not needed for the understanding of obligation: he gives as an example purchasing carbon offsets; someone can believe that they have an obligation to purchase carbon offsets without thinking that there is a common practice to do it<sup>51</sup>. Social rules are an important aspect of Hart's theory, and a defeat or substantive criticism of Hart's theory would seriously discredit Hart's book. Green's comments if valid would be seriously undermining.

Green, who starts his introduction by saying that one of the problems with the misinterpretations of *The Concept of Law* stemmed from people reading it without understanding that it is a philosophical approach to law rather than a practical one, is himself a victim of this misinterpretation. His comments regarding social rules show an unfortunate disregard for Hart's philosophical background and its influence in his book<sup>52</sup>. In fact, on social rules Peter Winch expresses a similar view to Hart's, in his book *The Idea of Social Science*<sup>53</sup>, as indicated in Hart's own notes in *The Concept of Law*<sup>54</sup>. Winch's comments on Rules and Habits are an adaptation of Wittgenstein's

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<sup>51</sup> Hart (n 1) xxii.

<sup>52</sup> As discussed above (cf text to footnote 27) Green believes that Hart employs very little linguistic analysis in *The Concept of Law*.

<sup>53</sup> Winch, P. (2002). *The idea of a social science: And its relation to philosophy*. Routledge.

<sup>54</sup> Hart (n 1) 289. Interestingly, even though Hart references Winch's work in the notes to *The Concept of Law*, in Sugarman's interview he (i.e. Hart) claims to have never read Winch's book. Hart says that he cannot be sure how influential Winch was in *The Concept of Law*, for despite

ideas in *Philosophical Investigations*<sup>55</sup>, and it is therefore important to understand whether social rules could be better understood if read in light of Wittgenstein's teachings. This will be a recurring theme in this thesis, since all of the legal philosophers mentioned in the following chapters make reference to rule following and Wittgenstein's philosophy. Let's start with Green's first criticism: "there are rules that are not social practices (e.g. an individual's rules)"<sup>56</sup>. It is not clear whether Green is arguing that people might have their own rules, which are not social practices since they are the individual's rules, or whether he is re-iterating Dworkin's argument that there might be a consensus of independent conviction manifested in the concurrent practices of the group. Either way these issues can be easily addressed if we take into account Wittgenstein's philosophy. Wittgenstein believes that it is not possible for a rule to exist solely in one's mind. A rule needs to be the result of a social practice. For something to amount to a rule there need to be individuals who "obey a rule", and those who go against it; if a rule is something personal there is no way of checking if a rule is being obeyed or not. He claims that:

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numerous discussions with him about social rules he never actually read his book. We can only but speculate why Hart referenced his work in the notes to *The Concept of Law*, but one possible explanation is that Winch's exposition of Wittgenstein's idea Social Rules is perhaps easier to read and grasp than Wittgenstein's. Oxford Academic (Oxford University Press), 'H.L.A. Hart Interview Part Four: Harvard Visit and Exchange with Lon Fuller (audio)' <<https://www.youtube.com/watch?v=TMcmFS1DhmE>> accessed 16 January 2016.

<sup>55</sup> Ryle (n 15) 15.

<sup>56</sup> Hart (n 1) xxii.

It is not possible that there should have been only one occasion on which someone obeyed a rule (...) To obey a rule, to make a report, to give an order, to play a game of chess, are customs<sup>57</sup>

Let's take the example of a game of cards. To Wittgenstein the rules of the game need to be known by the players (the social context), in order for there to be rules. Everyone has experienced, or seen, a child playing a game of cards for the first time: children tend to play in accordance to their own rules. They have their own personal interpretation and make everything accord with the rule. Would we still be able to say that the child was playing a game? Wittgenstein claims a problem would arise since we could not be able to determine if they were following the rules, everything could be made in accordance with the rule.

The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.<sup>58</sup>

This is the very idea that you cannot obey a rule privately. The concept of failing to obey a rule is inherent to the *concept* of following a rule. In *Philosophical Investigations*, Wittgenstein is trying to assert that obeying a rule is a practice. Thinking one is obeying a rule is quite different from actually obeying it<sup>59</sup>. So, Green's

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<sup>57</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967), ss. 199.

<sup>58</sup> Wittgenstein (n 55) ss. 201.

<sup>59</sup> Wittgenstein (n 55) ss. 199-202. Wittgenstein writes: "It is not possible that there should have been only one occasion on which someone obeyed a rule. It is not possible that there should have been only one occasion on which a report was made, an order was given or understood; and so on. To obey a rule, to make a report, to give an order, to play a game of

objection that rules followed by a certain individual would not be accounted for in social practices is invalid – at least according to Wittgenstein’s later philosophy. A rule that is only followed by one individual is not a rule. Wittgenstein then claims that we are trained to follow a rule, much like we are trained to obey orders. Here he gives the example of a rail track: the tracks are already set down, all the steps are already taken, the train just goes through the motions. That is why he says: “When I obey a rule, I do not choose. I obey the rule blindly”<sup>60</sup>. Hart applies Wittgenstein’s philosophy to law, by means of the development of ‘social rules’. He claims that the existence of social rules, making certain types of behaviour a standard is normal; it is (just) *what we do*. Society develops these social rules when there is a common practice accepted by convention. Whether or not a practice amounts to a social rule depends on an external statement of fact as to whether a given mode of behaviour has the features of a social rule, or if it is merely a result of convergent habits<sup>61</sup>. Dworkin’s example of people “reaching a consensus of independent convictions manifested in the concurrent practices of a group”<sup>62</sup>, would be considered a result of convergent habits, and therefore not a social rule. In sum, this answers the first criticism that Green posed to social rules. However, before leaving Green’s first criticism it is worth emphasising that he simply passes over without comment (or notice) the extensive post-Philosophical Investigations literature on private rules, even though this literature is

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chess, are *customs* (uses, institutions). (...) And hence also ‘obeying a rule’ is a practice. And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule ‘privately’: otherwise thinking one was obeying a rule would be the same thing as obeying it”.

<sup>60</sup> Wittgenstein (n 55) ss. 219.

<sup>61</sup> Wittgenstein (n 55) ss. 109.

<sup>62</sup> Hart (n 1) xxii.

immediately called to mind by his remarks, and might be thought doubly important in light of its bearing on the work of the supposedly linguistic philosopher Hart.

Green's second criticism pertains to accepted social practices that are nonetheless not rules. He gives the example of "the common and accepted practice of surrendering one's wallet to a robber rather than resisting"<sup>63</sup>. This objection to social rules is very interesting, particularly the example given, since Hart tackles this very issue in *The Concept of Law*<sup>64</sup>. In order to understand why "surrendering one's wallet to a robber" might be a social practice but not a rule, it is important to take a slight diversion and explain Hart's discussion of "obligation". Hart's thoughts on the idea of obligation<sup>65</sup> comprise a good example of how J. L. Austin's philosophy informed *The Concept of Law*<sup>66</sup>. Hart explains that there is a substantial difference, often overlooked, between "having an obligation" and "being obliged". Hart claims that only once we analyse these two situations in context, will we be able to understand how one concept differs from another. This type of analysis is seen in the philosophy of J. L. Austin. An example of this is Austin's paper *A Plea for Excuses*<sup>67</sup>, where he proposes to look at all the different circumstances in which we use the concept of "excuses". Austin writes:

It is arguable that we do not use the terms justification and excuse as carefully as we might; a miscellany of even less clear terms, such as

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<sup>63</sup> Hart (n 1) xxii.

<sup>64</sup> Hart (n 1) 82.

<sup>65</sup> Hart (n 1) 82.

<sup>66</sup> This issue will be discussed again on Chapter seven, "Beyond the Anglo-Saxon Realm".

<sup>67</sup> JL Austin, 'A Plea for Excuses' [1971] *Philosophy and Linguistics* 79.

“extenuation”, “palliation”, “mitigation”, hovers uneasily between partial justification and partial excuse (...) Such doubts merely make it more urgent to clear up the usage of these various terms.<sup>68</sup>

J. L. Austin proposed to look at different situations in which we use the word “excuses” and analyse when we use the term “excuse”, and when excuses are proffered. Hart undertakes a similar investigation with the word “obligation”. Hart’s investigation of the concept of “obligation” is used in his wider thesis as a rebuttal of John Austin’s theory of law as coercive orders. To illustrate his point, Hart gives the example of a gunman situation. He writes: “A orders B to hand over his money and threatens to shoot him if he does not comply.”<sup>69</sup> Hart writes that according to John Austin’s theory this would be an example of a situation where B has an obligation or a duty to hand over his money to A. According to the theory of coercive orders, the sovereign (in this case A) must be habitually obeyed and the orders must be general, and prescribe courses of conduct and not single actions. The rationale behind Hart’s argument is that if B handed his money over to A, most people would agree that he was obliged to do it. Had he not handed over the money, he would be at risk of bodily harm. It would however not be accurate for us to say that B had an “obligation” or a “duty” to hand over the money<sup>70</sup>. So, Hart concludes that we need something else to explain the idea of obligation. John Austin’s theory is not compelling enough, for there are cases, such as the gunman case, that would clearly be misdescribed if we applied his theory. Hart argues that there is a substantial difference between someone “being

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<sup>68</sup> Ibid, 3.

<sup>69</sup> Hart (n 1) 82.

<sup>70</sup> Hart (n 1) 82.

obliged” to do something, and “having an obligation” to do it. Hart distinguishes it in the following way: “being obliged” means that, as in the gunman situation, someone is under the impression that he might be harmed or ill consequences might befall him if he fails to comply with the order. The notion of someone “being obliged” to do something is a psychological one referring to the beliefs and motives with which an action was done<sup>71</sup>. In the second case, of “having an obligation”, the beliefs and motives do not necessarily come into play. If someone “has an obligation” this remains true whether or not he did it – for example, upon swearing an oath people “have an obligation” to tell the truth in court, and this remains true irrespective of whether they comply with it or not. In addition to this, for there to be a social rule, there needs to be social pressure for the rule to be adhered to<sup>72</sup>. So, Green’s example of “the common and accepted practice of surrendering one’s wallet to a robber rather than resisting”, is an accepted social practice but is not a rule. As in the case described above, if B handed the money over to A, we would say he was “obliged to do so”. However, if B managed to run away and not give the money to A, we would not say that he was “obliged” to hand the money over. There would be no social pressure for B to adhere to the “common and accepted practice of surrendering one’s wallet to a robber”. Related to this, Green makes an additional comment that it is not necessary for a social rule to exist in order for us to understand the concept of obligation. As mentioned at the beginning of this section, he uses in particular the example of someone (let’s call him C) who believes that he has an obligation to purchase carbon

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<sup>71</sup> Hart (n 1) 83.

<sup>72</sup> Hart (n 1) 87.

offsets against air travel without supposing that there is a common practice of doing it. Significantly, what Green fails to understand is that, according to Hart, there is a crucial difference between “feeling obliged” and “having an obligation”. C might feel that he has a moral obligation to purchase carbon offsets against air travel, to prevent the destruction of the planet as we know it. However, there is no kind of external pressure (as Green writes, there is no common practice) for him to do it, and he in no way perceives that he would be criticized for failing to purchase carbon offsets; there is no social pressure to purchase carbon offsets. Therefore, C’s beliefs and sense of civic duty are not enough to warrant that he “had an obligation”. This ultimately means that there would be *no social rule*, since he was under no obligation.

Green’s third criticism is that citing a rule can be offered as a justification for one’s behaviour, not merely a sign that one supposes that there is a justification for it. This criticism is not clear, and as Green offers no more in explanation or support of it, it will not be addressed here.

## **An Overview**

Throughout his lengthy introduction Green covers, and criticises, almost every aspect of Hart’s work. After all, Green provides a 41 page-long introduction to Hart’s book, which in itself only has 237 pages (excluding the Postscript). For the advancement of this thesis, only certain aspects of Green’s introduction have been commented on. Rather ironically, *The Concept of Law* is part of the Clarendon Law Series, which, according to OUP, is a series of books that provide “concise, accessible

overviews of major fields of law and legal thought”<sup>73</sup>. Hart himself praised OUP’s Clarendon series, and was glad that his work had been published under this successful OUP title<sup>74</sup>. It is not altogether clear why OUP opted to add an introduction to *The Concept of Law*, leaving us with Green’s comment that after 50 years Hart’s book needs an introduction<sup>75</sup>. For those who believe the main premise of this thesis, that there is much to be gained by looking at Hart’s work through an OLP perspective, Green’s introduction is a step in the wrong direction since it cements the idea that despite Hart’s interest in philosophy, there is little philosophy of language in *The Concept of Law*. As discussed, with the exception of Green’s contribution, all other works analysed in Section B are from legal theorists who take the philosophy of language in Hart’s work into serious consideration. As such, this chapter provides an overview of the common criticisms of Hart from those who fail, or refuse to, acknowledge any significant philosophical focus or influence in Hart’s book.

Three main issues were discussed in this chapter: Hart’s methodology, the relation between Law and Morals and the idea of social rules. These topics, bar law and morals, will be discussed further in the chapters to follow. Green’s discussion on Hart’s methodology rests on two main tenets: The Concept of Law as descriptive sociology and Hart’s dismissal of OLP. The issue of descriptive sociology will be further discussed by Tony Cole in chapter seven, and The Spanish, in chapter eight. Hart’s

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<sup>73</sup> As per the OUP website, accessible here: <<https://global.oup.com/academic/content/series/c/clarendon-law-series-cl/?cc=gb&lang=en&>> accessed 17 January 2016.

<sup>74</sup> Ibid.

<sup>75</sup> Cf footnote no. 8.

apparent dismissal of OLP, that, as discussed, is the result of a misquotation of Hart's words, will be alluded to in other chapters since it is a recurring criticism. The idea of social rules will be discussed at length in chapters 4 and 5, on Bix and Marmor's work respectively, and alluded to in all other chapters.

# Brian Bix on Judicial Discretion

Section B

Chapter Four

This chapter will focus on the work of Brian Bix, namely his book *Language and Legal Determinacy*<sup>1</sup>, published in 1993. This chapter is the first to focus on the work of a legal theorist who believes that Hart's work in *The Concept of Law* had a philosophical foundation and seeks to uncover how philosophy of language impacted on Hart's work. Following Leslie Green, Brian Bix presents a very different interpretation of *The Concept of Law*<sup>2</sup> in which Green claims that there is very little linguistic analysis in *The Concept of Law*<sup>3</sup>. Moreover, Brian Bix was one of the first legal theorists to place significant focus on the investigation of Hart's philosophy of language in *The Concept of Law*, and to conduct a serious investigation into the linguistic intricacies of Hart's book. Though not the only legal philosopher to have attempted an analysis of Hart's philosophical influences, Bix's book was published before any of the other legal theorists whose work will be analysed in this thesis.<sup>4</sup> What is perhaps of greater significance, and the reason why Bix's work is the second chapter in this section, is that his analysis of Hart's book lays the groundwork for the analysis of the work of the other legal theorists included in this section, for he touches

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<sup>1</sup> Brian Bix, *Law, Language, and Legal Determinacy* (Oxford University Press 1995).

<sup>2</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012).

<sup>3</sup> Cf Chapter three, Green and The Third Edition of *The Concept of Law*, text to footnote 26.

<sup>4</sup> Andrei Marmor's book, *Interpretation and Legal Theory*, was originally published a year before Bix's book, in 1992. However, a substantially revised second edition was published in 2005. In the Preface to the Revised Edition Marmor states that he not only made substantial revisions to the chapters (including the clarification of some of the arguments), but has also added a new chapter, as a reply to critics. Since this thesis addresses Marmor's revised edition, and not the first edition, and this was published several years after Bix's book, Bix's contribution is addressed here as preceding Marmor's. Andrei Marmor, *Interpretation And Legal Theory* (2nd edn, Hart Publishing (UK) 2005).

upon the key point of philosophical engagement shared in common amongst all these writers, namely the issue of open texture and judicial discretion in Hart's book. Because of this, many of the philosophical issues discussed in this chapter will be further supplemented and refined in subsequent chapters, as other legal theorists challenge Bix's assumptions and impose their own interpretation and theoretical cast on Hart's words. In looking at the set of writers examined from this point, the similarity between Bix and Marmor's<sup>5</sup> approach is most apparent. Even though they arrive at very different conclusions, both their approach to *The Concept of Law* and their philosophical insights about Hart's book are strikingly similar. These similarities are perhaps due to the fact that both legal theorists graduated from Oxford, where they both completed their DPhil theses under the supervision of Joseph Raz<sup>6</sup>, and that a mere year apart<sup>7</sup>. However, this similarity and common history does not account for, and indeed makes more interesting, the different conclusions that they draw about *The Concept of Law*. These theorists' similarity to and points of departure from each other offer further insight into how even legal theorists who were working on similar topics, at the same time, in the same institution, under the supervision of the same

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<sup>5</sup> Cf Chapter four.

<sup>6</sup> Joseph Raz was one of Hart's doctoral students, and was one of the only doctoral students of Hart that carried on, as Nicola Lacey calls it, the "Hartian positivism". See Lacey, N. *A life H.L.A. Hart – The Nightmare and the Noble Dream* (Great Britain: Oxford University Press, 2004), 162. According to Lacey, Hart's discussions with Raz "were to have a decisive impact on the development of Herbert's ideas". Interestingly, the four legal theorists included in this thesis were doctoral students of Joseph Raz.

<sup>7</sup> Both Brian Bix and Andrei Marmor, both at Balliol, received their D.Phil. in Law from Oxford University, in 1991 and 1990 respectively. Bix and Marmor both published their thesis, but only Marmor has so far published a revised second edition.

Professor, and with a similar approach to engaging with the source text, nonetheless interpret Hart's words and ambition in contrasting ways.

It is clear from his introduction to his book that Bix wants to make a different contribution to the literature surrounding legal language and determinacy. Rather than writing a book *on* philosophy of language, Bix aims to give the reader a different insight by taking a distinctive approach: he will comment on the work of a few select legal scholars whilst taking philosophy seriously<sup>8</sup>. Bix himself does not endorse a particular philosophy of language, he merely aims to explain the philosophy of language behind theories such as Hart's, Dworkin's and Moore's<sup>9</sup>. Though equally interesting and intriguing, this chapter will not focus on Bix's interpretation of Dworkin and Moore's work, for this plainly departs from the scope of this thesis. For the advancement of my thesis, I will focus solely on Bix's interpretation of *The Concept of Law*. Interestingly, and despite the fact that Bix's main aim is to take philosophy seriously, Bix claims that his assertions about legal theory are sufficiently distinct from his interpretation of the philosophy of language that his comments and assertions about legal theory and legal language will still stand even if one were to disagree with

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<sup>8</sup> See Bix, *Law, Language and Legal Determinacy* (New York, Oxford University Press, 1993), 1-2 where Bix claims that "I do not put forward this book as a text about the philosophy of language. What I do claim is that I discuss legal theory in a way that tries to be serious about philosophy".

<sup>9</sup> Bix (n 1). Bix presents his arguments over six chapters, two of which are dedicated to Ronald Dworkin's Right Answer Thesis and Michael Moore's Metaphysical Realism respectively. His final chapter is a conclusion of his argument, and trying to cohesively bring all his arguments together. Overall, half of his chapters are dedicated to Hart's work, thereby making a significant contribution to the literature in this area.

the philosophy of language which Bix attributes to them<sup>10</sup>. Bix's analysis of Hart's work can be split into two main areas: open texture and judicial discretion. These will be reflected in the two sections in this chapter. The first section of this chapter will focus on Bix's interpretation of the open texture of language. As will be seen throughout this chapter, Bix's understanding of Hart's application of Waismann's theory to law and legal language has a great influence in his understanding of *The Concept of Law*, and his views on Hart's stance on judicial discretion. Bix claims that Hart outlines a paradigmatic and criteriological approach to meaning, based on Hart's application of Waismann's thesis about the open texture of language. Bix's understanding of Hart's application of open texture is at odds with the philosophy of language that he claims inspired Hart (i.e. Ordinary Language Philosophy), and it will be argued that his view is inconsistent with what Hart writes in *The Concept of Law*.

The second section of this chapter will focus on Bix's insights on the connection between the open texture of language and judicial discretion in *The Concept of Law*. According to Bix, Hart's claim that language is open textured will lead to his claim that there needs to be judicial discretion. Ultimately however, Bix raises concerns about the applicability of the theory of open texture to law, claiming that Waismann's theory

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<sup>10</sup> Bix (n 1) 2. Interestingly Cole claims that Hart, as Bix, in order to maximise the acceptability of his own argument, did not reference many philosophical sources nor was he clear about his methodology. Cf Chapter 6 text to n 51. Furthermore, Bix is apologetic for his non-committal approach, asking for the reader's forgiveness for any misunderstanding of the later Wittgenstein's, arguably controversial, philosophy. Bix (n 1) 2. Regarding his use of the later philosophy of Wittgenstein, he writes: "... it is inevitable that occasionally I will offer an interpretation (or evaluation) of the later Wittgenstein with which some readers might disagree. To the extent that I have underestimated the difficulty of certain writings, or the controversy of certain claims, I apologise in advance."

is not applicable to the legal world, and raising doubts about the inevitability of judicial discretion. It will be argued that it is due to Bix's fundamental misunderstanding of Hart's theory of open texture that most of these issues occur. A short summary of Bix's commentary will be provided in the final section of this chapter. This will serve to bring together the different aspects of Bix's work discussed throughout this chapter.

### **Hart's application of Waismann's Open Texture of Language**

This first substantive section will focus on what is perhaps one of the most controversial topics of Hart's theory: Hart's application of Waismann's theory of open texture to law. Most legal theorists to have written on the issue agree that Hart's explanation of the core and penumbra of concepts can be traced back to Waismann's theory of open texture. After all, Hart says as much in the notes to *The Concept of Law*<sup>11</sup>. However, the extent to which Hart's "open texture" is an application of Waismann's theory, as well as what is meant by the "open texture" of language with regards to law, has been subject to much debate<sup>12</sup>. Due to the widespread controversy around this issue, it is perhaps unsurprising that most legal theorists who contributed to the literature on *The Concept of Law* allude to or impute wholesale to Hart an

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<sup>11</sup> Hart (n 2) 297.

<sup>12</sup> This issue is also discussed in Chapters 4 and 5 of this thesis, since both Andrei Marmor and Nicos Stavropoulos discuss this issue. For some insight into the discussion of Hart's use of open texture, see e.g. A Brian W Simpson, *Reflections on 'The Concept of Law'* (1st edn, Oxford University Press 2011), 96. Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, USA 2004), 140. David Lyons, 'Open Texture and the Possibility of Legal Interpretation' (1999) 18 *Law and Philosophy* 293 – 309.

application of Waismann's theory of open texture. Out of all the theorists whose work is analysed as part of this thesis however, Bix and Marmor are perhaps the two who focus on this issue in the greatest depth. As mentioned, despite the fact that they both reach different conclusions, their scheme of analysis is similar in so far as they take the same approach, which is to identify and unpick Wittgenstein's influence in *The Concept of Law* - as will become apparent throughout this chapter and the next. Nonetheless, Bix's approach suffers from two main problems<sup>13</sup>: First, Bix reads Hart's book in light of what he calls a "paradigmatic and criteriological" approach to meaning, but does not give enough detail to substantiate this claim. Second, Bix's approach leaves parts of Hart's text unexplained, as we will go on to see now. As mentioned, these methodological mistakes are committed by all legal theorists whose work is analysed in this thesis.

According to Bix, Hart claims that when legislation is enacted both the legislators and the public have a particular problem in mind. Bix uses the example of the rule "no vehicles in the park"<sup>14</sup>. So, following this example, the rule would have

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<sup>13</sup> As introduced in Chapter one, and illustrated in Chapter two, it not only Bix's work that suffers from these two fundamental issues. All legal theorists whose work is presented in this thesis seem to follow a similar scheme of analysis, in so far as they commit the same methodological mistakes.

<sup>14</sup> This example was first used by Hart in his inaugural lecture at Harvard, later published by the Harvard Law review. HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593. Due to the prominence of the Hart-Fuller debate, Fuller's criticism of Hart is a recurring theme in the thesis. Lon Fuller, a natural lawyer and an avid critic of Hart, published *Positivism and Fidelity to Law* as a reply to Hart's Holmes lecture. Nicola Lacey notes how, in the lecture, Fuller was "pacing back and forth at the back of the lecture hall like a hungry lion" and he left the lecture theatre half-way through the question section. A few days after the lecture, Fuller decided to comment on Hart's lecture by way of

been enacted to address a particular problem, whatever that may be. When faced with this rule, according to Bix, one needs to think about why the rule was enacted and to invoke an image, or an example, which this rule was aimed at. Bix claims that when faced with the rule “no vehicles in the park”, the images we would invoke around the term “vehicle” would be about things such as “normal car, bus, and motorcycle traffic”<sup>15</sup>. These “normal” things that we would associate with the rule are termed by Bix as “the paradigm”<sup>16</sup>. The issue will arise when we are faced with more unusual cases, such as the use of roller-skates, since if faced with such a situation, one would immediately acknowledge that this is a circumstance that does not fit the norm (or the paradigm). When dealing with these more unusual situations, according to Bix, we need to consider whether the case at hand would fit as an extension of the rule or general term. So, in the park example, we would need to consider whether or not roller-skates are an extension of the term “vehicle”. This can be achieved, says Bix, by compiling a list of criteria that will allow us to evaluate and reach a conclusion as to whether or not roller-skates are an extension of the term “vehicle”. Referring to this example, Bix writes that similarly to cars they make noise (though at a lower level), and threaten safety and order (though in a much lower scale). On the other hand, they

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an article published in the Harvard Law Review in 1958 alongside Hart’s. Lon L Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ Harvard Law Review. Lacey (n 6) 197. This debate has generated myriad discussion over the years, so much so that 50 years on, in 2008, the New York University organised a conference with leading legal philosophers to revisit this debate. Amongst them were Nicola Lacey (widely regarded as a Hart scholar of significance since her publication of Hart’s biography), Fred Schauer and Jules Coleman. All articles have been published in volume 83 of the *New York University Law Review* journal.

<sup>15</sup> Bix (n 1) 9.

<sup>16</sup> Bix (n 1) 9.

are smaller and do not pollute the air. Bix concludes that there are both similarities and dissimilarities, giving us reasons for and against the applicability of a general term. This, Bix says, is what Hart calls the "open texture" of rules, when situations arise that were not initially envisaged by the legislator<sup>17</sup>. Hence, Bix's claims that Hart's explanation in *The Concept of Law* can be summed up as a paradigmatic and criteriological approach to meaning: paradigmatic in so far as there is always a plain case (a "paradigm") that serves as the benchmark for all other cases (hence the paradigmatic); and criteriological, since with this plain case in mind, we need to consider a list of criteria which allows us to begin to evaluate whether some particular case would fit the original<sup>18</sup>. Reading Bix's explanation, the similarity to Lon Fuller's criticism of Hart's work is striking<sup>19</sup>. In his response to Hart's lecture, Fuller writes:

The task of interpretation is commonly that of determining the meaning of the individual words of a legal rule, like "vehicle" in a rule excluding vehicles from a park. More particularly, the task of interpretation is to determine the range of reference of a word, or the aggregate of things to which it points<sup>20</sup>.

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<sup>17</sup> Bix (n 1) 9.

<sup>18</sup> Bix (n 1) 9.

<sup>19</sup> As presented in Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' Harvard Law Review. Cf footnote n 14. Fuller presented a criticism of Hart's work, in an attempt to defeat and raise doubts about the validity of Hart's theory.

<sup>20</sup> Fuller (n 14) 662. Fuller considers one of the main problems of Hart's proposed theory to be that interpretation of a rule lies in the meaning of individual words (Fuller (n 14) 662). He goes on to say that generally, when interpreting a rule, one does not give meaning to an individual word but rather interprets the sentence, the paragraph, or even the whole page. As will be seen throughout this chapter, Fuller (and Bix's) interpretation of Hart's "open

In fact, the approach taken by Fuller and Bix resonates not with Waismann and his school of thought, but rather with Frege's work, who took a completely different approach to the subject of meaning<sup>21</sup>. According to Frege the extension of a statement is its truth value, and the extension of a concept or expression is the set of things that it applies to. So, for example, the extension of the term (or concept or expression) "cat" is the set of all cats in the world (either present, past or future). Every expression that has an extension has a sense, which amounts to the set of conditions whose existence in the world is necessary and sufficient for a proposition predicating the expression or term or concept to be true<sup>22</sup>. Taking Bix's example of "vehicle", under

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texture" as referring to the meaning of an individual word is at the root of their misunderstanding of Hart's theory (cf text to note 16).

<sup>21</sup> Gotlob Frege is seen as one of the most influential philosophers in the systematisation of the notion of meaning. Frege invented the symbolic language of modern logic, and introduced many ideas which to this day are influential in philosophy of language, one of them being his theory of sense and denotation. Alexander Miller, *Philosophy of Language* (2nd edn, Routledge 2007).

<sup>22</sup> In support of his claim that Hart takes a paradigmatic and criteriological approach to meaning, Bix quotes a passage from Gordon Baker, where he writes: "Gordon Baker claimed that Hart's argument is circular: Waismann's notion of "open texture" derives from his argument/assumption that a term's sense is constituted by the rules governing its application and that no rule can be formulated in such a way that the rule's application is never in doubt; given that indeterminacy of application is built into the idea of "open texture", it is not surprising to find it as one of the idea's consequences (...) Although this is not generally recognised, the notion of open texture makes sense only within a particular form of semantic theory...As a result it might well be impossible for Hart to incorporate it into his philosophy of law". Bix (n 1) 18. It is of note that Gordon Baker explicitly refers to the "term's sense". As mentioned, for Frege a term's sense is the set of conditions in the world that are necessary and sufficient for something to be true of the sentence which it expresses. This passage

the theory there must be necessary and sufficient conditions for something to be a “vehicle” (including making noise, and threatening safety and order perhaps). If Bix was indeed aligning Hart’s theory with that of Frege’s, which his work seems to indicate, there is a fundamental incompatibility between this claim and his earlier claim that Hart’s insights on open texture are an application of Waismann’s theory. Waismann renounced positivism and Wittgenstein’s teachings in the *Tractatus*<sup>23</sup>, he was not endorsing a Fregean account of meaning, but rather a much more (later) Wittgensteinian account. These questions arise due to Bix’s novel claim of a “paradigmatic and criteriological” approach to meaning, a claim that he neither explains fully nor comprehensively tests against the evidence to see if it is feasible.

In my view, the main reason for Bix’s (and Fuller’s) misunderstanding of Hart’s discussion on “open texture” is that, unlike Hart, who focuses on the understanding of the term “vehicle” in the context of a given rule, Bix focuses on the application of the term “vehicle” by itself, as emphasised by his reference to a “criteriological” approach to meaning. Fuller is even more explicit, claiming that “interpretation is to determine the range of reference of a word”<sup>24</sup>. There has been some confusion in the legal literature, as exemplified by the analysis of the works of both Bix and Marmor, between the concepts of open texture, vagueness and generality, despite their fundamental philosophical differences. Vagueness can be defined as the property of

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supports the claim that Bix’s conception of Hart’s theory was somewhat similar to Frege’s philosophy.

<sup>23</sup> BF McGuinness (ed), *Friedrich Waismann - Causality and Logical Positivism* (Springer 2011), 15.

<sup>24</sup> Fuller (n 14) 662.

an expression which gives rise to "borderline cases"<sup>25</sup>, meaning that the expression or piece of language in question is neither indisputably applicable nor inapplicable. In other words, the term's extension is lacking in clarity. Jeremy Waldron provides a clear and concise explanation of vagueness in his paper *Vagueness in Law and Language* where he writes:

A predicate P is vague if there are objects or instances x<sub>1</sub>, x<sub>2</sub>, etc. within the domain of the normal application of terms of this kind such that users are characteristically undecided about the truth or falsity of "x<sub>1</sub> is P," "x<sub>2</sub> is P," and they understand that indecision to be a fact about the meaning of P rather than about the extent of their knowledge of x<sub>1</sub>, x<sub>2</sub>, etc. Example: "Blue"-colored is vague because, although the predicate is supposed to apply to and discriminate among color patches, most of us would hesitate about saying of certain shades of turquoise and lavender either that they were blue or that they were not blue. We would regard them as borderline cases, perhaps undecidable except by arbitrary stipulation. Our hesitation would not be because we had only had a glimpse of the patches in question and needed a closer look. We would say rather that even under optimal conditions of perception the meaning of the word "blue" did not determine an answer.<sup>26</sup>

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<sup>25</sup> Robert Audi, *The Cambridge Dictionary of Philosophy* (Cambridge University Press 1995), 945.

<sup>26</sup> Jeremy Waldron, *California law review vagueness in law and language: Some philosophical issues* (2015) 513.

Waldron gives the example of the colour “Blue”, but there are other examples. Let's take the example of the expression "a short man". When thinking of the term "short man", a few interesting questions may arise pertaining to its applicability<sup>27</sup>, for example: what is the maximum height that a man can have for him to be short? Is there a cut-off point after which the man is no longer short? The unanswerable nature of these questions is due to the vagueness of certain terms in our language<sup>28</sup>. This vagueness should be distinguished from generality. General terms are those that can apply to different objects, and/or different kinds of objects. For example, the term "person" can refer to many different people, and also to different kinds of people (it applies to both men and women)<sup>29</sup>. Other general terms are “complete”, “dead”, and

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<sup>27</sup> Vagueness has been an issue for philosophers for centuries. The earliest report of such issues was Cicero's “heap paradox”. See, Roy A Sorensen, *A Brief History of the Paradox: Philosophy and the Labyrinths of the Mind* (Oxford University Press, USA 2003) 53.

<sup>28</sup> The Sorites Paradox exemplifies the philosophical significance of this type of vagueness. “A series of things could be arranged in such a way that the first consists of a large heap of grains of some kind and each subsequent member consists of grains of the same kind but contains, in each case, one less grain than the one before.... The last member, which consists of a single grain, is obviously not a heap. But if any member of the series is a heap, then it would surely remain so if just one grain were subtracted. The application conditions for the predicate ["heap"] are not sharp enough to distinguish heaps from non-heaps on the basis of the difference of a single grain so if one member of a (suitably gradated) series is a heap, so is the next. Since the first member is certainly a heap, all the subsequent members are also, including the last.” Linda Burns, *Vagueness: An investigation into natural languages and the Sorites paradox* (Kluwer Academic Publishers 1991) 5.

<sup>29</sup> It is important to note that a term can be general and not vague. For example, the expression "Philosophy Lecturer" is a general expression (it can apply to a multitude of objects, or in this case to a multitude of individuals who happen to be philosophy lecturers), but it is not vague, since its application is definite, and it does not allow for borderline cases. The same is true of terms like "dog", "cat" or "car".

“empty”. None of these terms are vague: there are no borderline cases. In turn, open texture is different from both generality and vagueness: Waismann referred to open texture as "the possibility of vagueness"<sup>30</sup>. A concept or expression is open textured when it is precise along some dimensions, but has not been considered in other dimensions. For any dimensions that it has not been considered, it is not clear what the application would be. Let's take the example of the term "mother". The term "mother" is not considered vague, as its application is definite, but it is however "open textured". It is open textured in the sense that human invention has opened new possibilities that have shown this term to be open textured. With the introduction of new technology that allows the harvesting of eggs, a new set of questions surrounding the use of the term "mother" have arisen: is the "mother" the person who carries the baby to term? Or is the "mother" the person who donated the egg? Or is the mother the person who raises the baby? When the term "mother" was first introduced, these different dimensions weren't considered, and there needs to be a fresh decision as to how the term is to be applied in these new dimensions. The possibility that both general definite terms and general vague terms can be open textured is sufficient to show that distinctions obtain amongst the three.

With this in mind, let's return to the topic at hand. According to Hart, when dealing with a large group of people it would not be possible to give every individual particular instructions and guidance of conduct. It would be impractical, if not impossible, to enforce social control by addressing every single person individually. Legislation tends to therefore address groups of people, or refer to general situations

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<sup>30</sup> McGuinness (n 23) 15.

by using general terms<sup>31</sup>. In order to address large groups of people there need to be general rules, standards of conduct and principles<sup>32</sup>. In law, society has therefore made use of general terms in one of two distinct ways: legislation and precedent<sup>33</sup>. Many legal theorists argue that when compared with legislation, precedent can seem uncertain, unreliable and unclear. By its very nature, precedent does not give people a written description of the rule, and the ability to clearly recognise instances where it would be applicable<sup>34</sup>. There is a strong belief amongst the legal community, Hart

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<sup>31</sup> General terms are predicable of more than one object. Unlike singular terms they cannot be used as a grammatical subject, meaning that they cannot be replaced by individual variables. Robert Audi, *The Cambridge Dictionary of Philosophy* (Cambridge University Press 1995).

<sup>32</sup> Hart (n 2), 124.

<sup>33</sup> Hart compares precedent to giving examples, where there is minimal use of general terms, the case is decided on its merits and a decision is reached based on the specificities of the case. Unlike precedent, legislation needs to address a large number of people and deal with an unforeseeable number of diverse situations. The use of legislation, Hart argues, is more closely aligned with giving instructions where there will be maximum use of general terms. Hart (n 2), 125.

<sup>34</sup> Hart (n 2), 125. The iconic case of *Donoghue v Stevenson* illustrates this rather well. Not only was the modern concept of negligence in English law formulated in *Donoghue v Stevenson*, but it was also refined and stretched in the years that followed, in cases such as *Dorset Yacht Co Ltd v Home Office* and *Hedley Byrne v Heller*. In *Donoghue v Stevenson* the facts involved the claimant, Mrs Donoghue, drinking a bottle of ginger beer and finding a dead snail at the bottom of the bottle. Subsequently, Mrs Donoghue fell ill and sued the ginger beer manufacturer. Mrs Donoghue had no contractual relationship with the café (since it was her friend who placed the order), and her friend did not suffer any injuries. Furthermore, neither Mrs Donoghue nor the friend had any contractual relationship with the ginger beer manufacturer. Given that injuries resulting from defective products were generally claimed on the basis of a contract of sale, it could be reasonably expected that the ginger beer manufacturer would not be liable. Mrs Donoghue brought the case against Stevenson on the

argues, that legislation provides a much needed sense of clarity and certainty. According to Hart however, too much emphasis has been placed on the reliability and clarity that legislation provides when compared to precedent<sup>35</sup>. In most cases, when applying a general rule, there are no doubts as to its application. Were this not the case, general rules would lose their purpose. These cases are known as the "core", where the applicability of the rule is clear. There will however be cases, commonly known as "hard cases"<sup>36</sup>, where it is not clear whether a given rule applies or not. These cases are known as lying in the "penumbra". To illustrate this issue in *The Concept of Law* Hart gives the same example discussed above, of the rule "no vehicles in the park". Regarding this rule, Hart says that the aim of peace and quiet in the park is maintained at the cost of excluding certain things<sup>37</sup>. Hart suggests that the rule was enacted with the purpose of maintaining peace and quiet in the park, and so there are clear cases where no dispute will arise as to the applicability of the rule (e.g. in the case of cars, motor-bikes or buses). There would be no argument that, for the purpose of this rule, a car, a motorbike or a bus would be a vehicle. If however instead of a car, we give the example of roller-skates, it is not as intuitive whether or not these would

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basis of negligence and duty of care, and in his judgement Lord Atkin established the neighbour principle (that one must take reasonable care to avoid acts or omissions which could reasonably be foreseen as likely to injure one's neighbour). There was no way for the defendants in all of these cases to foresee the court's decision, and, as Hart puts it, there was no law for an individual to apply "by himself, to himself".

<sup>35</sup> Hart's defence of the validity of legal precedent is perhaps unsurprising, particularly bearing in mind his career as a Barrister for the Chancery Court.

<sup>36</sup> HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593.

<sup>37</sup> Hart (n 2) 129.

be considered a vehicle for the purpose of the rule<sup>38</sup>. It is not intuitive because the rule is open textured; it was never considered whether roller-skates were a vehicle for the purpose of this rule, as discussed at the beginning of this section. When enacting legislation, Hart says, we have two main handicaps: the relative ignorance of the facts, and the relative ignorance of the aim. There will be unforeseen dimensions, which were not taken into account when the rule was devised. These cases, unforeseen when the legislation was enacted, are those in which it is not clear whether a given situation will or will not be covered by a particular piece of legislation. So, in the case of the rule "no vehicles in the park", where our main aim was to keep the peace and quiet, until we consider this particular case (that of roller-skates) and a decision is made as to whether or not the use of roller-skates would impinge the peace and quiet in the park, there is no way of knowing whether or not "roller-skates" are a vehicle for the purpose of this rule.

Up until this point Bix's theory, though convoluted, would be reconcilable with Hart's theory, however it is important to clarify the difference between Bix's version of open texture, referring to a single term, and what I argue is Hart's point, the open texture of language. Supporters of a Fregean conception of logical meaning would support, as Bix seems to, the idea that even though there can be no explanation of the sense of a complex proposition, there can be an explanation of its component parts. This was defended by Wittgenstein in his earlier works, namely the *Tractatus*<sup>39</sup>. According to the earlier Wittgenstein, in order to understand a proposition, the only

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<sup>38</sup> Hart (n 2) 126.

<sup>39</sup> Norman Malcolm, *Nothing Is Hidden: Wittgenstein's Criticism of His Early Thoughts* (Blackwell Publishers 1988) 84.

requirement is to understand the constituent parts of the relevant sentence. In other words, in order to understand the sentence "No vehicles in the park", we need to understand what is meant by "vehicles" and "park", together with "no" and "in the", nothing more. In the *Tractatus*, Wittgenstein writes,

One name stands for one thing, another for another, and they are combined with one another. In this way the whole group - like a living picture - presents a state of affairs.<sup>40</sup>

In his later philosophy, by which Bix claims Waismann and Hart were influenced, Wittgenstein takes a completely different approach to meaning. In fact, Wittgenstein goes against his earlier philosophy, and that of Frege and Russell, and claims that meaning is to be found in use, and there are countless different uses of what we call "symbols", "words, and "sentences". Wittgenstein illustrates the idea that concepts are not always bound by rules guiding their applicability in §80 of *Philosophical Investigations*<sup>41</sup>. Wittgenstein gives the example of disappearing chairs. The passage reads:

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<sup>40</sup> Ludwig Wittgenstein and Luis Valdés M Villanueva, *Tractatus Logico-Philosophicus* (2nd edn, Tecnos 2003) 4.0311

<sup>41</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967) §80. Even though it was Waisman who coined the term "Open Texture" in his article *Verifiability* (See Friedrich Waismann, *Philosophical Papers* (Brian McGuinness ed., Dordrecht and London 1976)), many claim that he was heavily influenced by Wittgenstein in his thinking. Waismann worked closely with Wittgenstein for many years, and during his time at Oxford he was a great promulgator of Wittgenstein's philosophy. Edmonds and Eidinow write: "Although not the most original of thinkers, Friedrich Waismann had the wonderful capacity of being able to sum up abstruse notions in a straightforward way and accessible language. For nearly a decade, mostly with cooperation from Wittgenstein, he applied this gift to Wittgenstein's

I say "There is a chair". What if I go up to it, meaning to fetch it, and it suddenly disappears from sight? - "So it wasn't a chair, but some kind of illusion" - But in a few moments we see it again and are able to touch it and so on - "So the chair was there after all and its disappearance was some kind of illusion". - But suppose that after a time it disappears again - or seems to disappear. What are we to say now? Have you rules ready for such cases - rules saying whether one may use the word "chair" to include this kind of thing? But do we miss them when we use the word "chair"; and are we to say that we do not really attach any meaning to the word, because we are not equipped with rules for every possible application of it?<sup>42</sup>

So, as Wittgenstein explains, we have rules for the usage of a certain term (e.g. "chair") when we need them, and will create new rules whenever a new situation crops up, where due to its novel nature we don't yet have any established rules as to whether a certain concept will apply<sup>43</sup>. Hart did not refer to words and rules interchangeably, but

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oracular utterances, diligently trying to on them a form and structure." John Eidinow and David Edmonds, *Wittgenstein's Poker* (Faber & Faber Non-Fiction 2005), 126. It is therefore not surprising that although Waismann is credited with the term "open texture", many claim that he was heavily influenced by Wittgenstein's thinking.

<sup>42</sup> Wittgenstein (n 41) §80. According to Baker and Hacker this is comparable to J.L. Austin's exploding goldfinch - reference Baker & Hacker p.178.

<sup>43</sup> This was an attack on Frege's conception of determinacy of sense. Wittgenstein both in the *Tractatus Logico-Philosophicus* and in *Philosophical Investigations* was highly critical of Frege's work, particularly his universalist views. (See Gordon P Baker and PMS Hacker, *Analytical Commentary on the 'Philosophical Investigations': V. 2: Wittgenstein: Rules, Grammars and Necessity* (DA Information Services 1985) 178 & Audi (n 31) 328)

rather he referred to the rules that govern the applicability of concepts or words, which only make sense when looked at in the context of a sentence.

Bix, based on his interpretation of Hart's theory, dismisses open texture of language and claims that it is fundamentally different from the theory put forward by Waismann. To understand Bix's rationale, let's look at *The Concept of Law*, and the practical application of Bix's understanding of Hart's "open texture". A few pages into Chapter VII of *The Concept of Law*, Hart brings up the issue of a "toy motor-car electrically propelled"<sup>44</sup>. Following Bix's interpretation of Hart's theory, namely that open texture ultimately refers to whether a single concept applies or not, we would, like Bix, make a list of the similarities and dissimilarities between the plain case (the "motor-car") and the new case (the "toy motor-car electrically propelled"). Bix writes,

We begin with a list of plain cases or the paradigm (the car) and then consider a list of criteria which allow us to begin to evaluate how similar a purported extension would be.<sup>45</sup>

So, a toy motor-car electrically propelled would most likely make noise (much like a car but at a lower volume), and be disruptive to passers-by (like a car, but to a much lower extent). We would then set this against the particular situations that the legislator was thinking of when proffering the rule<sup>46</sup>, namely that peace and quiet in the park was to be preserved. It is of note that under Bix's reasoning, we would consider the extension of a proposed new concept, like "electrically propelled toy-car", and not a proposed new case. So, according to Bix's theory, the legislator would

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<sup>44</sup> Hart (n 2) 129.

<sup>45</sup> Bix (n 1) 9.

<sup>46</sup> Ibid.

then make a decision based on the similarities and dissimilarities of the "electrically propelled toy-car" and the paradigm case (the "car"). Unsurprisingly then Bix concludes that following this logic, Hart's open texture would be irreconcilable with that of Waismann, since the use of "vehicles" such as bicycles (or electrically propelled toy cars) was far from unforeseeable.

There is however a way of looking at this that is very much reconcilable, and indeed consistent, with that of Waismann's and Wittgenstein's theories, which as Bix himself mentions were Hart's inspiration. Hart is, I claim, very clear in that he is not looking at concepts in isolation, but rather at concepts as part of rules. Let's apply this idea to the electrically propelled toy-car example. A general rule is enacted legislating that no vehicles are allowed in the park. For most cases, we understand this rule and are able to follow it (as per Wittgenstein's example of the "Chair", we can use this term even though we are not equipped with rules for every single application of it). There will however be other cases where its proper use is not clear. One of these cases might be that of an electrically propelled toy-car. What is uncertain in this case is not whether the particular concept "electrically propelled toy-car" is a "vehicle", but rather whether it would be a vehicle for the purpose of this rule. So, the confusion lies on what it means to say a vehicle for the purpose of this rule. As mentioned, according to Hart, when enacting new laws, legislators have two main handicaps: their relative ignorance of the facts (due to unforeseen cases, such as the electrically propelled toy-car), and their relative ignorance of the aim (due to the fact that we have not yet looked at these aims in conjunction with the unforeseen cases). When establishing the rule "no vehicles in the park", our general aim was clear, but we did not foresee such circumstances as those of children wanting to play, and deriving pleasure from

playing, with electrically propelled toy-cars. In this particular case, the rule's general aim of "peace and quiet in the park" would need to be set against the pleasure that some children would gain from playing with such electrically propelled toy-cars. It is due to the fact that our aim is unclear, that rules are open-textured. So, the open-texture stems not from the fact, as Bix contends, that it is unclear whether "electrically propelled toy cars" are a vehicle, but whether they are a vehicle for the purpose of this rule, since the legislator might decide to relax the requirement of peace and quiet, to allow the happiness of children who enjoy playing with electrically propelled toy-motor cars<sup>47</sup>. As Hart writes,

When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our aim, and shall incidentally have settled the question as to the meaning, for the purpose of the rule, of a general word.<sup>48</sup>

So, analysing Hart's thesis in light of Waismann's and Wittgenstein's teachings brings about a much more coherent explanation of Hart's work. Moreover, it illustrates that Hart's theory, as it is claimed throughout this thesis, was indeed influenced by OLP and analysing his work under this light not only provides us with a more plausible interpretation, but allows us to see Hart's work at its full potential.

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<sup>47</sup> Hart (n 2) 129.

<sup>48</sup> Ibid.

## The issue of Judicial Discretion

This second substantive section of the chapter will focus on the issue of judicial discretion. As will become clear in the next few paragraphs, Bix's interpretation of Hart's theory of "open texture" follows from, and is informed by, his understanding of judicial discretion. It is clear throughout *Law, Language and Legal Determinacy* that the main focus of Bix's book is judicial discretion (after all, his book is about legal determinacy<sup>49</sup>), and Bix's reading of Hart's work is constrained by his views on judicial discretion. Even though most of Bix's discussion is focused on the issue of open texture, this is so because it informs Bix's view of Hart's attitude towards judicial discretion. Bix puts forward two main criticisms of Hart's theory of open texture and views on judicial discretion: firstly that Hart misapplies Waismann's open texture, and secondly that Hart's views on judicial discretion are entirely dependent on his views on open texture but since Hart's views on open texture are flawed so are his conclusions about judicial discretion. These two points will be dealt with in turn. Let's first deal with Bix's first criticism of open texture. As mentioned, Bix attributes to Hart a "criteriological and paradigmatic" approach to meaning, supposedly derived from Waismann's theory of open texture<sup>50</sup>. As illustrated in the previous section, Bix's interpretation of Hart's work creates new problems and tensions that would otherwise not exist. However, Bix's own understanding of Hart leads him to claim that Hart's theory of open texture is conflicted, and not a true adaptation of Waismann's theory. According to Bix, Hart applied a theory about general language (i.e.

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<sup>49</sup> In the introduction to his book Bix is clear about the focus of his book being judicial discretion, and legislative choices. Bix (n 1) 2-3.

<sup>50</sup> Cf text to footnote 15.

Waismann's "open texture") to legal language, and as a result there are noticeable conflicts and tensions in Hart's theory. Moreover, Bix argues that Hart's interest lay not in presenting a theory of language, but with showing how legal rules "are (and should be) applied"<sup>51</sup>. To that end, Bix contends, Hart was not precise in his use of Waismann's theory, often using different terms such as "*words, sentences and rules*"<sup>52</sup> interchangeably. This imprecise use of words, according to Bix, is a telling sign of the tension of adapting a theory about general language to legal language<sup>53</sup>. This is an interesting argument, but one that I claim is the result of Bix's own (mis)understanding of Hart's philosophy.

Let's start with Bix's claim that Hart uses terms such as "words, sentences and rules"<sup>54</sup> interchangeably. As explained in the first section of this chapter, Bix conflates the concepts of open texture and vagueness. The distinction between claiming that rules are open textured, and that the general terms that we use to communicate to

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<sup>51</sup> Bix (n 1) 18

<sup>52</sup> Bix (n 1) 18.

<sup>53</sup> Bix (n 1) 19. Bix does also suggest that Hart's use of *words, sentences and rules* interchangeably might reflect an "inexactness in transcribing an idea, not being sufficiently careful in describing the idea's domain or scope". Though a bold and unsubstantiated argument, Brian Simpson makes a similar remark in his book *Reflections on The Concept of Law*. He notes that this inexactness, and extensive use of metaphors (such as "language games", "open texture", family resemblances") are typical of analytic linguistic philosophers of Hart's period. Simpson notes that could indeed be due to "intellectual indolence or sloppiness of thought". Simpson (n 12) 73. It is argued in the first section of this chapter that Hart was indeed clear on his views on Open Texture, and his work can be interpreted coherently. Moreover, in the notes to *The Concept*, Hart directs the reader to two of his earlier pieces where he mentions the idea of open texture and develops his thoughts further. Hart (n 2) 297.

<sup>54</sup> Bix (n 1) 18.

large groups of people are vague, is a significant one, particularly for the topic at hand. If, as Bix suggests, Hart was referring to the vagueness of general terms, then it should follow that Hart should always refer to words, and not confuse these with sentences and rules. However, it is argued that Hart was not referring to the vagueness of general terms, but rather to the open texture of language. It therefore follows that Hart does not use the terms “words, sentences and rules” interchangeably, rather he refers to words (which can be general terms), sentences (which might employ general terms), and rules (which might employ general terms too) as instances where we can see how *language* is open textured. If Hart’s theory is interpreted as applying to general language, as Hart himself claims it is<sup>55</sup>, this is not an issue.

Since Bix’s first criticism has been addressed, we can now focus on Bix’s second claim regarding judicial discretion. As mentioned, Hart believes that language is open-textured, and that there will be situations where a fresh choice will need to be made between alternatives. This is where judicial discretion comes into play: according to

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<sup>55</sup> There can be no stronger argument for discrediting Bix’s views on Hart’s application of open texture to legal language and rules, than from Hart himself, claiming that Bix’s assessment of his (i.e. Hart’s) work was inaccurate. It is therefore interesting to note Bix’s comment that after extracts of this chapter were published as part of an article, H.L.A. Hart sent him a letter. In this letter, in which Bix claims that Hart was sympathetic to much of what he had written, Hart said: “I certainly did *not* think I was saying something applicable only to the language of *statutes* or *rules* or *statutory* interpretation etc. My view was (and is) that the uses of *any* language containing empirical classificatory general terms will, in applying them, meet with borderline cases calling for fresh regulation. This is the feature of language called ‘open texture’”. Bix (n 1) 49. This letter goes to show that Hart himself did not agree with what Bix presents as being Hart’s views on ‘open texture’. Notwithstanding the fact that Hart might not agree with the views promulgated in this chapter either, Hart’s letter to Bix will inevitably raise questions about his interpretation of Hart’s work.

Hart, there will be situations where judges will be called upon to make fresh decisions. According to Bix, Hart makes a circular argument, for not only does judicial discretion occur as a direct result of the “open texture” of rules, but it is also solely justified by the open texture of rules. However, Bix claims that Hart failed to prove that there is something inherent to legal language that means that rules are open textured, but rather that Hart claims that there are good reasons for us to interpret legal rules in that way.<sup>56</sup> Bix intimates that Hart was trying to justify his own belief - that judicial discretion is of benefit - through the employment of the theory of open texture<sup>57</sup>. Moreover, Bix is unclear as to why the open texture of rules would necessarily lead to judges having to exercise discretion. Towards the end of the chapter Bix asserts that:

Hart had not been completely clear in his description of the situation in which judges must use discretion. Are there ‘gaps’ in the law because language, rules, or the law have ‘run out’ entirely, or because the meanings of the relevant materials have simply ‘faded’ so much at the periphery that they no longer determine a particular answer or

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<sup>56</sup> Bix writes: “Hart had not proven from the nature of language that judges must have discretion; rather, he gave reasons why legal texts should be interpreted in a way that leave judges discretion in applying the law.” Bix (n 1) 18. Moreover, Bix claims that Hart wasn’t concerned with presenting a theory of language. Rather, Hart’s aim was to show how legal rules “are (and should be) applied” Bix (n 1) 18. He asserts this in support of his claim that Hart’s use of the theory of open texture was not accurate.

<sup>57</sup> Some legal writers are of the view that Hart’s time at the Chancery Bar had an impact on his views on judicial discretion.

interpretation (and, by inference, a range of impermissible answers and interpretations)?<sup>58</sup>

Bix's criticism can be easily dismissed by looking at Hart's work. In *The Concept of Law*, Hart writes:

... the existence of borderline cases is forced upon our attention, and this shows that the assumption that the several instances of a general term must have the same characteristics may be dogmatic. Very often the ordinary, or even the technical, usage of a term is quite 'open' in that it does not *forbid* the extension of the term to cases where only some of the normally concomitant characteristics are present.<sup>59</sup>

Hart is not talking about *rules* or *laws* or *statutes*. Hart is talking about general terms. And when we use general terms, which are very frequently used in legislation, we will always encounter borderline cases where the use of the term is quite "open". Once again, Bix's misunderstanding of judicial discretion is symptomatic of his deeper misunderstanding of open texture. As mentioned throughout this chapter, Hart was referring to a characteristic of language, not just of rules and certainly not specific to legal language. In fact, in the notes to *The Concept of Law*, Hart refers to Wittgenstein's teachings in this area<sup>60</sup>. In *Philosophical Investigations* Wittgenstein makes reference to the concept "game". The concept "game" is not bounded in any way, and even though we could establish boundaries for the use of the word "game",

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<sup>58</sup> Bix (n 1) 25.

<sup>59</sup> Hart (n 2) 15.

<sup>60</sup> Hart (n 2) 297.

we are all still able to use the term “game” without them<sup>61</sup>. There is no ‘running out’ of law, or language, or rules. That is not what Hart, and certainly Wittgenstein and Waismann were referring to. When a general term is applied there are no ‘rigid’ boundaries drawn from the beginning. When applying a rule that contains general terms, the one who is called upon to answer has to make a choice. There is no boundary, but you can draw one if you need to. And this is precisely what Hart means when he says that the one who is called upon to answer makes a decision as to whether a new line of cases should be added. When that decision is made a boundary is drawn. But this in no way means that there are ‘gaps’ in the law that need to be filled. For Hart claims that if we wanted we could draft legislation in such a way that no doubts as to the application of the rule would exist. However, we benefit from this characteristic of ‘open texture’, particularly visible in the application of general terms, since it allows a fresh decision to be made whenever it is needed.

Hart’s reasoning behind why rules will always suffer from this “open texture” of language is of vital importance for understanding this need for a fresh decision. As mentioned, according to Hart there are two major handicaps when one is trying to legislate some conduct of human behaviour through general standards of conduct: “our relative ignorance of the facts” and “our relative indeterminacy of the aim”<sup>62</sup>. In

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<sup>61</sup> Wittgenstein (n 41) 68. Wittgenstein writes: “... For I *can* give the concept ‘number’ rigid limits in this way, that is, use the word “number” for a rigidly limited concept, but I can also use it so that the extension of the concept is not closed by a frontier. And this is how we use the word “game”. For how is the concept of a game bounded? What still counts as a game and what no longer does? Can you give the boundary? No. You can draw one; for none has so far been drawn. (But that never troubled you before when you used the word “game”.)”

<sup>62</sup> Hart (n 2) 125.

other words, Hart claims that we do not live in a world where everything is certain, and therefore cannot know in advance all the situations that may eventually come about. There are questions that go beyond our language. But Hart is not so bold as to assert that there is no way in which a system of rules could be in place whereby the meaning of a rule would be so strictly construed that the application of a rule is never in question. If we take Bix's Fregian account of language, where he claims that judges could make a "list" with similarities and dissimilarities of particular instances, and then decide whether a concept could be considered an extension of the paradigm, it could be conceivable that the meaning of a particular concept could be frozen, so that a general term would have the same meaning in every case. Taking Bix's interpretation of open texture, this would be a plausible, and even relatively easy, way to settle the issue of open texture. Hart, whose theory I argue is completely different from that presented by Bix, is against the idea of "necessary and sufficient conditions" that when present would mean the term could be applied properly in every instance of the rule. Hart is not oblivious to the fact that the meaning of a general term could be frozen and used in the same way irrespective of context; he does however make his views clear in Chapter VII of *The Concept of Law*. Hart argues that formalists holds this exact view, and that it would be possible, though not desirable, to freeze the meaning of a rule so that its general terms had the same meaning in every possible instance<sup>63</sup>. This could be done by ascertaining "sufficient and necessary" conditions for proposed extensions of a general term. Hart writes,

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<sup>63</sup> Hart (n 2) 129.

The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down. One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequences of applying the rule in this way. (...) The consummation of this process is the jurists' heaven of concepts'.<sup>64</sup>

The expression "heaven of concepts" was echoed by an article Hart wrote years after *The Concept of Law*, which can provide us with greater clarity regarding what Hart really meant by the above quotation. Around 1969, after his resignation from the Chair of Jurisprudence at Oxford, Hart was working on a paper on about Jhering's legal philosophy, entitled "Jhering, Heaven of Concepts"<sup>65</sup>. In his paper, Hart firmly states

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<sup>64</sup> Hart (n 2) 129-130.

<sup>65</sup> HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence' [1983] *Essays in Jurisprudence and Philosophy* 265. This paper was published in 1983 as part of the book *Essays in Jurisprudence and Legal Philosophy*. Also, see Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, USA 2004), 302, where she writes: "In 1969, he (i.e. Hart) was also working on a paper on the late nineteenth-century German jurist Jhering's contribution to jurisprudence - a paper for which he had to do a substantial amount of reading in German, given that many of Jhering's publications had never been translated".

that the lack of a translation of Jhering's work to English is an "intellectual tragedy"<sup>66</sup>. Given Hart's praise of Jhering's work, it is hardly a coincidence that Hart refers to formalism as "the jurists' heaven of concepts". In this paper, Hart explains Jhering's aversion to these theorists' over-simplification of real life applications of legal rules<sup>67</sup>. According to Hart, Jhering thought that the belief that we could consider concepts "in abstract" without looking at the legal consequences of a legal rule or concept was absurd<sup>68</sup>. Hart links Jhering's legal philosophy with his own when he says that Jhering understood that concepts are open, and when an unforeseen situation arises there must be a fresh choice as to whether adapting the concept to this new circumstance would lead to socially desirable ends. Jhering ridiculed the idea of rules so detailed that they would provide juristic specifications for the decision of all possible cases<sup>69</sup>. It is of note that on multiple occasions in the paper Hart makes reference to *The Concept of Law*, and his own teachings, on this matter<sup>70</sup>. Moreover, he makes reference to J.L. Austin and Wittgenstein's philosophy as "being free of *Begriffsjurisprudenz* in Jhering's sense<sup>71</sup>". Referring to Waismann's concept of open

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<sup>66</sup> Hart (n 65) 1.

<sup>67</sup> Hart (n 65) 266.

<sup>68</sup> Hart (n 65) 266.

<sup>69</sup> Hart (n 65) 270.

<sup>70</sup> Hart (n 65) 271.

<sup>71</sup> Hart (n 65) 374. *Begriffsjurisprudenz* can be directly translated as *conceptual jurisprudence*, and it refers to the idea that there can be a logical application of concepts to judicial decisions. Following this *conceptual jurisprudence* there would be no room for judicial discretion, since the judge would at every stage be bound by rules so detailed that they would govern every course of action.

texture, who in the paper Hart calls "a close adherent of Wittgenstein"<sup>72</sup>, Hart says that it illustrates how ordinary language philosophy is relevant to jurisprudence and, even though their writings were not about law, it has a lot to offer the jurisprudential world<sup>73</sup>.

If Hart's theory is interpreted, as it is suggested throughout this thesis, through ordinary language philosophy, particularly by taking into account Waismann's and Wittgenstein's insights, then Bix's argument has no foundation. As argued, interpreting Hart's theory as a true adaptation of Waismann's teachings, one would reach the conclusion that Hart refers to open texture and not vagueness. Moreover, the issue of open texture arises due to a relative ignorance of the facts, and a relative ignorance of the aim, when a legislator enacts a rule. So, disputes over whether a concept or a situation falls under a particular rule do not arise because the general concept itself is unclear in all situations where it is applied, but rather because it is unclear whether the particular situation being presented was considered when the rule was enacted, and therefore until it is considered our aim in this area is indeterminate. This is what Hart meant by unforeseen situations. So, just like Waismann's image of cats growing to gigantic sizes, and Wittgenstein pointing to a

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<sup>72</sup> Hart (n 65) 271.

<sup>73</sup> Hart (n 65)275. Interestingly, Lacey expresses broadly the same opinion in her book. Moreover, she claims that Hart was prevented from following Wittgenstein's teachings due to "an impatience with what he saw as Wittgenstein's scandalously obscure written style", and "a loyalty - perhaps even a desire to please and win admiration from - J.L. Austin". Lacey (n 6) 219. This is hard to understand given his outright praise for Ordinary Language Philosophy (particularly Wittgenstein's and J.L. Austin's contribution) in *Jhering, Heaven of Concepts*. As mentioned, on multiple occasions Hart refers to *The Concept*, indicating that his theory was inspired by the teachings of these two language philosophers.

chair that keeps disappearing, Hart comments on the case of law by suggesting that there are situations that arise that had not been considered in the past. In conclusion, it is not that Hart did not believe that it would be possible to artificially minimise the impact of “open texture” of language, and reduce judicial discretion, it is that he did not believe this to be a good, helpful or beneficial thing to do.

## Overview

Bix was the first legal theorist to embrace Hart’s philosophical insights in *The Concept of Law*, and try to understand them in light of the theories that inspired them. All legal theorists whose work is discussed in the next chapters of these thesis, except for Marmor<sup>74</sup>, mention Bix’s work and his contribution to this area of the literature. As mentioned in the introduction, though his conclusions are flawed, his attempt to shed some light on Hart’s theory should not be underestimated. Like many legal theorists, Bix’s main focus was the issue of judicial discretion, namely whether judges should be able to exercise discretion in their rulings. In order to explore Hart’s insights on judicial discretion, Bix undertook an investigation of Hart’s application of the theory of open texture and compared it with Waismann’s work. Bix concluded that Waismann’s theory was only applicable to general language. The fact that Waismann wrote about general language, coupled with the fact that Bix claims Hart’s application of Waismann’s theory to be imprecise (he detects some “tension” in Hart’s application of the theory to law), leads him to conclude that open texture is not applicable to legal

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<sup>74</sup> This could potentially be given to the proximity in publication (as mentioned, Bix and Marmor’s book were published a mere year apart).

language. Regarding judicial discretion, Bix claims that since it is so closely linked with Hart's views on the open texture of language, it is more asserted than argued for. Since Hart claims that open texture is a characteristic of language, it follows that judicial discretion will be inevitable. Bix disagrees with this claim, and argues that Hart did not present a convincing enough argument as to why judicial discretion should be allowed.

Not even Hart's letter, claiming that his theory was not about rules or legal language, but rather about a characteristic of language, dissuaded Bix who still claims that his version of Hart's theory is more defensible. Throughout this chapter Bix's claims have been closely examined, and a view of Hart's work, that is much more compatible with what Hart himself said his work was about, was presented. It is argued that this view, which is compatible with Ordinary Language Philosophy and the different sources that Hart claim inspired his work, makes much better sense of *The Concept of Law*.

The next chapter will focus on the work of Andrei Marmor, whose book was published a mere year after Bix's. Marmor, who was Bix's fellow colleague at Oxford during their doctorates, holds different but related views to those of Bix and will be investigating the issue of interpretation and legal theory.

# Andrei Marmor on Easy Cases

Section B

Chapter Five

Following my examination of Brian Bix's *Language and Legal Determinacy*<sup>1</sup> in the last chapter, I now turn to focus on the work of Andrei Marmor who puts a similar emphasis upon taking Hart's philosophy of language seriously. The choice to include Marmor as the fourth chapter in this thesis is made principally for two reasons: it preserves the chronological order of subjects in this section, since Andrei Marmor's work<sup>2</sup> was published after Brian Bix's<sup>3</sup>, but more importantly Marmor's work will allow us to look closer at the issue of "open texture" of language through the point of view of a legal philosopher who supports the thesis that Hart's *The Concept of Law*<sup>4</sup> was greatly influenced by Wittgenstein's later philosophy. As seen in the previous chapter with Bix's work, and as will be seen in chapters to follow, e.g., Cole<sup>5</sup> and the *Beyond the Anglo Saxon Realm*<sup>6</sup>, Marmor picks out one specific aspect of Hart's work that he wishes to analyse through Wittgenstein's philosophy: the theory of open texture. As would be expected, and as illustrated through the analysis of Bix's work, Marmor's methodology will create tensions in Hart's work that would not otherwise arise had he taken a more holistic approach to Hart's, and indeed Wittgenstein's, work<sup>7</sup>. These

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<sup>1</sup> Brian Bix and Professor Brian Bix, *Law, Language, and Legal Determinacy* (Oxford University Press 1995).

<sup>2</sup> Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing (UK) 2005).

<sup>3</sup> Cf Chapter four footnote 4.

<sup>4</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012) chapter VII.

<sup>5</sup> See Chapter seven, Tony Cole.

<sup>6</sup> See Chapter eight, *Beyond the Anglo-Saxon Realm*.

<sup>7</sup> Marmor (n 2) 112. At the start of section 5, Chapter 7, entitled "Wittgenstein on Following a Rule", Marmor writes: "Needless to say, a full account of this discussion of Wittgenstein's would go far below the scope of this work (or my competence for that matter). Instead, I shall try to summarize those of his arguments that have direct bearing upon our present concerns".

tensions and inconsistencies will be highlighted throughout this chapter in order to demonstrate that a more holistic interpretation of Hart's work would eliminate such tensions and would reveal a greater depth to Hart's theory.

Taken as a whole, Marmor's book, written as a criticism of Dworkin's semantic sting argument<sup>8</sup>, focuses on the work of a number of legal theorists such as Raz and Fish.<sup>9</sup> This breadth is, however, not pertinent for this thesis, and Marmor's main aim (proving that the semantic sting "stung no one"<sup>10</sup>) as well as his interpretation of other legal philosophers' work will be disregarded since it goes beyond the scope of my argument. Instead, what is of interest is Marmor's theoretical framework and the way in which he presents his defence of Hart's theory, and with it Legal Positivism itself. In short, Marmor's defence of Hart's theory focuses on the defence of the (i.e. Hart's)

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Marmor is referring to Wittgenstein's discussion of rule-following, discussed in sections 143-242 of *Philosophical Investigations*. It would not be expected of Marmor to provide a full explanation of the arguments presented in *Philosophical Investigations*, but what might be said of any philosophy, is probably even more true in the case of *Philosophical Investigations*: the arguments in Wittgenstein's philosophy are so intertwined that it is not possible to isolate any single part of the book and disregard its connections to other parts. Furthermore, it is not clear why Marmor informs the reader of this shortcoming, for presumably the observation could have reasonably been omitted. This issue is not particular to Marmor, as will be seen in Chapter seven, where Tony Cole takes a similar approach of "picking and choosing" parts of J.L. Austin's philosophy that he feels suit Hart's work. (See Chapter seven, text to footnote 56.)

<sup>8</sup> Marmor (n 2) 5. In the introduction to his book, Marmor writes of Dworkin's principal idea: "Law as interpretation calls into question the main tenets of its positivist rival, in substance as well as method. This book sets out to re-examine positivism in the light of this interpretative challenge". Marmor (n 2) 8. It is beyond the scope of this thesis to deal with Marmor's objections to Dworkin's semantic sting, and therefore this will not be addressed in any detail.

<sup>9</sup> Marmor (n 2) 108.

<sup>10</sup> Marmor (n 2) 108.

legal positivist separability thesis. It is Marmor's claim that the positivist separation of "law as it is" from "law as it ought to be", is established successfully by Hart in *The Concept of Law* through the introduction of the distinction between so-called "easy" and "hard" cases<sup>11</sup>. According to Marmor, Hart's distinction, embedded in the theory of open texture, itself embedded within a particular philosophy of language, gives the separability thesis a conceptual foundation separate from legal positivism. In virtue of being conceptually independent from legal positivism, the separability thesis can stand on its own merits, and not as a positivistic conception, and is therefore defensible from the criticism arising from anti-positivistic legal theorists. Marmor chooses to present his arguments against the backdrop of Fuller's criticism of Hart's theory, as presented in the Hart-Fuller debate<sup>12</sup>. Marmor's chapter on Hart reads as a response to Fuller's criticism rather than a defence of legal positivism, and therefore numerous references to Fuller's work will emerge throughout this chapter.

One particular nuance of Marmor's work that is absent from other legal theorists' discussed in this thesis is that Marmor discusses Wittgenstein's rule-following theory in some detail. Marmor's discussion is advantageous for the advancement of my thesis since it will allow us to understand the way in which

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<sup>11</sup> Marmor (n 2) Marmor writes, "One of the main tenets of legal positivism is its insistence on the conceptual separation between law as it is and law as it ought to be". Marmor claims that this distinction is embedded in the Separability Thesis. For further reference see HLA Hart, 'Positivism and the Separation of Law and Morals' [1983] *Essays in Jurisprudence and Philosophy* 49, 606.

<sup>12</sup> As Bix before him, Marmor's main focus is Fuller's article *Positivism and Fidelity to Law* (Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.).

Marmor reads and understands Wittgenstein. By explaining his understanding of Wittgenstein, we can clearly see where his misunderstandings lie and so identify the impact that this approach has on his understanding of Hart's theory. In the same way that Marmor seems to analyse Hart's work, he picks out certain sections of Wittgenstein's *Philosophical Investigations* and analyses them in isolation<sup>13</sup>. It cannot be claimed that other legal theorists, such as Bix, finally interpret Wittgenstein's work in the same way, but given that their methodology is very similar, and that (as I claim) they therefore commit the same methodological mistakes, there is some plausibility in the claim that it is not only their selective reading of parts of Hart's theory that affects their understanding of Hart's whole theory, but also their selective reading of parts of Wittgenstein's philosophy. Marmor's understanding and explanation of Wittgenstein's philosophy will be discussed throughout this chapter.

There will again be two substantive sections to this chapter: the first section will focus on Marmor's understanding of Hart's "easy" and "hard" cases, also known as the core and penumbra of concepts. This is the main focus of Marmor's chapter - after all it is entitled "No Easy Cases?<sup>14</sup>", and it will therefore be the most substantial section of this chapter. The second section will focus on Marmor's understanding of Hart's defence of legal positivism against legal formalism. This section will illustrate some of the difficulties of analysing parts of both Hart's and Wittgenstein's work in isolation and will give some indication of the problems to follow. The final section will conclude this chapter by referring to Marmor's own conclusion and a summary of his

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<sup>13</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967).

<sup>14</sup> Marmor (n 2) 108.

understanding of how his claims link together. Perhaps due to Marmor's focus on Fuller's work rather than Hart's, Marmor's analysis throughout the chapter is somewhat disparate and lacks a coherent approach. This will in turn mean that the critical commentary I make in different sections in this chapter might not immediately flow or connect in a way that is fluid and cohesive. I join up these various strands later in the chapter in a criticism of Marmor's overarching method and approach.

### **On Easy and Hard Cases**

Marmor's analysis of "easy" and "hard" cases is done against the criticism of one of Hart's harshest critics, Lon Fuller. It is perhaps Marmor's hope that by defeating one of Hart's harshest critics he would in turn deal with Dworkin's criticism of Hart's theory<sup>15</sup>, but this idea is merely speculative in nature since Marmor is not explicit regarding his methodology or wider ambition. As Green and Bix before him, Marmor reads Hart against an idea that he holds (in this case Wittgenstein's later philosophy), but does not give enough detail of Wittgenstein's philosophy and its relation to Hart's theory for his case to be compelling (even claiming that a full account of Wittgenstein's philosophy would be beyond his competence<sup>16</sup>). When testing his theory, in this case as a defence to Fuller's criticism, he leaves large parts of his argument and premises unexplained, and thereby creates new problems and tensions in the understanding of Hart's theory that (again) would not occur had Marmor pursued a more holistic interpretation of Hart's work. All these issues will be

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<sup>15</sup> As discussed, it is beyond the scope of this thesis to deal with Marmor's objections to Dworkin's semantic sting, and therefore this will not be addressed in any detail.

<sup>16</sup> Marmor (n 2) 112. Cf footnote no. 7 above.

addressed in turn in the paragraphs to follow. In his commentary Marmor focuses on Fuller's example of the World War II memorial tank. Though lengthy, it is important to read Fuller's passage in full for a comprehensive account of Fuller's, and subsequently Marmor's, criticism. Fuller writes:

What would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the "no vehicle" rule? Does this truck, in perfect working order, fall within the core or the penumbra? Professor Hart seems to assert that unless words have "standard instances" that remain constant regardless of context, effective communication would break down and it would become impossible to construct a system of "rules which have authority." If in every context words took on a unique meaning, peculiar to that context, the whole process of interpretation would become so uncertain and subjective that the ideal of a rule of law would lose its meaning.<sup>17</sup>

According to Marmor, Fuller's criticism is based on three main assumptions on Hart's theory<sup>18</sup>:

- A. That interpreting a legal rule is a matter of interpreting the concept-words<sup>19</sup> it deploys

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<sup>17</sup> Fuller (n 12) 663-664.

<sup>18</sup> Marmor (n 2) 99.

<sup>19</sup> It is unclear why Marmor uses the expression "concept-words", rather than the more established terminology of "general terms" or "general expressions". This term seems to be used exclusively by Marmor. This terminology is in stark contrast to essentialist or definitional

- B. That interpretation of concept-words in legal rules is determined by ordinary use of these terms in natural language
- C. That the meaning of concept-words is insensitive to the particular legal-context in which these words are meant to function.

Marmor claims that Fuller's main criticism was that for Hart understanding a rule is always a matter of determining its purpose, and the purpose can only be ascertained in light of what the rule is there to settle in the first place (meaning that the "ought" is deciding what the rule "is"). By breaking down Fuller's criticisms into 3 main assumptions, Marmor hopes to address them each in turn and invalidate them all. The problem with Marmor's approach is that by itemizing Fuller's criticism in this manner, his own analysis becomes disjointed and nonsensical, and his defence of Hart suffers in similar manner.

The first point Marmor addresses is point C, "that the meaning of concept-words is insensitive to the particular legal-context in which these words are meant to function<sup>20</sup>". According to Marmor, Fuller is mistaken to assume that concept-words need to have the same meaning irrespective of context. In other words, Marmor claims that the meaning of concept-words varies depending on the wider context. To illustrate his point, he gives the example of the concept-word "vehicle", and claims that there is no reason why the concept "vehicle" in the rule "no vehicles in the park"

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ideas of the meaning of concepts, and plays an important part in framing Marmor's view as will be seen in the paragraphs to follow.

<sup>20</sup> Marmor (n 2) 100.

should have the same meaning as “vehicle” for motor insurance purposes<sup>21</sup>. According to Marmor, Hart is not claiming that concept-words should have the same meaning in every context, but rather that they have a “core” of meaning. That is, there are some “core” instances (paradigm cases) where there is no dispute as to the application of the concept-word (e.g. “if anything is a vehicle, a motor car is one”<sup>22</sup>). Marmor affirms that Fuller is against this view, as Fuller claims that according to Hart a term’s meaning needs to be the same in every context (otherwise, Fuller writes, “the whole process of interpretation would become so uncertain and subjective that the rule of law would lose its meaning<sup>23</sup>”). So, Marmor interprets Fuller’s words to mean that if, for example, an electric bicycle, was considered a vehicle for the purpose of a particular rule, it would be considered a vehicle for the purpose of any rule. So far, Marmor presents a logical and defensible argument. The difficulty lies with his understanding of the so-called “core” cases. Let’s start with Marmor’s explanation of Wittgenstein’s philosophy and its relation to “easy” and “hard” cases. According to Marmor, there are two types of legal case: the so-called “easy cases”<sup>24</sup> where the judges will be able

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<sup>21</sup> Marmor (n 2) 100. Marmor’s example can be illustrated further by using a real-life example. The Road Traffic Act 1998 article 143 requires of every person who uses a motor vehicle on the road to have, at least, third party liability insurance. However, electric bicycles are not considered “motor vehicles” for the purpose of this rule (legally they are equivalent to pedal bicycles). This does not mean that for the purpose of another rule (e.g. “no vehicles in the park”) an electric bicycle would not be considered a vehicle. So, the same concept-word could have different extensions depending on context. 'Electric bikes: The rules', (8 March 2016) <<https://www.gov.uk/electric-bike-rules>> accessed 3 April 2016

<sup>22</sup> Hart (n 4) 126.

<sup>23</sup> Fuller (n 12) 664.

<sup>24</sup> Marmor notes that the terms “easy” and “hard” cases might be potentially misleading, as per Raz’s comments that this distinction is not related to the amount of intellectual effort

to identify the law and apply it without any extraneous reference, such as to its purpose (akin to “law as it is”), and “hard cases” where judges will need to modify and create new law (in the realm of “law as it ought to be”). The modification to or creation of new law present in “hard cases” is, for Marmor, akin to having to “interpret” a rule. The foundation of Marmor’s argument lies in his claim that Hart’s explanation of the core and penumbra of concepts has so far been gravely misunderstood, since its connection to “a highly sophisticated conception of meaning and language”<sup>25</sup>, namely Wittgenstein’s<sup>26</sup>, has not been taken into account. Explaining Hart’s position, Marmor writes:

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required to decide the legal case, but rather with the application of the legal rule. Marmor (n 2) 97. Interestingly, Marmor’s explanation of “easy” and “hard” cases follows the same methodological analysis as Bix’s, in so far as Marmor uses the example of the rule “no vehicles in the park” to explain his reasoning.

<sup>25</sup> Marmor (n 2) 96. As it was mentioned in Chapter 2, Brian Bix (cf Chapter 3) holds a similar view, in so far as he claims that legal theorists have misunderstood legal philosophy for they failed to take the *philosophy* aspect seriously. He says: “I discuss legal theory in a way that tries to be serious about philosophy” Bix (n 1) 2.. Stefano Berteza (see Stefano Berteza, ‘Remarks on a Legal Positivist Misuse of Wittgenstein Later Philosophy’ SSRN Electronic Journal, 514-515) makes reference to the work of Andrei Marmor, as he notes that he was the first legal theorist to put forward the positivist argument from Wittgenstein. Regarding this, he writes: “The argument aims to show that the interpretation thesis is inconsistent with the account of rule-following found in Wittgenstein’s later philosophy, and hence that we have to renounce this philosophy if we want to make a case for interpretativism. But the philosophy we are asked to rejoice is quite significant, so the argument from Wittgenstein, if tenable, will prove to be powerful and persuasive weapon that legal positivism can wield against interpretativism”. It should be noted that Stefano Berteza proceeds to disagree with Marmor’s use of Wittgenstein’s philosophy.

<sup>26</sup> Hart (n 4), 96. As stated, Marmor claims that Hart’s passage (quoted above) has been greatly misunderstood, and proposes defend Hart’s assertion by first responding to criticisms that

The gist of Hart's thesis may be summed up as follows: the formulation of legal rules in natural language makes their meanings depend, primarily, on the meanings of the *concept-words* used in these formulations. Since the meaning of a concept-word consists in (*inter alia*) its *use*, there must always be standard instances in which the application of the concept-word is unproblematic.<sup>27</sup>

When employing "concept-words" there will be cases where their application is unproblematic, where we know how to apply the concept-word. These cases, Marmor argues, fall under what Hart calls the "core of meaning"<sup>28</sup>. There will however be cases

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have been put against it, and then demonstrate that it is based on the philosophy of Wittgenstein. In the same paragraph, Marmor states that the distinction between easy and hard cases is entailed by the distinction between law as it is and law as it ought to be, as illustrated by Hart's passage. One can therefore safely assume that Marmor is intending to defend the distinction between "easy" and "hard" cases by explaining it based on the philosophy of the later Wittgenstein.

<sup>27</sup> Marmor (n 2) 96.

<sup>28</sup> Marmor's employment of the term *use*, which Marmor himself italicises in his book, is of particular relevance here, since it is a clear reference to Wittgenstein's use theory of meaning whereby he claims that the meaning of concepts is shown in their use. Wittgenstein writes: "For a *large* class of cases – though not for all – in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in language". Wittgenstein (n 13) §43. Peter Strawson (Strawson, P. F. "Review of Wittgenstein's Philosophical Investigations" *Mind* LXIII (1954), 73) explains this by saying: "Instead, then, of gazing at this over simple picture of language, with its attendant assimilations, we are to look at the elements of language as instruments. We are to study their use. Only so can we solve our conceptual problems. Variants on 'use' in Wittgenstein are 'purpose' 'function' 'role' 'application'. (...) The general aim is clear enough: to get us away from our fascination with the dubious relation of naming, of meaning, and to make us notice the different parts that words and sentences play in this activity."

where it is unclear whether or not a concept-word is applicable, and these fall under the so-called “penumbra of meaning”, and mark the distinction between “easy” and “hard” cases. So, where there is a general agreement as to the concept-word’s applicability, i.e., the so-called “familiar cases”<sup>29</sup>, the case falls under the category of ‘easy’. In these cases the circumstances are constantly recurring, and there are no doubts as to the applicability of the legal rule, thus they fall under the “core of meaning”. All others amount to a “crisis in communication”<sup>30</sup>, where it is not clear if the general word or expression should apply or not, the so-called “hard” cases. “Hard cases” are those that fall under the “penumbra of meaning”. In conclusion, according to Marmor, “easy” and “hard” cases are the direct result of the use of concept-words<sup>31</sup>. He writes,

...since most of the concept-words in our language are actually vague or open-textured, their application to the facts will always involve some borderline cases

What is interesting about Marmor’s concluding remark is that, as elsewhere and much like Bix, he appears to use the terms “vague” and “open textured” interchangeably. Unlike Bix however, Marmor’s misunderstanding is not due to a philosophical oversight but rather to his conviction that “open texture” is no more than an extreme version of vagueness and should therefore be disregarded. According to Marmor, even words that are not vague could potentially be so, and this “possibility of

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<sup>29</sup> Marmor (n 2) 126.

<sup>30</sup> Marmor (n 2) 127.

<sup>31</sup> Marmor (n 2) 126.

vagueness” is what “open texture” denotes<sup>32</sup>. As discussed in chapter four<sup>33</sup>, there is a significant philosophical difference between “vagueness” and “open texture”. To briefly recap, vagueness is the property of concepts that gives rise to “borderline cases”, meaning that a given concept or expression is neither indisputably applicable nor inapplicable. Open texture on the other hand is what Waismann calls “the possibility of vagueness”. Marmor understands “open texture” to mean that all concepts are in fact vague<sup>34</sup>, since even the ones which wouldn’t necessarily be considered vague under the definition of “vagueness”, are included in open texture given that there is a possibility of them being vague. In sum, according to Marmor, open texture is just an extreme version of vagueness, and therefore does not need to be distinguish from, or analysed as a different concept than vagueness. This leads Marmor to claim that “all the words in our language are vague”<sup>35</sup>. Notwithstanding

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<sup>32</sup> Marmor (n 2) 102. Marmor writes: “Even terms which are not vague are potentially so, since one can always imagine circumstances where there would be irresolvable disagreements in judgement as to the word’s applicability.” Jeremy Waldron seems to hold a similar view regarding vagueness being ineliminable. Waldron writes: “A number of philosophers have speculated that vagueness is in principle ineliminable because it is possible to envisage puzzling borderline cases for every predicate we define. This possibility was labelled “open texture” by Friedrich Waismann.” Jeremy Waldron, *California law review vagueness in law and language: Some philosophical issues* (2015) 522.

<sup>33</sup> Chapter four, Brian Bix on Judicial Discretion, text to footnote 28.

<sup>34</sup> Marmor (n 2) 100. Marmor writes, “The former term (coined by Waismann) is meant to designate the possibility of vagueness. Even terms which are not vague are potentially so, since one can always imagine circumstances where there would be irresolvable disagreements in judgements as to the word’s applicability.”

<sup>35</sup> Marmor (n 2) 100 writes: “If we understand vagueness to mean that in the practice of applying a word there are irresolvable disagreements in judgement over certain areas of its application, then it is obviously true that most concept-words are vague”.

the impact of such a claim, Marmor's conflation of these two distinct philosophical concepts also blinds him to the possibility of a concept being open textured, but not vague. Let's take the term "mother". If I point to a woman and say: "This is my mother", the use of the word mother is quite definite. I am indicating that the woman who I am pointing to is my mother. Moreover, the term "mother" is neither a degree concept (in the same way as, let's say, baldness<sup>36</sup> is a matter of degree), neither is it a relative term (i.e. in the same way as "tall" or "heavy"<sup>37</sup>). The term "mother" however is open textured, and there are new situations revealed through technological advances that have highlighted its open textured nature, but it is nonetheless not vague and its application may be definite in many situations, including new ones<sup>38</sup>. Marmor dismisses open texture in one paragraph, and does not give it any further thought throughout his chapter. The reasoning behind this outright dismissal of open texture as a version of vagueness, is that Wittgenstein would have found this

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<sup>36</sup> Bald is classic example of a "vague" term. Similar to the heap paradox (discussed in the last chapter – cf Chapter Four – Brian Bix on Judicial Discretion, footnote 28), if a person with  $n$  hairs on his head is bald, so is a person with  $n+1$  hairs. So how many hairs would it take for a person to stop being bald? Baldness is a matter of degree. Unlike absolute terms (such as "dead"), there are different degrees of baldness. Other examples are "young", "fatty", "good student".

<sup>37</sup> Concepts such as "tall" or "heavy" are relative, in so far as they are context-dependent. For example, someone who is 4 feet tall might think that someone who is 5 feet tall is "tall". However, someone who is 6 feet tall, might find that same 5 feet tall person "short". The same applies to the concept "heavy". For example, when questioning whether or not a baby elephant is heavy, one could say that it is heavy (if we are thinking of lifting it), but it is not heavy (if we are comparing it to a full grown elephant).

<sup>38</sup> For further clarification see Chapter Four, Brian Bix, text to footnote 26.

distinction largely irrelevant, and would not have employed it either<sup>39</sup>. Marmor notes that more important than the distinction between open texture and vagueness, is distinguishing between vagueness and family resemblance (possibly due to the relation to Wittgenstein's work, and Marmor's aim to link it to Hart's philosophy)<sup>40</sup>. According to Marmor, family resemblance implies that the phenomena in question are "linked to each other by numerous and complex similarities"<sup>41</sup>. Family resemblance would present a variety of instances that might not present one single thing in common, but be connected by different and complex similarities. As discussed in the previous chapter, being aware of the distinction between these three related, albeit different, philosophical concepts is important. However, it is also important to acknowledge that Hart chose to employ the terminology "open texture", and one should therefore begin by taking Hart's use of the term seriously, and explore whether

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<sup>39</sup> This is a convoluted argument, whereby Marmor claims that: "Wittgenstein would subscribe to the view that most of the words in our language are at least possibly vague (...) yet one would be on safe ground presuming that he would not have attached great significance to this fact." Marmor (n 2) 102. One could argue that claiming that Hart employed Wittgenstein's philosophy in theory of "easy" and "hard" cases is a much more powerful argument than claiming that Hart's theory resulted from an adaptation of the much lesser known Waismann's theory of open texture.

<sup>40</sup> Marmor (n 2) 102. The concept of "family resemblance" was first introduced by Wittgenstein in *The Blue Book*. Ludwig Wittgenstein, *Blue and brown books* (HarperCollins Publishers 1980) 17. Family resemblance is also discussed in *Philosophical Investigations*, where Wittgenstein writes: "I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way. – And I shall say: "games" form a family." Wittgenstein (n 12) §67.

<sup>41</sup> Marmor (n 2) 102.

Hart was indeed employing an adaptation of the theory of open texture<sup>42</sup>. Marmor's application of the term 'family resemblance' to what was clearly referred to by Hart as open texture creates tension, namely in the fact that Marmor did not know whether he should claim that the core and penumbra of concepts were due to vagueness or family resemblance, merely stating that either would support the theory of a core and penumbra of meaning<sup>43</sup>. This is hardly a sound, conceptually independent, theory through which the separability thesis can be justified and defended.

Moreover, it is hard to see how Marmor's explanation of vagueness and family resemblance addresses Fuller's criticism of Hart's theory. If anything, it supports Fuller's assertions that the interpretation of concept-words is determined by ordinary use (premise B), and insensitive to the particular legal-context in which these words are meant to function (premise C). Following Marmor's rationale, Fuller's example of

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<sup>42</sup> It is important to note that Hart does make reference to the concept of family resemblance in the notes to page 15 of *The Concept of Law*, even though Marmor fails to mention it, and we can therefore be reasonably confident that Hart knew the difference between family resemblance and open texture and opted to refer to them both at different stages and regarding different aspects of his theory. Hart makes reference to family resemblances when discussing general terms and the definition of "law". Hart wished to emphasize that in the multitude of occasions where we use the word "law" it is not necessarily because the instances in question have one single thing in common, but because there are lots of different complex connections between them. It is however unsurprising that someone as enthusiastic as Hart was about *Philosophical Investigations* would know the distinction between open texture and family resemblance (see Introduction (Chapter 1, Introduction, text to footnote 34).

<sup>43</sup> Marmor (n 2) 102. Marmor writes: "Thus we can see that vagueness, open texture, and family resemblance all support the thesis that concept-words we employ must have a core of meaning, that is, standard examples which manifest agreement in judgements about the word's applicability".

the World War II memorial tank would be considered a vehicle for the purpose of the rule (since it falls under the “core”), and would result in a potentially unjust ruling.

Marmor’s response to this reads:

...there is no need to deny that in some unusual circumstances a judge might face the possibility that the application of a rule to a given case in keeping with the core of the pertinent concept-word would lead to unacceptable results, and hence decide that even an ordinary automobile was not a “vehicle” for the purposes of the rule at hand.<sup>44</sup>

So, according to Marmor, it is solely at the judge’s discretion to decide whether or not the application of a given rule results in an unfair judgement, and the meaning of the concept-word should therefore be modified to allow for an exception. Marmor’s explanation of Hart’s theory results in a convoluted, if not somewhat unethical, approach to legal rules. Even though Marmor’s methodology is distinct from Bix’s, and their research question is somewhat different, Marmor and Bix nonetheless commit exactly the same methodological mistake. Like Bix before him, Marmor reads Hart’s comments on open texture as relating to the open texture of individual *concepts* rather than the open texture of language, and therefore legal rules<sup>45</sup>. Since this was explained at length in the previous chapter, it will only be explained in connection with Fuller’s example here. According to Waismann, a concept is open-textured when it has been considered along some dimensions, but has not been

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<sup>44</sup> Marmor (n 2) 100.

<sup>45</sup> Cf. Chapter four, Brian Bix, text to footnote 36.

considered in others. This is why Waismann refers to the “possibility of vagueness”. On this issue Hart gives the example of the rule “no vehicles in the park”, enacted to keep peace and quiet in the park. Taking this example, it is clear that motorised vehicles (such as cars, motorcycles and buses) are vehicles for the purpose of the rule. It is important to stress that they are vehicles for the purpose of this particular rule, and it does not mean that in the context of a different legal rule they would still be deemed vehicles (even though it is likely that they would).

When enacting this rule, our aim was clear, but we did not foresee, and had not yet encountered, circumstances such as those which Fuller refers to, for example the World War II memorial tank. The question then arises as to whether a tank used in World War II, still in perfect working condition, to be mounted on a pedestal in the park, would be considered a vehicle for the purpose of the rule. The issue here is whether the truck is considered a “memorial” (therefore not falling within the scope of the rule) or a “vehicle” (covered by the aforementioned rule). In other words, this particular situation had not yet been encountered, and the meaning of vehicle for the purpose of this rule, specifically whether or not it would extend to a “memorial”, had not yet been decided. As Hart writes in the postscript to *The Concept of Law*,

...when the question is whether a given rule applies to a particular case the law fails to determine an answer either way and so proves to be partially indeterminate. Such cases are not merely “hard cases”, controversial in the sense that reasonable and informed lawyers may disagree about which answer is legally correct, but the law in such cases is fundamentally *incomplete*: it provides *no* answer to the questions at

issue in such cases. They are legally unregulated and in order to reach a decision in such cases the courts must exercise the restricted law-making function which I call “discretion”.

According to this interpretation, the judge does not decide that following the standard cases (the “core”) is unfair (as suggested by Marmor<sup>46</sup>), but rather that a fresh decision needs to be made because this novel case had never been considered. It is yet to be decided whether a tank, in perfect working condition, that is going to be put on a pedestal in the park is a “vehicle” or a “memorial” for the purpose of the rule. If it were to be decided that it was indeed a “memorial”, then the respective laws regarding “memorial monuments” would apply<sup>47</sup>. This explanation would address not only premise B of Fuller’s criticism, but also premise A and C.

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<sup>46</sup> Cf text to footnote 44.

<sup>47</sup> Jeremy Waldron makes an interesting point about this very issue. He writes, “An ambulance is not a borderline case of a vehicle; if anything it is a paradigm case of vehicle. We call for an ambulance precisely because we need a vehicle to transport the sick person. There are some imaginable instances where the need for flexibility and the existence of borderline cases go together. Lon Fuller’s example of the veterans who want to place a Second World War jeep on a plinth as a monument in the park is an example of this, inasmuch as we may hesitate about whether to call the immobilized shell of a jeep a vehicle. But we must not make the mistake of assuming that the vagueness of natural language predicates matches our pragmatic uncertainty about what should be done in future or unanticipated cases.” Waldron (n 32) 537. Waldron’s view on this issue could, and should, be challenged. Legal rules do not exist in isolation, and Hart does not present the hypothetical rule “no vehicles in the park” in isolation. There is legislation covering emergency vehicles (such as an ambulance). In case of emergency, ambulances have special exemptions. So, if a person were to drive an ambulance for a joy ride around a park, this would be in breach of the “no vehicles in the park” rule. However, if someone were to drive the same ambulance to attend to an emergency, then, even though they would be in breach of the “no vehicles in the park rule”, they would be

As discussed, Marmor aims to illustrate how Hart's theory is embedded within Wittgenstein's philosophy of language, and the key to understanding Marmor's interpretation of Hart is to be found in his interpretation of Wittgenstein. It should be noted that Marmor explains his views on Wittgenstein's philosophy to refute premise A, "that interpreting a legal rule is a matter of interpreting the concept-words it employs". Marmor's section on Wittgenstein focuses on Wittgenstein's teachings on rule-following. According to Marmor, Wittgenstein thought of the relation between a rule and its application as internal to language. In other words, understanding a rule entails being able to detail which actions are in accordance with it. Marmor writes,

...perhaps the key to the whole discussion, is that Wittgenstein conceived of the relation between a rule and its application as a grammatical one, that is, one which is internal to language. To understand a rule *is* to be able to specify which actions are in accord with it (and which would go against it), just as to understand a proposition is to be able to specify its truth conditions.<sup>48</sup>

As we have seen in Bix and Marmor's work, and will see again in the work of the other legal philosophers discussed in this thesis, the idea presented is that, according to Wittgenstein, to understand a rule one needs to be able to *specify* which actions would be in accordance with it, and which actions would go against it<sup>49</sup>. When

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exempt by relevant emergency services legislation. Emergency Vehicles, 'UK emergency vehicles' (3 April 2016) <<http://www.ukemergency.co.uk/blue-light-use/>> accessed 4 April 2016

<sup>48</sup> Marmor (n 2) 114.

<sup>49</sup> According to Marmor, understanding of the rule (here 'no vehicles in the park') entailed being able to detail, in the standard situation, what would count as a vehicle. Marmor writes,

discussing the rule “no vehicles in the park”, both Marmor and Bix seem to believe that if one understands the word “vehicle”, one should be able to specify instances, perhaps “core” instances, of ‘vehicle’, hence eliminating the need for interpretation. The use of “truth conditions”, which is very much related to the idea of “criteria”, is intriguing, particularly since it resonates not with Wittgenstein’s later work, but with his earlier philosophy found in the *Tractatus*<sup>50</sup>. Given the context, a discussion about rule-following as clarified in *Philosophical Investigations*, the reference to “truth conditions” seems misplaced<sup>51</sup>. In the early stages of Wittgenstein’s career, which culminated with the publication of the *Tractatus*<sup>52</sup>, he was a supporter of Logical Positivism. Wittgenstein followed the teachings of Frege and Russell<sup>53</sup>, and, like Frege,

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“In other words, it makes no sense to say that one has understood a rule if one cannot identify the actions that are in accord with it”. Marmor (n 2) 114.

<sup>50</sup> Ludwig Wittgenstein and Luis Valdés M Villanueva, *Tractatus Logico-Philosophicus* (2nd edn, Tecnos 2003). Marmor expressed this view earlier in the chapter when referring to the rule “no vehicles in the park”. Marmor (n 2) 114.

<sup>51</sup> It should be noted that so too does the notion that ‘understanding a rule requires the ability to specify its instances *just as* understanding a proposition *is to be able to specify its truth conditions*’. Plainly Wittgenstein does not claim that understanding has anything to do with such an ability.

<sup>52</sup> *Ibid.*

<sup>53</sup> In the preface to the *Tractatus*, Wittgenstein expresses his gratitude to both Frege and Russell for the “stimulation of my thoughts”. Timothy Endicott alludes to the connection between Frege’s work and Wittgenstein’s early work in his article “Putting Interpretation in its place”. He writes: “Then how do we classify the generality of Marmor’s account of understanding a rule? He proposes that there is a quite sensible notion of completeness: “one has a complete grasp of a rule, if under normal circumstances, one is able to specify which acts are in accord with the rule . . . ” (153). Wittgenstein drew on this notion of “normal circumstances”, and it was valuable for his purpose of clearing away the incoherent notion of complete understanding that he attributed to his earlier philosophy and to Gottlob Frege.”

he held the view that the meaning of a sentence was defined by its truth conditions.

He writes,

4.024 To understand a proposition means to know what is the case if it is true.<sup>54</sup>

In the *Tractatus* Wittgenstein held that a proposition is whatever can be held to be true or false, and the world is comprised of true propositions. Wittgenstein's approach to philosophy did however change during his life, resulting in a radically different philosophy of language, as explained in his final book *Philosophical Investigations*<sup>55</sup>. It is this later philosophy that Marmor believes influenced Hart, and from which Hart borrowed some key philosophical insights about rule following. Interestingly, one of Wittgenstein's many corrections to his thoughts in the *Tractatus* was in regard to his views of propositions. In *Philosophical Investigations* he questioned his previous claim that propositions are whatever can be held true or false by saying that the belief that knowing a proposition is knowing whether it is true or false, would require us to have independent concepts of truth and falsity. Only by having these concepts of truth and falsity, independent from the proposition itself, could we judge whether something was or was not a proposition<sup>56</sup>. Given this realisation, in *Philosophical Investigations*

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Timothy A. O. Endicott, 'Putting interpretation in its place' (1994) 13(4) *Law and Philosophy* 451.

<sup>54</sup> Wittgenstein (n 50) 63.

<sup>55</sup> Wittgenstein (n 13). In the Preface to *Philosophical Investigations*, Wittgenstein writes: "For since beginning to occupy myself with philosophy again, sixteen years ago, I have been forced to recognise grave mistakes in what I wrote in that first book". Wittgenstein (n 13) vii.

<sup>56</sup> Wittgenstein (n 13). For further insights, see Norman Malcolm, *Nothing Is Hidden: Wittgenstein's Criticism of His Early Thoughts* (Blackwell Publishers 1988).

Wittgenstein goes against this notion of “truth conditions” and argues that there is no set of conditions, or general truth conditions, for propositions<sup>57</sup>. To illustrate this point, let’s take Wittgenstein’s example of “He can walk”<sup>58</sup>. This sentence will mean, and can be understood as, different things depending on when it is uttered. For example, when said in reference to a toddler, “He can walk” might be understood as “he has learned to walk”. However, when climbing a mountain, if someone said “He can walk”, this might be understood as “he isn’t tired”. In different circumstances, we can therefore see that this expression can be understood as different things, such as: “he has learned to walk”, or “he isn’t tired”, or “he has permission to walk”, or “his leg is healed”<sup>59</sup>. According to Wittgenstein, it would be impossible to have truth conditions that could articulate the myriad of uses and understandings of the expression “He can walk”. Norman Malcolm concludes that:

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<sup>57</sup> Wittgenstein (n 13).

<sup>58</sup> This example was given by Wittgenstein in *The Blue and Brown Books*. Ludwig Wittgenstein, *The Blue and Brown Books: Preliminary Studies for the ‘Philosophical Investigations’* (Harpercollins College Div 1980) 114.

<sup>59</sup> Malcolm (n 56) 165. See also John McDowell’s comment, he is in accord with Norman Malcolm when he says: “The idea at risk is the idea of things being thus and so anyway, whether or not we choose to investigate the matter in question, and whatever the outcome of any such investigation. That idea requires the conception of how things could correctly be said to be anyway – whatever, if anything, we in fact go on to say about the matter; and this notion of correctness can only be the notion of how the pattern of application that we grasp, when we come to understand the concept in question, extends, independently of the actual outcome of any investigation, to the relevant case. So if the notion of investigation-independent patterns of application is to be discarded, then so is the idea that things are, at least sometimes, thus and so anyway, independently of our ratifying judgment that that is how they are.” John McDowell, *Mind, value, and reality* (Harvard University Press 2001), 221.

Wittgenstein warns us against the assumption that there is such a thing as 'the complete set of conditions' for a person's walking. This implies that there are no *general* truth conditions for the sentence 'He can walk'.<sup>60</sup>

So, there are no truth or falsity conditions that can tell you, for every individual circumstance, whether or not the sentence is true. Had Marmor understood Wittgenstein's later philosophy and applied it correctly to Hart's work (as he claims to) he would not have reached the conclusion that there are criteria (or general truth conditions) that something needs to fulfil to be a "vehicle". Furthermore, this might have led Marmor to consider and correctly interpret Waismann's theory of open texture. There are no criteria for the concept-word vehicle, rather, there are some cases, as discussed, where the fresh decision simply needs to be made because a particular dimension of a rule was not yet encountered (such as the World War II memorial tank)<sup>61</sup>.

### Easy Cases and Legal Formalism

In his defence of legal positivism, Marmor also aims to clarify the mistaken assumption that "easy" cases are somehow related to legal formalism. Even though the detail of this discussion might seem petty, what is perhaps of more importance is Marmor's methodology and approach to Hart's "easy" cases, and his defence of legal positivism. According to Marmor, legal formalism holds that the application of rules

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<sup>60</sup> Malcolm (n 56) 165.

<sup>61</sup> Cf text to footnote 39 above.

to facts is a matter of logical inference, expressible in terms of analytical truths<sup>62</sup>. An analytical truth is a statement that is made true by its very meaning, and therefore underlines a specific kind of relationship between two rules or expressions, that Marmor calls a “rule-rule” relation<sup>63</sup>. To illustrate “rule-rule” relations, Marmor gives the example of the expression “bachelor = unmarried man”<sup>64</sup>. He argues these concepts have a semantic relationship, in other words, you only need to know the *definition* of ‘bachelor’ and the *definition* of ‘unmarried man’ to know that this proposition is true. So, since the expression “bachelor = unmarried man” is not concerned with the application of rules, but rather with the semantic relationship between concepts, it follows that this is a “rule-rule” relationship. The importance of this lies in the fact that Marmor claims that critics of Hart, namely those who associate Hart’s theory with judicial formalism, do so because of a misunderstanding of what an analytical truth, and a rule-rule relation is<sup>65</sup>. According to Marmor, the distinction between “easy” and “hard” cases, the main bone of contention for those who criticize Hart’s theory for being too formalistic, is not concerned with “rule-rule” relations, but rather with “rule-world” relations. Unlike the former, “rule-world” relations do not

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<sup>62</sup> Marmor (n 2) 98.

<sup>63</sup> Marmor (n 2) 98. Please note that there is no reference to “rule-rule” relations in the wider literature, and therefore it is assumed that this is a term coined by Marmor himself.

<sup>64</sup> Regarding a priori knowledge, traditionally there are three classes of statements: logical statements, mathematical statements and conceptual truths. The proposition “All bachelors are unmarried” comes under the latter. For further clarification, Bob Hale and Crispin Wright (eds), *A Companion to the Philosophy of Language* (Blackwell Publishers 1999) 334.

<sup>65</sup> Marmor (n 2) 98. Marmor claims that “whatever it is that connects a rule to its application cannot consist of logic or analyticity.” He considers this to be even more perplexing given that Hart himself vehemently criticised judicial formalism.

denote a logical inference, but rather refer to use. To illustrate the difference between these two relations, Marmor gives the example of “red”. According to Marmor, unlike the relation between the concept Bachelor and Unmarried Man (a purely semantic relation<sup>66</sup>), when someone says “this is red”, the only way of justifying this assertion is by appealing to the *meaning* of red, to how the word red is used in English, making this a “rule-world” kind of relation. When explaining what a “rule-world” relation is, he gives the following example:

Suppose someone is pointing at a red object in front of him, saying: “This is red”. When asked to justify his assertion, one can only appeal to *a rule* about how a word is used in English<sup>67</sup>

At this stage, one has to ask whether it would be plausible, in a commonplace conversation, to appeal to a rule about how red is used if we were asked what red is. I would venture that the answer given by most of us, if faced with such a question, might be more akin to: “Do you not think this is red? What do you think that colour is (pointing to another red object)?” We would try to understand where our disagreement lies, rather than appeal to a *rule* about how “red” is used in English. The more likely circumstance would therefore be to point to a different object with a similar colour and try to ascertain the reason for the disagreement. If the disagreement about the colour “red” continues, we might just have to agree to disagree. It is in fact hard to imagine how one would articulate a rule for how the word “red” is used in English. It is unclear whether Marmor’s reference to the rule about

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<sup>66</sup> Marmor (n 2) 98.

<sup>67</sup> Ibid.

how a word is *used* in English was an attempt to reference Wittgenstein's theory of meaning. On one hand, interpreting this as a reference to Wittgenstein's work would seem logical, since Marmor claims to be explaining Hart's theory through Wittgenstein's work<sup>68</sup>, yet on the other hand Marmor's explanation is so at odds with Wittgenstein's later philosophy that his interpretation is hard, if not impossible, to reconcile with Wittgenstein's later work.

When we start to unpick Marmor's explanation of "rule-rule" and "rule-world" relations, we start to see how it resonates with Kant's analytic and synthetic propositions<sup>69</sup>. To fully understand the connection, we will reiterate Marmor's understanding of the distinction between "rule-rule" and "rule-world" relations. According to Kant, analytic propositions, to which Marmor alludes, are true by virtue of their meaning<sup>70</sup>. In other words, the truth of the relevant proposition is knowable just by knowing the meanings of the constituent words. Let's take the example of the proposition "Ophthalmologists are doctors"; we can ascertain the truth of this proposition by knowing the meaning of Ophthalmologist and doctor. This is what Marmor calls a rule-rule relation. Synthetic propositions on the other hand relate to

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<sup>68</sup> Marmor (n 2) 98.

<sup>69</sup> Marmor does not provide the reader with a full explanation of his "rule-rule" and "rule-world" relations, and does not make reference to wider literature. Due to the absolute lack of literature referring to "rule-rule" and "rule-world" relations, it is not possible to fully investigate what Marmor's reasoning behind these were. However, taking into account Marmor's explanation and wider context, it is assumed that Marmor is referring to synthetic and analytic propositions.

<sup>70</sup> Robert Audi, *The Cambridge Dictionary of Philosophy* (Cambridge University Press 1995) 26. Analytic statements are a priori (knowable without empirical evidence) and necessary (could not be false).

the “world”, and their truth is therefore dependant on how their meaning relates to the world. Using the previous example, the proposition “David is an Ophthalmologist” will only be deemed true if David is actually an Ophthalmologist. This kind of relation is termed by Marmor as a rule-world relation. According to Marmor, Judicial Formalism relies on rule-rule relations, such as the example of “all bachelors are unmarried”<sup>71</sup>. However, he argues that the kind of relation exposed by Hart with “easy” cases cannot fall under formalism since it is of the rule-world kind. Once more, Marmor’s reference to analytic propositions, particularly as a defense of Hart’s work, is in stark contrast to his previous claim that Hart’s philosophy would be better understood through Wittgenstein’s later philosophy<sup>72</sup>. As discussed, this distinction is not one that can be found in Wittgenstein’s later work, but rather in Kant’s, Frege’s, Carnap’s and in Quine’s later work<sup>73</sup>. The *use* theory of meaning, attributed to the later Wittgenstein and the OLP movement, is very much against this view of meaning as an abstract object; for ordinary language philosophers meaning is understood *as* use within social behaviour<sup>74</sup>. In fact, as mentioned throughout this thesis,

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<sup>71</sup> This statement is taken to be logically true since “it is not merely true as it stands, but remains true under any and all reinterpretation of “man” and “married”. See above no. 45, 339.

<sup>72</sup> Marmor (n 2) 96. To recap, Marmor quotes the passage from *The Concept of Law* where Hart introduces the rule “no vehicles in the park”, and claims that this passage “epitomizes Hart’s thinking” on the subject of easy and hard cases. He goes on to explain how Hart has been gravely misunderstood, for many disregard the fact that it is embedded within a sophisticated philosophy of language, namely that of the later Ludwig Wittgenstein (as per *Philosophical Investigations*).

<sup>73</sup> Audi (n 70) 26.

<sup>74</sup> William G Lycan, *Philosophy of Language: A Contemporary Introduction* (Routledge 1999) 89.

*Philosophical Investigations* stood very much against a received dogmatic view of language, and against the logical approach exhibited by the Wittgenstein himself in the earlier *Tractatus*<sup>75</sup>.

It is unclear why Marmor, who is so keen to demonstrate that Hart's theory of "easy" and "hard" cases is embedded in a particular philosophy of language, does not apply the same logic here. This is particularly surprising given that he discussed Wittgenstein's philosophy in relation to "hard" cases. This aspect of Hart's philosophy really does lend itself to a Wittgensteinian analysis of language as *per* the Notes to *The Concept of Law* where Hart himself references Wittgenstein's work<sup>76</sup>. Once again, Marmor's method of dealing with issues in isolation, rather than providing a holistic approach to *The Concept of Law* creates unnecessary tensions when reading Hart's work. Hart's explanation is simple: we would not be able to use general terms in our language if there weren't circumstances where we all knew what we were talking about. These are the plain cases, that are constantly recurring; the cases that we learn about when learning how to use a rule or language. As Wittgenstein writes:

Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. That is part of the framework on which the working of our language is based (for example, in giving descriptions)<sup>77</sup>.

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<sup>75</sup> Wittgenstein (n 50).

<sup>76</sup> Hart (n 4) 297. Hart writes: "Wittgenstein in *Philosophical Investigations* (esp. i, ss.208 -38) makes many important observations concerning the notions of teaching, and following rules."

<sup>77</sup> Wittgenstein (n 50) ss. 240.

If there were no new cases, no new situations arising every day due to technological advances or unforeseen circumstances, then language would not be open textured and we could indeed have formalistic legal system. However, this is not the case, and it is incoherent to say that a theory could be “half” formalistic. It either adheres to the principles of legal formalism, or it does not. Hart’s theory clearly does not.

## Overview

Marmor’s contribution to the literature on Hart is seen as a positive one, having even been invited to republish his book as a revised second edition a few years after its initial publication. The reason for including Marmor’s work as part of this thesis was not only because he is one of the few legal philosophers who attempt to understand Hart’s work through ordinary language philosophy, but also because it illustrates the major theoretical conclusion reached throughout this thesis, that all legal philosophers who, so far, have attempted to take Hart’s philosophy seriously have committed the same methodological mistakes. As mentioned, Marmor’s approach is different in so far as he uses Fuller’s work as a vehicle to present his defence of Hart’s work. This in itself is an intriguing approach. By taking Fuller’s account and attempting to answer his criticisms, instead of providing his own framework for interpreting Hart’s theory, he is binding himself to Fuller’s criticism and methodology. Moreover, instead of taking a holistic approach to *The Concept of Law*, Marmor gives us a number of disconnected remarks, and fails to see the connections between them. Marmor approaches Hart, and Wittgenstein’s, work in a very analytical (perhaps even lawyer- like) way. Instead of reading their work as a holistic piece of writing, as a theory or thesis or sustained argument, Marmor unpicks the specific

sections that he wishes to focus on and ignores or disregards or merely passes over the teaching that comes before and after it. This approach is particularly clear with regards to his discussion of “easy” and “hard” cases as two separate, unrelated issues. As mentioned, Marmor’s startling admission that a full discussion of rule-following in Wittgenstein’s *Philosophical Investigations* would go far beyond his competence is surprising: the arguments in Wittgenstein’s philosophy are so intertwined that it is not possible to isolate any single part of the book and disregard its connections to the other. Kripke<sup>78</sup>, (a firm critic of Wittgenstein, with whose opinions of Wittgenstein I do not agree in any other respect) put the matter skilfully when he wrote that:

It should be borne in mind that *Philosophical Investigations* is not a systematic philosophical work where conclusions, once definitely established, need not to be re-argued. Rather the *Investigations* is written as a perpetual dialectic, where persisting worries, expressed by the voice of the imaginary interlocutor, are never definitively silenced. Since the

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<sup>78</sup> See Kripke, A. *On rules and private language* (Cambridge: Harvard University Press, 1982). The writer is not endorsing Kripke’s analysis of the work of Wittgenstein, neither is Kripke’s work going to be explored in this work. Peter Hacker argues along the same lines when he says that: “The multiplicity and diversity of subjects and the occasionally abrupt jump of topic to topic, as well as the *Bemerkungen* style of writing, give the book the appearance of a collection of *aperçus* on a variety of sometimes related, sometimes apparently wholly independent themes. This is misleading. The book has a twofold unity, methodological and thematic. The methodological unity is obvious: the book is informed by a consistent vision of the character of philosophical problems and of the methods of dealing with them. The thematic unity is given by the concern with the nature of language and linguistic representation. The investigation of subjects in philosophical psychology are largely (though not exclusively) strategic and tactical moves within a grand strategy.” See “Wittgenstein’s Place in Twentieth century analytic philosophy” (Oxford: Blackwell Publishers, 1996).

work is not presented in the form of a deductive argument with definitive thesis as conclusions, the same ground is covered repeatedly, from the point of view of various special cases and from different angles, with the hope that the entire process will help the reader see the problems rightly<sup>79</sup>

Kripke makes evident in this passage what many others have explained in their work: *Philosophical Investigations* was written in a spiral, and the arguments are all intertwined and constantly revisited. It is therefore understandable that Marmor's approach to *Philosophical Investigations* raises some concerns. Particularly so since the sections on rule following in *Philosophical Investigations* have been widely discussed in the extensive literature devoted to Wittgenstein's later work, and there are multiple interpretations of what Wittgenstein's real intentions and ideas were. Though no definite conclusion can be reached as to whether this is the same methodological mistake committed by other legal theorists, namely Bix and Stavropoulos, when interpreting Hart's work through Wittgenstein, in light of the fact that all three theorists speak of "conditions" when testing the applicability of a concept, it would be fair to argue that they might have adopted a similar approach to Wittgenstein's work. In sum, it is their misunderstanding of Wittgenstein's work that leads them to misinterpret Hart's ideas in *The Concept of Law*<sup>80</sup>. The next chapter will

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<sup>79</sup> Kripke (n 78) 20. Interestingly, the same can be said of *The Concept of Law*.

<sup>80</sup> This is not to say that had they understood Wittgenstein correctly, they would have fully understood Hart's work. This issue will be addressed in the final chapter of this section, chapter eight, where it will be argued that even though the legal theorists in question understood Wittgenstein, their lack of consideration of J. L. Austin's philosophy leads them astray.

focus on the work of Nicos Stavropoulos, who contributed to Jules Coleman *Hart's Postscript*<sup>81</sup>. Stavropoulos' takes yet a different approach, not only since he reads Hart's work as work in metaphysics, but also because he believes that Dworkin was right, and Hart's theory does indeed suffer from the "semantic sting".

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<sup>81</sup> Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press, USA 2001).

# Stavropoulos and the Metaphysical Approach

Section B

Chapter Six

This chapter will focus on Nicos Stavropoulos' contribution to the literature on Hart<sup>1</sup>. Unlike Bix and Marmor, Stavropoulos takes a rather different approach to *The Concept of Law*<sup>2</sup>. Stavropoulos still advocates that *The Concept of Law* was, to some extent, influenced by philosophy of language (hence his work being mentioned), yet he differs from the others in his interpretation of Hart's work as a metaphysical enterprise<sup>3</sup>. In fact, Stavropoulos' work brings another dimension to this thesis, since he explores Hart's book from a starting point that is in stark contrast to that of all the other legal theorists whose work is analysed throughout this thesis. Moreover, Stavropoulos argues, against Bix, that Hart was indeed "stung" by Dworkin's semantic sting<sup>4</sup>. Despite these contrasts, however, I aim to show that analysis of Stavropoulos'

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<sup>1</sup> Nicos Stavropoulos is an Associate Professor of Legal Theory at Oxford University. Stavropoulos was a doctorate student at Oxford in the 1980s, alongside Marmor, Bix and Green. See 'Legal Philosophy in Oxford > about Us > Some History' <<http://www2.law.ox.ac.uk/jurisprudence/history.htm>> accessed 15 December 2015. It is of note that Stavropoulos acknowledges and thanks Joseph Raz for comments on earlier drafts of this piece.

<sup>2</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012).

<sup>3</sup> Stavropoulos mainly refers to Hart's metaphysical approach in connection with his interpretation of Hart's methodology. According to Stavropoulos, Hart's pursuit of the "nature" of law is a metaphysical enquiry, and Hart "goes on to explain the place of such questions in metaphysical enquiry". Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'the Concept of Law'* (Oxford University Press, USA 2001) 59. Stavropoulos' claim is unique, since even though there are other legal philosophers that claim that Hart is looking for elucidation on the "nature" of law, none of them explicitly associate Hart's work with metaphysics quite in the same way as Stavropoulos does.

<sup>4</sup> Stavropoulos concludes his work by saying: "A proper defence of Hart would involve showing how the facts of endemic disagreement on which Dworkin relies can be adequately explained by the semantics that drives Hart's theory of law, a semantics that gives the facts of actual

thesis, despite the differences his work exhibits from the other scholarship examined here, is nonetheless finally subject to the same methodological oversights that are to be found throughout the relevant literature, to similarly damaging effect.

In common with the legal theorists before him, Stavropoulos focuses sharply on particular aspects of Hart's theory, analysing these in isolation – and again this fragmentary approach to Hart's work creates tensions and problems for the understanding of Hart's work that, otherwise, would not exist<sup>5</sup>. Stavropoulos presents the reader with a unique interpretation of Hart's work: he argues that Hart's aim was to expose the *nature* of law, procuring an answer to metaphysical questions<sup>6</sup>.

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usage the role of individuating the concepts used, and identifies determinacy with collective certainty. It that can be showed the record will be taken out of the sting. For the record, I think it cannot, but saying why will have to wait for another occasion.” Coleman (n 3) 98. Ronald Dworkin starts his book, *Law's Empire*, by criticising many legal theorists (Hart included) for insisting that 'lawyers all follow certain linguistic criteria for judging propositions of law'. Regarding Hart's theory, Dworkin is critical of the Rule of Recognition since he claims that due to the fact that the Rule of Recognition is a social rule, it is not possible for people to engage in debates about what the law is if they all have to be in agreement to identify the rule of recognition (due to its status as a social rule). Ronald M. Dworkin, *Law's Empire* (3rd edn, Fontana Press 1986) 45. Full discussion of the semantic sting and its implications is beyond the scope of this thesis, but will nevertheless be ruled out (though implicitly) by this thesis.

<sup>5</sup> Cf Chapter four, Brian Bix on Judicial Discretion, and Chapter five, Andrei Marmor on easy cases. Both Bix and Marmor pick specific areas of Hart's work (open texture and judicial discretion) and analyse them in isolation. It is argued that not having a holistic approach caused the serious misunderstandings discussed in previous chapters.

<sup>6</sup> Hart's postscript needs to be acknowledged, particularly section one entitled "The *Nature* of Legal Theory". It should however be noted that the postscript to *The Concept of Law* was heavily edited, and as a result it is in parts unclear. As Raz and Bulloch, the editors, wrote: "At times the text itself was incoherent. Often this might have must have been the result of a misreading of a manuscript by the typists, whose mistakes Hart did not always notice. At other

Coloured by this unusual starting point Stavropoulos proceeds to interrogate the same aspects of Hart's theory as Bix and Marmor did before him, namely Hart's methodology<sup>7</sup> and the open texture of language.

Stavropoulos' work was published as part of Jules Coleman's book, *Hart's Postscript*<sup>8</sup>. After the publication of the second edition of *The Concept of Law*, with the addition of the postscript, various legal theorists focused on interpreting Hart's final words. Jules Coleman edited a book, *Hart's Postscript*<sup>9</sup> that, as the name indicates, focused solely on the Postscript to *The Concept of Law*<sup>10</sup>. Stavropoulos contributed a

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times it was no doubt due to the natural way in which sentences get mangled in the course of composition, to be sorted out at the final drafting, which he did not live to do". Hart (n 2) ix. It is of note that in the same paragraph Hart writes of "the nature", "an account" and also "a theory". Hart (n 2) 240. This issue will be discussed at length in the next section of this chapter, and I will argue against the view that Hart was pursuing an investigation into the *nature* of law.

<sup>7</sup> Cf Chapter seven, Cole and J.L. Austin's influence in *The Concept of Law*. Cole draws some interesting conclusions regarding Hart's methodology that have some similarities to Stavropoulos' work.

<sup>8</sup> Coleman (n 3).

<sup>9</sup> Coleman (n 3). *Hart's Postscript*, edited by Jules Coleman, had amongst its contributors: Joseph Raz, Timothy Endicott, Nicos Stavropoulos, Jules L. Coleman, Scott Shapiro, Andrei Marmor, Brian Leiter and Jeremy Waldron. Originally published in 2001, it was the first comprehensive contribution to the literature that analysed every aspect of Hart's postscript to *The Concept of Law*.

<sup>10</sup> According to Leslie Green, the postscript to *The Concept of Law* is the only one about which a whole book has been written. Hart (n 2), 325. Unfortunately Hart never fully finished writing the response to his critics that was so eagerly awaited by the legal community. Joseph Raz and Penelope Bullock were tasked with reading through Hart's work, and put together what is now known as the Postscript to *The Concept of Law*. Interestingly, as Jules Coleman writes, the postscript is important not only as it "sets out Hart's response to Dworkin, but because it also provides us with a tool for interpreting the original text". Coleman (n 3), v. It is questionable

chapter entitled *Hart's semantics*, which is the topic of this chapter. For Stavropoulos, semantics means “non-trivial, often controversial claims regarding the structure and nature of language and the character of concepts.”<sup>11</sup> As the title rightly suggests, *Hart's Semantics* is an investigation into the semantic doctrines that Hart employed in *The Concept of Law*. According to Stavropoulos, we are under an “intellectual burden” to find “the precise relation between semantic and legal theory in Hart’s thought, and identify the substantive semantic views which drive it”<sup>12</sup>. As discussed in Chapter 2, not everyone agrees with Stavropoulos’ claim, and a chief opponent of the view is Leslie Green who argues, as we have seen, that Hart’s *The Concept of Law* was not a semantic enterprise<sup>13</sup>. Against this, Stavropoulos argues that Hart’s preface leaves little doubt as to his methodology, and he recognizes that Hart was inspired by the

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whether a postscript less than 30 pages long can provide us with such a tool, or whether Hart himself set out with that objective, but nonetheless it is of great importance that the legal community thought that such a tool was needed.

<sup>11</sup> Coleman (n 3) 60. Despite not very fitting with ordinary language philosophy, Stavropoulos’ definition of semantics is perhaps not surprising given that from the outset he claims that Hart is look at the *nature* of law, seeking a metaphysical interpretation of law. Though he claims that Hart thought the study of words was important for the study of law, this is true insofar as Hart is looking for “deeper understanding” of the “nature of objects to which words apply”<sup>11</sup>. Ultimately, Stavropoulos argues that Hart’s interest in *semantics* stems from his quest to uncover a “deeper illumination” of other metaphysical questions.

<sup>12</sup> Coleman (n 3) 61.

<sup>13</sup> Cf Chapter three, Leslie Green and the third edition of *The Concept of Law*.

*semantic* doctrine of Ludwig Wittgenstein<sup>14</sup>, and to some extent by J.L. Austin<sup>15</sup>. Perhaps unsurprisingly, despite his brief mention of J.L. Austin, Stavropoulos also ignores the extent to which J.L. Austin had impact in *The Concept of Law*, opting to rely solely on Wittgenstein's influence (and even then, only in a very fragmentary manner). It is therefore surprising to find that Stavropoulos understands *The Concept of Law* to be a metaphysical enterprise, in which Hart hopes to uncover the "nature" of law.

As already stated, Stavropoulos chooses to focus on two main aspects of Hart's theory: Hart's methodology of "conceptual analysis", and the open texture of language. Despite acknowledging that Hart might have relied on other semantic insights in *The Concept of Law*, Stavropoulos claims the two areas of Hart's philosophy clearly demonstrate the semantic foundations of Hart's work<sup>16</sup>. These are the two

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<sup>14</sup> As previously noted, Ludwig Wittgenstein had two distinct philosophical phases, during which he endorsed two different philosophies. For clarity therefore, Stavropoulos is referring Wittgenstein's later philosophy that is mainly comprised in L. Wittgenstein, *Philosophical Investigations* (Great Britain: Blackwell, 1953).

<sup>15</sup> In H.L.A Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 274, Hart claims that J.L. Austin's "most original" contribution can be found in *How to do things with words* (Oxford: Clarendon Press, 1975).

<sup>16</sup> Coleman (n 3) 62. Justifying his decision, Stavropoulos writes: "I think that these two elements of Hart's thought are more central to his theory, and more directly relevant to Dworkin's sting argument – an argument virtually all of Hart's defenders want to deflect – than his early commitment to speech-act analysis and his conception of evaluative discourse". Stavropoulos' claim that Hart had an "early commitment" to speech-act analysis is an interesting one if one takes into account that a few paragraphs prior Stavropoulos mentioned Hart's article published years after *The Concept of Law*, *Jhering Heaven of Concepts* (HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence' [1983] *Essays in Jurisprudence and Philosophy* 265.), where Hart acknowledged the importance of J.L. Austin's

areas that will be explored in depth in this chapter. Though briefly alluded to by Bix, Stavropoulos' analysis of Hart's methodology will allow a greater discussion of this topic, in turn to be revisited in the next Chapter, and this thematic treatment here constitutes part I of the chapter<sup>17</sup>. On the other hand, the issue of open texture has been discussed at length in the two previous chapters, since both Bix and Marmor focus on this issue. Stavropoulos' analysis will allow us to view Hart's work from another perspective, and will further illustrate the need for a holistic approach if we are to fully understand Hart's ideas. The issue of open texture will be discussed on part II of this chapter. Though a lot of the discussion in part II will repeat and reinforce ground covered earlier in the thesis, it will serve the purpose of illustrating how even legal philosophers who read *The Concept of Law* in very distinct ways commit the same underlying methodological mistakes.

### Hart's Metaphysical Approach

The foundation of Stavropoulos' argument, which will inform his claims about Hart's "conceptual analysis", is that Hart's enterprise was a metaphysical one. In other words, Stavropoulos imagines that rather than looking for the *concept* of law, Hart was looking for the *nature* of law. Stavropoulos writes:

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work. It is, according to Stavropoulos, this "explicitness regarding the relevance and importance of semantics to theory of law", demonstrated by Hart in *Jhering*, that places us upon an intellectual burden. Stavropoulos apparent reluctance to deal with J.L. Austin's philosophy might indicate a greater familiarity and easy with Wittgenstein's philosophy. As mentioned in Chapter One, this reluctance to deal with J.L. Austin's philosophy is widespread in the literature, with very few legal theorists considering his influence in Hart's work.

<sup>17</sup> Cf Chapter seven, Cole and J.L. Austin's influence in *The Concept of Law*.

(...) the quest for definitions is not exclusively about language but it is meant to provide metaphysical knowledge: we want to define 'law', for example, so that we can know what *counts* as legal, and thereby so that we can discover certain important properties about things legal – so that we can an insight, that is, into the nature of law<sup>18</sup>.

According to Stavropoulos, Hart's focus on defining the *concept* of law is done with the view of uncovering properties of things legal, and ascertaining what the *nature* of law is. Interestingly, Stavropoulos also claims that though the quest for definitions is meant to provide metaphysical knowledge, when Hart discusses the meaning of 'law' he (i.e. Hart) is adamant that linguistic rules cannot settle metaphysical questions.

Stavropoulos writes:

It is important to note, nevertheless, that whenever he (i.e. Hart) discusses the meaning of 'law', he is adamant that the linguistic rules governing the word's use cannot alone settle the important metaphysical questions about law's nature. There seems to be, therefore, a tension: on the one hand, Hart professes to seek metaphysical insight from the way words are used; on the other, he says that rules governing use will not take us far enough in the metaphysical inquiry<sup>19</sup>.

Stavropoulos acknowledges the weakness of his argument (even though he tries to pin this on Hart). On the one hand, Stavropoulos aims to show that Hart was pursuing a metaphysical enterprise, but on the other hand he is faced with tensions in the

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<sup>18</sup> Coleman (n 3) 63-64.

<sup>19</sup> Coleman (n 3) 69.

interpretation of Hart's work that he is not able to dissolve. In the next few paragraphs, I will demonstrate that had Stavropoulos not adopted the view that Hart was pursuing a metaphysical enterprise, such tensions would not have arisen. To support and frame his argument, Stavropoulos uses the following quotation from *The Concept of Law*:

Sometimes...a definition of a word...may make explicit the latent principle which guides our use of a word, and may exhibit the relationships between the type of phenomena to which we apply the word and other phenomena. It is sometimes said that definition is 'merely verbal' or 'just about words'; but this may be most misleading where the expression defined is one in current use. Even the definition of a triangle as a 'three-sided rectilinear figure', or the definition of an elephant as a 'quadruped distinguished from others by its possession of thick skin, tusks, and trunk', instructs us in a humble way *both to the standard of use of these words and about the things to which the words apply*. A definition of this familiar type does two things at once. It simultaneously provides *a code or formula* translating the word into other well-understood terms and *locates for use the kind of thing to which the word is used to refer*, by indicating the features which it shares in common with a wider family of things and those which mark it off from others of that same family. In searching for and finding such definitions we 'are looking not merely at words...but also at the realities we use words to talk about'.<sup>20</sup>

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<sup>20</sup> Coleman (n 3) 63-64. The quote was extracted from Hart (n 2) 14.

Stavropoulos interprets Hart's passage to mean that sometimes we seek definitions not only to provide greater clarity about the language that we use, but rather to gain metaphysical knowledge<sup>21</sup>. He gives the example of law: we want to define law so that we can find out what "counts as legal"<sup>22</sup>, the "properties" of legal things are, in sum, what is the nature of law<sup>23</sup>. Stavropoulos bases his metaphysical claim on this passage of *The Concept of Law*. But a closer analysis of Hart's quotation shows that Stavropoulos' claim - that Hart was swaying towards a metaphysical approach - is unfounded. It is of particular importance, and the key to understanding this passage, that the two expressions 'merely verbal' and 'just about words' are in quotation marks. Upon closer inspection it transpires that, as per the notes to *The Concept of Law*, Hart borrowed the expression "merely verbal" from Richard Robinson<sup>24</sup>. In his

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<sup>21</sup> Cf text to footnote 18.

<sup>22</sup> Regarding a pursuit for a definition of the concept of law, Hart notes that "the deep perplexity that has kept alive this question, is not ignorance or forgetfulness or inability to recognise the phenomena to which 'law' commonly refers to". Hart (n 2) 5. This passage from *The Concept of Law* is in complete opposition to Stavropoulos' claim that Hart wanted to know what "counts as legal". Moreover, Hart dedicates several pages of his first chapter to this very issue. Hart writes: "To this unending theoretical debate in books we find a strange contrast in the ability of most men to cite, with ease and confidence, examples of law if they were asked to do so. (...) They could describe, at least in outline, how to find out whether something is law in England..." Hart (n 2) 2.

<sup>23</sup> Ibid, 63-64.

<sup>24</sup>Hart, who worked closely with J.L. Austin, places particular importance in the meaning of words, and it is therefore important to pay attention to detail, in this case Hart's use of quotation marks. In the extensive notes section for this page in *The Concept of Law*, directs us to the work of Richard Robinson "for a general modern view on the forms and functions of definition" (Hart (n 2) 278).

book *Definition*<sup>25</sup>, Robinson provides an account of what definitions are, and how they should be used. I do not intend to comment on Robinson's work, for it would go beyond the scope of this thesis, but merely use it to gain insight into why Hart said that definitions are not 'merely verbal'. Hart borrowed the expression 'merely verbal' from Robinson's work. Robinson writes,

Some persons consider word-thing definition and the study of word-thing definition worthless enterprises. Such matters, they feel, are merely verbal and give no important knowledge. We should disregard words and give our attention to things.<sup>26</sup>

Robinson then goes against the stated view, and explains why there is always important knowledge to be gained by comprehending a definition. This is exactly what Hart does when he gives the example of the 'triangle' and the 'elephant'. Hart is trying to show that definitions relate to things and that there is knowledge to be gained even by the most commonplace definitions. If we take Hart's example of the definition of an elephant, as Hart explains, we can see that definitions can instruct us in two distinct ways: the standard of use of the words, and the things to which words apply to. Firstly, describing an elephant as a "quadruped distinguished from others by its possession of thick skin, tusks and trunk", allows us to understand what an elephant is. When speaking to someone who has never seen an elephant, and does not know what the

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<sup>25</sup> Richard Robinson, *Definition* (Oxford University Press 1962).

<sup>26</sup> Robinson (n 25) 33. As quoted above, Hart writes: "Even the definition of a triangle as a 'three-sided rectilinear figure', or the definition of an elephant as a 'quadruped distinguished from others by its possession of thick skin, tusks, and trunk', instructs us in a humble way *both to the standard of use of these words and about the things to which the words apply.*" Hart (n 2) 14.

word “elephant” stands for (e.g. what an elephant is or looks like), giving them this definition of elephant will go some way towards helping them understand what an elephant is, and the instances in which we call something an elephant. Thus, as Hart writes, instructing us *about the things to which words apply*<sup>27</sup>. Moreover, by understanding the definition of the word “elephant”, upon sight of an elephant they would be able to exclaim: “that is an elephant”. So, definitions not only instruct us *about the things to which words apply* but they also instructs us about the *standards of use* (i.e. when to apply – or not - the word or concept. Robinson further explains that if the word means ‘this thing’ to any persons at any time, there must be a rule or custom that guides their use of the word. According to Robinson,

Even when we are somewhat familiar with the thing before we learn the definition, the definition may give us new knowledge of the thing in that it abstracts it and sets it off from the rest of the world in a way which we probably had not done before unless we already had some other word for that thing.<sup>28</sup>

Thus a definition is not merely about language in so far as words relate to things in reality. By taking into account the idea that words relate to the world, and are not merely abstract entities, it becomes clear that study of a definition can help to provide knowledge about the world. So, a definition is two-fold: it instructs us as to ‘the standard of use’, and also ‘about the things to which the word applies’. For Hart it is dangerous, and therefore misleading, to think of definitions as ‘merely verbal’ or ‘just

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<sup>27</sup> Hart (n 2), 14.

<sup>28</sup> Robinson (n 25), 33.

about words', and therefore not of use. In fact, what Hart is trying to show is that it is grossly mistaken to assume that a definition is 'merely verbal', because language is how humans communicate and therefore words *are used* in relation to things<sup>29</sup>. As Hart writes: "All of us are sometimes in this predicament: it is fundamentally that of the man who says, "I can recognise an elephant when I see one but I cannot define it"<sup>30</sup>". The danger of thinking that definitions are 'merely verbal', or 'just about words', is that people will ignore the knowledge that can be obtained from them. There is some knowledge to be gained, even by definitions of words that we are familiar with. Hart illustrates this with reference to a famous St Augustine passage: "What then is time? If no one asks me I know: if I wish to explain it to one that asks I know not"<sup>31</sup>". Though most of us would be confident answering the question 'what time is it?', when asked to define what time *is* most of us would probably struggle. Moreover, as mentioned Stavropoulos' claim that Hart is pursuing a metaphysical enterprise<sup>32</sup>, focusing on the *nature* of concepts, goes against his earlier claim that Hart "took semantic insights" from J.L. Austin and Wittgenstein<sup>33</sup>. As discussed in previous chapters, supporters of Ordinary Language Philosophy, as endorsed by J.L. Austin and Wittgenstein, believe that the significance of concepts is fixed by linguistic practices<sup>34</sup>.

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<sup>29</sup> Ibid, 29.

<sup>30</sup> Hart (n 2) 14.

<sup>31</sup> Hart (n 2) 14.

<sup>32</sup> Cf footnote 18. To reiterate, Stavropoulos writes: "the quest for definitions is not exclusively about language but it is meant to provide metaphysical knowledge"

<sup>33</sup> Coleman (n 3) 59.

<sup>34</sup> Robert Audi, *The Cambridge Dictionary of Philosophy* (Cambridge University Press 1995) 635.

In short, they claim that (many) philosophical puzzles can be resolved if philosophers take into account the actual *use* of words or concepts<sup>35</sup>. As discussed in Chapter Two<sup>36</sup> of this thesis, Ordinary Language Philosophers hold that most philosophical problems can be solved by looking at the everyday *use* of words. Moreover, as Mulhall says, Ordinary Language Philosophers are suspicious of philosophical discourse that aims at uncovering the essence of a particular aspect of reality<sup>37</sup>. There will therefore be tensions in trying to apply ordinary language philosophy to uncover the *nature* of concepts. It does therefore not come as a surprise that Stavropoulos acknowledges that there are tensions with this approach (even though he presents it as a criticism of Hart's work)<sup>38</sup>. If Stavropoulos was right in his assumption that Hart was indeed pursuing a metaphysical approach, he would then be entirely correct in his criticism. There is however no evidence that Hart "professes to seek metaphysical insight from the way words are use[d]", quite the contrary, and therefore Stavropoulos' criticism is more damning of himself than Hart.

In the quest for the "nature" of law, Stavropoulos claims that Hart employs what he calls "conceptual analysis", despite not being very clear on what is meant by this terminology<sup>39</sup>. According to Stavropoulos, Hart argued that the classical mode of

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<sup>35</sup> As immortalised by Wittgenstein's saying: "Don't look for its meaning, look for its use". Wittgenstein (n 14) ss. 43.

<sup>36</sup> Chapter Two, The Case of Ordinary Language Philosophy, text to footnote 22.

<sup>37</sup> BBC, 'Ordinary language philosophy, in our time - BBC radio 4' (BBC, 7 November 2013) <<http://www.bbc.co.uk/programmes/b03ggc19>> accessed 8 April 2016, starting 17:04.

<sup>38</sup> Cf text to footnote 19.

<sup>39</sup> Coleman (n 3) 69. Stavropoulos writes: "What conceptual analysis is, however, is not altogether clear. I will not try to give a comprehensive answer to this question here, but only

definition *per genus et differentiam* is not suitable in the case of law, and therefore a new method needs to be employed, in this case conceptual analysis. Stavropoulos links this method of analysis with metaphysics, by claiming that it is the “prologue to metaphysics”, since one needs to understand what counts as something before its nature can be ascertained<sup>40</sup>. Moreover, Stavropoulos claims that this method of conceptual analysis involves the notion of criteria, “conditions ‘normally’ necessary and sufficient, yet ‘defeasible’ in special circumstances”<sup>41</sup>. Even though Stavropoulos acknowledges that Hart himself never used this terminology, he claims that Hart’s arguments regarding easy and hard cases meant that this doctrine is fairly attributed to him<sup>42</sup>. It is of note that this notion of “necessary and sufficient” conditions is also applied by Bix<sup>43</sup>, Marmor<sup>44</sup> and, as will be seen in the chapters to follow, by the Spanish. However, unlike his predecessors here, Stavropoulos argues that Hart’s conception of analysis is aimed at the folk theory<sup>45</sup>. Significantly, Stavropoulos bases

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sketch a few aspects”. It is not clear from Stavropoulos’ argument whether he chose not to provide a comprehensive answer, or whether he is not clear on the terminology and therefore does not attempt a definition.

<sup>40</sup> Coleman (n 3) 69.

<sup>41</sup> Coleman (n 3) 65.

<sup>42</sup> Coleman (n 3) 65. Stavropoulos writes that this notion of criteria “is a genuine semantic doctrine that is intended to replace the old doctrine of severally necessary and jointly sufficient conditions”.

<sup>43</sup> Cf Chapter four, Brian Bix on Judicial Discretion, text to footnote 21.

<sup>44</sup> Cf Chapter five, Andrei Marmor and Easy Cases, text to footnote 38.

<sup>45</sup> Coleman (n 3) 70, footnote 25. Folk psychology presents itself as a common sense theory that underlies everyday explanations of human behaviour. This theory focuses on so-called mental states, such as “beliefs”, “desires”, “fear”, and “hope”. Folk theory is a network of social practices, that includes being able to ascribe these mental states to ourselves and others. The folk psychology theory can be seen as a conceptual framework. A conceptual

his approach on Frank Jackson's *Defence of Conceptual Analysis*<sup>46</sup>, and indeed Jackson's theory of conceptual analysis is the key to unlocking Stavropoulos' claims about Hart's methodology<sup>47</sup>. There are numerous similarities between Jackson's methodology (and even his turn of phrase) and Stavropoulos' interpretation of Hart's work. Stavropoulos' work further illustrates the main claim running throughout this

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framework is the cognitive capacity allows us to interpret and frame particular conscious and unconscious cognition. Let's take the example of someone who is driving and notices that the car in front stops when a lollipop man stands in the road with a "STOP" sign. Without a conceptual framework, the person observing this phenomenon would be unable to understand why the man stepped onto the road, and why the driver stopped. Supporters of folk psychology believe that there is a conceptual framework that perceives and can interpret these exchanges by acquiring the pertinent cultural knowledge. Regarding Hart's application of folk theory, Stavropoulos writes: "Hart's conceptual analysis is a specific and highly controversial version of the claim that analysis aims at the 'folk theory'." Stavropoulos goes on to argue that Hart might have been against this idea since his theory was aimed at lawyers, and not any folk. He does also acknowledge that Hart "would probably be hostile to the idea that the folk must have theories, rather than unreflective mastery of the concepts they use..." Coleman (n 3) 71. However, he argues that this distinction is fictitious, and that we can therefore attribute a version of the folk theory to Hart. Nonetheless, he notes that Joseph Raz assured him that Hart would have been hostile to the idea of "folk theory" too (Coleman (n 3) 71, footnote no. 27). Even though in parts Stavropoulos is at times hesitant in his claim, nonetheless his interpretation of Hart's work depends upon and begins from the assumption that Hart is presenting a variant of the folk theory.

<sup>46</sup> Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford University Press 1998).

<sup>47</sup> Frank Jackson published his work six years after Hart's passing, and it is therefore fair to assume that Hart was unfamiliar with his work even when writing the postscript to *The Concept of Law*. It is perhaps for this reason that though referenced throughout his paper, Stavropoulos never claims that Hart is using Jackson's methodology. However, given the strong links between Stavropoulos' analysis of Hart's work and Jackson's, it is fair to assume that Stavropoulos' analysis was based on Jackson's work.

thesis: that legal philosophers read Hart's work in terms of a particular theory or idea, but then present it with insufficient detail, and without compelling defence, which results in large parts of Hart's work being left unexplained and creates considerable tensions in understanding Hart's theory (surmising that it is inchoate, presents a muddled methodology, and so on). This was made clear in the two previous chapters, where both Bix and Marmor tried to analyse Hart's work solely through their understanding of Wittgenstein's philosophy. As will be seen, Stavropoulos analyses specific aspects of Hart's work through Jackson's thesis on conceptual analysis, and this ill-matched perspective inevitably creates considerable problems for the understanding of Hart's theory (one of which has already been made clear by Stavropoulos himself regarding metaphysics). As mentioned, one of Stavropoulos' claims regarding Hart's metaphysical enterprise is that to understand the nature of a concept we first need to understand the concept itself. On this issue, Jackson writes:

Although metaphysics is about what the world is like, the *questions* we ask when we do metaphysics are framed in a language, and thus we need to attend to what the users of the language mean by the words they employ to ask their questions<sup>48</sup>.

According to Jackson, there is a strong connection between metaphysics and conceptual analysis. Jackson's, and therefore Stavropoulos', theory of conceptual analysis aims at uncovering the "nature" of concepts, and what "counts" as being

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<sup>48</sup> Jackson (n 45) 30.

something, rather than Wittgenstein and J. L. Austin's conception of meaning as use<sup>49</sup>. Jackson's theory builds upon some of Wittgenstein's teachings, particularly by weaving the concept of family resemblances within his theory<sup>50</sup>, but it is a much more elaborate, and altogether different method of analysis from that of Wittgenstein and J.L. Austin. Following Jackson's analysis, Stavropoulos claims that Hart uses ordinary language as a source of theoretical knowledge<sup>51</sup>. Thus, according to Stavropoulos Hart's aim was to build a "database", using ordinary language in use as "data"<sup>52</sup>. However, Stavropoulos goes on to argue that the raw data cannot support the analysis on its own, for it will need sifting and ordering to ensure that linguistic mistakes are eliminated from the data set. Ultimately, according to Stavropoulos, actual usage feeds into our conceptual analysis to give an idealised benchmark of correctness in the application of terms<sup>53</sup>. Stavropoulos does not give any examples of how the database or the sorting and ordering actual usage would work in practice, perhaps because even Stavropoulos is doubtful as to the application of the theory he attributes to Hart. Stavropoulos writes:

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<sup>49</sup> In a further similarity with Stavropoulos' work, Jackson claims that the objective of conceptual analysis is to extract what a person's theory of what *counts* as K is, "from intuitions about how to describe possible cases", which will eventually reveal their concept of K-Hood. Jackson (n 45) 32.

<sup>50</sup> Jackson claims that he will not revive the paradigm case argument since he acknowledges that cases will not have one particular thing in common, but a multitude of connections. Jackson (n 45) 34.

<sup>51</sup> Coleman (n 3) 72.

<sup>52</sup> Coleman (n 3) 72.

<sup>53</sup> Coleman (n 3) 75.

It is not clear that the process of idealisation that I describe is coherent and workable<sup>54</sup>.

Rather ironically, this disarming admission leads Stavropoulos to the conclusion that *Hart's* sophisticated theory of "shared criteria" is obscure, and not transparent to users<sup>55</sup>. An appraisal of Jackson's work would be beyond the scope of this thesis, and a full account of the intricacies of Stavropoulos' workings of Hart's "folk theory" wouldn't serve its advancement. Though it would be possible, perhaps even straightforward, to address every aspect of Stavropoulos' claims regarding Hart's conceptual analysis, the summary provided above is enough to pick out in bold terms Stavropoulos' misconception of Hart's theory. In contrast and counterpoint it is therefore both illuminating and elucidatory to focus on a different approach to conceptual analysis that is far more consistent with Hart's school of thought and the philosophical movement to which he subscribed in Oxford in the 1950s and 1960s, and by this method draw out some significant conclusions about Stavropoulos' project.

Robert Summers (who, as mentioned in the first chapter<sup>56</sup>, worked closely with Hart) wrote an interesting article in 1966 on Conceptual Analysis<sup>57</sup>. Summers credits Hart, Glanville Williams, Ronald Dworkin and others with ushering in a new era of

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<sup>54</sup> Coleman (n 3) 75.

<sup>55</sup> Coleman (n 3) 85. "His semantic rules are too sophisticated to be transparent to users (...). Given that the rules Hart was after are criteria, rather than scientific definitions, the result is that he is, after all, trying to articulate shared criteria, notwithstanding the fact that such criteria are not shared in the sense of users being aware of them."

<sup>56</sup> Chapter two, text to footnote 48.

<sup>57</sup> Robert Summers, 'The New Analytical Jurists' (1966) 41 *New York University Law Review*.

analytical jurisprudence. According to Summers, when these “new” analytical jurists speak of conceptual analysis this phrase is synonymous with “analysing the meaning of words” currently used by laymen or professionals in dealing with law<sup>58</sup>. Moreover, according to Summers, this “analysis” is not confined to a single activity but to myriad activities such as “breaking down concepts, differentiating related concepts, correlating and/or unifying related concepts, classifying them in some way, and charting their implications...<sup>59</sup>”. Moreover, as Summers and Stavropoulos indicate, Hart was influenced by J.L. Austin and Wittgenstein’s new way of doing philosophy. Contrary to what Stavropoulos goes on to claim in his article, this new way of doing philosophy does not involve a “database” or “sorting data” and eliminating linguistic mistakes, but quite the opposite. Thus, in stark opposition to the *Tractatus*, in *Philosophical Investigations* Wittgenstein does not advocate for a constructive theory of meaning, rather claiming instead that in order to understand a concept or a proposition, we must “look and see”<sup>60</sup>. In short, Ordinary Language Philosophers wanted to get back to the basics, not create or reify complex theory, since they believed that many philosophical problems could be dissolved if one simply took into account the ordinary use of expressions. In turn, and in exact sympathy, when Hart

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<sup>58</sup> Summers (n 56) 867.

<sup>59</sup> Summers (n 56) 867.

<sup>60</sup>As mentioned, the relevant passage of *Philosophical Investigations* was quoted by Hart in the notes to *The Concept of Law*, where Hart writes: “Considering the definition of ‘a game’ he said, ‘Don’t say there *must* be something common or they would not be called ‘games’, but *look* and *see* whether there is anything in common at all. For if you look at them you will not see anything common to *all* but similarities, relationships, and a whole series at that”’. Hart (n 2) 280.

refers to the “ordinary” use of an expression, he is not referring to a folk theory, but just to the “stock” use, or the “regular” use of an expression<sup>61</sup>. We are all able to communicate because as part of our “training” in a language, we learn the “stock” uses of a word. There are situations where we simply know what a concept or general term means. As Hart writes,

There will be plain cases constantly recurring in similar contexts to which the general expressions are clearly applicable (‘If anything is a vehicle a motor-car is one’)...<sup>62</sup>

So, Hart’s main aim in his book was to show that by “looking and seeing” we would find situations where the concept *law* is used and no doubts are felt as to its applicability. There will however, as Hart notes, be situations where it is unclear whether the term will apply or not, the so-called borderline cases. Hart himself says that “...the suggested resolution of these doubts, which he (i.e. the reader) will also find here, is only a secondary concern of the book<sup>63</sup>”.

### **Legal Indeterminacy, Social Rules and Open Texture**

Stavropoulos dedicates the second part of his article to a discussion on legal indeterminacy, covering both social rules and the open texture of language<sup>64</sup>. These

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<sup>61</sup> Gilbert Ryle, ‘Ordinary Language’ (1953) 62 *The Philosophical Review* 167, 169.

<sup>62</sup> Hart (n 2) 126.

<sup>63</sup> Hart (n 2) 17.

<sup>64</sup> The issue of open texture of language issue has been discussed by both Bix and Marmor in previous chapters, but Stavropoulos, in line with his interpretation of Hart’s methodology, takes a different approach to Hart’s application of Waismann’s theory. Stavropoulos’ arguments are, in part, dense and complex and for that reason it is important to quote

two issues will be addressed in turn. Stavropoulos raises a serious concern regarding Hart's conception of primary and secondary rules. According to Stavropoulos Hart explains the nature of law as being dependent on two types of rules, primary and secondary, which Hart claims are united by "a set of conditions necessary and sufficient for the existence of a legal system<sup>65</sup>". However, Stavropoulos claims that it is at this stage that Hart "cashes the semantic cheque drawn at the beginning of his book", when he claims that it is not possible to define law according to "necessary and sufficient conditions<sup>66</sup>". So, according to Stavropoulos, Hart never really analyses the nature of law due to his own account of indeterminacy which restricts and qualifies his analysis of law as a union of primary and secondary rules. As will be seen, this is not Stavropoulos' main argument regarding legal indeterminacy, since he goes on to discuss and further criticize Hart's theory with regards to hard cases. As noted at the beginning of this chapter, the importance of Stavropoulos' reference to "necessary and sufficient conditions" lies in its recurrence as a theme in others' work, and should therefore be fully addressed here. As Stavropoulos notes, Hart refers to "necessary and sufficient" conditions regarding primary and secondary rules. According to Stavropoulos it is inconsistent to claim that law cannot be analysed in terms of

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passages of the text in the footnotes to ensure the reader fully understands Stavropoulos' argument and the subsequent criticism.

<sup>65</sup> Coleman (n 3) 91.

<sup>66</sup> Coleman (n 3) 91. On this issue, Stavropoulos writes: "Hart's method of conceptual analysis yields a specification of the nature of law in terms of the union of two kinds of rule. He expressed that union in terms of a set of conditions necessary and sufficient for the existence of a legal system. Had he left it at that, all his early talk about the impossibility of analysis in terms of such conditions would be mysterious. But in the discussion of indeterminacy, Hart cashes the semantic cheque drawn at the beginning of the book."

necessary and sufficient conditions, but then claim that there is a set of necessary and sufficient conditions for something to be a legal system<sup>67</sup>. It should be clarified that what Hart writes is that “there are therefore two *minimum* conditions necessary and sufficient for the existence of a legal system”<sup>68</sup>. Hart does not define a set of conditions for the definition of law, rather he sets out two *minimum* conditions for a legal system to exist. Stavropoulos claims that due to Hart’s version of indeterminacy, in marginal cases “all claims of conceptual necessity about law may fail<sup>69</sup>”. Let’s examine this issue in more detail. It should be noted that Hart’s discussion of primary and secondary rules takes place before Hart’s introduction of open texture of language. On the issue of primary and secondary rules, Hart writes:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials (...) The assertion that a legal system exists

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<sup>67</sup> Coleman (n 3) 91. Stavropoulos writes: “Hart’s method of conceptual analysis yields a specification of the nature of law in terms of the union of two kinds of rule. He expressed that union in terms of a set of conditions necessary and sufficient for the existence of a legal system”.

<sup>68</sup> Hart (n 2) 126.

<sup>69</sup> Coleman (n 3) 91.

is therefore a Janus-faced statement looking both towards obedience of  
by ordinary citizens and to the acceptance of official behaviour.<sup>70</sup>

So, according to Hart there are two minimum conditions necessary and sufficient for the existence of a legal system: there are rules of behaviour that must be generally obeyed, and the officials responsible for enforcing these rules of behaviour must recognise them and accept them as being legal rules of behaviour. We could use traffic lights as an example. Any driver recognises a red light as a sign that he needs to stop. In addition to this, if a driver doesn't stop at a red light and a policeman observes this behaviour, the policeman will generally issue the driver with, at least, a penalty notice. In this case there is a rule of behaviour that is generally obeyed (here, stopping at a red light), and the officials responsible for enforcing this rule recognise it as a legal rule (e.g. if spotted, the perpetrator will face some kind of punishment). Legal rules exist in so far as they are recognised as such. If drivers started disregarding traffic lights, and officials did not recognise the traffic signs regulations as an enforceable legal rule<sup>71</sup>, it would stop being considered such. Let's take the legal rule forbidding the keeper of a place of public resort to permit drunkenness in the house as an example. In the United Kingdom it is illegal for the keeper of a place of public resort to permit drunkenness in the house<sup>72</sup>. Though this is a valid legal rule that could be

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<sup>70</sup> Hart (n 2) 116-117. Please note that Stavropoulos indicates this page of *The Concept of Law* as the one containing an explanation regarding necessary and sufficient conditions, and we can therefore be confident that he was referring to this passage.

<sup>71</sup> As set out by The traffic signs regulations and general directions 2002.

<sup>72</sup> Further, under the Licensing Act 2003, section 140, it is an offence to allow disorderly conduct and under section 141 it is an offence to sell alcohol to an intoxicated person.

enforced by court officials, ordinary people do not acknowledge this rule as being a legal rule (or so the newspapers lead us to believe). The lack of arrest of pub owners for the drunkenness of their clients would also lead us to believe that officials do not recognise this as a law either. It is fair to say that in this instance the necessary and sufficient conditions for the existence of a social rule were not fulfilled and this rule (i.e. the keeper of a public place cannot resort to permit drunkenness in the house) is not currently enforced. It is fair to say that in this instance the necessary and sufficient conditions for the existence of a social rule were not fulfilled and this rule (i.e. the keeper of a public place cannot resort to permit drunkenness in the house) is not considered to be a current, valid legal rule. As has been demonstrated, Hart's two minimum conditions for the existence of a legal system do not suffer from open texture or vagueness. They are conditions that apply to rules of behaviour, and therefore even though the rules might be open-textured, the conditions themselves are not.

Stavropoulos' misunderstanding might be related to his understanding of open texture. According to Stavropoulos, Hart claims that all rules are indeterminate, as are all concepts. From this it follows that there are two main sources of legal indeterminacy: the partial indeterminacy of language (i.e. "concepts including the concept of law are indeterminate"<sup>73</sup>) and the partial indeterminacy of rules (i.e. "the rules law consists in"<sup>74</sup>). Stavropoulos questions Hart's conflation of these two sources of indeterminacy, mainly contesting Hart's use of indeterminacy of language and

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<sup>73</sup> Coleman (n 3) 90.

<sup>74</sup> Coleman (n 3) 90.

indeterminacy of rules interchangeably<sup>75</sup>. Interestingly, Stavropoulos, much like Bix and Marmor, claims that for Hart there is an issue of classification. According to Stavropoulos, the indeterminacy in rules and general terms stems from an uncertainty of the extension of a particular expression or rule<sup>76</sup>. So, Stavropoulos argues, Hart is arguing from an epistemic shortcoming: there is a possibility of uncertainty regarding the application of a certain rule or expression. Furthermore, Stavropoulos thus claims that Hart attempts to draw metaphysical conclusions framed in epistemic terms. Stavropoulos argues that when there is uncertainty as to the application of a certain rule or expression, there is no certainty as to how things in the world are arranged. So, according to Stavropoulos when faced with a 'hard' case (e.g. whether roller-skates are a vehicle for the purpose of the rule) we are faced with an epistemic shortcoming (we are unclear on whether or not roller-skates are vehicles). This epistemic premise, Stavropoulos argues, will then result in a metaphysical conclusion: the question of whether (in the current example) roller-skates are a vehicle for the purpose of the rule has no determinate answer. Stavropoulos writes:

It is important to emphasize that Hart is not simply saying that there are easy and hard cases. He is not simply reporting the 'platitude' that uncertainties in the application of words are inevitable; rather, he draws from the 'platitude' the *metaphysical* implication that in cases of

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<sup>75</sup> Coleman (n 3) 90.

<sup>76</sup> Coleman (n 3) 90. Stavropoulos writes: "Both rules on the one hand and expressions and concepts on the other have extensions or ranges of application. Indeterminacy consists in there being no fact of the matter as to whether an expression or rule is applicable to certain things".

uncertainty here is no fact of the matter as to how things in the world are arranged, as to whether some metal is gold or a certain sort of behaviour is negligent.<sup>77</sup>

Stavropoulos' analysis of Hart's work involves little reference to *The Concept of Law*, and contains mainly a critique of Hart's supposed metaphysical approach. For this reason it is hard to address some of Stavropoulos' criticisms with objectivity. It would be fair to conclude however that like Marmor and Bix, Stavropoulos' discussion of legal indeterminacy, and Hart's application of open texture of language, seems more aligned to Frege's approach to meaning than Wittgenstein's or OLP. Stavropoulos, like his predecessors, is preoccupied with the issue of extension of a general concept and whether or not it is applicable to a particular situation. Stavropoulos writes:

Why should Hart think that certainty or uncertainty, our ease or difficulty or generally our ability to tell when an expression applies, would imply anything at all as to whether the expression does apply? Why should we think that what we know about the future has any implication as to what counts as what's in it? Arguments that move from our epistemic position in respect of a proposition to metaphysical conclusions that concern the proposition's truth and determinacy seem not, as a general matter, to be valid. We may be uncertain as to whether life ever existed in Mars, but

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<sup>77</sup> Coleman (n 3) 95.

this is no reason to think that there is no answer to the question of whether it did<sup>78</sup>.

This passage further illustrates Stavropoulos' misunderstanding of Hart's application of the theory of open texture. Stavropoulos' argument seems to have some similarities with Marmor's, namely that both of them seem to allude to "truth conditions"<sup>79</sup>. Stavropoulos is conflating the application of a general term or rule to a particular situation, with that application being "true". Our ease or difficulty or our general ability to tell when an expression applies only matters in as far as a decision needs to be made as to whether a particular instance is covered by a rule or not. As discussed in the previous chapter, Ordinary Language Philosophy disagrees with the idea that there are truth or falsity conditions that can tell you for every individual circumstance whether or not a sentence is true (or in this case whether or not a rule is applicable to a particular instance).

As mentioned in Chapters 3 and 4, there is a way to interpret Hart's discussion on rule following that is much better aligned with Waismann's theory of open texture, which even Stavropoulos attributes as an inspiration to Hart's thoughts on legal indeterminacy. Given that a lengthy explanation of Hart's open texture has been provided in both Chapter 3 and 4, only an abridged version will be provided here. Hart is concerned with, practically, how rules are followed. According to Hart, a lot of

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<sup>78</sup> Coleman (n 3) 94.

<sup>79</sup> See Chapter five, Andrei Marmor and Easy Cases, section "On Easy and Hard Cases". Stavropoulos writes: "The idea that correctness is constituted by evidentiary relations to exemplars is as problematic as the general inference from premises to metaphysical conclusions".

criticism is unfairly placed on precedent rather than legislation, with many arguing that legislation provides a much more certain direction than precedent. Hart's discussion on open texture is an illustration of the issues that arise with the use of legislation, which will invariably make use of general terms, where there is sometimes uncertainty as to whether a general term will apply or not. Applying the insights of OLP, particularly Wittgenstein's insights on rule following, we are taught how to follow rules. Following rules is a practice. There are general agreements as to what constitutes following a rule and going against it. There will however be situations, unforeseen situations, where we are unsure as to whether a particular general term applies or not. In this situation a fresh decision will need to be made, in the case of law by a judge, as to whether or not the particular situation is covered by the rule. Stavropoulos, like his predecessors, seems to analyse open texture in relation to particular concepts rather than rules. This is emphasised by his criticism of Hart for using indeterminacy of language and indeterminacy of rules interchangeably. Let's take Hart's example of "no vehicles in the park". When faced with the situation of a World War II memorial tank, our indecision as to whether or not a World War II memorial tank would be a vehicle for the purpose of the rule does not stem from the criteria providing unequivocal support or not (as Stavropoulos seems to indicate). Under normal circumstances, ordinary language users would probably agree that a tank would be a vehicle for the purpose of the rule. If an individual decided to go for a casual tank ride in the park, we would have no hesitation in claiming that a "tank" is a vehicle for the purpose of this rule. The concept "vehicle" by itself is not open textured in that way. The issue arises due to the fact that this was an unforeseen situation not considered when the rule was enacted. The very reason why our ease of

application does matter is not a metaphysical one, but a rather practical one. A judge, when faced with this situation, would have doubts as to whether a memorial tank would be considered a vehicle for the purpose of this rule. This is not a metaphysical doubt, or a doubt about how the world is designed, but rather a doubt as to whether in this instance the tank is a vehicle or a memorial.

## Overview

Stavropoulos attributes to Hart a metaphysical interpretation of law. According to Stavropoulos, Hart is looking to provide an insight into the *nature* of law. Unsurprisingly, Stavropoulos encounters numerous issues with his interpretation of Hart's work, such as tensions in attributing a metaphysical approach to Hart (both in terms of uncovering the *nature* of law, and in Stavropoulos' understanding of legal indeterminacy), which he attributes to an inadequacy of Hart's theory to deal with the issues that he proposes to address in *The Concept of Law*. In much the same vein as Bix and Marmor, Stavropoulos analyses *The Concept of Law* with reference to a particular view that he holds of Hart's work (in this case a metaphysical approach). In trying to apply his view of *The Concept of Law*, he leaves large parts unexplained and creates unnecessary tensions in the understanding of Hart's work. Stavropoulos starts his analysis by explaining Hart's style of conceptual analysis. Despite the fact that he acknowledges that Hart is indebted to semantics, and was particularly influenced by Ordinary Language Philosophy, Stavropoulos aligns Hart's semantic insights with Folk Theory, a theory that emerged years after the publication of *The Concept of Law*. Furthermore, and despite the fact that Stavropoulos himself attributed this exotic theory to Hart, Stavropoulos raises several questions about the applicability of Hart's

conceptual analysis, and questions its validity. It is fair to say that if the first section of Stavropoulos' paper was damning enough, the second section on Legal Indeterminacy, taken at face value, would have seriously undermined Hart's teachings in *The Concept of Law*. According to Stavropoulos, Hart draws metaphysical conclusions from epistemic questions, and fails to provide a satisfactory account of the nature of legal indeterminacy. Given that Stavropoulos' ultimate goal was to demonstrate the unsuitability of Hart's semantic insights, and to validate Dworkin's criticism, his harsh comments were perhaps to be expected. Throughout this chapter it was argued however that Stavropoulos' account of Hart's theory was deeply flawed, and he failed to provide a true and adequate account of Hart's insights in *The Concept of Law*.

The next chapter will focus on the work of Tony Cole. Unlike the legal theorists whose work was discussed in the previous chapters, Cole focuses on the impact of J.L. Austin's philosophy in *The Concept of Law*.

# Cole and J. L. Austin's influence in *The Concept of Law*

Section B

Chapter Seven

Following Nicos Stavropoulos' metaphysical interpretation of *The Concept of Law*, Chapter 7 will focus on an unpublished paper by Tony Cole<sup>1</sup>. Cole's article, entitled *Doing Jurisprudence Historically: Interpreting Hart through J. L. Austin*<sup>2</sup>, has to date only been published on the Social Science Research Network website<sup>3</sup>. It is perhaps uncommon to include an article, arguably still in its early stages and not having been submitted to the scrutiny of a peer-reviewed paper, as the subject of a chapter in a doctoral thesis. However, in the introduction to this thesis I claimed to examine all contributions to the literature regarding the philosophical influences and insights in Hart's *The Concept of Law*<sup>4</sup>. It would therefore be irresponsible not to include Cole's paper; an article which is available through a well-established academic research website and accessible to all. Moreover, even though still only a working paper, Cole is the only legal theorist to date who claims to provide an in-depth analysis

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<sup>1</sup> Tony Cole is currently a senior lecturer at the University of Brunel. The research paper discussed in this thesis was made available online during his time at Warwick University.

<sup>2</sup> Tony Cole, 'Doing Jurisprudence Historically: Interpreting Hart through J. L. Austin' (2010) Warwick School of Law Research Paper 2010/28, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1715178](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1715178)> accessed 12/09/2015. This paper was first published on the 26<sup>th</sup> November 2010, and subsequently amended by the author and re-published on the 22<sup>nd</sup> April 2011.

<sup>3</sup> The Social Science Research Network (SSRN) is a website used for the rapid of publication of research started in 1994. Academic Papers in a PDF format can be uploaded to the website by any author, and can be subsequently downloaded by any user. Articles available through the SSRN website are not peer reviewed in any way. Authors update and change the text whenever they like.

<sup>4</sup> Hart HLA, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch eds, 3rd edn, Oxford University Press 2012)

of the influence that Hart's friendship with J. L. Austin had on the insights Hart exposed in *The Concept of Law*<sup>5</sup>.

Cole advocates what he calls a "historically aware" interpretation of legal theory.<sup>6</sup> According to Cole, not much attention is paid nowadays to reading the works of legal philosophers on their own terms, rather, they are read to find answers to contemporary debates. Cole argues that it is time to approach jurisprudential works "from a perspective that sees them as having value in themselves"<sup>7</sup>. Cole claims that there can be no better example than Hart's work, which, due to its popularity and

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<sup>5</sup> Cole (n 2) 4. It is interesting that rather than mentioning the extent to which Hart's involvement with the OLP movement at Oxford had impact in his book, numerous times throughout his chapter Cole mentions the friendship with J. L. Austin. Both Hart's friendship with J. L. Austin as well as their academic dealings, have been well documented in the literature. See, K Fan (ed), *Symposium on J. L. Austin* (Routledge & Kegan Paul 1969).

<sup>6</sup> Cole (n 2) 2-3. As stated in Chapter One, Introduction, one of the aims of this thesis is to emphasise the importance of a reading of *The Concept of Law* that is historically aware, similarly to what Cole is proposing. In the next few paragraphs it will be argued however that Cole does not succeed in providing a historically aware interpretation of Hart's book.

<sup>7</sup> Cole (n 2) 2. Cole starts his article by writing, "any reader approaching contemporary jurisprudence for the first time could be forgiven for concluding that serious thought about the nature of law simply did not exist prior to H.L.A. Hart's pioneering work on the topic in the 1950's". This is a sweeping assumption, and one that should be taken seriously. Cole quotes a series of undergraduate jurisprudence textbooks where he claims that very few pages, if any, are dedicated to the work of Bentham and Austin. Even though it can be argued, as Cole indeed does, that only a few pages are dedicated to Austin and Bentham's work, it should be noted that only a few pages are then dedicated to Hart's work too, with most books having to cover a wide range of theories and theorists. If we take J.W. Harris' book as an example (see J. Harris, *Legal Philosophies 2<sup>nd</sup> edition* (OUP 2004)), out of 300 pages, 7 pages are dedicated to Austin's work, 5 to Bentham and 12 to Hart's. Moreover, it can be argued that a proper understanding of Hart's work demands an understanding, or at the very least an awareness, of Austin and Bentham's contributions.

reach has inspired many and been the subject of numerous articles and books. Despite Hart's support for the analysis of language, and his well-known affiliation with J. L. Austin and the Ordinary Language Philosophy Movement, Cole claims that many still reject J. L. Austin's influence on Hart. Cole continues to make the ambitious claim that by revisiting and in some cases rectifying our understanding of J. L. Austin's work, its influence upon *The Concept of Law* will be understood, and many methodological questions that attach to that book will be answered. Cole writes:

It will be argued here that this understanding of Hart's methodology in COL, and the relevance of Austin for understanding Hart's jurisprudence is mistaken. That is, that commentators rejecting the influence of Austin upon Hart have based their conclusions upon serious misunderstandings of Austin's work, and that once Austin's work is understood correctly, its influence can indeed be traced in Hart's jurisprudence. As a result, Austin's work can be used to resolve ongoing disagreements over the jurisprudential methodology in COL, as a supplement to the meagre insights into the methodology that Hart himself provides<sup>8</sup>.

Despite his bold claim, throughout this chapter it will become clear that Cole commits the same methodological mistakes as all the other legal theorists before him. Firstly, Cole does not give any details to corroborate his claims. As per the passage quoted above, Cole claims that he will read *The Concept of Law*, and resolve ongoing disagreements, by correcting some ongoing misunderstandings about J. L. Austin's philosophy. Unfortunately, throughout his article Cole fails to quote *The Concept of*

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<sup>8</sup> Cole (n 2) 4.

*Law*, preferring to make reference to numerous other publications by Hart. So, despite giving himself the task of uncovering J. L. Austin's philosophy *within The Concept of Law*, he fails to even quote *The Concept of Law*. Secondly, his approach creates artificial problems that could be avoided if he employed the standard view of what Ordinary Language Philosophy is, and what J. L. Austin's approach was. Like other legal theorists, Cole is fixed on a particular esoteric and under-analysed interpretative methodological claim (in this instance, that of J. L. Austin being a supporter of Phenomenology), and therefore fails to establish his claimed outcomes. I propose to demonstrate that had the standard interpretation of J. L. Austin's work been adopted, the artificial problems created by Cole's approach would no longer exist, and the study would indeed then be able to resolve ongoing disagreements over jurisprudential methodology in *The Concept of Law*.

The first section of this chapter will focus on what Cole refers to as Hart's rejection of Ordinary Language Philosophy (which curiously is one of the few matters upon which Cole claims that Hart is in agreement with J. L. Austin), as well as some remarks on what Cole describes as "language-boundedness". The second section will focus on Cole's approach to Hart's methodology, particularly on Cole's claims that Hart's methodology is purposefully "obscure"<sup>9</sup>. The final section will be dedicated Cole's defence of Hart's 'description' of his book as an exercise in "descriptive sociology".<sup>10</sup>

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<sup>9</sup> Cole (n 2) 3.

<sup>10</sup> Cole (n 2) 58-63.

## Tracing Phenomenology in the work of Hart and J. L. Austin

Cole sets out to demonstrate how an understanding of J. L. Austin's work will help the reader to better understand Hart's *The Concept of Law*. As has been discussed throughout this thesis, and is noted by Cole in several parts of his chapter, J. L. Austin and Hart were not only colleagues but close friends and it is therefore only natural that J. L. Austin would have influenced Hart's philosophy, particularly considering that *The Concept of Law* was conceived during the period of ascendancy of the Oxford Philosophy movement<sup>11</sup>. However, despite this clear connection, and despite numerous references to J. L. Austin's influence on Hart's work, no substantive work had yet been undertaken to fully understand the extent to which J. L. Austin's teachings filtered into, and had an impact on, Hart's theory<sup>12</sup>. This is what Cole

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<sup>11</sup> Cole (n 2) 4.

<sup>12</sup> Cole (n 2) 16. Cole mentions that one of the reasons why Austin's work hasn't been widely considered, and its influence traced in Hart's work, is that his work is not widely known, let alone read, by people who aren't academics in the field of philosophy of language. Martin Gustafsson, one of the editors of *The Philosophy of J. L. Austin*, mentions that though important, J. L. Austin's work was soon forgotten after his passing and has only recently started to re-appear. He writes, "In the forties and fifties, Austin was a revered, feared, and deeply controversial figure. In the sixties and seventies, he was posthumously dethroned. And then his work gradually "slid into a state of respectable semi-obscurity" (Crary 2002:59) – arguably the worst fate that can befall a philosophical corpus." Martin Gustafsson and Richard Sorly (eds), *The Philosophy of J. L. Austin* (OUP 2011), 3. If J. L. Austin's philosophy is considered semi-obscure by philosophers, it is not surprising that legal academics aren't familiar with his philosophy. What is surprising though is that no legal academic, until Cole, made the effort to understand the influence that J. L. Austin's philosophy had in Hart's work despite many of them either mentioning it in passing or dismissing it outright.

proposes to do<sup>13</sup>. He approaches this undertaking in a novel way: he picks out a single quotation from J. L. Austin's famous paper, *A Plea for Excuses*<sup>14</sup>, and claims that a close analysis of this quotation (with reference to other work by J. L. Austin) will allow conclusions to be drawn and similarities to be picked out between Hart and J. L. Austin's work. Given that this quotation is of pivotal importance in Cole's article it is important to quote it here in full despite its length. The full quotation reads,

First, words are our tools, and as a minimum we should use clean tools: we should know what we mean and what we do not, and we must forearm ourselves against the traps that language sets us. Secondly, words are not (except in their own little corner) facts or things: we need therefore to prise them off against the world, to hold them apart from and against it, so that we can realise their inadequacies and arbitrariness, and can re-look at the world without blinkers. Thirdly, and more hopefully, our common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth making, 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

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<sup>13</sup> Cole (n 2) 15. Cole writes: "The influence of Austin upon Hart has, of course, been widely recognised and discussed before, however no clear consensus has been reached as to the degree to which Hart retained Austin-influenced views at the time of writing COL".

<sup>14</sup> John L Austin, "A plea for excuses: The presidential address." (1956) *Proceedings of the Aristotelian Society* 1.

in our armchairs of an afternoon – the most favoured alternative method.<sup>15</sup>

Cole makes a series of assertions about J. L. Austin's work based on this passage, many of which will be discussed in the paragraphs to follow, but there is one particular claim that deserves more meticulous attention: that of J. L. Austin being a supporter of Phenomenology. Before continuing with Cole's understanding of J. L. Austin's work it is important to discuss what Cole's understanding of Phenomenology is<sup>16</sup>. According to Cole, phenomenologists draw a sharp distinction between the "real" world and the world as we, as human beings, experience it. We can therefore only gain knowledge

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<sup>15</sup> Austin (n 14) 383. Interestingly, Brian Simpson mentions about this passage: "There are many examples in *The Concept of Law* of Hart's use of the methodology which he states in this passage. It is impossible to say whether it was Austin or Hart, or both of them, who developed this view. Simpson claims that the passage is a "product of cooperation between Hart and Austin". Brian Simpson, *Reflections on The Concept of Law* (OUP 2011), 90. According to Simpson, J. L. Austin's presidential address to the Aristotelian Society in 1956 (which has been published as *A Plea for Excuses*), was the product of an interdisciplinary approach with Hart. From this cooperation resulted Hart's *Ascription of Responsibility and Rights* (Herbert Hart, "The ascription of responsibility and rights." (1948) *Proceedings of the Aristotelian Society*, 1), which was later disowned by Hart. See Simpson (n 12, 50). From Simpson's brief comment on this passage, it seems to indicate that rather than seeing J. L. Austin as a great influence in Hart's work, he believes that both Hart and J. L. Austin influenced each other's thoughts resulting in what is presented in *The Concept of Law*.

<sup>16</sup> Defining our field of enquiry is always important, but particularly so in the case of phenomenology since as Kockleman's writes: "In contemporary philosophy there is no system or school called "phenomenology" characterised by a clearly defined body of teachings. Phenomenology is neither a school nor a trend in contemporary philosophy. It is rather a movement whose proponents, for various reasons, have propelled it in many directions, with the result that today it means different things to different people". Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (2nd edn, Cambridge University Press 1999) 664.

of the “phenomena”, or how things appear to us, but we can never gain knowledge of the real world (that underlies the phenomena). So, Cole concludes that for phenomenologists the questions relating to the nature of the real world need to be disregarded, since there is no conceivable way of understanding what this real world actually is<sup>17</sup>. The passage “words are not (except in their own little corner) facts of things<sup>18</sup>”, is interpreted by Cole to mean that words pose a neo-Kantian block or interference between the speaker and the world. Moreover, we should not impose on J. L. Austin a view of direct realism since it is not clear whether he would advocate that we can view objects in the world-as-is<sup>19</sup>. According to Cole, Austin’s understanding of truth, where true involves a reference to the world, is such that it does not refer to the “actual world”, but rather to the “world as is”<sup>20</sup>. This is a particularly interesting claim, especially given that Cole acknowledges that it is one that has received little attention<sup>21</sup>. So, by his own admission, Cole’s interpretation of

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<sup>17</sup> Cole (n 2) 28.

<sup>18</sup> cf Cole (n 2).

<sup>19</sup> Cole (n 2) 28.

<sup>20</sup> Cole (n 2) 30.

<sup>21</sup> Cole (n 2) 28. It is important to note that though not the mainstream interpretation of J. L. Austin’s philosophy, Cole’s assertion that it has received “little attention” is misleading. It is true that within the legal community no particular attention has been drawn to Austin’s use of the world “phenomena” (of particular importance since the passage is quoted in *The Concept of Law*), but there is relevant literature in the area of philosophy on this subject. There are a number of articles investigating the relation between Ordinary Language Philosophy and Phenomenology, most of which have been published in academic journals dedicated to the study of Phenomenology. For literature in this area see e.g. James F Harris, “A New Look at Austin’s Linguistic Phenomenology” (1976) 36 *Philosophy and Phenomenological Research* 384, Marjorie Weinzweig, “Phenomenology and Ordinary Language Philosophy” (1977) 8

the use of the word “phenomena” as a hint towards J. L. Austin’s favourable views on phenomenology, is a novel claim and goes against the established view on J. L. Austin’s Ordinary Language Philosophy. It would therefore be expected that Cole would defend, or in some way argue for this view of J. L. Austin’s work, over the more mainstream view<sup>22</sup> adopted by the philosophical community. Cole’s lack of an argument in support of his methodological claim is then surprising. At no point in his article does he actually pinpoint exactly where it is apparent that J. L. Austin held these views, apart from the passage quoted above containing the term “phenomena”, and a one line assertion about J. L. Austin and his concept of truth. This is a flaw that we have found in the works of the other legal theorists whose work is discussed in previous chapters, whereby they ascribe a methodological claim or commitment to “Ordinary Language Philosophy” (despite the fact that it goes against the standard understanding in philosophy of OLP), and do not explain or substantiate their claims through evidence from the relevant texts in any way.

So, the question remains as to whether or not J. L. Austin was a supporter of Phenomenology. In 1965 when *Symposium on J. L. Austin*<sup>23</sup> was published, J.O. Urmson and G.J. Warnock<sup>24</sup> called for a fair reading of J. L. Austin’s work by asserting

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Metaphilosophy 116, Herbert Spiegelberg, “Linguistic Phenomenology: John L. Austin and Alexander Pfander” (1981) *The Context of the Phenomenological Movement* 83.

<sup>22</sup> As discussed in Chapter Six, Nicos Stavropoulos and the Metaphysical Approach, the mainstream view held on this issue is that Ordinary Language Philosophers are suspicious of philosophical discourse that aims at uncovering the essence of a particular aspect of reality. BBC, ‘Ordinary language philosophy, in our time - BBC radio 4’ (*BBC*, 7 November 2013).

<sup>23</sup> Fan (n 5).

<sup>24</sup> Urmson and Warnock were J. L. Austin’s colleagues at Oxford. They both presented and prepared J. L. Austin’s papers for publication after his death.

that Austin himself did provide explanations, though in less ostentatious ways than those trying to understand his work, about his theses and these should be taken to mean just what they say<sup>25</sup>. In a way, Urmson and Warnock were already standing against ambitious readings of J. L. Austin's work that try to infer meaning beyond what is actually there. Writing on J. L. Austin's use of the word "phenomena", Simon Glendinning<sup>26</sup> writes:

...Austin's return to the *words* of ordinary life is intended to be, as such, a return to the *world* of ordinary life. This is, as Austin notes himself, best understood as an attempt to pursue philosophy as 'linguistic phenomenology'. It is, that is to say, an attempt to find a way of getting *back in philosophy* to the native land of an understanding that is not dominated by traditional prejudices about, for example, the primary data for a theory of perception or meaning or whatever.<sup>27</sup>

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<sup>25</sup> Fan (n 5) 48. Stuart Hampshire claims that 2 theses could be attributed to Austin: a strong and a weak one. The strong thesis holds that methodological reasons can be found for every application of a word/term, whereas the weak thesis holds that there is no single and exclusive programme for the application of a word/term. See Fan (n 5) 35. Urmson and Warnock defend Austin by claiming that no such "strong thesis" could be attributed to Austin's work. They write: "Large assertion as such as those "strong" theses tentatively attributed by Hampshire he (sic Austin) would certainly have regarded, besides repudiating them, as worthless. (...) But Austin sometimes gave, in much less ambitious terms, his own explanations. Why should then these not be taken as meaning just what they say?" (See Fan (n 5) 48)

<sup>26</sup> Dr. Simon Glendinning is a Reader of European Philosophy at the London School of Economics and Political Science.

<sup>27</sup> Gustafsson and Sorly (n 12) 49.

J. L. Austin, in common with other ordinary language philosophers, was not concerned with the experience of the “phenomena”, or with describing our experience. In fact, a historically aware reading of J. L. Austin’s work (such as that which Cole claims to make) would have to be coloured by the fact that J. L. Austin stood against the views on sense-datum and the “external world” held by philosophers such as A. J. Ayer. In fact, J. L. Austin and A. J. Ayer had numerous arguments about their differing views in philosophy. Of these encounters, Mary Warnock recounts:

He (i.e. Austin) wanted to puncture any overarching theories about perception which would necessitate the introduction of such terms as “sense-datum” to stand between the perceiving, language-using person, and the “external” world<sup>28</sup>

These discussions were later the subject of a series of lectures delivered by J. L. Austin which resulted in the book *Sense and Sensibilia*<sup>29</sup>, published posthumously. In fact, there is arguably no greater statement that J. L. Austin could have made against “phenomenology” than his lectures on sense data<sup>30</sup>. J. L. Austin’s views on this subject are highlighted by his distinction between “real” and “non real”<sup>31</sup>, which he proposes to examine in Lecture VII. He concludes his Lecture by claiming that there is no general criterion to distinguish “real” from “non real”. According to J. L. Austin, the word “real” is used in a variety of different contexts, and works differently depending on what the speaker has in mind. Thus we should understand the word “real” within the particular

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<sup>28</sup> Mary Warnock, *A Memoir People & Places* (Duckbacks, 2000).

<sup>29</sup> John L. Austin and Geoffrey J. Warnock, *Sense and Sensibilia* (OUP, 1964).

<sup>30</sup> Cf Austin (n 14).

<sup>31</sup> Austin (n 14) 77.

context in which the speaker utters the word. Given that the context in which the word is uttered is crucial for the understanding of its meaning, philosophising about the meaning of the word “real”, or about the nature of reality, in some abstract way will not produce any valuable results. Accordingly J. L. Austin finishes the lecture by stating that “a distinction which we are not in fact able to draw is – to put it politely – not worth making”<sup>32</sup>.

Interestingly, even though Cole claims that J. L. Austin’s philosophy was affiliated with phenomenology, he (i.e. Cole) claims that Hart himself never referred to phenomenology as such<sup>33</sup>. Hart famously quoted J. L. Austin’s passage from *A Plea for Excuses*<sup>34</sup>, but quoted the sentence before J. L. Austin makes reference to phenomenology. Hart’s quotation reads:

...as Professor J. L. Austin said, ‘a sharpened awareness of words to sharpen our perception of the phenomena’<sup>35</sup>

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<sup>32</sup> Austin (n 14) 77. However, if more proof was needed for Austin’s lack of affiliation to Phenomenology, such evidence can be found in his lecture on “The meaning of a word”. In this lecture, Austin explained the equivocations that can arise from people asking the “meaning of words”. Austin says that philosophers, with their goal to “generalise” everything, end up asking questions about “nothing-in-particular”. Austin writes: “Many other examples of the fallacy can be found: take, for example, the case of “reality” – we try to pass from such questions as “How would you distinguish a real rat from an imaginary rat?” to “what is a real thing”, a question which merely gives rise to nonsense.” John L. Austin, *Philosophical Papers* (OUP, 1970), 26.

<sup>33</sup> Cole (n 2) 43.

<sup>34</sup> Austin (n 14).

<sup>35</sup> Hart (n 4) vi, quoting J. L. Austin, 'A plea for excuses' [1971] *Philosophy and Linguistics* 80.

According to Cole, Hart purposefully left out the sentence about linguistic phenomenology. As a reminder, the full paragraph from J.L. Austin's work reads:

In view of the prevalence of the slogan 'ordinary language', and of such names as 'linguistic' or 'analytic' philosophy or 'the analysis of language', one thing needs specially emphasizing to counter misunderstandings. When we examine what we should say when, what words we should use in what situations, we are looking again not *merely* at words (or 'meanings', whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena. For this reason I think it might be better to use, for this way of doing philosophy, some less misleading name than those given above - - for instance, 'linguistic phenomenology', only that is rather a mouthful<sup>36</sup>.

According to Cole, the fact that Hart quoted Austin's passage in *A Plea for Excuses* in *The Concept of Law*, but purposely quoted the sentence that immediately precedes Austin's invocation of phenomenology<sup>37</sup> (leaving out this last part), provides strong evidence that Hart did not want openly to endorse phenomenology. Consequently, Cole admits that there are no references in Hart's work that could provide evidence of Hart's endorsement of phenomenology<sup>38</sup>. Despite this, Cole nevertheless argues that Hart's methodology, his approach to jurisprudence in *The*

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<sup>36</sup> Austin (n 14) 4.

<sup>37</sup> Cole (n 2) 43.

<sup>38</sup> Cole (n 2) 43. Cole writes, "...these references themselves are inadequate to attribute to him a theoretical embrace of anything resembling phenomenology".

*Concept of Law* resonates with some of the phenomenological philosophical principles, namely his views on “language-boundedness”<sup>39</sup>. Regarding language-boundedness, Cole refers to an article Hart wrote in 1948 (13 years before the publication of *The Concept of Law*), entitled *Ascription of Responsibility and Rights*<sup>40</sup>. Cole argues that in this article Hart puts forward the view that due to the unique characteristics of legal language, only lawyers can adequately make use of it. From this it follows, for Cole, that legal language will only ever allow us to have a view of the “legal world” and not the “real world”. So, Cole argues that, in a parallel with J. L. Austin’s philosophy, Hart draws a distinction between the “legal world” and the “real world”. As previously discussed, the main aim of this thesis is to discuss *The Concept of Law*, however to better illustrate Cole’s understanding, or seeming lack thereof, it is important to diverge and entertain at least some discussion about Hart’s earlier piece, *Ascription of Responsibility and Rights*<sup>41</sup>. In this article, Hart’s aim was to demonstrate that we attach claims of responsibility to claims of action, in the same way that legal consequences attach to legal pronouncements<sup>42</sup>. Hart wishes to make

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<sup>39</sup> Cole, text to footnote 155.

<sup>40</sup> Herbert Hart, "The ascription of responsibility and rights" (1948) Proceedings of the Aristotelian Society. It is of note that all the articles mentioned by Cole regarding the influence of Ordinary Language Philosophy in Hart’s work were previously mentioned by Moris Weitz in his article on Ordinary Language Philosophy. See Morris Weitz, "Oxford philosophy" (1953) *The Philosophical Review* 187.

<sup>41</sup> Hart (n 40).

<sup>42</sup> Hart (n 40) 271. “My main purpose in this article is to suggest that the philosophical analysis of the concept of human action has been inadequate and confusing, at least in part because sentences of the form “He did it” have been traditionally regarded as primarily descriptive whereas their principal function is what I venture to call *ascriptive*, being quite literally to ascribe responsibility for actions much as the principle function of sentences of the form “This

use of J. L. Austin's performative sentences to make the ambitious claim that the concept of a human action is defeasible and ascriptive. As part of the wider discussion, Hart touches lightly on the issue of vagueness of legal concepts. He starts from the premise that most people are familiar with the fact that in England judges are not provided with a list of legal criteria to define "trespass" or "contract". Rather, the judge has discretion to decide, by reference to past cases and precedent, whether the facts of the case do indeed constitute "trespass" or a "contract". It is this vagueness of legal concepts, Hart argues, that makes it impossible for us to speak of necessary and sufficient conditions. According to Cole, the claim that judges have discretion to decide cases based on the facts presented to them highlights the constraints presented by language. Due to the vagueness of concepts, judges have wide discretion regarding how legal concepts are to be applied to individual situations, and, according to Cole, this ultimately results in legal concepts having no "determinate content"<sup>43</sup>. And since concepts have no "determinate content", Cole says, it follows that there is no "exact correlation between a legal expression and one in ordinary language"<sup>44</sup>. Cole writes,

...because there is no "verbal rule for the translation of a legal expression into other terms or one specifying a set of necessary and sufficient

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is his" is to ascribe rights in property." Hart (n 40) 271. This was such an ambitious claim, that Hart refused to re-publish this paper as part of a collection. See Nicola Lacey, *The nightmare and the noble dream: A life of HLA Hart* (OUP, 2004). This makes Cole's choice to use this article as proof that Hart still held these views at the time of the publication of *The Concept of Law* interesting.

<sup>43</sup> Cole (n 2) 163.

<sup>44</sup> Cole (n 2) 166.

conditions, there is also no means of finding an exact correlation between a legal expression and one in ordinary language<sup>45</sup>.

To corroborate this claim Cole refers to Hart's assertion that the definition of a concept cannot be answered "by the provision of a verbal rule for the translation of a legal expression into other terms or one specifying a set of necessary and sufficient conditions"<sup>46</sup>. Cole's assertion would be entirely correct if he was merely claiming that there is no way we could straightforwardly explain in ordinary language what a legal concept meant, without resorting to common law examples. However, what Cole actually claims is that "although legal language uses the same words as ordinary English, it constitutes a specialized language, not directly translatable into ordinary English"<sup>47</sup>. Cole argues that individuals with no legal training can therefore never properly use legal terms, because they do not possess the "internal point of view". This is a perversion of Hart's argument, pursued by Cole to fit his ascription of phenomenology to Hart's views (that he ascribed to J. L. Austin before him).

Hart never intended to argue that legal concepts, forming part of a "specialised language", would not be able to be correctly used by laymen. Hart's assertion - and this is why it is so important to understand what his aim in writing this article was - is that there are cases outside the law courts where utterances in ordinary language are similar to legal cases, in some respects. Hart claims that there are cases where the words derive their meaning from legal or social institutions, such as "mine", "yours",

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<sup>45</sup> Cole (n 2) 166.

<sup>46</sup> Hart (n 40) 173.

<sup>47</sup> Cole (n 2) 166.

“his”. Hart argues that by the utterance of sentences such as “this is yours” or “this is his” we often do not describe but actually “perform or effect a transaction”<sup>48</sup>. *Responsibility* and *Rights* are not descriptive features, but are *ascribed to* human beings, and these are dependent on social rules. Hart gives the example of someone who observes and judges that “Smith hit her”. In this case the observer is ascribing responsibility to Mr. Smith. However, this ascription is *defeasible* since if, in light of new facts, the observer actually reaches the conclusion that it was an accident, he must judge again since his ascription of responsibility is no longer right in light of the new events. Wherein lies the difference between the social context and the legal one. In a social context the observer has the duty to judge again in light of new facts since, unlike the judge, his ascription of responsibility need not be final. The reason why Hart says that even though we use sentences to perform an action, or ascribe responsibility, these do not have the same “power” as when the judge makes a decision, is due to the legal character of judicial decisions. This is distinct from Cole’s claim that it is the result of laymen not having the “internal point of view”. Regarding exactly this issue, in his book about Hart, MacCormick writes:

The very terms like *intent* or *intention* in which the criminal law is framed by legislators and applied by judges and lawyers are key terms for philosophers. These terms are used in the context of a social practice that gives them sense and that is publicly available for scrutiny and analysis.<sup>49</sup>

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<sup>48</sup> Hart (n 40) 185.

<sup>49</sup> Neil MacCormick, *HLA Hart* (Stanford University Press, 1981), 27.

Laymen use legal terms on a daily basis, and some of these terms originated in everyday language and only after were they applied to legislation, or legal-speak. Therefore, Cole's final assertion that "the analysis of words can 'sharpen our awareness of the phenomena', the phenomena in question are solely those of the legal world"<sup>50</sup>, cannot be right.

### **On Hart's Methodology**

At various stages throughout his chapter Cole mentions Hart's methodology, or lack thereof. From the start, on page 3, Cole makes reference to the "meagre insights into methodology that Hart himself provides"<sup>51</sup>, but he explores Hart's methodology in depth in section 2 of his article. The lack of agreement as to Hart's methodology in *The Concept of Law* has become evident throughout this thesis, with all legal theorists whose work was discussed in previous chapters in this section presenting a different interpretation of Hart's methodology. If we think back to the first chapter in this section, Leslie Green presents claims that Hart's methodology was not based in any philosophy of language<sup>52</sup>. In the two chapters that followed, it became apparent that Brian Bix and Andrei Marmor support the view that further insight into Hart's methodology can be found in Wittgenstein's philosophy<sup>53</sup>. Finally, Nicos Stavropoulos' put forward the view that we can find some interesting insights

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<sup>50</sup> Cole (n 2) 170.

<sup>51</sup> Cole (n 2) 4.

<sup>52</sup> Cf Chapter Three, Leslie Green and the third edition of *The Concept of Law*, text to footnote 27.

<sup>53</sup> Cf Chapter Four, Brian Bix on Judicial Discretion and Chapter five, Andrei Marmor and Easy Cases.

into Hart's work through an understanding of Folk Theory. What is perhaps most interesting about these contrasting approaches to Hart's methodology is that, as mentioned in previous chapters, the different legal theorists concerned don't acknowledge the wider philosophical literature in this area (unless it supports their own viewpoint), and dismiss without any explicit consideration insights provided by other legal theorists<sup>54</sup>. Cole follows the same scheme of analysis, not acknowledging the wider literature, apart from Matias Bodig's article (this in support of his own view)<sup>55</sup>. According to Cole, even though there is mention of the importance of

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<sup>54</sup> Brian Bix's, Andrei Marmor's and Nicos Stavopoulos' work all precede Leslie Green's introduction to the Third Edition of *The Concept of Law*. Given Leslie Green's strong objection to the suggestion that there is any kind of linguistic analysis in *The Concept of Law*, and given how restricted the literature is in this area, it would have been expected for him to at least acknowledge differing views. As an aside, Brian Simpson makes an insightful comment about academics disregarding criticisms or differing views. Simpson himself wrote an article criticising Hart's Inaugural Lecture in the Law Quarterly Review (Brian Simpson, 'The Analysis of Legal Concepts' (1964) 80 LQR.) to which he received no response. On this, he writes: "There is an odd practice in the academy of simply ignoring critical writings, sometimes perhaps because they are thought to be rubbish, but sometimes because those criticised cannot think of a reply." See Simpson (n 15) 11.

<sup>55</sup> Cole's argument resonates with Matyas Bodig's views expressed in his article *Hart's Jurisprudence: Its relation to Philosophy* (Matyas Bodig, *Hart's Jurisprudence: Its relation to Philosophy* (2011) 41 *Acta Juridica Hungarica* 1). This is unsurprising since Cole references this article at numerous points throughout his chapter. Matyas Bodig argues that Hart purposefully kept some distance from any philosophical school of thought, to ensure that his theory is autonomous from any philosophy (which is why, Matyas claims, it is so hard to ever truly ascertain the connection between his work and that of J. L. Austin and Wittgenstein). Like Cole, Matyas argues that there are some specific aspects of Hart's theory that have a backdrop of Wittgenstein's and J. L. Austin's work, but Hart never fully embraced Ordinary Language Philosophy.

language, many arguments put forward by Hart lack any kind of observation about language and its use<sup>56</sup>. Cole thereby attributes to Hart a “methodological obscurity”<sup>57</sup>.

Cole writes,

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<sup>56</sup> Ibid. Cole advocates that Hart’s disregard for methodology, and the lack of explanation of the philosophical foundations of *The Concept of Law*, springs from the approach to philosophy common in Oxford in the 1950’s. Cole quotes Morris Weitz, *Oxford Philosophy* (1953) 62 Phil Rev. 187, 208, where he writes “Their (i.e. Oxford Philosophers) main concern is solving particular, recognized philosophical problems, and for the most part they avoid metaphilosophical discussion”. Cole concludes therefore that Hart’s disregard for “the methodology of jurisprudence”, whatever this means, would have found support within his close-knit group of “Oxford Philosophers”. This further demonstrates Cole’s lack of understanding of the philosophy of language that he proposes to analyse and trace in *The Concept of Law*. Firstly, it should be noted that Morris Weitz wrote the article on “Oxford Philosophy” in 1953, when Oxford Philosophy was at its prime, and as Weitz (n 10, 187) put it: “It is inevitable, with such a geographical grouping as this, that the question should arise whether the work of these philosophers constitutes a movement of some sort; and, indeed, there has been a good deal of fuss about it both inside and outside of Oxford”. Weitz had just spent a year at Oxford, and was trying to figure out what Oxford Philosophy was all about. At the time when Weitz wrote his paper, “outsiders”, or people who did not belong to the exclusive Oxford group led by J. L. Austin, had little idea of what went on in the Saturday Meetings and their approach to philosophical problems. This might therefore not be the ideal source for Cole’s insight into Oxford Philosophy. Secondly, Oxford Philosophers’ avoidance of “metaphilosophical discussions”, is distinct from a discussion on methodology. Moreover, part of their methodology is this avoidance of metaphilosophical discussions, for they do not focus on the “nature” of concepts”. Weitz writes that Oxford Philosophers follow a unique methodology of enquiring into the meaning and use of words rather than their nature given that they believe this to be a more fruitful approach to solving the problems of philosophy. Cole’s remark about Hart’s lack of attention to methodology, and his more general remark about Oxford Philosophers’ lack of concern for the matter, demonstrates a significant gap in his knowledge of their revolutionary approach to philosophy.

<sup>57</sup> Cole (n 2) 6.

... COL is an often vague and arguably inconsistent book, in which impressive theoretical insights are buried in the midst of rambling digressions, and prominent praise of the importance of analytic clarity stands uncomfortably beside an obscure and barely explicated methodology<sup>58</sup>.

Cole puts forward two possible reasons for the methodological obscurity: Hart could have either hoped to enhance the wider acceptability of his arguments by not advocating a particular methodology, or he could have simply not have been sure what the appropriate methodology would be for a work in jurisprudence<sup>59</sup>. The former claim was initially put forward by Matias Bodig in an article published in 2001, where he argues that Hart strived for “a kind of theoretical (philosophical) autonomy<sup>60</sup>”. This “philosophical autonomy” would ultimately mean that Hart’s thesis could be judged on its own merits, rather than on the merits of the philosophical theories which it embodies. The latter claim, that Hart wasn’t sure of the appropriate methodology to use, is an interesting one but one that Cole does not expand or justify further. As bold a claim as this requires some explanation, but unfortunately none is provided. As discussed in previous chapters, a considerable number of legal theorists, and more generally readers of *The Concept of Law*, might be inclined to agree with Cole that Hart’s methodology was somewhat obscure. This has been clearly evidenced in earlier chapters in this section, particularly chapter three and chapter six. In fact, Brian Simpson in his rather damning book about *The Concept of Law*, makes his views on

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<sup>58</sup> Cole (n 2) 3.

<sup>59</sup> Cole (n 2) 6.

<sup>60</sup> Bodig (n 55) 21.

Hart's elusive sources clear<sup>61</sup>. However, none of these legal theorists goes as far as Cole, to assert that Hart wasn't sure as to what the appropriate methodology would be for a work in jurisprudence. One would have thought that Hart, who wrote a book of such intended significance, based on lectures delivered as early as 1954, and which was at least six years in the making, would have decided on the appropriate methodology to use before publication<sup>62</sup>. As with Cole's reference to Phenomenology, Cole's barely explicated comments about Hart's methodology further illustrate the main claim put forward in this thesis: legal theorists, such as Cole, put forward an assumption (i.e. Hart wasn't sure which methodology would be most appropriate), do not explain that assumption fully or with enough detail, leaving large parts unexplained (in this case, Cole did not articulate or defend his claim at all), and therefore create problems and tensions when trying to understand Hart's work. Cole's thesis provides exemplary material in point.

The first problem that Cole encounters is a significant one, and is caused by the inconsistency between his assumption of Hart's methodological indecisiveness

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<sup>61</sup> Simpson (n 15) 200. Brian Simpson has a chapter entitled "The Elusive Sources of Hart's ideas in *The Concept of Law*". Regarding Wittgenstein's thoughts on language games, Simpson writes that "a case can be made for the view that it may have influenced his analysis". It is however, according to Simpson, not clear in Hart's work whether or not he was actually alluding to Wittgenstein's work. Similarly, when discussing family resemblances, regarding which Hart quotes the relevant passages from Wittgenstein's work in the notes to *The Concept of Law*, Simpson writes that "he (i.e. Hart) himself does not use the expression "family resemblance", but makes what is essentially the same point". However, despite the fact that Hart makes essentially the same point, Simpson goes on to add that to a certain extent it might have been more likely that he was influenced by J. L. Austin's "The meaning of a word".

<sup>62</sup> Lacey (n 42) 219.

and Cole's own claim that tracing J. L. Austin's impact on *The Concept of Law* would help clarify, and even resolve, ongoing disagreements over Hart's chosen methodology<sup>63</sup>. Cole's claims that his analysis will bring methodological clarity to Hart's *The Concept of Law* sits uncomfortably with his earlier claim that Hart himself might not have been sure of what methodology he wished to employ. The tension arising from these conflicting statements is evident in section 3(ii) of Cole's article when he discusses Hart's views on Language. Cole writes,

...it is beyond question that the sparseness of Hart's methodological statements in COL precludes any absolutely certain attribution to Hart of a particular methodological approach. Moreover, although Hart clearly used the analysis of language in his work, he did not himself write on philosophy of language, with the exception of very early pieces. It is unavoidable, then, that there will be no conclusive evidence in any of Hart's writings that he held a genuinely Austinian view of language at the time he wrote the COL.<sup>64</sup>

But halfway through his article, Cole changes the aim of the piece from clarifying some engrained methodological misunderstandings, to attempting to demonstrate that there are "certain specific elements" of J. L. Austin's philosophy that can be traced back to both works preceding *The Concept of Law* and the book itself. This "pick and choose" approach, whereby Hart could have chosen which parts of Ordinary Language Philosophy he wanted to apply in *The Concept of Law*, is a peculiar scheme for analysis

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<sup>63</sup> cf Cole (n 2).

<sup>64</sup> Cole (n 2) 37.

of either J. L. Austin's or Hart's work, and one which does not sit comfortably with the doctrine of Ordinary Language Philosophy. Plainly this does not invalidate the claim that Hart drew inspiration from other sources, which he undoubtedly did. As discussed throughout this thesis, Ordinary Language Philosophy, much more than a theory is a way of *doing* philosophy<sup>65</sup>. Moreover, many supporters of ordinary language philosophy did not attempt to articulate what they were doing, or what methods of analysis they were employing, as they simply *did* it (as might be imagined under the rubric of the position). As Ryle wrote, "preoccupation with questions about the methods tends to distract us from prosecuting the methods themselves"<sup>66</sup>. The second problem that Cole encounters is his own conception of how a work in Ordinary Language Philosophy (or a work influenced by the philosophy of J. L. Austin) would be shaped. In the last section of his article, where Cole advocates an "Austinian Jurisprudence" it becomes apparent that, according to him, any contribution to the literature that was deemed to be "Austinian" in nature would need to resemble

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<sup>65</sup> Adam Leite gives an insightful summary of Austin's approach when he writes: "...he (Austin) did not offer a general critical theory of epistemological theorizing or of the intellectual motivations that lead to it. Instead, he subjected individual arguments to piecemeal criticism, patiently showing how things go awry in conception, motivation, argumentation and plain fact. The work was incremental, but the goal was radical: to reduce large edifices to rubble. As he put it regarding certain sense datum theories, "the right policy is to go back to a much earlier stage, and to dismantle the whole doctrine before it gets off the ground"". Richard Sørli, *The Philosophy of J. L. Austin* (Martin / Gustafsson and Richard Sorli eds, Oxford University Press 2011) 78.

<sup>66</sup> Gilbert Ryle, 'Ordinary Language' (1953) 62 *The Philosophical Review* 167, 331. Ryle writes: "We run, as a rule, worse, not better, if we think a lot about our feet. So let us, at least on alternate days, speak instead of investigating the concept of *causation*. Or, better still, let us, on those days, not speak of it at all but just do it".

something that J. L. Austin himself would have published<sup>67</sup>. Cole argues that J. L. Austin's style was "very constrained" and consisted of "exact examinations of word usage"<sup>68</sup>, characteristics which are at odds with Hart's method. According to Cole, language use is explored in *The Concept of Law*, but Hart goes beyond language use (something which, according to Cole, one does not find in J. L. Austin's work). However, despite the considerable dissimilarities in the approach of these two philosophers, Cole believes J. L. Austin would have still accepted Hart's method. Cole writes,

...Austin could happily endorse a jurisprudential method starkly at odds with his own methodology, so long as linguistic analysis still provided the first step in the argument being advanced<sup>69</sup>.

It follows that, according to Cole, *The Concept of Law* was not a book that J. L. Austin would have written, being "starkly at odds" with J. L. Austin's methodology (and cannot therefore be considered of an 'Austinian' nature), but J. L. Austin could nonetheless have endorsed it (considering that it is a book that uses linguistic analysis). This is an intriguing assertion, particularly taking into consideration Gilbert Ryle's work (mentioned repeatedly throughout this thesis). As mentioned, Ryle and J. L. Austin pioneered the Ordinary Language Philosophy at Oxford. Ryle's most well-known publication, *The Concept of Mind*<sup>70</sup>, is a great illustration of the application of Ordinary Language Philosophy to another area of philosophy. Following Cole's

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<sup>67</sup> Cole (n 2) 53.

<sup>68</sup> Cole (n 2) 54.

<sup>69</sup> Cole (n 2) 54.

<sup>70</sup> Gilbert Ryle, *The Concept Of Mind* (Kessinger Publishing 2007).

analysis, this would presumably be a piece of work that J. L. Austin would have never produced himself, but it is nonetheless unquestionably a work in Ordinary Language Philosophy. Cole's preoccupation with what the shape of an 'Austinian jurisprudence' written by J. L. Austin himself would be, leaves little room for an appreciation of what a work in Ordinary Language Philosophy (which, ultimately, was what J. L. Austin's teachings were about) looks like.

Despite not endorsing the view that Hart's work was 'Austinian', Cole tries to uncover the specific aspects of J. L. Austin's philosophy that were employed by Hart in *The Concept of Law*. As mentioned, Cole is analysing J. L. Austin's impact on Hart's work through a single quotation from "A Plea for Excuses"<sup>71</sup>. He starts by referencing an article published by Hart in 1951, ten years prior to the publication of *The Concept of Law*. Cole notes that "A Logician's Fairy Tale"<sup>72</sup> is one of the few publications that Hart dedicated to philosophy of language, and one where J. L. Austin's impact and influence can be clearly noted. This article is widely accepted as being a philosophical piece, written during a time when J. L. Austin was particularly present in Hart's academic life since the two were then teaching a seminar together. Cole does however acknowledge that the connection between "A Logician's Fairy Tale" and *The Concept of Law* is rather tenuous, given the time lapse between publications, but he argues that evidence for the relation can also be found (though not as explicitly) in later articles such as "Analytical Jurisprudence in Mid-Twentieth Century"<sup>73</sup> (published

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<sup>71</sup> Cf J. L. Austin (n 14).

<sup>72</sup> HLA Hart, 'A Logician's Fairy Tale' (1951) 60 *The Philosophical Review* 198.

<sup>73</sup> HLA Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1957) 105 *University of Pennsylvania Law Review* 953.

only 4 years prior to *The Concept of Law*). Interestingly, when it comes to *The Concept of Law*, Cole argues that the evidence is much less clear since “Hart eschews any explicit comment on the nature of language<sup>74</sup>”. So what does Cole’s meta-thesis then amount to? Cole argues that there is evidence of J. L. Austin’s philosophy in *The Concept of Law* in as much as there is a recognition (in his opinion) that certain features of Hart’s theory of law, such as the “internal point of view” and the existence of power conferring laws, would not have been adopted had Hart not already adopted certain views on language<sup>75</sup>. As previously, Cole gives no supporting evidence or reasons for the view.

In an article where Cole proposes to uncover J. L. Austin’s impact in *The Concept of Law*, and help solve some methodological misunderstandings, Cole only makes direct and substantiated reference to *The Concept of Law* regarding Hart’s (and J. L. Austin’s) alleged views on Phenomenology. Regarding all other aspects Cole mentions different articles that Hart published throughout his early career, prior to the publication of *The Concept of Law*, in which Cole feels that Hart better evidences his affiliation with philosophy of language. Few legal theorists oppose the views expressed by Cole that Hart published articles that were influenced by OLP. Even Leslie Green, who strongly objects to any reading of *The Concept of Law* in light of philosophy of language, acknowledges that Hart was part of the ordinary language philosophy movement at Oxford and published articles in this area<sup>76</sup>. Moreover, Cole, who

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<sup>74</sup> Cole (n 2) 41.

<sup>75</sup> Cole (n 2) 42.

<sup>76</sup> Leslie Green and HLA Hart, ‘The Concept of Law Revisited’ (1996) 94 Michigan Law Review 1687, 1687. Leslie Green refers to Hart’s Causation in the Law (HLA Hart and Tony Honoré,

ironically in the same article criticises Nicos Stavropoulos for only referring to *The Concept of Law* once in his article, is subject to exactly the same methodological weakness<sup>77</sup>.

### Hart and Descriptive Sociology

This final section will discuss Hart's use of the term "descriptive sociology" to describe his legal theory. In the Preface to *The Concept of Law*, Hart writes:

Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false.<sup>78</sup>

These remarks might seem relatively unimportant as, after all, Hart only mentions "descriptive sociology" once - in The Preface to his book. However, Hart's claim that his theory could also be read as descriptive sociology has, over the years, been referred to by critics as another reason to disregard and discredit Hart's theory. It is therefore important to explain, as Cole does in the final section of his article, Hart's rationale for the use of this description. Cole associates Hart's label of "descriptive

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'Causation in the Law' [1985]), noting that Hart demonstrated "facility" with philosophy of language.

<sup>77</sup> Cole (n 2) 9 writes: "...perhaps the most notable aspect of Stavropoulos' account of Hart's semantic views is the almost complete absence of Hart from them (...) the only non-COL work of Hart's to which Stavropoulos appeals, itself not an express endorsement of ambitious analysis, was published almost a decade after COL, so can hardly provide good evidence that Hart held the view in question at the time of writing COL."

<sup>78</sup> Hart (n 4) vi.

sociology” with J. L. Austin’s philosophy through the idea that linguistic usage will shed light on our understanding of the world we live in<sup>79</sup>. He then discusses a possible interpretation of some aspects of Hart’s work through J. L. Austin’s philosophy<sup>80</sup>. Cole’s interpretation, and defence of Hart’s use of the expression “descriptive sociology”, provides strong argument against those who have criticised Hart for saying that his work “*may also be regarded as descriptive sociology*”<sup>81</sup>. Interestingly, shortly after its publication, Hart’s book was reviewed in the *British Journal of Sociology* by Morris Ginsberg, a renowned sociologist<sup>82</sup>, who claims that though the book was primarily a contribution to analytic jurisprudence, there could be no doubt of the “great value of the work as a contribution to both philosophy and sociology of law”<sup>83</sup>. Most legal philosophers however disagree with Hart’s assertion (and presumably,

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<sup>79</sup> Cole (n 2) 61.

<sup>80</sup> Cole (n 2) 58-63. In this final section, Cole discusses Hart’s methodology in *The Concept of Law* (this is included in section II of this chapter), namely Hart’s assertion that *The Concept of Law* may be described as essay in descriptive sociology (to be addressed in this section), and whether *The Concept of Law* is conventional or essentialist. This final commentary was purposely left out from this analysis since it would not help the advancement of this thesis.

<sup>81</sup> Cf text to footnote 79.

<sup>82</sup> It is of particular importance that Hart’s book, a book published by a Law Series (e.g. Clarendon Law Series), was reviewed by a renowned professor of sociology in an important and widely read sociology journal. About the reviewer, Morris Ginsberg, in a moving testimony to his life and contribution to British Sociology, Marshall and MacRae write: “By the death of Morris Ginsberg British Sociology has lost one who was for a good many years its only professor, its master teacher and acknowledged spokesman”. Tim Marshall and Donald MacRae, ‘Morris Ginsberg’ (1970) 21 *The British Journal of Sociology* 357.

<sup>83</sup> Morris Ginsberg and HLA Hart, ‘The Concept of Law’ (1962) 13 *The British Journal of Sociology* 64.

then, with Ginsberg's assessment), pointing out that Hart's label was inaccurate<sup>84</sup>.

Thus Frederick Schaeur<sup>85</sup> writes:

So although *The Concept of Law* opens with the announcement that it is a work in "descriptive sociology", the identification is one that few sociologists would be able to fathom<sup>86</sup>.

As briefly mentioned in the third chapter of this thesis, Leslie Green wholeheartedly supports Schaeur's claim, writing in the introduction to the latest edition of *The Concept of Law* that "it is a funny sort of sociology that presents no fieldwork, no statistical modelling, and even few legal cases"<sup>87</sup>. According to Green, Hart's description of his work was largely inaccurate, particularly given that an exercise in descriptive sociology should go beyond ordinary knowledge and arrive at generalisations or even predictions<sup>88</sup>. Hart's work doesn't fulfil any of these expectations. Green mentions that in an interview with David Sugarman Hart did suggest that the book is more akin to a "kind" of sociology, or even preparatory to

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<sup>84</sup> For further discussion on this issue please see Simpson (n 12) 77, David Sugarman, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32 *Journal of Law and Society* 267 <<http://dx.doi.org/10.1111/j.1467-6478.2005.00324.x>> accessed 20 October 2015, Wayne Morrison, *Theoretical Criminology From Modernity To Post-Modernism* (1st edn, Routledge Cavendish 1995), Michael D Bayles, *Hart's Legal Philosophy: An Examination (Law and Philosophy Library)* (1st edn, Kluwer Academic Publishers 1992).

<sup>85</sup> Frederick Schauer is David and Mary Harrison Distinguished Professor of Law at the University of Virginia, not a sociologist.

<sup>86</sup> Frederick Schaeur, 'Re(Taking) Hart' (2005) 119 *Harvard Law Review*, 860.

<sup>87</sup> Hart (n 4) xlv.

<sup>88</sup> *Ibid.*

sociology<sup>89</sup>. Interestingly, in David Sugarman's interview of Hart, Hart himself remarks that his reference to descriptive sociology "drives people mad"<sup>90</sup>. It was perhaps for this reason that Hart suggest that he should have said that *The Concept of Law* "provide the tools for descriptive sociology, not that it is descriptive sociology"<sup>91</sup>.

According to Cole, much confusion is generated by reading Hart's prefatory statement as indicating that *The Concept of Law* has two different strands, "analytic jurisprudence" and "descriptive sociology". Cole writes,

...Hart, however, presents them (i.e. "analytic jurisprudence" and "descriptive sociology") as two distinct aspects of COL. Both contribute to the final theory, but they are pursued separately. Hart, however, presents them not as complementary aspects of the book, but as two different viewpoints from which the book as a whole can be seen. That is, the COL does not constitute an attempt to combine analytic jurisprudence with descriptive sociology<sup>92</sup>.

According to Cole, J. L. Austin held that the study of words provides an insight into social realities, but it is also true that observing concepts "at work", and studying the social realities, can also provide deep insight into the meaning of words. Therefore, by adopting an Austinian interpretation of Hart's work, one can see that Hart's pursuit led to an investigation which looked into both language and social realities<sup>93</sup>.

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<sup>89</sup> Ibid.

<sup>90</sup> Sugarman (n 84) 291.

<sup>91</sup> Ibid.

<sup>92</sup> Cole (n 2) 62.

<sup>93</sup> Cole (n 2) 63.

According to Hart, there are distinctions which are not immediately obvious between types of social situations which are often best examined taking into account the standard use of words and the context in which they are uttered<sup>94</sup>. This understanding of Hart is consistent with Hart's own explanation to David Sugarman. Hart claims that the kinds of distinctions that come out of his analytical philosophy are distinctions that are absolutely vital for the study of sociology. The need to differentiate between different kinds of situation, the difference between "habitual" behaviour and "rule-bound" behaviour, are distinctions which need to be made and thought about.

As a way of explaining how the analysis provided through analytic jurisprudence is essential for the practice of sociology, Hart gives the example of discriminating between various types of situations, such as<sup>95</sup>:

- A. Habitually following someone.
- B. Accepting someone as a guide of conduct, and therefore taking his word as a reason for acting. He is therefore a guide to criticism of other peoples' conduct.
- C. Accepting someone as motherly and legitimating.

This discussion resonates with Hart's discussion regarding rule following in *The Concept of Law*<sup>96</sup>. There is a difference between a habit (as in example A and C) and the acceptance of a rule (example B). Yet, from an "external point of view" they might look exactly the same. It is important to discriminate between these different types of

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<sup>94</sup> Hart (n 4) vi.

<sup>95</sup> Sugarman (n 84) 291.

<sup>96</sup> Hart (n 4) 51-77.

situations in order to be able to analyse and understand them<sup>97</sup>. We can use Hart's example of taking your hat off in church as an example. A father and son enter church, the father takes off his hat and the son follows suit. As an external observer it would be hard, if not impossible, to tell whether the son took his hat off out of habit (he always does it), if it was because he looks up to his father and thinks he ought to do as he does, or whether it is because his father is regarded as a figure of authority or guide of conduct, and therefore he takes his word as a reason for acting. If it is the latter, and only if it is the latter, if someone else walked into the church and did not take their hat off, this would be seen by the son as a reason to criticize their behaviour. Though to an external observer there would be no difference, from an internal point of view only if someone was accepted as a guide of conduct would other people be criticised for not taking their word or following their behaviour. Understanding these nuances is important for analytical jurisprudence and descriptive sociology alike. The importance of understanding these nuances was discussed earlier in the thesis, in Chapter Three regarding the notion of obligation<sup>98</sup>, and the difference between "having an obligation" and "being obliged".

## Overview

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<sup>97</sup> On the importance of the distinction between the "internal" and "external" points of view, Hart writes: "Indeed, one of the central themes of this book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called "internal" and "external" and which can both be made when social rules are observed". Hart (n 4) xi.

<sup>98</sup> Chapter Three, Leslie Green and the Third Edition of *The Concept of Law*, text to footnote 48.

Cole identified a major gap in the relevant literature about *The Concept of Law*: a complete absence of an investigation of J. L. Austin's influence in *The Concept of Law*. Though mentioned in passing by various legal theorists, Cole was the first (and so far, the only) theorist to undertake a serious investigation of how an awareness of J. L. Austin's philosophy would shape our understanding of Hart's book. Though a valuable enterprise, Cole's article does not deliver its promised outcomes. As discussed throughout this chapter, Cole commits the same methodological mistakes as the legal philosophers that precede him. Firstly, he does not provide sufficient detail regarding the claims he makes. Let's take, for example, Cole's claim that J. L. Austin's philosophy resonates with Phenomenology. Considering the boldness of Cole's assertion, he does not give enough detail or evidence to substantiate his claim. Secondly, Cole's claims create problems for the understanding of Hart's philosophy. By claiming that J. L. Austin takes a phenomenological approach, Cole struggles to find evidence in Hart's work to substantiate his claims, resorting therefore to mentioning a series of earlier articles where he could draw tenuous connections between Hart's writing and views consistent with Phenomenology. Inevitably Cole's views on J. L. Austin's philosophy also colour his understanding of Hart's methodology, which Cole finds "obscure". Had Cole taken a more mainstream and more widely accepted view of J. L. Austin's work as ordinary language philosophy, many of the problems he encountered when trying to evidence J. L. Austin's impact in *The Concept of Law* would not have surfaced. It is argued throughout this chapter that the burden is on Cole to provide the reader with enough evidence and reasons as to why they should support his less accepted view of J. L. Austin as a phenomenologist. However, not only does he fail to provide such evidence, but his approach creates problems for his own

interpretation of *The Concept of Law*. Cole's scheme of analysis is however consistent with the work of the other legal theorists whose work is analysed in the preceding chapters.

Some of the issues discussed in this chapter, particularly those pertaining to Hart's methodology will be revisited in the next Chapter focused on the reception of *The Concept of Law* in the continent.

# Beyond the Anglo-Saxon Realm

Section B

Chapter Eight

This final chapter of section B will focus on the reception of *The Concept of Law*<sup>1</sup> in Hispanophone countries, namely Spain and Argentina. As discussed, all of the legal philosophers whose work has so far been analysed (with the exception of Tony Cole) studied at the University of Oxford. These four legal theorists, Bix, Marmor, Green and Stavropoulos, were students at Oxford during the same decade and were influenced by Joseph Raz, often considered the leading academic on Hart's philosophy. Even though their approach to *The Concept of Law* varied significantly, as illustrated throughout this thesis, they all committed similar methodological mistakes and so reached similar fragmentary conclusions about Hart's book. What this chapter offers is the perspective of a number of academics who were introduced to, and studied, Hart's work in a completely different way. The aim of this chapter is to understand whether the reception, and subsequent misunderstanding, of Hart's book was limited to the Anglo-Saxon community, or whether Hart's work had a similar reception in other parts of the world. In light of this ambition the chapter forms the last in this section of the thesis. Two main works will be discussed here (for there will be sufficient material even within this limited set to show that a difference exists): Cámara's book entitled "Law and Language: Wittgenstein's Philosophy and Hart's legal

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<sup>1</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012).

theory”<sup>2</sup>, and Navarro and Bouvier’s article entitled “Legal controversies and rule following”<sup>3</sup>.

Cámara, unlike the other legal philosophers whose work is analysed in this section, is a Professor of Philosophy in Spain. Even though his background was in Law, having graduated with a law degree, it appears that his main interest was philosophy<sup>4</sup>. Cámara’s book is divided into two main sections: the first offers a short but comprehensive insight into *Philosophical Investigations*<sup>5</sup>, and the second section explains Hart’s theory with reference to *Philosophical Investigations*. Cámara asserts that the influence that Wittgenstein has over Hart’s legal theory is undeniable, and proposes to uncover the connections in question. Cámara covers many different aspects of *The Concept of Law* in his book, thus giving us the opportunity to investigate and draw within the present analysis some aspects of *The Concept of Law* that were passed over more quickly by the other legal theorists investigated here. Moreover,

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<sup>2</sup> Ignacio Cámara, *Derecho Y Lenguaje* (Universidade da Coruña 1996). Cámara is a Reader in Philosophy of Law at the University of Coruña. Currently this book is only available in Spanish.

<sup>3</sup> The article was presented at the “Terceras Jornadas sobre Wittgenstein” (translated as “Three Days about Wittgenstein”), hosted at the University of Buenos Aires, Argentina, in 2004. The article was never published in a peer-reviewed journal. Both Navarro and Bouvier are Professors at the Universidad Nacional de Córdoba in Argentina. Currently this article is only available in Spanish.

<sup>4</sup> It was perhaps due to this that Blanco Miguélez describes Cámara’s work as being about Wittgenstein, a book that in addition to an explanation of Wittgenstein’s later philosophy offered an insight into a practical application of Wittgenstein’s philosophy in the form of Hart’s work. Susana Blanco Miguélez, ‘Ignacio Sánchez Cámara, Derecho Y Lenguaje’ (2008) <<http://ruc.udc.es/bitstream/2183/1922/1/AD-1-40.pdf>> accessed 29 December 2015.

<sup>5</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967).

since Cámara's sole focus is Wittgenstein's later philosophy, the analysis of his work will enable a clearer picture to emerge, in counterpoint, of the fundamental nature of J.L. Austin's contribution to *The Concept of Law*. To be clear, even though Cámara's understanding of Wittgenstein's work is (it seems to me) correct, there are still tensions in his analysis of Hart's work that can only be properly resolved once J. L. Austin's philosophy has been taken into account. The analysis of Cámara's work will be the main focus of this chapter.

Navarro and Bouvier's contribution is a more modest one. Navarro and Bouvier are both scholars working in the philosophy of law, but much like Cámara present their interpretation of Hart's work as a practical application of Wittgenstein's philosophy. Unlike Cámara however, they are only focused on the issue of rule following. Whilst Cámara wants to analyse certain key parts of *The Concept of Law* in order to demonstrate Wittgenstein's influence in Hart's thesis, Navarro and Bouvier want to demonstrate how Wittgenstein's teachings were quickly filtered into other areas, namely Law. Even though their paper is yet to be published in a peer reviewed academic journal, it was presented at the III JORNADAS WITTGENSTEIN conference in Argentina<sup>6</sup>. Despite its lack of academic standing, Navarro and Bouvier's paper adds something different, and presents a point of view that is not found in anglo-saxon jurisprudential works<sup>7</sup>, namely a different understanding of the application of Wittgenstein's philosophy to Hart's work.

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<sup>6</sup> <<http://www.accionfilosofica.com/jornadas/jornada.pl?id=2>> accessed 1 May 2015.

<sup>7</sup> Navarro and Bouvier's work stands at odds with, for example, Stefano Berdea's views on the application of Wittgenstein's philosophy. See Stefano Berdea, 'Remarks on a Legal Positivist Misuse of Wittgenstein's Later Philosophy' (2003) 22 CrossRef Listing of Deleted DOIs.

Due to the much greater length and depth of Cámara's work when compared with Navarro and Bouvier's, his work will be the foundation of this chapter with much of the analysis directed towards his book. Cámara's sole focus on Wittgenstein's philosophy, and his aim to analyse the main points of *The Concept of Law* through Wittgenstein's later philosophy, will help test and finally demonstrate this thesis' claim that Hart's book must properly be understood through J. L. Austin's influence. In particular, the analysis of Cámara's work will help demonstrate the importance of taking into account J.L. Austin's unique methodology when reading *The Concept of Law*. The final section of this chapter will discuss Navarro and Bouvier's interpretation of Wittgenstein's, and Hart's, philosophy.

### **Cámara on Hart's Methodology**

Much like the other legal philosophers discussed in previous chapters, Cámara acknowledges J.L. Austin's contribution to *The Concept of Law*, but does not explore it in any great depth. Despite Cámara's acknowledgement that J.L. Austin was much closer to Hart (geographically and personally), and therefore much more likely to have had an impact in Hart's philosophical background, Cámara still credits Wittgenstein with inspiring Hart's philosophy. Cámara sees J.L. Austin as a disciple of Wittgenstein, whose philosophy was an adaptation of Wittgenstein's, meaning that J.L. Austin's contribution to Hart's philosophy and *The Concept of Law* can be relegated to the position of supplement. Ultimately, writes Cámara, despite their adopting different

methodologies, J.L. Austin's philosophy was inherently Wittgensteinian<sup>8</sup>. As discussed in previous chapters, there is much speculation as to the extent to which the Oxford Philosophers were influenced by, and followed, Wittgenstein's philosophy<sup>9</sup>. Cámara argues that the fundamental difference between J.L. Austin and Wittgenstein lies in their methodologies, insofar as J.L. Austin perceived Ordinary Language Philosophy as a new "science of language" which could help shed some light on traditional philosophical problems, whereas Wittgenstein thought of it as a set of techniques which would dissolve philosophical problems. Some philosophers, such as Morris Weitz, argue that Wittgenstein was instrumental and the single greatest philosophical influence for the Oxford Philosophers, whilst others such as Severin Schroeder disagree, claiming that the views of the two camps were far too diverse to classify them under a single influence. Schroeder writes:

Soon it became common to speak of "Oxford Philosophy" or "Oxford Ordinary Language Philosophy", seen by many as the "school" based on Wittgenstein's *Philosophical Investigations*. However, the label is

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<sup>8</sup> Cámara (n 2) 49. It has been argued in previous chapters that Wittgenstein's work has been read much more widely than J.L. Austin's. J.L. Austin's work is still considered very specialist, and mainly only read by those with an interest in philosophy of language. It is therefore not surprising that Cámara would be a lot more familiar with Wittgenstein's work than J.L. Austin's. Cámara's confusion regarding J.L. Austin's work will become apparent throughout this chapter. When referring to Wittgenstein's work, Cámara is referring to his later philosophy as per *Philosophical Investigations*. Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations* Philosophische Untersuchungen (3rd edn, Blackwell Publishers 1967).

<sup>9</sup> Cf Chapter Two, *The Case for Ordinary Language Philosophy*, section two "Hart and Ordinary Language Philosophy".

misleading, for the views of these philosophers were far too varied for them to be classed as members of the same school, and some of them (e.g. Austin, Ayer and Grice) were in many respects highly critical of Wittgenstein.<sup>10</sup>

Though an interesting question, it would be beyond the scope of this thesis to add to the debate on Wittgenstein's influence on Oxford Philosophy, or whether J.L. Austin had started his teachings before Wittgenstein's later philosophy emerged. What is relevant however is the extent to which the teaching of the so-called Oxford Philosophers, particularly J.L. Austin, emulated Wittgenstein's<sup>11</sup>. As argued

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<sup>10</sup> Severin Schroeder, *Wittgenstein: The Way out of the Fly-Bottle* (Polity Press 2006). Grayling is also supportive of this view. He writes: "None of the people who at the time were prominent in philosophy (in addition to Ryle and Austin there were, for example, Moore, Broad, Russell and Ayer) were Wittgensteinians; most of them were largely unaffected by Wittgenstein's later ideas, and some were actively hostile to them". AC Grayling, *Wittgenstein: A Very Short Introduction* (Oxford University Press 2001), 129.

<sup>11</sup> It is unclear what Wittgenstein's teachings were after the war, or to what extent J.L. Austin engaged with them. It is however undeniable that most Oxford philosophers admit that Wittgenstein was a great influence. Even though careful reading of their work suggests that Oxford Philosophers were not Wittgenstein's followers, Wittgenstein's influence on the Oxford Philosophers cannot be disregarded. These questions have been around from very early on, with Weitz writing in 1953 that the origins of Oxford Philosophy is a "tricky business", since some say that Wittgenstein "inspired Oxford philosophy", but others argue "it developed quite independently from him until after the war". Moritz Weitz, argues that he is able to give the "more or less agreed upon version of the origins as offered by Oxford Philosophers", which culminates in the statement that Wittgenstein was actually the "single greatest influence". He writes: "Amongst the recognized influences are Prichard and Ross, because of their concern for linguistic propriety in ethical matters; Moore and later Wittgenstein and Wisdom; Price and Ryle, because they had led the revolt against traditional philosophy in Oxford in the late twenties; and the weekly seminar groups consisting of a

throughout this thesis, both J.L. Austin's and Wittgenstein's philosophy can be traced in *The Concept of Law*, but it is important to distinguish between the contributions of these two philosophers if we are to fully understand *The Concept of Law*. As discussed in Chapters four and five where Bix and Marmor were seen to impose a purely Wittgensteinian analysis, and later in Chapter seven where Cole pursues a peculiar analysis of Hart's work solely through J.L. Austin's philosophy, one should be wary of imposing narrow and restrictive readings on *The Concept of Law*. Thus this section will be required to focus carefully on the philosophical and methodological differences between J. L. Austin and Wittgenstein. The one thing that can be agreed on regarding OLP is that, if as far back as 1953, at the pinnacle of Oxford Philosophy, there was no agreement as to the philosophical influences held by the 'group', it will be hard to

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number of younger Oxford dons, especially Austin and Berlin. The last of these, according to Berlin, is extremely important because it promoted in a unique way Austin's own philosophical procedures. All of these Oxford philosophers agree that Wittgenstein was the single greatest influence, although not more than half a dozen actually studied him". See Morris Weitz, 'Oxford Philosophy' (1953) 62 *The Philosophical Review* 187, 187. As mentioned in the introductory chapter, an important writer in this area is Morris Weitz. His importance pertains not to his philosophical status, but due to the fact that he was writing about Oxford Philosophy in 1953, when Oxford Philosophy was booming. It was Bertrand Russell, who Weitz met whilst doing French History Research at the University of Chicago that inspired him to follow Philosophy. His new found interest in philosophy lead him to visit Oxford for a year residency. Weitz spent a year at Oxford researching for, amongst other things, this article. During Weitz's residence at Oxford, he became good friends with Oxford Philosophers such as Gilbert Ryle, Herbert Hart and Isaiah Berlin, but even then, he considered himself an "outsider". His lengthy article, entitled "Oxford Philosophy" gave the world an insight into what was going on at Oxford in the 1950's, and it was a particularly significant publication in America where very little was known about this post-war philosophical movement.

settle this question today. However, what Berlin, Weitz, Schroeder and many others<sup>12</sup> seem to agree on is that Austin's approach to philosophy was completely different to that of Wittgenstein. So, even if Cámara was right to assume that J. L. Austin was initially influenced by Wittgenstein's insights on philosophy, he made it his own by having his own "philosophical procedures". It is this "philosophical procedure" that makes Austin's philosophy unique, and entirely distinguishable from that of Wittgenstein<sup>13</sup>. It is therefore important to show what J. L. Austin's unique philosophical approach is. Perhaps the closest we can ever come to an explanation of J. L. Austin's method in engaging Ordinary Language Philosophy, is through his article "A Plea for Excuses".<sup>14</sup> In "A Plea for Excuses"<sup>15</sup>, Austin exemplifies how his method of analysis works using the topic of excuses as his source. He starts by thinking of

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<sup>12</sup> On the difference of J.L. Austin and Wittgenstein's philosophy please see KT Fann (ed), *Symposium on J.L. Austin* (Routledge & Keegan Paul 1969), Richard Sørli, *The Philosophy of J. L. Austin* (Martin / Gustafsson and Richard Sorli eds, Oxford University Press 2011), Avner Baz, *When Words Are Called for: A Defense of Ordinary Language Philosophy* (Harvard University Press 2012).

<sup>13</sup> A.C. Grayling adds to this in *A Very Short Introduction to Wittgenstein*, where he writes: "So-called 'Ordinary Language Philosophy', which flourished at Oxford mainly during the 1950's and which is chiefly associated with Austin, is sometimes thought to be a result of Wittgenstein's teachings, but in fact his influence was far less immediate than that; certainly Austin did not take himself to owe his ideas to Wittgenstein. There is no doubt that Wittgenstein's views had some part in promoting the philosophical concern for language which was dominant in the mid-century, even if only in part and at second-or-third-hand; but it is equally certain that Wittgenstein would have found aspects of 'Ordinary Language Philosophy' uncongenial". AC Grayling, *Wittgenstein: A Very Short Introduction* (Oxford University Press 2001), 129.

<sup>14</sup> JL Austin, 'A Plea for Excuses' [1971] *Philosophy and Linguistics* 79, 3.

<sup>15</sup> J.L. Austin (n 14) 7.

different situations in which people might use excuses, and then examines their ordinary usage. Unlike Wittgenstein, Austin does not believe that Ordinary Language Philosophy will solve all philosophical problems (and Cámara acknowledges as much). What Austin argues is that since we use words as “our tools”, we should ensure we know what we mean when we use them. It is therefore important to “hold them apart from and against” the world, to understand the inadequacies of language<sup>16</sup>. Wittgenstein’s approach to Ordinary Language Philosophy is slightly different. Even though Wittgenstein is still concerned with how words are used, his focus is directed towards *looking* and *seeing* whether there is any connection from the different applications of a word<sup>17</sup> and the insistence that one should describe the *use* of the word rather than theorize about it<sup>18</sup>. As discussed in the previous chapter, J.L. Austin’s influence on Hart’s work is apparent from the Preface of *The Concept of Law*, where Hart sets the scene for his book and explains his methodology<sup>19</sup>. Cámara acknowledges that Hart quotes J.L. Austin in the preface to *The Concept of Law*, but since he views Austin as a disciple of Wittgenstein he does not consider this particularly relevant. Hart expressly rejects the idea that inquiries into the meaning of words merely throw light on words<sup>20</sup>. He believes that by examining the standards of

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<sup>16</sup> J.L. Austin (n 14) 8.

<sup>17</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967), ss 66.

<sup>18</sup> Wittgenstein (n 17) ss 109. For further discussion on this issue, please see Norman Malcolm, *Nothing Is Hidden: Wittgenstein’s Criticism of His Early Thoughts* (Blackwell Publishers 1988), 237.

<sup>19</sup> Cf Chapter seven, text to footnote 68.

<sup>20</sup> Hart (n 1) vii.

use of different expressions, we can get an insight into important distinctions that would not be immediately obvious. This mirrors J.L. Austin when he claims that it is important that we examine “what we should say and when”<sup>21</sup>, since this will allow us to “look at the world without blinkers”<sup>22</sup>; for J.L. Austin believes that “we are not merely looking at words but also the realities we use the words to talk about”<sup>23</sup>, hence Hart calling his book “an essay in descriptive sociology”<sup>24</sup>. On the whole, Hart’s *approach* has a much closer resemblance to that of J. L. Austin than to Wittgenstein. In various parts of *The Concept of Law*, Hart undertakes a careful enquiry into “what we should say and when”, as well as “why and what we should mean by it”<sup>25</sup>.

This important distinction between the methodologies of J.L. Austin and Wittgenstein can be illustrated by the central ambition of Hart’s book, the discussion and elucidation of the concept of law. To review what was already discussed in previous chapters in this thesis, in the first chapter of *The Concept of Law* Hart discusses the definition of the word Law, and argues that no agreement has yet been reached as to the precise definition of the concept of Law. Even though most people use this concept with ease, and would be able to identify phenomena as legal, and what would count as law, there is no definition as such of the *concept* of law. It is this

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<sup>21</sup> J.L. Austin (n 14) 7.

<sup>22</sup> J.L. Austin (n 14) 7.

<sup>23</sup> J.L. Austin (n 14) 8.

<sup>24</sup> Hart (n 1) vii. Hart’s claim that his book was an “essay in descriptive sociology” was not well received, and has sparked much debate. This issue was discussed at length in the previous chapter. Cf Chapter seven, Cole and J. L. Austin’s influence in *The Concept of Law*, text to footnote 68.

<sup>25</sup> J.L. Austin (n 14) 7.

lack of consensus that leads Hart to enquire why it is that with so much common knowledge, the question “What is Law” is yet to be answered<sup>26</sup>. In order to tackle this question, Hart claims that what is needed is not yet another definition, but rather an understanding of what it is about “law” that has puzzled so many generations. Cámara, who analyses *The Concept of Law* through a purely Wittgensteinian point of view, understands this to mean that Hart is claiming that instead of providing a definition of the word “law”, he will try and find Law’s “central case”. Cámara writes:

What Hart proposes is not another definition of Law in the traditional sense, nor a mere description of how the concept Law is used. He is looking for the “central case” of Law.<sup>27</sup>

Cámara, claiming that Hart’s thesis should be analysed through Wittgenstein’s philosophy, understands the “central case of Law” as being an adaptation of Wittgenstein’s core and penumbra of concepts. According to Cámara, Hart argues that there are several instances that fall within the “penumbra”, but there are some that form the “core” of Law. He argues that what Hart is looking for is this “core” case, a central case which will demonstrate law’s central features, and that this will therefore give us the definition of Law<sup>28</sup>. Though inspired by Wittgenstein’s later philosophy,

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<sup>26</sup> Hart (n 1) 1-3.

<sup>27</sup> Cámara (n 2) 53. Interestingly Stavropoulos, who claimed to also be analysing the semantic insights in *The Concept of Law*, reaches a completely different conclusion claiming that Hart is looking for the *nature* of law. Chapter six, Nicos Stavropoulos, text to footnote no. 10.

<sup>28</sup> Cámara (n 2) 53. It is important to clarify that, as illustrated in previous chapters, Hart does place importance in the distinction between “core” and “penumbra” of concepts, and this distinction is important in Hart’s thesis. However, what is disputed is that Hart was looking for a “central case” of Law.

according to Cámara, Hart's approach distances him from the traditional approach of Ordinary Language Philosophy, and arguably J.L. Austin's philosophy, since he is not looking for the *use* of the word "law". This is however, Cámara writes, a clear demonstration of the application of *Philosophical Investigations*, particularly the aspect of "core and penumbra" of concepts. In order to find what Cámara calls the "central" case of law, Hart identifies three central elements of law, in the form of questions, which are of prime importance to our understanding of it<sup>29</sup>:

1. What relation is there between law, legal obligation and orders backed by threats?
2. What relation is there between law and moral rules?
3. What are rules? Does law consist of rules? Do courts really apply rules? What relation is there between rules and habits?

Cámara concludes that it is Hart's conviction that once these three elements are exposed and analysed, we will be able to reach consensus as to what law is. In other words, by addressing these three areas of concern Hart will be able to elucidate the concept of law. Cámara links these to Wittgenstein's family resemblances. He argues that by answering all three questions, Hart claims that we can gain an insight into the different connections and similarities between them, and will therefore ascertain what the "central case" of law is. It is not apparent from Cámara's book what this "central" case is, or what it looks like. Even though Cámara presents an intriguing

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<sup>29</sup> Cámara (n 2) 53.

argument, it leaves a lot of questions unanswered, such as what this “core” or “central” case of law looks like, and what lies in the penumbra. These are questions that are not answered by Cámara’s book. There is, however, strong evidence to suggest that Hart’s approach, delineated in Chapter I of *The Concept of Law*, might have been in line with Ordinary Language Philosophy, inspired by J.L. Austin’s teachings<sup>30</sup>. For this purpose, let’s look at J.L. Austin’s paper, “A Plea for Excuses”<sup>31</sup>, where (we remember) Austin aims to examine the subject of “excuses”: what is an excuse, how it is used, and how others receive it<sup>32</sup>. As mentioned, Austin’s main aim in this article was to exemplify how OLP can be used to shed light on important issues, such as those of “excuses”. In the beginning of his paper, Austin writes:

What, then, is the subject? I am here using the word “excuses” *for a title*, but it would be unwise to freeze too fast to this one noun and its partner verb: indeed for some time I used to use “extenuation” instead. Still, on

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<sup>30</sup> It is important to recall that in Hart’s article “Jhering’s Heaven of Concepts”, mentioned throughout this thesis, Hart credits J.L. Austin and Wittgenstein with a whole new phase in analytic philosophy. It could therefore be argued that Hart’s work would be in line with Ordinary Language Philosophy rather than just with Wittgenstein’s later philosophy as per *Philosophical Investigations*. HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983).

<sup>31</sup> J.L. Austin (n 14) 1. As it was mentioned, most of the materials available to illustrate Austin’s philosophy were published post-mortem, with many of them being drafted from his student’s notes. Austin did not feel the need to publish much, for his whole enterprise was based in the discussion of ideas. “A Plea for Excuses” is therefore pivotal paper. Moreover, this paper springs from a series of seminars that J.L. Austin ran with Hart on this same topic<sup>31</sup>. We can only speculate as to the influence that Hart had in Austin’s paper, but Austin did acknowledge Hart’s contribution, leaving us to assume that some of it might have been formulated, or at least discussed, in the seminar he and Hart ran together.

<sup>32</sup> J.L. Austin (n 14) 1.

the whole “excuses” is probably the most central and embracing term in the field, although this includes others of importance – “plea”, “defence”, “justification”, and so on. When, then, do we “excuse” conduct, our own or somebody else’s? When are “excuses” proffered?<sup>33</sup>

Throughout the paper J. L. Austin picks out (and explains the significance of) different instances where “excuses” are proffered, for example:

- As a defence: When someone is accused of having done something, but they do not accept full (or even partial) responsibility for having done so<sup>34</sup>
- As a plea: When someone accepts that they have done it, but provides arguments for mitigating circumstances<sup>35</sup>
- As a justification: When someone accepts that they have acted in a particular way, but they give reasons as to why they acted in that particular way.<sup>36</sup>

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<sup>33</sup> J.L. Austin (n 14).

<sup>34</sup> J. L. Austin (n 14) 2. Austin writes, “In the one defence, briefly, we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don't accept full, or even any, responsibility.”

<sup>35</sup> Ibid. J. L. Austin writes, “In general, the situation is one where someone is *accused* of having done something, or (if that will keep it any cleaner) where someone is *said* to have done something which is bad, wrong, inept, unwelcome, or in some other of the numerous possible ways untoward. Thereupon he, or someone on his behalf, will try to defend his conduct or to get him out of it”.

<sup>36</sup> Ibid. J. L. Austin writes: “One way of going about this is to admit flatly that he, X, did do that very thing, A, but to argue that it was a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion. To take this line is to justify the action, to give reasons for doing it: not to say, to brazen it out, to glory in it, or the like.”

As shown, the term “excuses” is a very wide term, in so far as it used to cover a variety of situations. When considering the term *excuses* it is not enough to focus on the general ordinary usage of the word (since it would not give our investigation any depth), we need to uncover the different situations when the expression *excuses* is uttered (such as its use as a plea, as a defence or as a justification), and appreciate its intricate connections. We need to understand when we “excuse” conduct, and when “excuses” are proffered. J. L. Austin is looking into these connections by uncovering how the concept of excuses works in everyday practice. He is searching for the *use* of “excuses” not by looking at how the general term of “excuses” is used, but rather by looking at the different situations where the term excuses is featured and seeing what they might have in common. Hart reaches a similar conclusion regarding the analysis of the concept “law”. A general investigation into what “law” is, without careful consideration of the different situations to which the concept “law” is applied, would be fruitless (as, Hart argues, can be seen by the definitions of law that have so far been provided). In a similar way to J.L. Austin, Hart is looking at the different, and often controversial, situations where “law” is used, and what they might have in common, in order to fully understand *The Concept of Law*. Hart writes:

Plainly the best course is to defer giving any answer to the query “What is Law?” until we have found what it is about law that has in fact puzzled those who have asked or attempted to answer it, even though their familiarity with the law and their ability to recognize examples are beyond

question. What more do they want to know and why do they want to know it?<sup>37</sup>

Hart argues that it would be of no use to give yet another definition of “Law” without first understanding the current disagreements. J.L. Austin takes a similar approach to dealing with the concept of “excuses”. J.L. Austin argues that when usage is loose, and we might at first not understand why there is a disagreement regarding usage, we should not “shy away from it”. On the contrary, it is by exploring the disagreements that we will shed light on the true usage of concepts. He writes:

If the usage is loose, we can understand the temptation that leads to it, and the distinction that it blurs: if there are “alternative” descriptions, then the situation can be described or can be “structured” in two ways, or perhaps it is one where, for current purposes, the two alternatives come down to the same. A disagreement as to what we should say is not to be shied off, but to be pounced upon: for the explanation of it can hardly fail to be illuminating.<sup>38</sup>

Even though we could, as Cámara does, attempt to justify Hart’s approach with reference to Wittgenstein’s philosophy, by claiming that Hart is looking for a “central case” of law, the connection is uneasy (as exemplified by Cámara’s lack of explanation for what this “central case” is or what it would look like). However, the connection illustrated above between Hart’s work and that of J.L. Austin seems a lot more solid. Just as J.L. Austin was using the concept of “excuses” as a title, Hart is using “law” as

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<sup>37</sup> Hart (n 1), 5.

<sup>38</sup> J.L. Austin (n 14) 1.

an umbrella term which is comprised of a variety of different elements, from which Hart picks three which he believes are the most important in elucidating the concept of law.

### **The Concept of Obligation**

Though Stavropoulos and Cole have focused on Hart's methodology, Cámara is the only theorist mentioned in this thesis to focus on the concept of "obligation". It is particularly surprising that this is not mentioned by Cole since it will be argued it is one of the aspects of Hart's theory where J.L. Austin's theory is on display. Cámara provides a very brief explanation of this aspect of Hart's theory, spending just short of three pages on an explanation and critique of Hart's exposition of the idea of obligation. Cámara's analysis focuses solely on Wittgenstein's later philosophy and, as will be seen, misses some important nuances in Hart's work that could not be reconciled with Wittgenstein's philosophy (since, it is argued, they are in a more Austinian vein). Alongside his previous comments on J.L. Austin's philosophy, this suggests that Cámara believes all issues of Ordinary Language Philosophy to have been covered by Wittgenstein's later philosophy, and then perhaps added to by his followers. It is possibly for this reason that Cámara misses the connection to J. L. Austin's work and some important insights in Hart's work. Hart uses John Austin's command theory as the foundation for his own theory in *The Concept of Law*. One aspect of John Austin's theory that is challenged by Hart is his idea of "obligation"<sup>39</sup>. According to John Austin, law is a species of command, "an intimation or expression

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<sup>39</sup> Hart (n 1) 82.

of a wish to do or forbear from doing something, backed up by the power to do harm to the actor in case he disobeys”<sup>40</sup>. Hart starts by explaining that generally people perceive law as something that makes us act in a compulsory way. When there is law, generally people feel that they have no option, or an “obligation”, to act in a certain way<sup>41</sup>. He believes that this idea of “obligation” is one that has led to numerous mistakes and misconceptions, namely arising from a confusion between expressions such as “obliged” and “feeling obliged” or “having an obligation”. With regards to Hart’s enquiry into the use of the word “obligation”, Cámara writes,

He is not trying to distinguish between concepts, he is trying to distinguish the different uses of the same concept.<sup>42</sup>

Cámara proceeds to explain how the concept of obligation is related to the idea of a social rule. He writes,

An obligation is always dependent on the existence of a legal rule, the opposite however is not always true. So, when there is a legal rule, the human conduct is generally, in some way, obligatory. We need to distinguish the obligation resulting from an order uttered by a gunman and an obligation resulting from a legal rule? (...) To establish the difference, Hart resorts to a pure Wittgensteinian thought, given that the distinction is to be found in the ordinary use of the word<sup>43</sup>.

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<sup>40</sup> John Austin, *The Province of Jurisprudence Determined* (2nd edn, B Franklin 1970).

<sup>41</sup> Hart (n 1) 82.

<sup>42</sup> Cámara (n 2) 58.

<sup>43</sup> Cámara (n 2) 57.

So, according to Cámara even though all obligations are the result of a rule, not all rules impose obligations<sup>44</sup>. To illustrate this he borrows Hart's example of rules of etiquette – these are undoubtedly rules but they do not impose obligations. Even though generally people think that rules of etiquette should be followed, the idea of “obligation” or “duty” would not generally be associated to these kinds of rules. Thus, according to Cámara, the way to distinguish between rules that impose an obligation and those that do not is to consider the seriousness of the social pressure to conform to a particular norm<sup>45</sup>. Though it cannot be said that Cámara's conclusion is inaccurate (the idea that the seriousness of social pressure is the primary factor determining whether a rule imposes an obligation is indeed Hart's conclusion in *The Concept of Law*<sup>46</sup>), he misses some important aspects of Hart's analysis. Cámara merges Hart's discussion regarding the distinction of “obligation” and “feeling obliged” with his subsequent discussion of social rules, missing therefore the nuance in Hart's work which gives it depth and philosophical precision. Analysing Hart's views on the idea of obligation through a more Austinian method will prove to uncover greater depth in Hart's work. It is then important to show what this would look like; it will be seen that a much better, more natural, connection can be made

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<sup>44</sup> Cf Hart (n 1) 85, Hart writes: “The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation.”

<sup>45</sup> Cámara (n 2) 58.

<sup>46</sup> Hart (n 1) 87, Hart writes: “What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations”.

between Hart's enquiry into the use of "obligation" and J.L. Austin's work in "A Plea for Excuses"<sup>47</sup>.

For this connection to become clear, it is important to recall Hart's argument. To illustrate his argument, Hart uses the example of gunman A, who "orders B to hand over his money and threatens to shoot him if he does not comply"<sup>48</sup>. Hart explains that according to the theory of coercive orders this situation would demonstrate the idea of obligation or duty. According to Hart, if B obeyed A's orders and gave him the money, people would naturally comment that he was "obliged" to hand over the money to A. People would naturally assume that if B has not handed over the money to A, he might have got himself injured or worse. However, Hart argues that B did not *have an obligation* to hand over the money:

It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B 'had an obligation' or a 'duty' to hand over the money. From the start it is clear that we need something else for an understanding of the idea of obligation. There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it.<sup>49</sup>

Hart argues that a distinction should be made between our use of the expression "being obliged" and that of "having an obligation". According to Hart, we would

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<sup>47</sup> J.L. Austin (n 14) 28.

<sup>48</sup> Hart (n 1) 82. This aspect of Hart's theory has already been explored in Chapter 3, Leslie Green and The Third Edition of *The Concept of Law*, but will be revisited here to add greater clarity and depth. Having further explored Hart's theory throughout the previous chapters in this thesis, we are now in a position to add greater clarity to this aspect of Hart's theory.

<sup>49</sup> Hart (n 1) 82.

generally use the expression “was obliged” in connection to a person’s beliefs and motives, consequences that might arise from non-compliance or any other psychological factors. We normally employ the expression “was obliged” after someone has already acted in a particular way. For example, in the gunman situation above, if B gave the money to A, for fear that he might be gravely injured otherwise, we would say that he “was obliged” to hand over the money. However, we would not say that he “had an obligation” to hand over the money. A did not have a legal entitlement to the money. Hart argues that “having an obligation” is quite independent from whether or not the subject will actually comply or do the required action. Someone will “have an obligation” even if it is believed that even if he did not comply with it, and he would never be found out. For example, people have an obligation to pay penalty charge notices, and this remains true even if the subject was able to evade this and never be caught. Now let’s look at J.L. Austin’s “A Plea for Excuses”, where he writes:

It is not enough, either, to attend simply to the “key” word: notice must also be taken of the full and exact form of the expression used. In considering mistakes, we have to consider seriatim “by mistake”, “owing to a mistake”, “mistakenly”, “it was a mistake to”, “to make a mistake in or over about it”, “to be mistaken about”, and so on (...) These varying expressions may function quite differently ‘ and usually do, or why should we burden ourselves with more than one of them?<sup>50</sup>

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<sup>50</sup> J.L. Austin (n 14) 24.

With regards to excuses, J.L. Austin argues that we have to look at the use of words carefully, for we do not use the word “by mistake” in the same way that we use “owing to a mistake”, etc. It is important to understand these little subtleties of our ordinary use of language if we are to truly understand the topic of excuses. J.L. Austin adds that not only do we need to be aware of the exact phrase, but we also need to pay attention to its place in the sentence. He gives a very good example of this when he asks the reader to compare four sentences:

a1 He clumsily trod on the snail

a2 Clumsily he trod on the snail

b1 He trod clumsily on the snail

b2 He trod on the snail clumsily<sup>51</sup>

J.L. Austin writes that whereas in a1 and a2 we describe the treading on the snail as an accident due to his clumsiness, with b1 and b2 we describe the treading on the snail as being his aim, we assume he did it purposefully<sup>52</sup>. Hart in *The Concept of Law* follows J.L. Austin’s analysis of “excuses”. The careful analysis of words in their different context is an approach that is unique to J.L. Austin. Even though Wittgenstein’s philosophy attended to “ordinary use”, he was, as Cámara writes<sup>53</sup>, concerned with solving the greatest problems of philosophy, and not the careful analysis of the ordinary concepts in different contexts. Wittgenstein aims to tackle the

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<sup>51</sup> J.L. Austin (n 14) 25.

<sup>52</sup> J.L. Austin (n 14) 25.

<sup>53</sup> Cámara (n 2) 59.

biggest problems of philosophy, and is not particularly concerned with how our use of “excuses” or “obligations” could vary in a particular context. This attention to detail is however very present in J.L. Austin’s philosophy, and as described by Berlin and others<sup>54</sup>, he derived pleasure from having lengthy philosophical discussions about the various uses of one particular concept. Moreover, Hart’s concern with the role that psychological factors play is also very Austinian. If we look at “A Plea for Excuses”<sup>55</sup>, J.L. Austin writes,

...the third source-book is psychology, with which I include such studies as anthropology and animal behaviour. (...) But this is at least clear, that some varieties of behaviour, some ways of acting or explanations of the doing of actions, are here noticed and classified which have not been observed or named by ordinary men and hallowed by ordinary language, though perhaps they might have been so if they had been of more practical importance.<sup>56</sup>

J.L. Austin places importance on psychological factors that might affect our actions. Hart criticises theorists for not viewing these as important. Hart criticises some theorists, “[John] Austin among them”<sup>57</sup>, who do not take into account people’s beliefs, fears and motives when thinking about whether people had an “obligation” to do something. According to Hart, these theorists look at the “chance” or “likelihood” that the person having the obligation will receive a punishment, rather than thinking

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<sup>54</sup> J.L. Austin (n 14) 24.

<sup>55</sup> J.L. Austin (n 14).

<sup>56</sup> J.L. Austin (n 14) 15.

<sup>57</sup> Hart (n 1) 83.

about the important psychological factors, reducing this exercise to clear, hard and empirical facts, which they are not<sup>58</sup>. Hart writes,

It has, indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing “above” or “behind” the world of ordinary, observable facts.<sup>59</sup>

This illustrates how, once again, this aspect Hart’s philosophy lends itself much better to an analysis in light of J.L. Austin’s teachings. Though Cámara’s conclusion that whether or not a rule imposes an obligation depends on the seriousness of the social pressure is important, it is equally, if not more, important to understand what this idea of obligation is. According to Hart, many misunderstandings have arisen due to the lack of understanding between the distinction and interplay between duty imposing rules, and rules that confer powers. This idea of what it means to have an obligation (as opposed to, for example, “being obliged”) is central to this discussion.

### **Hart on Primary and Secondary Rules**

Another important aspect of Hart’s theory that Cámara analyses is Hart’s idea of primary and secondary rules. Cámara’s writes:

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<sup>58</sup> Hart (n 1) 83-84.

<sup>59</sup> Hart (n 1) 83.

As discussed, the “key to the science of jurisprudence” can be found in Hart’s combination of two types of rules which he calls primary and secondary respectively<sup>60</sup>

In order to fully comprehend Cámara’s argument, and provide a thorough analysis, it is important to first understand Hart’s explanation of law as a union of primary and secondary rules. Hart’s exposition of law as a union of primary and secondary rules, supplemented by a Rule of Recognition, is probably the key aspect of his thesis. This follows from the aforementioned discussion regarding what it is to have an “obligation”. Considering his thoughts on “obligation”, Hart says that it would be inaccurate to describe rules as always imposing an “obligation”. Hart observes that there are rules, for example rules of etiquette, which are undeniably rules but nonetheless they do not give rise to an obligation. Even though society expects rules of etiquette to be adhered to, if someone was not to follow these rules they would probably not be gravely reprimanded. However, rules such as those establishing that we should not harm other human beings attract very high demand for conformity, huge social pressure from society for them to be obeyed, and serious consequences if one fails to obey them. From this, Hart derives two main factors needed for the rule to give rise to an obligation: a “general demand for conformity”, and the “social pressure brought to bear upon those who deviate or threaten to deviate is great”<sup>61</sup>. According to Hart, these rules are also “necessary to the maintenance of social life or some highly prized feature of it” and “it is generally recognised that the conduct

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<sup>60</sup> Cámara (n 2) 60.

<sup>61</sup> Hart (n 1) 86.

required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do”<sup>62</sup>.

Hart views this combination of primary and secondary rules as the centre of the jurisprudential system, and its understanding will allow the reader to better grasp the fundamental concepts of obligation, validity, and subjective law, amongst others<sup>63</sup>. However, as noted by Cámara, Hart considers this model of primary rules to be too simplistic, bringing with it problems of uncertainty, the static character of rules and the inefficiency of the diffuse social pressure by which rules are maintained. Hart concludes that, though unlikely, it would be possible for a society to function based on primary rules of obligation alone. Granted that this would have to be a small community, with common sentiment and shared beliefs, but it would nonetheless be possible. However, Hart notes that in such a community there would be three main problems. Firstly, there would be a sentiment of uncertainty as to the nature and content of these rules. Secondly, these rules would also be static, for the process through which social conventions and beliefs change is slow. And finally these rules would also be inefficient, for there would always be dispute as to whether or not the rules were complied with and no independent body to address them<sup>64</sup>. Hart notes that the remedy to this problem lies in the introduction of “secondary rules”, which are rules of a different kind. These secondary rules are rules about the primary rules. Secondary rules specify the ways in which primary rules may be “ascertained, introduced, eliminated, varied, and the fact of their violation conclusively

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<sup>62</sup> Hart (n 1), 87.

<sup>63</sup> Cámara (n 2) 61.

<sup>64</sup> Hart (n 1), 92-93

determined”<sup>65</sup>. Cámara is clear in his explanation of primary and secondary rules, and emphasises its importance in Hart’s legal theory (as per his reference to primary and secondary rules as the “key to the science of jurisprudence<sup>66</sup>”). He does however add that “Kelsen and Ross also denoted a similar distinction”<sup>67</sup>. On this issue, it is important to note that Hart was the first to admit that the distinction between “primary and secondary rules” was not unique to his legal theory, and he clarified this in the notes to *The Concept of Law*. What he claims is unique to his legal theory is the idea of a “rule of recognition”. Interestingly, Cámara mentions the Rule of Recognition, but does not place any emphasis on it. Though Cámara links the idea of primary and secondary rules to Wittgenstein’s teachings on rule-following, he does not explore the rule of recognition. A reason for this omission is perhaps the fact that Hart’s rule of recognition does not lend itself to an analysis through Wittgenstein’s philosophy. As discussed above in relation to the idea of obligation, Cámara appears to gloss over any aspect of Hart’s theory that is not reconcilable with Wittgenstein’s later philosophy. However, as it was mentioned in Chapter seven of this thesis, Hart’s rule of recognition clearly illustrates J.L. Austin’s influence in Hart’s work and is therefore worth exploring. Regarding the rule of recognition, Hart writes:

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<sup>65</sup> Hart (n 1), 94.

<sup>66</sup> Cf text to footnote 60.

<sup>67</sup> Cámara (n 2) 62. Cámara’s comment is particularly interesting since he proposes to write about “primary and secondary rules” given that he views this as showing Wittgenstein’s impact in Hart’s philosophy. However, he then mentions that the distinction between “primary and secondary rules” wasn’t new to Hart, and had in fact been mentioned, in one form or another, by other legal theorists such as Kelsen and Ross. It is not clear whether from this follows that Cámara would assume that Wittgenstein influenced Kelsen and Ross’s work as well.

For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.<sup>68</sup>

What Hart means by this is that people, or the courts, don't often state the rule of recognition when mentioning a piece of legislation, or passing a judgement; however, the way in which society acts shows that this rule of recognition exists and is widely accepted. Hart compares his rule of recognition to the scoring of a game: when playing a game, the players rarely formulate the rules that constitute scoring (e.g. a goal), however, these rules are followed by the players and officials and this is shown by the way they score and identify what counts towards winning<sup>69</sup>. As mentioned earlier, the important aspect is that the acceptance of the rule of recognition, like the acceptance of the scoring of a game, is shown by the acts of the courts, lawyers and layman alike rather than the explicit formulation of a rule in every occasion that they apply. This is the very foundation of ordinary language philosophy; in order to understand the meaning of a sentence it is important to look at how people use it. Morris Weitz, explaining the purpose of philosophy for ordinary language philosophers, writes that:

...philosophy is primarily the elucidation of certain concepts by an elucidation of the logic of our ordinary use of the relevant expressions...<sup>70</sup>

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<sup>68</sup> Hart (n 1) 101.

<sup>69</sup> Hart (n 1) 102.

<sup>70</sup> Weitz (n 11) 219.

As Weitz rightly states<sup>71</sup>, the concern of ordinary language philosophers is not with ordinary expressions, but rather with the logic behind their ordinary use. People recognise the rule of recognition and use it to assert the validity, or supremacy, of laws. The very fact that people ordinarily use this rule of recognition, even if they seldom refer to it directly, shows that this rule exists as a matter of fact. The meaning of the rule of recognition is understood once we look at its use. From this follows one of the criticisms that Hart's rule of recognition has attracted: the argument of validity. Whilst other rules can be "validated" by the criteria provided by the rule of recognition, the actual rule of recognition cannot be validated against any criteria. Addressing those legal theorists who doubt the "validity" of such a rule, Hart writes:

We only need the word "validity", and commonly only use it to answer questions which arise within a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but it is simply accepted as appropriate for use in this way.<sup>72</sup>

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<sup>71</sup> Weitz (n 11) 230. Weitz writes: "Their concern is not with ordinary expressions as such but with the logic of their standard use. Their basic problem is to ascertain the ordinary use of certain ordinary expressions or sentences in order to provide an account of the logic that they use. (...) But these philosophers don't fuss over them because they are ordinary – that would be pointless – but because they regard them as paradigms whose employment requires philosophical attention."

<sup>72</sup> Hart (n 1) 109.

Hart then explains that we only need to use the word “validity” when referring to a rule within a system of rules, where the validity of such rule depends on a set of criteria. The rule of recognition is simply accepted as providing said criteria, and therefore it cannot be seen as either valid or invalid, for it is merely accepted for use in that way. Furthermore, the rule of recognition exists only as a practice of courts, officials and private persons, for identifying the validity of laws by reference to it<sup>73</sup>. It is important to look so closely at the Rule of Recognition to understand whether Cámara was correct in his interpretation of *The Concept of Law*, or whether there is in fact, as it is argued, something to be gained by reading Hart’s book in light of J. L. Austin’s philosophy.

Hart’s rule of recognition, that exists as a matter of fact, has some resemblance to Austin’s approach to “truth”. J.L. Austin writes of truth that,

...‘truth’ itself is an abstract noun, a camel, that is, of a logical construction which cannot get past the eye even of a grammarian. (...) what needs discussing rather is the use, or certain uses, of the word “true”. In vino, possibly, ‘veritas’, but in a sober symposium ‘verum’.<sup>74</sup>

As with the rule of recognition, there is no point in dwelling on “what is truth”, for if “truth” is widely accepted, and used in different contexts then it is accepted for use in this way. What is important is to discuss the different uses of the word truth. Hence, if we accept that the rule of recognition exists as a matter of fact, since people use it and act in accordance with it, we can then move on to the more pressing issues of

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<sup>73</sup> Hart (n 1) 110.

<sup>74</sup> J.L. Austin and others, *Philosophical Papers* (2nd edn, Oxford University Press 1970), 85.

primary and secondary rules. Since Cámara is oblivious to the philosophical differences between Wittgenstein and J.L. Austin, and decides to ignore the latter, he misses this important connection. What is more, by not embracing J.L. Austin's influence in *The Concept of Law*, Cámara misses what is probably the most important, or at least original, part of Hart's thesis.

### Navarro and Bouvier on Social Rules

Many legal philosophers have struggled with Hart's conception of social rules, as seen in Chapter Three where Leslie Green raises a few concerns as to the validity of such rules<sup>75</sup>. Moreover, there are other legal philosophers, such as Bix and Marmor, who when trying to rationalise the application of social rules to Hard Cases, overcomplicate it and raise tensions in the application of Hart's work. Navarro and Bouvier's article aims to answer some of these concerns by providing a different framework for the analysis of Hart's work, but their interpretation, albeit different, does nonetheless raise similar complications and tensions in the understanding of Hart's work. As mentioned, Navarro and Bouvier claim that Hart drew inspiration from Wittgenstein's later philosophy, and that one can therefore understand Hart's work better when looking at it with reference to Wittgenstein's teachings in *Philosophical Investigations*<sup>76</sup>. This is perhaps why their framework for the understanding of social

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<sup>75</sup> Cf Chapter Three, Leslie Green and the third edition of *The Concept of Law*, text to footnote 42.

<sup>76</sup> Navarro and Bouvier write: "The teachings of Wittgenstein, regarding the existence and nature of rules, were quickly filtered into contemporary legal theory through a book, published in 1961 by H.L.A. Hart, entitled *The Concept of Law*"<sup>76</sup>. Navarro and Bouvier (n 3) 1.

rules creates further tensions in the understanding of Hart's work – as will be seen, despite their claim that Hart's work was heavily influenced by Wittgenstein's later philosophy, their framework has no connection to Wittgenstein's work. In opening illustration of their approach, Navarro and Bouvier comment on a few aspects of Hart's theory that have already been explored in previous chapters, such as Hart's distinction between rules and habitual behaviour (and in this section, they make compelling claims regarding the influence of Wittgenstein's teachings on rule following). Regarding this point Navarro and Bouvier argue that Hart's view (that there needs to be a "general demand for conformity", and "social pressure" for conformity with the rule) were inspired by Wittgenstein's views on rule-following. According to Hart, there are salient differences between "habits" and "social rules"; e.g. when there is a habit it is enough that behaviour converges, and deviation from such behaviour is not a matter for criticism<sup>77</sup>. However, when there is a social rule, not only will criticism be expressed, but the mere fact that there was deviation from the social rule is seen as enough reason for criticism. Most importantly, however, for Hart "social rules" are characterised by an "internal aspect". When there is a mere "habit", the members of the group do not need to think of the general behaviour of the group, or whether the

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<sup>77</sup> To illustrate this point, Hart uses the game of chess: participants in a game of chess do not move the Queen in the same way by mere habit. They have a critical reflective attitude to moving the Queen in a particular way: they perceive it as a standard of behaviour for all those who participate in the game, and demand conformity by criticising other players when conformity is threatened. Hart writes: "For the expression of such criticisms, demands, and acknowledgements a wide range of "normative" language is used. 'I (You) ought not to have moved the Queen like that', 'I (You) must do that', 'That is right', 'That is wrong'." Hart (n 1) 57.

behaviour converges. However, when there is a “social rule” there is a demand for compliance for the rule, and participants have a critical attitude<sup>78</sup>. Hart writes that this is often misunderstood, and classed as a matter of “feelings” rather than observable phenomena. However, he argues that despite the fact that where there are social rules people might feel a “compulsion” to act in a certain way, there are people who accept certain rules but do not feel a “compulsion” to act accordingly<sup>79</sup>. It is with these differences in mind that Hart applies the concept of “social rules” to Law, linking them to primary rules of obligation. According to Navarro and Bouvier, Wittgenstein makes a similar argument regarding language games and rule following in general. Wittgenstein believes, according to the theorists, that for there to be a rule, the social community needs to be in agreement as to what conduct is considered as “following a rule”, and there needs to be a social pressure for people to follow the rule. Wittgenstein writes:

“The word “agreement” and the word “rule” are *related* to one another, they are cousins. If I teach anyone the use of one word, he learns the use of the other with it.”<sup>80</sup>

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<sup>78</sup> Hart (n 1) 57.

<sup>79</sup> Hart writes: “What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.” Hart (n 1) 57

<sup>80</sup> Wittgenstein (n 17) ss 68.

Wittgenstein, and Hart, argue that following a rule is something people *do*, and there does not have to be a mental process *behind* it, leading Navarro and Bouvier to conclude that “The limits of a social rule are the limits of our social agreements.”<sup>81</sup>

As discussed in previous chapters, a problem arises for law at the point of the limit of a (social) rule, illustrated by hard cases. What happens when there is a rule and there is not a set agreement on how one should act? This is illustrated by Hart with the example of the rule “no vehicles in the park” (discussed throughout this thesis). What happens when there is disagreement as to whether a bicycle is a vehicle for the purpose of the rule? As can be recalled from the chapters on Bix and Marmor’s work, both claim that Hart presents an argument in terms of necessary and sufficient conditions. On the contrary, Navarro and Bouvier conceive of the use of necessary and sufficient conditions as a formalist approach, and attempt to defend the “open texture of rules”, and justify why Hart’s approach is better than that of the formalists. According to Navarro and Bouvier, when faced with a rule such as “no vehicles in the park”, the formalists’ response would be to formulate specific conditions for the correct extension of “vehicle”, such as having a motor, and four wheels<sup>82</sup>. With this in mind, if a case were to arise concerning whether or not a bicycle was a vehicle for the

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<sup>81</sup>Navarro and Bouvier (n 3) 12. Also, as Hart writes, there is no need for “psychological” phenomena. Wittgenstein writes: “Following a rule is analogous to obeying an order. We are trained to do so; we react to an order in a particular way.”

<sup>82</sup> As can be recalled, this was Bix’s approach. Cf Chapter Four, Brian Bix, text to footnote 19. Bix writes, “The task of interpretation is commonly that of determining the meaning of the individual words of a legal rule, like “vehicle” in a rule excluding vehicles from a park. More particularly, the task of interpretation is to determine the range of reference of a word, or the aggregate of things to which it points.” Brian Bix, *Law, Language and Legal Determinacy* (Oxford University Press 1995), 9.

purpose of this rule, the formalist response would be that it is not (since it does not meet the criteria: it is neither motorized nor does it have four wheels), even though this case had not been considered when the rule was enacted. However, Navarro and Bouvier argue that this would not be a favourable outcome. According to Navarro and Bouvier an important distinction, missed by the formalists, needs to be made between the scope of a rule and the strength of rules. They argue that even though we understand what rules mean, disagreements over social rules generally arise regarding the “scope” and “strength” of a given rule. Navarro and Bouvier explain that the scope and strength of rules help us distinguish the “internal relationship” between rules and instances when they are applicable<sup>83</sup>. They explain that if we maintain that there is an internal relationship between rules and the cases to which they apply, we can claim that: (a) the rule defines which cases fall within its scope, and (b) the rule determines whether the application to a certain case is justified<sup>84</sup>. To illustrate their point they refer again to “no vehicles in the park”. If there was an emergency in the park, an ambulance would surely be allowed through and would not be prosecuted for breaching the rule. If however someone decided to take advantage of this fact and go for a joy ride in an ambulance through the park and were caught he would surely be prosecuted for this. The question then arises of how we could enforce the same rule differently. According to Navarro and Bouvier we are in effect giving different meanings to the word “vehicle” depending on the situation. They write: “The ambulance is and is not an extension of the word ‘vehicle’ depending on the context

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<sup>83</sup> Navarro and Bouvier (n 3) 25.

<sup>84</sup> Navarro and Bouvier (n 3) 25.

(i.e. whether it is an emergency or not)". According to both theorists, this rather implausible conclusion arises due to two main assumptions that theorists normally make: firstly, that the meaning of a general term is fixed irrespective of context, and secondly that rules impose a solution to any case that they are applied to<sup>85</sup>. These assumptions should be challenged by taking into account the distinction between the scope and strength of a rule. Navarro and Bouvier claim that in the situation described above (i.e. the ambulance in the park), even though we agree on the scope of the rule (we agree that ambulances are vehicles, and fall within the scope of the rule), there are disagreements regarding its force (since we do not believe that it will solve a particular practical problem, and therefore deem the rule inapplicable in this case). So, they conclude that ambulances are indeed vehicles, but given the unfairness of applying this rule to an emergency situation, the rule has no 'force' and is therefore inapplicable.

Though Navarro and Bouvier believe they are providing a better, more coherent, interpretation of Hart's work, their interpretation (with the introduction of scope and strength of rules) creates similar tensions in the understanding of Hart's work as Andrei Marmor's interpretation (discussed in Chapter Four<sup>86</sup>). According to Navarro and Bouvier, in hard cases judges would have discretion to decide the strength of the rule in a given situation. Applying this to Fuller's well-known (and extensively discussed) example of a World War II memorial tank, we might agree that ambulances and trucks are within the scope of vehicle, but since the situation had not

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<sup>85</sup> Ibid.

<sup>86</sup> Cf Chapter Four, Brian Bix on Judicial Discretion, text to footnote 47.

yet been considered the strength of the rule to solve this particular practical problem had not yet been decided. The judge does therefore have discretion to determine the strength of the rule (i.e. whether it would apply to this particular instance). So, the issue stops being about the meaning of concepts, or ordinary language, and relies entirely on an individual's judgement. If one agrees, like Navarro and Bouvier seem to, that Hart is inspired by Ordinary Language Philosophy, this appears to be a slightly odd conclusion. It is argued instead that Hart is indeed focusing on the ordinary use of general terms (and not in the strength and scope of rules like Navarro and Bouvier suggest). Regarding the example of an ambulance, the question is not whether the outcome of considering an ambulance a vehicle would be desirable, but rather whether an ambulance is considered a vehicle for the purpose of the rule. As argued in Chapter Four, there is legislation covering emergency vehicles, and an ambulance on-duty (i.e. attending an emergency) would be exempt from such legislation. So, even though the ambulance would be in breach of the "no vehicles in the park" rule, it would be exempt by the relevant legislation covering emergency vehicles<sup>87</sup>. As discussed in previous chapters, the same interpretation would apply to Fuller's example, where the dispute is whether the truck is a "vehicle" (covered by the rule), or a "memorial" (covered by a different set of rules). Moreover, this interpretation, as opposed to Navarro and Bouvier's proposed scope and strength of rules, avoids further complications such as how one decides whether the outcome of a rule would be unfair, and whether the judge should have such discretion.

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<sup>87</sup> Ibid. An interesting question here is what would be Hart's approach if we lived in a world where there only legal rule was "no vehicles in the park"; would the ambulance still be a vehicle for the purpose of this rule? This is explored in the Conclusion chapter, pages 279-280.

Once again, it has been demonstrated that the proposed interpretation of *The Concept of Law* does not only make better sense of Hart's thesis, but avoids the further tensions created in the understanding of Hart's work.

## Overview

This chapter has focused on two international contributions to the literature on *The Concept of Law*. Cámara's thorough interpretation of Hart's book in light of Wittgenstein's philosophy has clearly highlighted the importance of a holistic understanding of Hart's work, taking into account J.L. Austin's contribution on its own merits and not just Wittgenstein's later philosophy. Cámara starts his book by explaining how *The Concept of Law* is an exercise in philosophy of language and should be understood as such. However, Cámara believes that Hart was mainly influenced by Wittgenstein's later philosophy, and proceeds to analyse *The Concept of Law* in this light. His misunderstanding of J.L. Austin as merely a Wittgenstein scholar leads to some uneasy explanations of Hart's work. Cámara's understanding of J.L. Austin's philosophy, though mistaken, allowed for some discussion regarding J.L. Austin's teachings and the extent to which they are in line with Wittgenstein's later philosophy. Though this had been alluded to in previous chapters, section I of this chapter allowed for an exploration of J.L. Austin's philosophical methods. Section II and III further highlighted the importance of J.L. Austin's theory, through the analysis of the concept of "obligation", and the rule of recognition. The final section of this chapter is dedicated to Navarro and Bouvier's understanding of social rules and its impact on *The Concept of Law*. As it was argued, they offer a much more comprehensive and

credible approach to Hart's philosophy than the other legal philosophers whose work was analysed throughout this thesis.

In each chapter of Section B of this thesis the work of a different legal philosopher who contributed to the literature on *The Concept of Law* was analysed. As mentioned in the very beginning of this thesis, there is a considerable overlap in the areas of analysis since most legal philosophers focused on similar aspects of Hart's theory. However, as also noted, this should be seen as a strength of this thesis since it allowed the reader to see the main argument at play in different settings: that a holistic understanding of *The Concept* by taking into account *both* J.L. Austin's and Wittgenstein's philosophy will provide us with a richer and deeper understanding of Hart's philosophy. The next, and final, chapter will conclude this thesis by providing an overview of the analysis presented in section B and drawing some final conclusion.



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## SECTION C

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Conclusion

Section C

Chapter Nine

## *The Philosophy in The Concept of Law*

As we come to its end, it is important to revisit some old ground and bring together some of the philosophical claims that I have made in this thesis. This conclusion therefore has two parts: the first section brings together the philosophical arguments and insights made throughout various chapters, to demonstrate how a philosophically nuanced understanding of *The Concept of Law*<sup>1</sup> enlightens and enlivens Hart's book. To this end, I will not revisit the critical analysis of the work of the various legal theorists mentioned, but focus instead on the insights that the analysis has delivered and the way in which this furthers our understanding of Hart's *The Concept of Law*. The second section will focus on where this research could take us, indicating the scope for future research.

Before we begin this concluding project, it is worth reflecting once again on Gustaffson's question. He writes,

Of course, no one denies that Austin's work is of considerable historical significance. We have to study it if we want to understand one important phase in the development of analytic philosophy. But is there really anything philosophically important to learn from him *today*?<sup>2</sup>

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<sup>1</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012).

<sup>2</sup> Richard Sørli, *The Philosophy of J. L. Austin* (Martin / Gustafsson and Richard Sorli eds, Oxford University Press 2011) 2.

My answer almost alone in the literature on Hart is a resounding “yes” for reasons that I will now set out in summary.

*On Hart’s methodology in The Concept of Law*

Legal theorists have expressed a panoply of opinions regarding Hart’s methodology in *The Concept of Law*. As illustrated throughout chapters four to eight, even those who agree that Philosophy of Language influenced Hart’s work interpret its impact differently. However, all those who agree that Ordinary Language Philosophy played a pivotal role in Hart’s legal philosophy, also agree that Wittgenstein’s work was Hart’s principal source of philosophical inspiration. My thesis argues that even though the influence of Wittgenstein’s later work<sup>3</sup> can be traced in Hart’s *The Concept of Law*, J.L. Austin’s way of doing philosophy had a more significant impact on Hart’s overall methodology<sup>4</sup>. Though it might seem petty (after all, both of these philosophers were advocates of Ordinary Language Philosophy), it is a crucial point because reading Hart’s work whilst adopting a more Austinian perspective makes better sense of some of the arguments presented by Hart in his book. Wittgenstein’s focus is directed towards the *use* of words and expressions: one should look and see whether there are any connections in the application of a word, and describe its application rather than theorise about it<sup>5</sup>. On the other hand, J.L. Austin

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<sup>3</sup> Ludwig Wittgenstein and translated [from the German] by G. E. M. Anscombe, *Philosophical Investigations Philosophische Untersuchungen* (3rd edn, Blackwell Publishers 1967).

<sup>4</sup> The substantial part of this discussion plays out in Chapters Seven and Eight. See Chapter Seven, “Cole and J.L. Austin’s influence in *The Concept of Law*”, 205-216; Chapter Eight, “Beyond the Anglo-Saxon Realm”, 228-240.

<sup>5</sup> See Chapter Eight, “Beyond the Anglo-Saxon Realm”, 233.

was concerned with the use of individual words; for Austin, only by scrutinising what we mean when we use certain words will we be able to grapple with the inadequacies of language<sup>6</sup>. My intervention seeks to establish that we can trace J.L. Austin's influence from early on in *The Concept of Law*. Indeed, it first becomes apparent in Chapter One of Hart's book<sup>7</sup>, where Hart claims that it would be fruitless to conduct a general investigation into what law is. Hart writes,

Such a way with the question would be agreeably short. But it would have nothing else to recommend for it. For, in the first place, it is clear that those who are most perplexed by the question 'What is law?' have not forgotten and need no reminder of the familiar facts which this skeleton question offers them. The deep perplexity which has kept alive the question, is not ignorance or forgetfulness or inability to recognise the phenomena to which the word "law" commonly refers<sup>8</sup>.

Instead, Hart suggests approaching the question of "what law is" by referring to current disagreements regarding the use of the word law. Hart argues that we use the concept "law" as an umbrella term, which is comprised of different elements. Hart picks out three of these elements, and raises three recurrent questions regarding law<sup>9</sup>:

1. How does law differ from and how is it related to orders backed by threats?

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<sup>6</sup> Above (n 5), 233.

<sup>7</sup> Above (n 1), 1-17.

<sup>8</sup> Above (n 1), 5.

<sup>9</sup> Above (n 1), 13.

2. How does legal obligation differ from, and how is it related to, moral obligation?
3. What are rules and to what extent is law an affair of rules?

This is an interesting approach, and one that would not necessarily be considered of a 'Wittgensteinian' nature. As discussed at length in Chapter Eight<sup>10</sup>, it is however an approach that resembles J.L. Austin's philosophical method, namely that exemplified in "A Plea for Excuses"<sup>11</sup>. Briefly, in this article J.L. Austin uses "excuses" to exemplify what can be gained by applying Ordinary Language Philosophy to practical concepts. He argues that Ordinary Language Philosophy can enlighten important issues. J.L. Austin argues that it is by looking at the disagreements that arise through the use of a certain word or concept (in this case "excuses") that we will shed light on its usage. He writes:

A disagreement as to what we should say is not to be shied off, but to be pounced upon: for the explanation of it can hardly fail to be illuminating.<sup>12</sup>

It is my argument that Hart is pursuing the same methodological approach, but applying it to the concept *law*. It is therefore expected that this same methodology permeates the book, and that a reading enlightened by J.L. Austin's Ordinary Language Philosophy will thereby enliven and enrich the book.

### *The Concept of Obligation and Primary Rules of Obligation*

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<sup>10</sup> See Chapter Eight, "Beyond the Anglo-Saxon Realm", 228-240.

<sup>11</sup> John L Austin, "A plea for excuses: The presidential address." (1956) Proceedings of the aristotelian society 1.

<sup>12</sup> Ibid, 10.

We saw a further example of J.L. Austin's influence in Hart's work in Hart's explanation of the distinction between "having an obligation" and "being obliged"<sup>13</sup>. Hart's discussion around the concept of obligation is founded on his argument against John Austin's view of law as commands. According to John Austin, law is "an intimation or expression of a wish to do or forebear from doing something, backed up by the power to do harm to the actor in case he disobeys<sup>14</sup>". Hart agrees with John Austin's theory insofar as where there is law, there is a requirement to act in a certain way, and "human conduct is made in some sense non-optional or obligatory<sup>15</sup>". However, Hart claims that John Austin's view is too simplistic and does not account for the multi-faceted uses of the word "obligation". As discussed at length in Chapter Eight, according to Hart a distinction needs to be made between the expressions "being obliged" and "having an obligation". Let us revisit Hart's illustration of the gunman situation, in which Gunman A orders B "to hand over his money and threatens to shoot if he does not comply<sup>16</sup>". In this situation, people would say that B was "obliged" to hand over his money; had B decided not to comply with A's command he could have been severely injured, or even killed. Thinking of the gunman example, would we say that B "had an obligation" to hand over his money to A? Certainly not. B has no obligation to hand it over to him; he would be perfectly entitled to keep the money and try to escape from A (at the risk of being shot). However, if B were to hand over

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<sup>13</sup> This discussion can be found in Chapter Eight, *Beyond the Anglo-Saxon Realm*, p 241.

Camara is the only theorist mentioned in this thesis who explores Hart's discussion around the concept of obligation.

<sup>14</sup> John Austin, *The province of Jurisprudence Determined* (2<sup>nd</sup> Edn, B Franklin 1970), 171.

<sup>15</sup> Hart (n 1) 82.

<sup>16</sup> Hart (n 1) 82.

the money, would we say “he was obliged” to do it? We almost certainly would. Most of us value life above material possessions, and would argue that he was obliged to hand over the money to avoid being injured. It is this very distinction that Hart argues is missing from John Austin’s theory; unlike “being obliged” (generally applied after someone acted in a particular way, as described above) “having an obligation” is independent of whether or not one chooses to comply with it, for the obligation will still stand even if one does not comply with it and it is never found out. As discussed in Chapter Eight, this view is concurrent with J.L. Austin’s analysis in *A Plea for Excuses*<sup>17</sup>, where he writes:

It is not enough, either, to attend simply to the “key” word: notice must be also taken to the full and exact form of the expression used. In considering mistakes, we have to consider “by mistake”, “mistakenly”, “it was a mistake to”, “to make a mistake in or over about it”, “to be mistaken about”, and so on...<sup>18</sup>

Though interesting in itself, this demonstration of the intricacies of the concept of obligation is of particular importance for the understanding of primary rules of obligation. There is a wide discussion in the literature about social rules, namely the difference between a rule and a habit<sup>19</sup>. Consideration of what Hart said regarding the

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<sup>17</sup> Above (n 11).

<sup>18</sup> Above (n 11), 24.

<sup>19</sup> An example of this can be found in Leslie Green’s introduction to *The Concept of Law*, as discussed in Chapter Three, where Green criticises Hart’s approach to social rules. See Chapter Three, Green and *The Third Edition of The Concept of Law*, p 79-87. In addition, in the *Notes to the Third Edition*, particularly those pertaining to Chapter IV, Leslie Green offers a wide array of titles which challenge Hart’s approach to social rules. See Hart (n 1) 313-315.

concept of obligation is pivotal to this discussion, particularly in light of the discussions around the appropriately named “Primary Rules of Obligation”<sup>20</sup>. Considering Hart’s discussion of what it is to “have an obligation”, Hart argues that we would be mistaken to claim that all rules impose obligations. He gives the example of rules of etiquette: these are undoubtedly rules, but they do not impose an obligation. It is true that society expects these to be adhered to, but it is equally true that if someone were not to follow them they would not be gravely reprimanded. In addition, it is important to understand the distinction between “having an obligation” and “feeling obliged” (which we saw in Chapter 3 adequately deals with Green’s example of buying carbon-offset emissions<sup>21</sup>). Hart concludes that for rules to impose an obligation two main factors need to be present: a “general demand for conformity” and the “social pressure brought to bear upon those who deviate or threaten to deviate is great”<sup>22</sup>. Hart claims that for a Primary Rule of Obligation to exist it is important for there to be “insistence on importance or *seriousness* of social pressure behind the rules<sup>23</sup>”. It would be conceivable for a society to function based on primary rules alone, but, as Hart mentions, there would be three main problems: a sentiment of uncertainty, the static nature of rules, and inefficiency<sup>24</sup>. According to Hart, the simplest way to solve

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<sup>20</sup> This issue is discussed at length in Chapter Eight, *Beyond the Anglo-Saxon Realm*, 249-255.

<sup>21</sup> As a criticism of Hart’s conception of social rules, Green gives the example of someone believing they have an obligation to purchase carbon offsets against air travel without supposing that there is a common practice of doing it. See Chapter Three, Leslie Green and *The Third Edition of The Concept of Law*, 86-87.

<sup>22</sup> Hart (n 1) 87.

<sup>23</sup> Hart (n 1) 87.

<sup>24</sup> Hart (n 1) 92-93. For a full discussion, see Chapter Eight, *Beyond the Anglo-Saxon Realm*, 250-251.

these issues is the introduction of secondary rules that supplement primary rules. Secondary rules specify the ways in which primary rules may be “ascertained, introduced, eliminated, varied, and the fact of their violation determined”<sup>25</sup>. In addition, and what is unique about Hart’s theory, is the “rule of recognition”. This “rule of recognition” has also been the subject of much debate in the literature. Interestingly, whereas the idea of social rules is associated with Wittgenstein’s philosophy, it is harder (as exemplified by Camara) to reconcile the rule of recognition with Wittgenstein’s philosophical insights<sup>26</sup>. As I demonstrated in previous chapters, this is because many of these insights were borrowed from J.L. Austin’s work.

Even though the idea of social rules might have been inspired by Wittgenstein’s teaching on rule following, in this thesis I argue that Hart’s approach is permeated with more subtle insights into the use of expressions (such as the concept of obligation), an approach resembling J.L. Austin’s philosophical method. About the rule of recognition, Hart writes,

For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.<sup>27</sup>

An important feature of the rule of recognition is that its acceptance is shown by the acts of the courts, lawyers and other members of society, rather than by explicit

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<sup>25</sup> Hart (n 1) 250.

<sup>26</sup> Despite this, Anthony Sebok attempts to demonstrate how Wittgenstein’s philosophy influenced Hart’s conception of a rule of recognition. See A Sebok, “Finding Wittgenstein at the Core of the Rule of Recognition” (1999) *SMU Law Review* 52, 75-109.

<sup>27</sup> Hart (n 1) 101.

formulation of the rule. This is perhaps the point at which Hart's philosophy most exhibits its foundation in J.L. Austin's Ordinary Language Philosophy: in order to understand the meaning of a sentence, it is important to look at how people use it. For this reason, the issue of validity, says Hart, is irrelevant. Hart's rule of recognition exists as a matter of fact, it is simply accepted as providing criteria, and the fact that it is accepted for use in that way means that it cannot be seen as valid or invalid<sup>28</sup>. The validity of the rule of recognition has been the subject of much debate in the literature, with many theorists arguing about the possible conventionalist nature of the rule of recognition<sup>29</sup>. My intervention seeks to establish that these challenges put forward in the literature regarding the rule of recognition, and indeed Hart's model of primary and secondary rules of obligation, are dissolved when reading Hart's work in light of J.L. Austin's philosophical approach.

#### *On Hart's explanation of the Open Texture of Language*

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<sup>28</sup> As discussed in Chapter 9, *Beyond the Anglo-Saxon Realm*, p 254-255, Hart's approach is somewhat similar to J.L. Austin's discussion of the concept "truth" about which Austin claims that "...'truth' itself is an abstract noun, a camel, that is, of a logical construction which cannot get past the eye even of a grammarian (...) what needs discussing rather is the use, or certain uses, of the word "true". J.L. Austin and others, *Philosophical Papers* (2<sup>nd</sup> edn, Oxford University Press 1970), 75.

<sup>29</sup> See, for example, J. Dickinson, "Is the Rule of Recognition Really a Conventional Rule?" (2007) *Oxford Journal of Legal Studies*, 373-402; A. Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001); L. Green, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35, at 35-52.

Following on from and related to social rules, one of the key aspects of *The Concept of Law* widely discussed in the literature is Hart's explanation of the open texture of language. However, despite this widespread discussion and prolific publications in this area, there is still no agreement in the literature as to what Hart meant by open texture with various legal theorists claiming that there is no actual distinction between open texture and vagueness<sup>30</sup>. The last eight chapters demonstrate that there is an important distinction between the concepts of vagueness and open texture. Not only is this distinction important for our understanding of legal rules - and it does indeed clear some misunderstandings and tensions in the literature - it enlightens our understanding of Hart's arguments regarding judicial discretion. In sum, Hart's introduction of the Open Texture of Language in *The Concept of Law*<sup>31</sup> comes as a way to demonstrate that despite people's general feeling that legislation provides a greater sense of clarity and certainty when compared to precedent, this faith might be misplaced. A short discussion on the related issue of judicial discretion will follow, but let's start by focusing solely on the issue of open texture. In order to do so it is important to recap the argument presented in this thesis in support of the view that Hart was indeed referring to open texture and not vagueness in *The Concept of Law*<sup>32</sup>.

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<sup>30</sup> This was demonstrated in previous chapters, please see Chapters 4, Brian Bix and Judicial Discretion p 94-110, and Chapter 5, Andrei Marmor on Easy Cases, 134-142.

<sup>31</sup> It is important to recall that Hart first introduced the notion of *Open texture of language* in his inaugural Harvard Lecture. See Chapter Four, Brian Bix on Judicial Discretion, footnote 14.

<sup>32</sup> Above (n 1).

## Open texture and Vagueness

It is argued throughout this thesis<sup>33</sup> that legal theorists have often conflated the terms *open texture* and *vagueness* and that this has resulted in a flawed analysis of Hart's message. In the thesis I demonstrate that there is a fundamental philosophical difference between these two concepts, and one which when attended to will reveal a more accurate interpretation of Hart's application of the open texture of language to legal rules. To recap, vagueness is the property of an expression that gives rise to "borderline" cases. In instances where vagueness is present, it is not clear whether a concept or expression is clearly applicable or not. In his chapter *The Value of Vagueness*<sup>34</sup>, Timothy Endicott gives a relevant example when he writes:

By statute it is an offence to cause a child or young person to be 'neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health' (Children and Young Persons Act, 1993 sec (1)). The statute defines 'child or young person' *precisely* as referring to a person under the age of 16 years. But when is it lawful to leave a child at home, without supervision? Or when is it lawful to leave a child with a babysitter? And how old does the babysitter have to be? The statute states no ages. The act subjected all these questions to the

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<sup>33</sup> For references of the main discussion throughout the thesis see Chapter 4, Bix on Judicial Discretion, section entitled "Hart's application of Waismann's Open Texture of Language"; Chapter 5, Andrei Marmor on Easy Cases, text to footnote 25; and Chapter 6, Stavropoulos and the Metaphysical Approach, section entitled "Legal Indeterminacy, Social Rules and Open Texture".

<sup>34</sup> Vijay K Bhatia, *Vagueness In Normative Texts* (P Lang 2005), 27-48.

vagueness of the terms ‘neglected’ and ‘abandoned’, and of the qualifying phrase, ‘in a manner which is likely to cause him unnecessary suffering or injury’<sup>35</sup>.

On the other hand, a concept or expression is open textured when it is precise along some dimensions, but its applicability has not been considered along other dimensions. We could use the term “aircraft” as an example. The term “aircraft” is not considered vague, its application is definite, but it is “open textured”. Aircraft is open textured in the sense that technological advances have opened new possibilities (namely that of unmanned airplanes, commonly known as drones) where it is unclear if the term applies or not. With the introduction of drones, a new set of questions have arisen, for example: ‘Are drones aircraft?’, and ‘Should drones be covered by the same strict legislations as aircraft?’ When the term “aircraft” was first introduced, its application was definitive along certain dimensions but these new dimensions (namely the possibility of an unmanned device) were not considered<sup>36</sup>.

### Social Rules and Open Texture

We shall now focus on the impact that the open texture of language has on legal rules. To recap, Hart starts by explaining that, to be effective, rules need to apply and deal with large groups of people. From this it follows that, in order to address large groups of people there need to be general rules, standards of conduct and principles<sup>37</sup>. According to Hart, there are two types of legal cases that arise from the

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<sup>35</sup> Ibid, 30.

<sup>36</sup> For further discussion see Chapter Four, Brian Bix on Judicial Discretion, 99-102.

<sup>37</sup> Hart (n 1), 124. For a definition of general terms see Chapter 4 footnote 31.

application of these: “core cases”, where their applicability to a certain situation is clear, and cases where it is not clear whether a given rule is applicable, which lie in the “penumbra” (Marmor terms these “easy” and “hard” respectively). Throughout this thesis the example of a rule, “*no vehicles in the park*”, has been used to illustrate the application of open texture of language. Let’s revisit this example in light of the clarification provided in previous chapters. According to Hart, when we enact a piece of legislation such as a rule prohibiting vehicles in the park, our legislative aim is clear in so far as we have decided that the peace and quiet in the park is to be maintained at the expense of not allowing vehicles in the park. From this it follows that there are clear cases in which the rule is indisputably applicable (what Hart calls the “paradigm” cases): the motor-car, the bus, the motor-cycle. However, there will be other cases where the applicability of the rule is not clear; Hart gives the example of a toy motor-car electrically propelled. So what is the rationale? According to Hart, we suffer from two main handicaps when enacting new legislation: relative ignorance of the facts and relative ignorance of the aim<sup>38</sup>. These handicaps are exemplified in the application of the aforementioned rule: when enacting the legislation we did not initially envisage the children’s use of a toy motor-car electrically propelled, and the pleasure that they would derive from using these things<sup>39</sup>. The applicability of the rule is unclear, and a

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<sup>38</sup> Hart (n 1) 128. Hart writes: “It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our ignorance of the fact: the second our relative ignorance of the aim.”

<sup>39</sup> Hart (n 1) 129. Hart writes: “We have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs: whether some degree

fresh decision needs to be made to establish whether or not toy motor-cars electrically propelled are vehicles for the *purpose of this rule*. It is important to emphasise the *for the purpose of this rule* aspect. Establishing that toy motor-cars electrically propelled are not vehicles *for the purpose of* the rule “no vehicles in the park” does not mean that they will not be vehicles for the purpose of any rule. It is conceivable that there shall be another rule containing the general term vehicle that would be perfectly applicable to toy motor-cars electrically propelled.

Navarro and Bouvier present an interesting scenario, that of an ambulance entering the park. If we apply the logic discussed above, the question before us is whether an ambulance would be a vehicle *for the purpose of* the rule<sup>40</sup>. In Chapter Eight I argue that in this instance though the ambulance would be in breach of the “no vehicles in the park” rule, it would be exempted by the relevant legislation covering emergency vehicles<sup>41</sup>. It could however be argued that in the instance of the ambulance, the reference to emergency vehicle legislation could be a way to eschew

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of peace in the park is to be sacrificed to, or defended against, those children whose pleasure or interest it is to use these things. When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purpose of the rule, of a general word”.

<sup>40</sup> The rule being the aforementioned “no vehicles in the park”.

<sup>41</sup> See Chapter Eight, “Beyond the Anglo-Saxon Realm”, 261, text to footnote 87. This follows the same logic that applied to Fuller’s argument of whether a World War II memorial tank was a vehicle *for the purpose of the rule*. In that instance, it is argued that the memorial tank would be considered a “memorial” and not a “vehicle” and therefore not a vehicle for the purpose of the rule.

a more interesting and philosophical issue: if we lived in a world where there were no other rules other than the “no vehicles in the park” rule, would an ambulance be considered a vehicle? Following the proposed interpretation of Hart’s work, this would be an instance where a fresh decision would need to be reached. The ambulance on-duty<sup>42</sup> (if entering the park for an emergency) would be a novel situation, a dimension that had not yet been considered and therefore a fresh decision would need to be made. As Hart would put it, our aim is indeterminate in this direction. My argument addresses the misunderstandings in the literature around Hart’s application of open texture to law, and emphasises the importance of correctly differentiating between open texture and vagueness for a holistic understanding of Hart’s work. This analysis is particularly relevant with regard to Hart’s discussion on judicial discretion.

### Judicial Discretion

It has been argued by some legal theorists that Hart’s own background at the Chancery Bar had an impact in his view and appreciation of judicial discretion<sup>43</sup>. Irrespective of whether or not these claims are true, Hart’s theory (as interpreted through Ordinary Language Philosophy) clearly advocates for judicial discretion in novel instances where it is unclear whether a particular term or concept is applicable. It is however important to acknowledge that even though Hart’s theory advocates for judicial discretion, the validity of Hart’s concept of law does not depend on the existence of judicial discretion. Hart never denies that greater certainty

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<sup>42</sup> As discussed in previous chapters, if someone took the ambulance for a joy-ride through the park, and not to attend to an emergency situation, it would indeed be considered a vehicle for the purpose of the rule.

<sup>43</sup> See Chapter Four, Brian Bix on Judicial Discretion, 114.

(regarding when rules were to be applicable) could be achieved. Thus, using the example above, one could decide to specify clearly all the instances to which the concept of “vehicle” applies. Hart writes,

One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequences of applying the rule in this way.<sup>44</sup>

Regarding the example “no vehicles in the park”, we could impose conditions for something to be a vehicle (e.g. that any contraption with wheels and a motor would be considered a vehicle). In this instance, (if we were living in our fictional one-rule world) an ambulance attending an emergency would fall foul of this rule. This would have damaging social consequences (e.g. paramedics and ambulance drivers could start refusing to attend to emergencies in the park), but it would nonetheless ensure that there would be much greater certainty in the application of the rule. The question at hand, for Hart at least, is whether, considering the handicaps of our relative ignorance of the facts and aims when enacting legislation, it would be desirable to diminish the need to consider the facts presented to make a decision about whether or not the rule is applicable to a particular case. According to Hart, making such

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<sup>44</sup> Hart (n 1) 129.

specifications would not be advisable, but it would nonetheless be possible. Thus, this thesis demonstrates that it is through a correct reading of Hart's theory of open texture, that we can understand his support of judicial discretion, and start to address claims that his views on judicial discretion were unfounded.

### **Scope for future research**

Many issues thrown up by this research are understandably awkward or uncomfortable for the present state of jurisprudence as a discipline. Hart is currently a main contributor (if not THE main contributor) to the present state of jurisprudence as a discipline, and yet this thesis not only highlights some questionable interpretations of Hart's work, but also calls into question many of the ideas expressed by various legal philosophers who have attempted to explain Hart's work. If I am right (and plainly I think I am), this research challenges the accepted understanding of what is held to be the greatest book in jurisprudence of the 20<sup>th</sup> Century. If indeed I am right, we ought to re-appraise *The Concept of Law* as a work in Ordinary Language Philosophy, in such a way that will allow us to see that Hart's contribution occupies an even more central and important role in twentieth century philosophy of language and ideas than has commonly been supposed.

This research should prompt the scholars discussed in Section B, all (excluding Leslie Green) of whom are already invested in a philosophically informed reading of *The Concept of Law*, to re-examine their own arguments and conclusions. It is my hope that the re-appraisal of *The Concept of Law*, by scholars already engaged with its philosophical roots, will lead to an expansion of the wider community's understanding and use of the target scholarship, with the ideas voiced in it deployed with more

caution or circumspection than before. As has been shown throughout Section B and in this final Chapter the re-examination and re-appraisal of Hart's book various insights untangles some of the controversies surrounding Hart's work (e.g. on the subject of social rules, open texture and judicial discretion) and allows for a better understanding of Hart's thoughts and ideas. This re-examination allows us to appreciate Hart's work for its simplicity and helps us settle and move on from questions that have vexed jurisprudence for years. After more than half a century, we can settle the question of what was Hart's reasoning behind the rule "no vehicles in the park", and whether or not open texture is to be considered as distinct from vagueness. Settling questions such as these will allow us to discuss the more interesting, and perhaps fruitful, questions such as, not whether vagueness and open texture are features of our legal system, but whether they are characteristics that we should cherish rather than dismiss or fear. Perhaps equally importantly, this re-examination also allows us to understand what Hart's book does not offer (and what it was never designed to offer), such as an exploration of how judges *should* or indeed *do* apply legal rules. This appreciation would perhaps settle the semantic sting debate, and highlight that Hart and Dworkin were indeed pursuing different lines of inquiry (as discussed by Hart with David Sugarman<sup>45</sup>). Moreover, this re-examination will help us address the different, and often contradictory, claims that are made about Hart's work.

In addition, my aim is also for the work to act as the catalyst for more incisive, more bountiful inter-disciplinary work on Hart, which might better combine the

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<sup>45</sup> David Sugarman, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32 *Journal of Law and Society* 267 accessed 20 October 2015.

insights and knowledge of legal scholars and philosophers alike. The research also leads to the thought that other works in philosophy of law might have suffered in similar ways too, so it would also be worth investigating whether this is a phenomenon affecting only Hart, or whether other works would have much to gain from the application of a more holistic and historically aware interpretation. *The Concept of Law*, itself an inter-disciplinary work, would greatly benefit from an in-depth inter-disciplinary analysis, to isolate and better highlight Hart's significant contribution to both Ordinary Language Philosophy (by demonstrating its practical application in the legal field) and Law. Moreover, this research comes at a time of renewed interest in Ordinary Language Philosophy<sup>46</sup>. The re-appraisal of *The Concept of Law* would not only be a significant contribution to the legal world, providing a new and deeper understanding of Hart's theory, but it would also aid and advance the movement within philosophy; demonstrating, as it does, the influence and breadth in application of Ordinary Language Philosophy, particularly the work of J. L. Austin.

This thesis has the grandest of ambitions: to be the trigger for both some serious re-appraisal on the part of present practitioners and a prompt for fresh lines of future research. This new research is revisionary and looks to the future with the ambition of setting a different course for the nature of academic scholarship in jurisprudential areas.

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<sup>46</sup> See, for example, T. P. USCHANOŮ's article, 'The Strange Death of Ordinary Language Philosophy', Article Death of Ordinary Language Philosophy, <http://www.helsinki.fi/~tuschano/writings/strange/> (last accessed 17/08/17); A. Baz, *When words are called for: A Defense of Ordinary Language Philosophy* (Cambridge: Harvard University Press, 2012); Richard Sørli, *The Philosophy of J. L. Austin* (Martin / Gustafsson and Richard Sorli eds, Oxford University Press 2011).

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