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‘Need’ and ‘Necessity’ in Law: A Conceptual  
Inquiry through Intension and Extension

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# 'Need' and 'Necessity' in Law: A Conceptual Inquiry through Intension and Extension

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## Introduction

The words "necessary" and "needs" are both relative expressions, admitting in each case a considerable range of meaning. – Lord Clyde<sup>1</sup>

Despite routine reliance on NEED<sup>2</sup> in legal invocations, there has been a disturbing misunderstanding concerning the concept. The misunderstanding of which I speak infects not only legal theory, but also judicial reasoning. In certain areas of law NEED is a core concept upon which a trial may hinge, determining liability or guilt of defendants. Accordingly, a strong understanding of the concept is necessary for the accurate assessment of such liability or guilt. Doubtful as it may seem on the face of it, alarming errors have occurred as a result of a disregard for the distinction between the *intension and extension*<sup>3</sup> of NEED. The difficulties that beset NEED are the symptom of a potentially deep-rooted and pervasive problem; and my ambition is, in part, to prompt serious reconsideration of where and to what extent the mistakes I highlight may be committed elsewhere, in both legal theory and case law. In order to achieve this, I begin by attending to recent developments in legal conceptual analysis by Brian Bix. Bix's work might reasonably be thought to stand amongst the best work there is on conceptual analysis in law, and I seek to demonstrate that it falls down in at least one disastrous way. My latter chapters investigate to what degree the application of legal principles has consequently been hindered, which invoke concepts that are not properly understood in theory, let alone practice. It is partly on this basis that I claim our attention needs to be brought to the errors in question; errors that are not unduly esoteric or solely academic, but have damaging practical consequences. Seemingly harmless mistakes in philosophy of language can be seen to seep into the invocation of legal principles, leading to unjustly damaged livelihoods and restrictions of liberty.

The wide ambit my task poses requires my proof be narrowly scoped and succinct; I achieve this through focusing on NEED in particular,<sup>4</sup> within both legal theory and law.<sup>5</sup> Despite this necessary focus, I suggest the mistakes surrounding NEED warrant serious investigation elsewhere. The conclusions I delineate around NEED are compelling in their own light, yet my conclusions regarding

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<sup>1</sup> [1997] 2 WLR 459 (HL) 610

<sup>2</sup> When referring to concepts I indicate this with small caps, as done in Stephen Laurence, Eric Margolis, 'Concepts and Conceptual Analysis' (2003) 67 *Philosophy and Phenomenological Research* 253

<sup>3</sup> I provide a preliminary account of this pair shortly. Theories of intension and extension are traceable to Gottlob Frege, 'On Sense and Reference' (first published 1892, A.W. Moore (ed) *Meaning and Reference* OUP 1993), and are developed significantly by Rudolf Carnap, *Meaning and Necessity* (University of Chicago Press 1947). I go on to examine the relationship between these distinct but related theories in chapter two part III.

<sup>4</sup> And, to a lesser extent, NECESSITY.

<sup>5</sup> By which I mean cases, as opposed to legal theory.

this one concept raise the concern that the same errors are present in relation to other concepts<sup>6</sup> in law and philosophy. NEED is simply the main vehicle in examining precisely what can go wrong when philosophers and judges disregard the value in separating a concept, and the various objects said concept can apply to in extension, when analysing legal, philosophical and linguistic issues.

I reserve the detailed development of intension and extension for later. By way of preliminary explanation the intension of, say, PURPLE, is the qualities of being purple, the extension anything that which is capable of being purple. A plum can be the extension of PURPLE, or a car, etc. The range of all things in the world to which a concept or term applies is the extension. BALL has the intension of all internal aspects of BALL, representing the concept in abstract, unattached to any particular referent. The extension is all things that are capable of being referred to by BALL. If someone asks to ‘get that ball’ the extension is the individual ball being referred to, but the potential available extensions include all things in the world that are capable of being referred to as balls- tennis balls, basketballs, etc. This is how the distinction operates regarding concrete nouns, but this paper specifically handles abstract nouns; primarily NEED and NECESSITY, among others. The role of intension and extension with regard to these concepts is just as simple: the intension of NEED is the internal qualities that NEED possesses,<sup>7</sup> and the extension that which it is capable of referring to. A concept need not refer to an actual physical object that exists in the physical world: in extension an abstract noun can attach to a referent which does not pick out any tangible object, but refers to something abstractly, i.e. ‘her need for love’. Clearly this is context dependent in a way that is not the case with concrete nouns, and the various ways a proposition can be structured is capable of providing a practically limitless range of possible referents. The vastness of this range is capable of leading one, (prominent theorists, and judges, we will see), to become tied in linguistic knots, with no hope of untying them without appealing to a distinction between the concept itself, and the referent it has in extension. The strength of my argument lies partly in the fact that the division is straight forward enough to grasp, calling into question why there is not better notice taken in the relevant theory and case law.

I will provide more general proof beyond NEED and consider contributions by other theorists.<sup>8</sup> It is of note that instances of such writers are limited in numbers, particularly in recent years,<sup>9</sup> and where they

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<sup>6</sup> I also explore NECESSITY, COHERENCE, TRUTH and FREEDOM, and there is good reason to suppose this only begins to scratch the surface.

<sup>7</sup> This is deliberately left vague. The precise formulation of what an intension consists of is not necessary for my investigation; needless to say I return to this point where appropriate, in chapter two part III.

<sup>8</sup> The necessary diagnosis of how intension and extension can inform contemporary conceptual analysis has not been entirely overlooked in contemporary theory, though its consideration is surprisingly limited. I will draw on those who offer meaningful contributions to my analysis, largely in chapter two part II.

are present their considerations are restricted to legal theory only, while my claim concerns a balance of legal practice and legal theory. This balance is sought and maintained partly because it is, in the task I have set out, important to challenge and correct some dangerous and faulty reasoning put forward very recently in legal theory, before discerning how judicial reasoning may be better informed.<sup>10</sup> It is for this reason that I devote chapter one to a comprehensive critique and rebuttal of the well-known article ‘*Law and Language: How Words Mislead Us*’ by Brian Bix.<sup>11</sup> As I will demonstrate, Bix’s criticism of American alimony law is crippled by a mistake which can be completely resolved through close attention to the distinction between NEED’s *intension*, and what referents it is capable of attaching to in *extension*.<sup>12</sup> This is the first substantial example I offer for my claim, specifically because it is a prime example of the error I wish to highlight; it is recent, in an important journal, and by a prominent contemporary philosopher. Beginning with this analysis straight away places my claim into the context of modern legal theory. It is worth noting that in order to be succinct and clear in dealing with the issues prompted by my analysis of Bix’s article, I reserve consideration of many of the wider issues for later chapters, and occasionally prompt where this is the case.

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<sup>9</sup> A relatively recent disregard for conceptual analysis within analytic philosophy may account somewhat for this, as opposed to a disregard for intension and extension specifically. Despite this, there has been a recent resurgence of interest in general conceptual analysis. See Toorben Spaak, ‘Book Review: Brian Leiter *Naturalising Jurisprudence*’ (2008) 74 *Theoria* 352, 358: ‘(W)e might continue with conceptual analysis if we were to adopt a more relaxed understanding of it, which does not involve appeal to *a priori* intuitions. For example, we might follow Frank Jackson, who defends “modest” conceptual analysis, which aims to determine not what the world is like, but “what to say in less fundamental terms given an account of the world stated in more fundamental terms”’. I speak more within on the decline/revival of conceptual analysis and how this pertains to intension and extension.

<sup>10</sup> This raises the question of whether errors in legal theory have contributed to the mistake ‘on the ground’, so to speak, in courts. The misconceptions of which I speak are present in legal theory where the specific concern is to analyse language; it is no surprise these misconceptions are being perpetuated by judges, who are not necessarily, (especially in lower courts), trained in philosophy of language. Additionally, judges have other practical concerns springing from the case before them, distinct from the relatively esoteric questions of meaning that conceptual analysis *might* raise. Though, as I will exhibit in chapter two, my position is not bound by issues that typically pertain to the pursuit of an esoteric or technical understanding of meaning.

<sup>11</sup> Brian Bix, ‘*Law and Language: How Words Mislead Us*’ (2010) 1 *Jurisprudence* 25

<sup>12</sup> Though, like a line of dominos, many other significant philosophical issues are prompted by my primary analysis. Where they are sufficiently relevant to my overall claim I will acknowledge and explore them to varying degrees, (at the least providing direction to relevant authors/discussion), partly through the use of footnotes.

Bix mistakenly identifies the satisfaction of ‘basic minimal requirements of life’<sup>13</sup> as the ‘conventional meaning’<sup>14</sup> of NEED despite being aware that NEED is predicated of something other than this in American alimony law.<sup>15</sup> According to the conventional meaning that he ascribes to NEED, Bix goes on to criticise the use of the concept in American alimony law. I demonstrate that Bix has attached properties or features of what NEED is capable of being predicated and associated these properties or features with NEED itself, when it is not being used in a remotely similar context as to what Bix conceives the ‘conventional’ meaning to be.<sup>16</sup> It is this error that leads him to conclude NEED is in some way being ‘stretched’<sup>17</sup> in its use in American alimony law, and his conclusions are consequently misplaced. This raises a whole host of issues; I dissect precisely what difficulties Bix encounters under this misconception, and reel in and rectify the matters that orbit it. It is not, as Bix purports, that NEED has a ‘conventional meaning’ that is consistent with the particular extension he relies upon in claiming that NEED is unsuitable for use in American alimony law. Rather, it is that some referents, of which NEED is capable of being applied to in extension, are considered to be *more important*. By ‘more important’ I mean that one type of referent a concept is capable of attaching to in extension is given particular prominence in the mind of a theorist, and consequently all uses that do not cohere with this conception the theorist has in mind are deemed to be inappropriate uses of that concept. This is critical, and a main theme throughout this piece. To put the notion into a preliminary example, it may be said that the need for sufficient water to avoid dying of thirst is ‘more important’ than the need to get a taxi in order not to miss a dentist appointment, but this does not mean that it would be wrong to say ‘I need a taxi’. This will initially seem (highly) elementary, and it would be, were it not an oversight that is being committed in both theory and practice, with surprisingly invasive ramifications.

I will also demonstrate how Bix makes the same and similar errors in relation to ‘freedom of contract’. I consider this partly for the purpose of demonstrating the wider application of what is said regarding NEED, and just as much to help inform my analysis of NEED within Bix’s article; for his

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<sup>13</sup> *Ibid* 35

<sup>14</sup> *Ibid* 36

<sup>15</sup> Bix does not use the terminology ‘intension and extension’, nor any other means of signifying comparison between a concept and what that concept can be predicated of. It will become apparent why thinking along the lines of intension and extension provides a distinction that is more than an exercise in semantics, and how doing so reliably resolves conundrums which are otherwise elusive for philosophers.

<sup>16</sup> Precisely what a ‘conventional meaning’ might be is not explored in any depth in Bix’s article; this I will deal with in due course.

<sup>17</sup> ‘How Words Mislead Us’ ‘With that understanding, suddenly alimony is understood as an entitlement rather than charity, we no longer have to stretch the word ‘need’ to cover middle class and upper class standard-of-living payments’ 36



treatment of NEED is not entirely self-contained and reference to the rest of the article is necessitated in fully understanding his claim.

Chapter two provides a background to the philosophical ideas discussed in this thesis and draws on other relevant theorists, both past and contemporary. Here I deal with general issues or objections my investigation may appear to give rise to, and present a wider account of the issues at hand, (following the relative specificity of chapter one, and the later chapters). It splits into three parts, the first of which discusses how the notion of talking past one another is relevant to my considerations, and addresses why it is that Bix and I are not falling into this particular philosophical trap. And also, why I conduct the analysis I do, and in what way one ‘conceptual theory’ can be ‘better’ than another. To say ‘better’, (and ‘conceptual theory’), here is to use Bix’s terminology<sup>18</sup> from his older article, *Conceptual Questions and Jurisprudence*.<sup>19</sup> It is through this established framework that the conceptual analysis I offer in response to Bix’s treatment of NEED is, in fact, ‘better’.<sup>20</sup> Part II of the chapter examines in closer detail how the ideas advocated in relation to NEED are transferable to other concepts. I do this throughout the thesis; the key difference here is I specifically investigate the work of other theorists who make similar claims to mine in different fields, particularly with attention to research conducted by Stephen Pethick<sup>21</sup> on COHERENCE and Susan Haack on TRUTH.<sup>22</sup>

Part III examines how intension and extension relate to other philosophical divisions of a similar nature. Here I also justify why concerns surrounding ‘meaning’, which traditionally hold to the

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<sup>18</sup> ‘The question remains, on what basis can it be asserted that one conceptual theory is better than another?’ Brian Bix, ‘Conceptual Questions and Jurisprudence’ *Legal Theory* (1995) 1 465 470

<sup>19</sup> As well Brian Leiter in *Naturalising Jurisprudence* (OUP 2007): ‘If a proposed conceptual analysis is to be preferred to others, it must be because it earns its place by facilitating successful *a posteriori* theories of law and legal institutions ... In other words, what would ultimately vindicate the conceptual arguments for Hard Positivism is not simply the assertion that they account for the “real” concept of law, but that the concept of law they best explicate is the one that figures in the most fruitful *a posteriori* research programs, i.e., the ones that give us the best going account of how the world works’. 134

<sup>20</sup> This is not to make a general argument about subjective and objective truth; simply to note that Bix and I are both referencing NEED in a context where our competing conceptions directly contrast, and cannot both be true due to this. For a general and thorough account of these separate issues see Simon Blackburn, *Truth: A Guide for the Perplexed* (first published Allen Lane 2005, Penguin Books 2006)

<sup>21</sup> While his treatment is strictly in relation to COHERENCE, and the treatment of COHERENCE in theoretical works, Pethick’s critical commentary in relation to the neglect of intension and extension is well worth close attention. Not least due to the fact he is the only contemporary philosopher to provide a direct treatment for some of the issues neglecting intension and extension, albeit in a relatively niche area.

<sup>22</sup> ‘The Unity of Truth and the Plurality of Truths’ (2010) 9 *Principia* 87

analytic school of philosophy, do not bind my position.<sup>23</sup> My claim does not depend on, nor do I pursue, some technical, use based, or esoteric understanding of meaning.<sup>24</sup> I treat a more fundamental issue than questions that surround the notion of meaning or intension: the relationship such meanings/intensions/conceptions have with the particular referents of which they are capable of being predicated, and a lack of appreciation for this relationship. Ultimately if one subscribes to the idea that a concept has a definition<sup>25</sup> and a plethora of potential referents, then one also commits to the intension and extension distinction as far as my analysis is concerned.

Chapter three reviews needs assessments within the provision of community care, and begins to provide more compelling evidence that the error I identify is not limited to legal theory,<sup>26</sup> but is demonstrable as causing difficulties in judicial reasoning. Through manipulation of what NEED is predicated of within needs assessments it is possible to illegitimately shift the legal responsibility of local authorities onto safe ground. I draw on a few crucial cases which fill out this landscape: *R(McDonald) v Royal Borough of Kensington & Chelsea*,<sup>27</sup> *R v Gloucestershire CC Ex P Barry*<sup>28</sup> and *R v Kirklees Ex P Daykin*<sup>29</sup> to show that, firstly, the reliability of needs assessments is under threat due to a lack of attention to the intension and extension of NEED in these assessments.<sup>30</sup> Secondly, and similarly, in assessing a patient's need the availability of resources is meant to be irrelevant, at least

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<sup>23</sup> It's not feasible or necessary to provide a detailed analysis of this traditional pursuit of conceptual analysis within analytic philosophy. The inquiries by logical positivists, early Wittgenstein, Bertrand Russell, etc, dominate 20<sup>th</sup> Century thought in this area but efforts to seek the answers, (or lack thereof), to metaphysical questions of meaning are distinctly irrelevant to my claims here.

<sup>24</sup> Such as that put forward by Bertrand Russell in 'On Denoting' (1905) 14 Mind 479, and Strawson 'On Referring' (1959) 68 Mind 539, as well others I go on to discuss.

<sup>25</sup> What intension constitutes in a precise way is not of particular interest within the scope of this analysis, and I explore why in some detail. For present purposes, it is sensible to regard it as the concept itself in abstract (that is, unattached to a referent). The vast literature surrounding precisely what constitutes an intension (i.e. as discussed by Carnap in *Meaning and Necessity* (UCP 1947) and Hilary Putnam in 'The Meaning of "Meaning"' (1975) 7 Minnesota Studies in the Philosophy of Science 131) does not hold to my argument.

<sup>26</sup> Worthwhile jurisprudence informs legal practice, and I do not intend to demean its importance; if a problem occurs in cases, and can be traced to or explained by legal theory, it is a problem that needs attention.

<sup>27</sup> [2011] UKSC 33

<sup>28</sup> [1997] 2 WLR 459 (HL)

<sup>29</sup> [1996] EWCA Civ J1126-5

<sup>30</sup> It may initially seem there is overlap here with theories of judicial interpretation (see Andrei Marmor, *Interpretation and Legal Theory* (2<sup>nd</sup> edn Hart 2005); As I will show though the matter is not one of preferring literal (see *Grey v Pearson* [1857] 6 HL Cas 61) over the golden rule (see *R v Allen* (1872) LR 1 CCR 367), etc, but simply that taking the original needs assessment at anything other than its specific interpretation renders it effectively unreliable as a means of protecting patient treatment.

initially; yet the relied upon method of distinguishing between *identifying a need* and *meeting a need*<sup>31</sup> is not fully understood in achieving this aim, while intension and extension suitably informs its application. Needs assessments can be pronouncedly more influenced by resource availability over an honest assessment of a patient's need, where such consideration is legally intended to be separate, if acute attention to the intension and extension of NEED is not maintained.

Finally, chapter four examines the role of NECESSITY in the defence of necessity, drawing on the well-known case *R v Dudley and Stephens*,<sup>32</sup> and others, which involved the killing and eating of a cabin boy during a shipwreck. Legal treatment of NECESSITY in law contributes further evidence of the wide applicability of what I put forward and the arguments this paper makes in relation to NEED extend naturally to NECESSITY. Fundamentally, both concepts have a lot hanging on their appropriate legal application, through the implementation of legal principles that rely on a strong understanding of the concepts they invoke. Mistakes in this application regarding both NEED and NECESSITY can cause similar difficulties in jurisprudence and cases. While I consider how intension and extension may inform a variety of concepts other than NEED, in order to show the wide applicability of my theory, the affinity shared between NEED and NECESSITY in linguistics and logic<sup>33</sup> make it a particularly lucrative focus point. This consideration is enhanced by the role that both concepts share as modal operators, and I examine the implications of this relationship.

Furthermore, devoting space to NECESSITY allows me to investigate, from a different angle, how theorists and judges may be misled by a particular preferred use of a concept they find *more important*<sup>34</sup> when compared to its other possible applications. I push further the idea that particular preferred invocations, (Bix phrases his as the 'conventional meaning'), are given to concepts simply because the proponent of the preferred invocation has a distinct referent in mind, (different to the one actually in use), which they consider to be *particularly important*. This consideration is enhanced by judicial commentary surrounding the defence of necessity in criminal law as 'legally acceptable' extensions<sup>35</sup> of NECESSITY within the defence are extremely limited, and limited to objectively

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<sup>31</sup> The method employed by the courts and care providers: *Barry* [1997] 2 WLR 459 (HL)

<sup>32</sup> (1884) 14 Q.B.D. 273

<sup>33</sup> Carnap, *Meaning and Necessity*: 'We form the modal system S, from our earlier system S, by the addition of the modal sign 'N' for logical necessity. We regard a proposition as necessary if any sentence expressing it is L-true. Other modalities can be defined in terms of necessity, for example, impossibility, possibility, contingency.' 173

<sup>34</sup> Due to their extreme or urgent nature, such as the threat of serious harm or death.

<sup>35</sup> Extensions of necessity that, if they can be demonstrated to be factually consistent with the case through evidence, will allow the defence to apply. Or, put otherwise, the circumstances in which one can sometimes use the defence are limited to extreme circumstances; usually loss of life or serious injury: *R v Willer* (1986) 83 Cr App R 225

important extensions<sup>36</sup> only. Judicial understanding and commentary around precisely in what circumstances the defence of necessity might apply is significantly firmer when compared to how the courts handle the wide applicability of needs assessments, in contrast. Judges demonstrate a reasonable understanding of the application of the defence, and an awareness of the implications of mistakes. I draw the conclusion that the manipulation of language is less common and less likely in dealing with the defence since its invocation is highly restricted, and restricted to exclusively important referents, (such as preventing death). Fortunately, despite it not currently being present, this awareness is achievable in all legal uses of both NEED and NECESSITY, even where the potential variable extensions are extremely diverse, as is the case with needs assessments, considered in chapter three. It is achievable by carefully considering the intension and relevant extension of the concept being relied upon, and I will demonstrate how this is the case.

Worryingly though, this improved judicial understanding within the defence of necessity may be due to a more sinister reason than first meets the eye. What we can say with certainty is the judges generally commit fewer linguistic oversights within the defence of necessity, yet this may not be due to actual awareness of the philosophical issues by the judges themselves. It may instead be that the issues which otherwise show themselves elsewhere are simply invisible, hidden by the legal limitations of the defence. If judges are not required to apply the defence beyond a highly restricted, and objectively important, context (protecting life), there is no cause for the mistakes I explore to ever reveal themselves. This, rather than being reason for relief as one might initially imagine, is a formidable concern; the potential consequences are much more subtle, and can not be ignored. They are twofold: should the defence ever be expanded to include a wider variety of referents, the issues that currently lie dormant would be awoken in relying on the defence in any new context. Moreover, (and necessarily speculatively), if NECESSITY is misconceived by judges as being primarily reserved for these limited invocations, the development of the defence in common law to protect defendants in other contexts may be unduly restricted to these invocations only. It is not suitable to say more of this before we develop the theory through chapters one to three first, as it rests on this basis. Due to these reasons, and the fact the defence of necessity is an area of law that has much hanging on effective communication,<sup>37</sup> (and consequently is worth investigation in its own right), it is worth close consideration.

Primarily considering a concept such as NEED allows my investigation to be focused, achievable and clear; yet can still offer compelling conclusions in a much wider way. Concepts can be simply tested

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<sup>36</sup> The defence can only typically be relied on when life is in danger or serious injury is imminent: *R v Kitson* [1955] 39 Cr App R 66

<sup>37</sup> In some of the cases I consider, it is literally a matter of life and death. Contemporarily, it can be the difference between life imprisonment or freedom.

against the distinction to determine its success or failure once explored in thorough detail to a few examples. Once my claim is properly explored through the precise disambiguation of some key legal concepts, it is possible to investigate problems besetting conceptual analysis using this distinction with remarkable ease.<sup>38</sup> And at an increasing rate, it makes more sense to do so the deeper into the quandary we go.

The examples I provide are just some of the prominent areas in which problems may arise in jurisprudential literature and legal cases. Although necessarily limited in order to ensure sufficient depth of analysis, they permeate many areas of law. Through these, my considerations include family, contract, public and criminal law. These instances will be sufficient consideration for my point to be well made, the practical limitations of this thesis require me to limit my investigation into specific areas, and these areas give as wide a scope as is possible in ensuring sufficient depth of analysis as to reach reasonable and thorough conclusions.

Thus, there are two primary tasks undertaken in this thesis. Firstly, to identify and rectify the immediate misconceptions NEED and NECESSITY suffer in both legal theory and the application of legal principles. Secondly, and equally as importantly, to prompt serious reconsideration of the pervasiveness and depth of the errors in question; while there is cause for concern in the specific examples I am able to analyse in depth, where, and to what extent, the mistakes I highlight may be committed elsewhere is equally as troubling. My claim is not, of course, that *all* of legal theory and judicial practice are guilty of the mistakes I highlight, though the evidence I provide suggests that investigation into the relevant literature is warranted. The structure of this piece reflects these two closely related aims: chapter one provides us with specific evidence in contemporary legal theory, chapter two leads us through the wider points brought up by my inquiry; backing up chapter one and setting up investigation into case law for chapter three and four. We will see how legal reasoning is compromised in important contexts due to seemingly esoteric philosophical and linguistic issues. This prevailing aim naturally splits into many avenues, and I have briefly set the path I will take in this introduction; from here on I fill out this framework and make evident what I have claimed.

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<sup>38</sup> That is, linguistic issues that we might otherwise entertain as legitimate are seen to be a simple muddling of the relevant concept and what that concept is capable of attaching to.

## Chapter One – ‘Need’ in Legal Theory

### Part I- Picking up the Bix and Pieces

In an article for *Jurisprudence* entitled ‘*Law and Language: How Words Mislead Us*’<sup>39</sup> Brian Bix seeks to ‘explore some of the ways in which we have been led astray, particularly in contract and family law, by our legal language’<sup>40</sup> and warns of the danger ‘that inaccurate language can so easily change our substantive views about what is natural or what is right’.<sup>41</sup> Our aims are strikingly similar, though our conclusions greatly differ. A thorough understanding of language use and legal concepts is important, and more needs to be done in order to be clear on why we often encounter problems with them, and where appropriate resolve them. Bix’s contributions represent a large body of work within analytic legal theory in which this clarity is pursued; a large portion of which invokes methods and ideas from philosophy of language to solve perceived problems. I am in full agreement with this overarching aim. The article in question sweeps across numerous concepts, but I focus particularly on its criticisms on the application of NEED in alimony law.

Bix’s error lies in the association of features evoked by a singular possible extension of NEED, in one isolated example of which he ascribes particular importance, and the imputation of these features onto NEED itself when it is predicated of a different object entirely.<sup>42</sup> Or, put otherwise, one particular extension of NEED is considered important enough that other applications of the concept which fall outside of it are purportedly problematic. This mistake can be separated into general stages. Though each stage takes considerable analysis, a general framework is of use, and will prevent tunnel vision as we embark into the tighter detail. Firstly, a preferred, particular invocation of a concept, (for Bix, NEED), is identified, that is considered to be especially important. Secondly, the features of this preferred invocation are brought to mind, (for Bix, it is the connotations/emotive associations he encounters within his preferred invocation). Thirdly, these features are transferred onto the concept itself, as opposed to the particular referent that initially evoked those features. Finally, the originally flexible and well understood concept is tainted in applications that are not consistent with the features of one, seemingly random and personal, referent that concept might occasionally have.

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<sup>39</sup> ‘This article is based on the Reappointment Lecture to the Frederick W Thomas Chair for the Interdisciplinary Study of Law and Language, given at the University of Minnesota on 7 April 2009. I am grateful for the comments and suggestions of Sean Coyle and those present at the Lecture.’ 25

<sup>40</sup> *Ibid* 26

<sup>41</sup> *Ibid* 38

<sup>42</sup> I use object in its wider abstract sense as to include metaphysical objects, such as propositions NEED may be predicated of.

I will examine why it may be the case that Bix, and others, attempt to restrict NEED's use to something like 'basic minimal requirements of life', and conclude that it is not that NEED has a 'conventional meaning' consistent with this particular extension, but rather meeting basic minimal requirements of life is just one of the more *important* referents in extension NEED is capable of having. All I mean by a 'more important' referent is the relative importance that is ascribed to a particular referent in the world when that concept is brought to mind. For instance, it is surely generally accepted that a community need for sufficient clean water is *more important* than a need for golf courses. But both these are capable of being described as being needed depending on which proposition NEED is predicated.<sup>43</sup> The 'more important' referents NEED might have say little about circumstances in which NEED does not have these referents, and its use in these other 'unimportant' contexts is not a 'stretch'<sup>44</sup> of the concept. We may say *I need her in my life*, or that someone *needs help or they will die* and certainly these circumstances are capable of being important, but to associate the sense of urgency and importance within these circumstances with NEED itself<sup>45</sup> (or the intension of NEED), in all its instantiations, leads to untenable conclusions of the kind Bix puts forward and errors in reasoning that can haunt legal trials. This difficulty encountered in relation to NEED, (and, as chapter two and four investigate, NEED is not alone in this), can be properly elucidated by distinguishing the intension and extension of the concept. Firstly Bix identifies that NEED is capable of referring to a meeting of 'basic minimal requirements of life', and that this is its 'conventional meaning'. He makes the loose link that historically alimony law was used partly to prevent destitution for the recipient. In accordance with this premise Bix notes that in American alimony law NEED is used in a way not consistent with this 'conventional meaning', leading him to conclude that NEED is being 'stretched'<sup>46</sup> in American alimony law. He offers various different concepts to use in its place. In response, I claim that Bix makes the mistake of associating properties of one possible extension of NEED (basic minimal requirements of life) with its intension in circumstances where NEED is predicated of a different

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<sup>43</sup> I return to the issue of necessary and contingent truths, prompted somewhat by this consideration, in chapter four part I. See Leibniz, *Primary Truths* (first published 1689, Hackett Publishing Co 2000) 275 and *Discourse on Metaphysics* (first published 1686, Hackett Publishing Co 2000) 234. For commentary, see Abdul Muhit 'Leibniz on Necessary and Contingent Truths' (2010) 4 Arts Faculty Journal 117

<sup>44</sup> 'How Words Mislead Us' 36

<sup>45</sup> When I say 'itself' I do not mean to suggest that these concepts exist in any metaphysical sense, merely that there is a genuine difference between a concept and what it is capable of applying to. It is worth noting here that in chapter two part III I deal with any potential problems that may arise from difficulties surrounding the meaning, or intension, or conception of a concept.

<sup>46</sup> 'How Words Mislead Us' 'With that understanding, suddenly alimony is understood as an entitlement rather than charity, we no longer have to stretch the word 'need' to cover middle class and upper class standard-of-living payments' 36

proposition entirely (living to the same quality of life as the ex-spouse did within the marriage). I suggest that Bix's misunderstanding is due to the fact that some extensions that NEED is capable of having are considered *more important* than others, but this is to say nothing of the concept NEED or its appropriateness in other contexts when not predicated of these referents. It is only to say something of the object that NEED is predicated of in the real world: the need of avoiding death, being happy or healthy, etc.<sup>47</sup>

The concern of '*Law and Language: How Words Mislead Us*' is consistent with its title, yet a disregard for intension and extension has led to significant philosophical errors surrounding important legal concepts *in an article that is specifically written to deal with conceptual analysis in legal theory*. The mistakes made in judicial commentary, considered later in this paper, are worrying in their own right. But these judgments do not have the principal aim of deliberately exploring the relevant language philosophy; they are to solve and decide upon a case that is presented before them.<sup>48</sup> Bix's article has a focus on conceptual analysis; yet clear, established, philosophical principles are not properly considered to the detriment of the conceptual analysis within. It is little wonder that courts may operate under damaging misconceptions if those misconceptions are propagated by prominent specialists.

This chapter will be structured in a way that deals with Bix's treatment of NEED first, and following this it will be necessary to briefly explore a few key issues that are explored in the rest of Bix's article. This will be to the extent that this consideration can helpfully inform my analysis of NEED and demonstrate how the points may apply to other concepts. This focus is necessitated by the practical limits of this thesis, but it would also be to the detriment of the analysis in this chapter if I were not to pay some attention to the rest of the article with a, limited, holistic approach. This would be the case with almost any analysis, the only exceptions being self-contained chapters which stand on their own without reference to the rest of the article. However this is far from the case with '*Law and Language: How Words Mislead Us*' and the argument that is common throughout the whole article is not explicitly stated with regard to NEED. Perhaps more importantly, this thesis is born of a desire to explore how intension and extension can help inform conceptual analysis, rather than from some

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<sup>47</sup> Rather than, for instance, needing a nap, a massage or a taxi. Concepts are necessarily vague, versatile and variable, dependent on a practically limitless source of referents. It is unfounded to suggest that developed legal terminology be changed based on these personal associations one may have. I take this into more detail further in.

<sup>48</sup> Noting the aim of an author as primarily being conceptual does not say anything about the *severity of the consequences* of any errors. Some errors in case law have consequences that are directly assessable, (such as a claim failing unjustly or a defendant being wrongly convicted), while consequences of mistaken analysis in the governing theory is more indirect; but not necessarily less serious.



abstract interest in NEED. Accordingly it is beneficial in making the points I do to consider how the ideas expressed here in relation to NEED may transfer to other concepts.

Initial clarifications and introductory remarks made, we can now evidence and examine precisely how Bix's analysis is unsatisfactory. This is how Bix introduces his analysis of NEED:

Many courts began to speak of alimony being appropriate where, and to the extent that, the recipient spouse (almost always the wife) could prove 'need'. This is the terminology and rhetoric that one finds in a large proportion of alimony cases to this very day. However, in the vast majority of those cases, 'need' is not used in a conventional way. The court does not inquire into whether a spouse has been left without the means to meet even basic minimal requirements of life<sup>49</sup>

One of the problems that I will discuss may be apparent after just this brief extract, and that is the assumption that when invoking the concept NEED one conventionally is using it to describe meeting 'even basic minimal requirements of life'. This is a highly questionable assumption and the rest of Bix's analysis does not consider it any further, yet depends upon it. Thus it is one of the main problems besetting his analysis.

He almost immediately goes on to say:

Because 'need' is used in alimony cases in a way that sharply differs from the conventional meaning of that term<sup>50</sup>

As we just saw, the conventional meaning of NEED under Bix's analysis is meeting 'even basic minimal requirements of life'. Practically no justification for this conventional meaning is supplied, and Bix's insistence on convention as something, (presumably), to do with meaning is central to his argument, but lies without general definition or defence. This can be distinguished from what his conception of the conventional use of NEED might *actually be*, (that is, something to do with 'basic minimal requirements of life'). It is one thing to criticise Bix's understanding of whether NEED is being used conventionally or not (which I go on to do in the next paragraph), another entirely for him

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<sup>49</sup> 'How Words Mislead Us' 35

<sup>50</sup> *Ibid* 36; Bix uses the expression 'the term NEED' and I 'the concept NEED'. Nothing of significance hangs on this for our purposes; whichever one employs the points remain the same. Commentary on their relation can be found in papers I consider in chapter two part II: Andrew Halpin's 'Concepts, Terms and Fields of Enquiry' (1998) 4 LT 187 and Stephen Laurence, Eric Margolis, 'Concepts and Conceptual Analysis' (2003) 67 *Philosophy and Phenomenological Research* 253: 'This terminology is perfectly harmless, so we'll continue to follow Jackson in moving back and forth between claims about concepts and claims about language.' 257

to establish that convention plays the role he expects it to in meaning. It *may* do, but the idea is not explained or defended, making this relationship between convention and meaning difficult to comment on further.

The conventional application of NEED to the reference ‘basic minimal requirements of life’ is problematic and sits without development or defence within Bix’s article. Many commonplace phrases must fall outside this scope; for example ‘I need five pieces of fruit or vegetables a day’ or ‘I need eight hours sleep every night’, yet these (or similarly expressed phrases) are surely conventional uses of the concept NEED. It is not a ‘basic minimal requirement of life’ to be very well nourished, or consistently well rested, but we would happily say we need these things. This is because we would be depending on the reference of our application of NEED. We would, in proposing such propositions, not be claiming ‘I need eight hours sleep every night to satisfy my basic minimal requirement of life’. We would, rather, be saying something like ‘I need eight hours sleep every night if I am to be alert at work consistently’ or something akin to this, shifting the referent in extension for NEED in each particular context. Language is flexible,<sup>51</sup> and concepts can be used in multiple ways. Bix is, obviously, aware that NEED is used in these other contexts as well (making his conclusions somewhat baffling). That Bix ascribes NEED this conventional meaning is the first step in resolving the confusion he encounters. It is necessary to identify Bix’s approach to NEED as having a ‘conventional meaning’ and examine, as far as possible, what this is supposed to be. It is the characteristics of this conventional meaning that he applies to NEED itself, even in circumstances where NEED is predicated of something else entirely than what Bix considers to be the conventional meaning.

Let us explore some preliminary instantiations of the concept NEED and assess whether they correspond with Bix’s conventional conception. If one were to say ‘I need to fill my name on the register- may I borrow your pen?’ we would certainly be deviating from the definition offered by Bix that is under scrutiny here. Or ‘I need to get the nine o’clock train or I will be stuck in Canterbury’. If these basic invocations to be presumed as unconventional, then this must be addressed by Bix, rather than his citing of a particular preference of NEED’s use and baldly asserting it as the conventional one.

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<sup>51</sup> And necessarily vague, as I will speak more of later. Wittgenstein put it so: ‘If I tell someone "Stand roughly here"—may not this explanation work perfectly? And cannot every other one fail too? But isn't it an inexact explanation?—Yes; why shouldn't we call it "inexact"? Only let us understand what "inexact" means. For it does not mean "unusable". And let us consider what we call an "exact" explanation in contrast with this one. Perhaps something like drawing a chalk line round an area? Here it strikes us at once that the line has breadth. So a colour-edge would be more exact. But has this exactness still got a function here: isn't the engine idling? And remember too that we have not yet defined what is to count as overstepping this exact boundary; how, with what instruments, it is to be established. And so on.’ *Philosophical Investigations* (first published 1953, Wiley-Blackwell 2009) 88

One may think that the context in which Bix considers NEED (that of American alimony law, henceforth AAL), justifies the claim offered by Bix here. However, this is not the case; consider this next extract:

When the courts speak of spousal ‘need’ in alimony case, the reference is often, indirectly, to the standard of living within the marriage. A long-term spouse is held basically to have a right to something like the quality of life she or he enjoyed during the marriage, and may receive alimony if his or her income-earning capacity will not rise near that level after the marriage is over.<sup>52</sup>

The extension of NEED in AAL is not the conventional one that Bix associates with NEED, as the above passage shows, Bix says himself that it is usually ‘to the standard of living within the marriage’. If the above is the reference of NEED in the context of alimony law<sup>53</sup> then it is perfectly sensible to say, something of the like, “in order to maintain the same quality of life the ex-spouse enjoyed during the marriage he/she will need x amount of currency’. A key word here is ‘indirectly’. To invoke the concept NEED in a sentence one requires a referent, either implicitly or explicitly. To put it into an example one might say:

‘I need to catch that train’

Or

‘I need to have a coffee to stay awake till 3am.’

In the former instance the referent is implicit; presumably it is to meet for an appointment of some kind, or the speaker just does not wish to wait for an hour in a station; the fact is we don’t know what it is without context. In the second example we are told the extension of which NEED relies: to stay awake till 3am. What is common through both examples is that NEED is either being used sensibly or not<sup>54</sup> based on the extension being employed. That is, it is sensible to say ‘I am tired enough that I need to have a coffee to stay awake till 3am’ because the requirement that invoking NEED expresses in that context is suitably satisfied by having a coffee. In many instances of NEED the extension is simply not directly, or explicitly, stated, resulting in the possibility of substituting one’s own ‘conventional’ conception in place of the one intended by the speaker; based on some vague association of

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<sup>52</sup> ‘How Words Mislead Us’ 35-36

<sup>53</sup> And Bix himself says that it is: ‘When the courts speak of spousal ‘need’ in alimony case, the reference is often, indirectly, to the standard of living within the marriage.’ *Ibid* 35

<sup>54</sup> That is, it is either true or not depending on whether the contingent elements of the proposition are satisfied. (I speak more of truth-functionality in chapter four part I).

importance to a particular extension NEED is capable of having.<sup>55</sup> Bix's use of NEED as a satisfaction of the 'basic minimal requirements of life' falls into this framework.

This indirect nature of NEED's possible referents is possibly part of the reason that Bix's mistakes are made, though this would be strange since he acknowledges the intended referent of NEED in AAL as being inconsistent with his own conventional conception. For Bix, the problem goes much deeper than this initial consideration, though it is not hard to imagine the way in which NEED is regularly employed—without explicit mention of the referent—is partly why errors manifest as they do. Of course, in normal conversation such clarity is hardly necessary; it is when a thorough and technical understanding is needed to apply the law that this is useful. I illustrate this point around indirect referents, compared with direct referents, in more detail in chapter four part II, where the issue becomes more relevant.

That NEED is not being used in a conventional way is not argued sufficiently or anywhere near comprehensively enough for Bix's assumption that "need" is being used in a way that sharply differs from the conventional meaning of that term".<sup>56</sup> Nor is it demonstrated by Bix that the loose idea of conventional use is in some way the measure of the appropriate meaning of a concept. Yet Bix's claim depends on both these points being accepted. So, before we even reach the deeper, general, philosophical error he makes, two of the legs upon which his position stands crumble under a relatively low level of scrutiny. He argues, in support of these claims, that alimony law is the "historical residue of a time, when the vast majority of women had no practical means of supporting themselves in the Marketplace",<sup>57</sup> and goes on to explain:

When a movement arose to make divorce more easily accessible—if only on fault grounds, to the innocent and wronged spouse—one practical 'necessity' was to create some provision for the wives (at least the innocent ones). Otherwise, divorce would leave wives destitute... Time passed, and alimony, this residue of a historical period, continued, even if only granted in a small fraction of divorces. However, a new justification was sought. Many courts began to speak of alimony being appropriate where, and to the extent that, the recipient spouse (almost always the wife) could prove 'need'... However, in the vast majority of those cases, 'need' is not used in a conventional way. The court does not enquire into whether a spouse has been left without the means to meet even basic minimal requirements of life<sup>58</sup>

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<sup>55</sup> I return to the indirect nature of some referents in chapter four part I.

<sup>56</sup> 'How Words Misllead Us' 36

<sup>57</sup> *Ibid* 35

<sup>58</sup> *Ibid* 35

Simply noting that historically alimony law served a different purpose, (i.e. preventing destitution, and similarly extreme circumstances), does not remotely imply that the concept NEED is being mistreated in its application in modern alimony law. It is usually not a matter of potential destitution for the ex-spouse, but rather a maintenance of the standard of living enjoyed within the marriage; which is actually admitted by Bix to be the intended referent of NEED in modern alimony law. Not being made destitute, it is fair to assume, would certainly fit under Bix's conception of 'basic minimal requirements of life', and thus be a more appropriate legal application of NEED under his account. Bix continues:

(T)he awkward compromise that was reached was that when a divorce occurred, though the marriage was dissolved, the husband's obligation to support his wife would continue, and this would be through periodic payments called 'alimony'... Time passed, and alimony, this residue of a historical period, continued, even if only granted in a small fraction of divorces. However, a new justification was sought. Many courts began to speak of alimony being appropriate where, and to the extent that, the recipient spouse (almost always the wife) could prove 'need'. This is the terminology and rhetoric that one finds in a large proportion of alimony cases to this very day.<sup>59</sup>

Even if the legal test for granting alimony was historically a requirement to meet basic minimal requirements of life (in this case, destitution), there is no reason for this particular invocation of NEED to make the use of NEED inappropriate in alimony law today; for it is conceded by Bix that the referent of NEED in this context is to maintain the same quality of life that the ex-spouse enjoyed within the marriage. If this is the accepted extension of NEED *in that particular context* then it is difficult to see how there is a problem in its use. Most concepts are required to be stretchy to work, are necessarily vague,<sup>60</sup> to fit around various contexts so they are useful.<sup>61</sup>

Some revelation into Bix's critique that NEED is stretched to cover modern alimony law is encountered further in:

Also, law, at least the common law system the United States inherited from England, is a process of reasoning and law-making that has strong ties to the past. The new case has to fit into the categories and concepts that we created for a prior case—fitting cases that came up hundreds of years before, in a different society, with different technology, facing a different set of problems. So judges often end up

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<sup>59</sup> *Ibid* 35

<sup>60</sup> I return to issues of vagueness in part II of this chapter and chapter four part I.

<sup>61</sup> Bix's treatment of FREEDOM in contract law is another good example of this, which I consider in part II of this chapter.

stretching the meaning of concepts, or using legal fictions to bridge the old rule with the new equities.<sup>62</sup>

NEED is capable of wide applications to a huge variety of referents in extension. Just because American alimony law once used NEED in a particular way hardly taints the use of the concept in modern applications, provided the use of the concept is actually sensible. We can utilise intension and extension to assess this and see that NEED is not being ‘stretched’; it is simply being used in a certain way, in relation to a certain referent in extension. The idea of having to ‘bridge’ NEED outside of some very specific, and irrelevant, application in order for it not to ‘stretch the meaning’ is a bizarre one, to say the least. Bix’s contention strongly implies that NEED has certain associations,<sup>63</sup> and these make it an unsuitable legal use of the word, and this appears to be the root of his criticism: ‘In time, we have learned the power of mere labels. Perhaps the sensitivity to names and the power they can have, is greatest in family law’.<sup>64</sup>

He goes on to say that NEED has an association of ‘charity’:

Perhaps if we followed the ALI, and started speaking of alimony in terms of what a spouse has ‘earned’, rather than charity given to meet spousal ‘needs’, there would also be less pressure to reduce the frequency, length and amounts given in those awards.<sup>65</sup>

This is a conceptual mess that needs careful disambiguation. No doubt a conception of charity in this use of NEED leaks through from the original assumption about NEED: that it conventionally means the satisfaction of basic minimal requirements of life. For if we are talking about a potential failure to meet basic requirements of life, charity may indeed spring to mind in relation to this referent NEED might sometimes have. But it does not have it here; Bix relates the use of NEED to charitable associations, yet the particular extension of NEED within the context of alimony law is to maintain ‘something like the quality of life she or he enjoyed during the marriage’.<sup>66</sup> While it may very well be

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<sup>62</sup> *Ibid* 38

<sup>63</sup> Or connotations: ‘The connotative meaning of a word is based on implication, or emotional association with a word.’ Zhala Jalfarli, Ali Rahimi, ‘An In-depth analysis of the Manifestation of Emotions and Ideas through Similies in Short Stories by Somerset Maugham’ (2013) 3 *Research on Humanities and Social Sciences* 14; Dušan Gabrovšek, ‘Connotation, Semantic Prosody, Syntagmatic Associative Meaning: Three Levels of Meaning?’ (2007) 4(1-2) *ELOPE* 9, 14: ‘(C)onnotation, a term used with reference to the associative/attitudinal/emotive meaning’.

<sup>64</sup> ‘How Words Mislead Us’ 33

<sup>65</sup> *Ibid* 36

<sup>66</sup> *Ibid* 35-36

wrong to enforce this standard, it is far from any reasonable association of charity that supposedly makes it an unfit word to use in alimony law.<sup>67</sup>

It is partly in this way that the usefulness of carefully marking the division of intension and extension can be seen. One may have a vague idea of what they associate with a certain concept<sup>68</sup> (essentially, what associations or connotations it does/ought to have), but it feels blurry and difficult to pin down in a way that cannot be articulated clearly. If one was recently mugged on a holiday in France, any subjective positive or negative associations that come with that is not something that is likely being communicated with intent by the speaker, yet this is a part of how the concept is understood by the recipient. Alternatively, some concepts have associations which are generally shared and integral to their meaning in a more objective way,<sup>69</sup> when compared to being mugged in France. To be bold, for example, has a clear positive association to it that is shared by most competent speakers of English. However if one was bold in seeking something that was not their due, for instance boldly stealing, the associations would be more mixed and negative than another example, i.e. being bold in declaring your love for the object of your desires. These examples clearly demonstrate how approaching the relevant association from the particular extension in question helps bring clarity to our thoughts when we are being influenced by strong associations one way or the other.

This can be further explored by adding more information to the context of the examples: if, in the first instance, the thief was stealing food to feed hungry children who had no means of feeding themselves, the associations turn positive,<sup>70</sup> and this is purely from knowing more about the *extension* of BOLD in this context. Additionally, if the second example involved the romantic doing so while he was also involved with the object-of-his-desires sister, and kept this secret, the associations would (for many)

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<sup>67</sup> There is a reasonable amount of research into this aspect of communication in linguistic studies: Geoffrey Leech, *Semantics: The Study of Meaning* (Penguin Books 1990); Nigel Love, 'Translational Semantics' (1983) 11 Stellenbosch Papers in Linguistics 115. It is worth noting that these linguistic issues are capable of being part of their own field. A linguistic investigation is not necessarily philosophical. See Anthony Grayling, *Introduction to Philosophical Logic* (first published 1982, 3<sup>rd</sup> edn Wiley-Blackwell 1997) 188

<sup>68</sup> Fittingly referred to in linguistics as 'associative meaning', see Geoffrey Leech, 'Semantics: The Study of Meaning' (Penguin Books 1990)

<sup>69</sup> By 'more objective' I mean simply that the concept is used exclusively, (or almost exclusively), in reference to a positive or negative objects in extension (which I return to in the next paragraph). This is referred to as a 'conventional connotation', as opposed to a 'subjective connotation' in Johann Mouton and HC Marais *Basic Concepts in the methodology of the social sciences*, (HSRC Press 1988) 127

<sup>70</sup> Or would at least from a utilitarian approach advocated by such theorists as Bentham, Mill and Sidjwick. See Anthony Skelton, 'Henry Sidgwick's Practical Ethics: A Defense' (2006) 18 Utilitas 199. Deontological perspectives may potentially suggest otherwise, see John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> edn OUP 2011) 33

turn negative. These two alternating examples demonstrate the significance of the referent in extension when bearing in mind our ‘emotive response’<sup>71</sup> to associations we may hold toward certain concepts. Attention to intension and extension when considering our own attitudes toward something can bring clarity of thought within discussions that would otherwise bring out and validate emotive responses for the wrong reasons. It is possible that a concept is so regularly used in a context that has negative associations, that the concept is permanently attached to the negativity; or vice versa with positive associations. Consider the following:

There are words – or rather concepts – that do not simply describe a fragment of possible reality. “Terrorist” is not simply used to refer to a person who commits specific actions with a specific intent. Words such as “torture” or “massacre”, “freedom” or “peace” carry with them something more than a simple description of a state of affairs, a mere conceptual content. These words are “ethical”: they have a “magnetic” effect, an imperative force, a tendency to influence the interlocutor’s decisions.<sup>72</sup>

Some of these concepts are this way precisely for their lack of variance in application. TORTURE and MASSACRE can hardly be understood in other contexts in the positive way BOLD could be above, (except perhaps uncommon fringe examples such as two businessmen or sportsmen talking about how they ‘massacred’ the competition). I return to FREEDOM in some detail in part II of this chapter. For now, I simply illustrate how the context in which we are used to using a word can massively vary, and if we contrast NEED with TORTURE, it is immediately apparent that NEED has a sufficiently varied array of referents in extension to be sensibly applicable to what I refer to as a ‘less important’ referent, without being ‘stretched’ in any way.

Simply because NEED is *capable* of referring to a circumstance where we may associate negative meaning of the type Bix puts forward, does not mean where it does not its use is somehow tainted. Bix attaches qualities to NEED because of a different proposition of which NEED is predicated: meeting minimal requirements of life. He then attaches these to NEED itself, or more technically, the intension of NEED. As Pethick criticises in relation to coherence theories that fall into the same error:

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<sup>71</sup> ‘Connotation, Semantic Prosody, Syntagmatic Associative Meaning: Three Levels of Meaning?: ‘(C)onnotation, a term used with reference to the associative/attitudinal/emotive meaning’. (n 63)

<sup>72</sup> Fabrizio Macagno, ‘What We Hide in Words: Value-Based Reasoning and Emotive Language’ <[http://fabriziomacagno.altervista.org/uploads/2/6/7/7/26775238/macagno\\_ossa\\_2013-ed-rv.pdf](http://fabriziomacagno.altervista.org/uploads/2/6/7/7/26775238/macagno_ossa_2013-ed-rv.pdf)> accessed 12 June 2014 1-2, citing Charles Stevenson, ‘The Emotive Meaning of Ethical Terms’ (1937) 46 *Mind* 14 16, 18-19; C Stevenson, ‘Ethics and Language’ (Yale University Press 1944) 210



The oversight has caused qualities to be ascribed routinely to coherence that properly attach to various object(s) of which coherence is predicated, and which a theorist happens to have in mind when bringing coherence into view.<sup>73</sup>

Substitute COHERENCE for NEED in this quote, and this problem with Bix's position is explained in terms that were intended for solving an entirely separate philosophical problem, a problem that wound itself up through inattention to intension and extension (I say a lot more about this in part II of chapter two). Ultimately, while his claim contains a few different ideas, it can succinctly be found in the following: '(W)e no longer have to stretch the word 'need' to cover middle class and upper class standard-of-living payments'.<sup>74</sup> There has still been no substantial reason given why NEED's application should exclude 'middle class or upper class standard-of-living payments'. The potential various extensions of NEED reach more than this narrow description, yet this is not something Bix considers in the article; NEED is not 'stretched' to cover more than 'basic minimal requirements of life'.

A further confusion Bix encounters results from not distinguishing between *why* ex-spouses should have the rights they do in alimony law (a separate question) and any misapplication of NEED:

When the courts speak of spousal 'need' in alimony case, the reference is often, indirectly, to the standard of living within the marriage. A long-term spouse is held basically to have a right to something like the quality of life she or he enjoyed during the marriage, and may receive alimony if his or her income-earning capacity will not rise near that level after the marriage is over. However, again, courts rarely venture to articulate *why* spouses in long term-marriages should be thought of to have such rights.<sup>75</sup>

While making his argument that NEED is not being used in a conventional way, Bix, in the above quotation, suggests that the justification for alimony itself is unsatisfactory and requires further thought. The argument made that the justification for alimony law requires scrutiny is not the same as his argument that the language used within alimony law is unsuitable; they are mixed together to the extent they appear to become entangled. While interesting and worthwhile, questioning the justifications for alimony law<sup>76</sup> has no relevance to the question of whether NEED is being misapplied

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<sup>73</sup> Stephen Pethick 'On the Entanglement of Coherence' (2014) 27 Ratio Juris 116 (I say more of this in chapter two part II).

<sup>74</sup> 'How Words Mislead Us' 36

<sup>75</sup> *Ibid* 35/36

<sup>76</sup> I do not comment on the legitimacy of the arguments Bix puts forward regarding the justification of alimony law; though they may be in need of examination, see Esther Horvath, 'Justifying Alimony' [2002] UCL Juris Review 85

or misused in alimony law. Bix, though, attaches the two in a curious way that it is important to distinguish; the justification for alimony law is an independent question. Unfortunately in *'Law and Language: How Words Mislead Us'* no cases are offered as examples with judges making spurious points regarding NEED to demonstrate the apparent misuse, which would go a long way to elucidating his point.

Bix has an interesting alternative suggestion that further demonstrates the problem with his position:

At least one American state, the State of Texas, does not allow permanent alimony (except where the recipient or a dependant child is mentally or physically disabled), and places strict time and dollar constraints on what the courts can award even on a temporary basis. Also, many states, by legislation or court practice, have moved from preferring permanent (that is, indefinite) alimony to preferring temporary (or 'rehabilitative') alimony. We understand the term 'rehabilitate' in the context of alimony—give the spouse the time and resources needed to retrain and re-enter the workforce—better than we understand the word 'need'.<sup>77</sup>

In this passage Bix seemingly tries to compare REHABILITATIVE and NEED in a way that is supposed to demonstrate NEED's shortcomings for use in American alimony law. But they are not related in the way the quotation seems to suggest. It is difficult to comment on what Bix might have meant by the proposition 'We understand the term 'rehabilitate' in the context of alimony... better than we understand the word need' because it is the only sentence on the matter. Quite clearly, at least part of his complaint is with the substance of AAL; the length of and justifications for payments. Attempting his assault through the conceptual analysis of NEED only serves to conflate these two separate questions. He disputes the use of NEED in this context because it has negative associations that would best be avoided, yet REHABILITATIVE has the exact same problem to the same degree if not greater. REHABILITATIVE is, by extension of Bix's argument, beset by all kinds of negative associations that one might dispute in the same way that Bix does with NEED. When analysed in the way that Bix does for NEED, REHABILITATIVE has its own negative associations that anyone might dispute as an unsuitable way to describe alimony law. A seemingly silly example, but one that demonstrate the problem well, is associations of drug use that some may find negative. Just because rehabilitation is sometimes used in this way does not mean that it is being 'stretched' to describe temporary alimony. We can realise that REHABILITATIVE may carry these associations, for some people in some circumstances, yet the extension of rehabilitative alimony in Bix's instance is leaps and bounds away from any such conception. There is of course little we can do, or even should do, if these associations come to mind when the application in question being different to our preferred instantiation of a concept. Suggesting a court act on them and reject the concept, like Bix does for NEED, is not

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<sup>77</sup> *'How Words Mislead Us'* 36

warranted. There is no stronger method of settling these conceptual disputes than appealing to intension and extension. Although the associations of drug use with REHABILITATIVE is a \*seemingly\* rather ludicrous comparison between the different contexts in which rehabilitation can be used, it is functionally identical to Bix taking issue with the use of NEED in the context of family law because in some circumstances one might describe NEED as meaning the satisfaction of ‘minimal requirements of life’. Sometimes NEED is used in that way, and when it is it certainly might bring up an emotive<sup>78</sup> response, but there is no reason to criticise the use of the word in alimony law because of this separate and distinct use of the concept.

Bix is right that associations have significance and courts should be aware of the impact their choices may have. Though without examining the referent in extension we are unable to precisely place a concept into context, and consequently any analysis will revolve around just how we happen to feel about it, and what associations we feel are appropriate based on not very much. Rehabilitative alimony, to use Bix’s example, is a fine way to describe the temporary alimony to which he is referring, for it well communicates the nature of the alimony being provided: ‘give the spouse the time and resources needed to retrain and re-enter the workforce’.<sup>79</sup> Yet, describing the ex-spouse as needing to maintain the same standard of living as that they enjoyed within the marriage is just as valid. (And is actually, on the face of it, a different assessment. Here again Bix crosses the lines between NEED’S apparent misuse and justifications for current alimony law). There is little reason provided by Bix to take his point that we understand this use of rehabilitative alimony ‘better than we understand the word ‘need’<sup>80</sup>. His preference for REHABILITATIVE over NEED is subject to the same erroneous criticisms he makes of NEED.

## **Part II- Degrees of Freedom and Vagueness**

There is a connecting thread between the concepts analysed by Bix: the effect that associations we make towards certain legal concepts can have on communication. Since so many concepts are briefly handled in the article it is not surprising that the mistakes occur with other concepts as well, particularly ‘freedom of contract’:

It is like the question of whether there was meaningful ‘freedom of contract’ for the bakers and other workers in *Lochner v New York* and the related United States Supreme Court cases in the early decades of the 20th century. In those cases, constitutional challenges were brought against state legislation purporting to protect

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<sup>78</sup> Fabrizio Macagno and Douglas Walton, *Emotive Language in Argumentation* (CUP 2014)

<sup>79</sup> ‘How Words Mislead Us’ 36

<sup>80</sup> *Ibid* 36

workers by setting maximum employment hours, minimum hourly wages, and workplace health and safety standards. Those challenging such statutes claimed that the laws unconstitutionally infringed the workers' 'freedom of contract', their freedom to enter agreements to work particularly long hours, for particularly low wages, and in doubtful working conditions.

Rhetorical excess aside, I *really do* mean to say that *it is an interesting question* whether 'freedom of contract' is present, in a morally significant sense, either for the users of software in so-called 'clickware' and 'browseware' transactions and other forms of electronic contracting, or for the workers who were the subject of paternalistic legislation. One can understand the argument that bakers can sometimes reasonably and autonomously choose to work longer hours, even at a low rate and in poor conditions (they may need the extra pay that long hours bring, and the alternative to a low-paying job in bad conditions may be no job at all), ... You can call it 'consent', you can call it 'freedom of contract', but most of the time, I just think it is the 13th floor.<sup>81</sup>

Essentially, Bix suggests it is problematic in some way to talk about 'freedom of contract' in a context that imposes limitation on that freedom. *Lochner v New York*<sup>82</sup> is referenced in illustration of the claim that maximum working hours and minimum wage interfere with freedom to contract. Bix says we are 'allowing ourselves to be fooled'<sup>83</sup>, and that it is 'just the 13<sup>th</sup> floor'<sup>84</sup>, if we consider this to be freedom to contract.<sup>85</sup> The attitude Bix takes towards the 'power of mere labels' is made even more evident through this example from '*How Words Mislead Us*'. Bix offers an example of some restrictions on FREEDOM, and claims that consequently when FREEDOM is attached to these we are 'are allowing ourselves to be fooled'. But it is not only sensible or right to use freedom as a concept when

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<sup>81</sup> *Ibid* 30-31; This is a reference to how the article is introduced, making the point that calling the 13<sup>th</sup> floor of a hotel something else does not stop it being the 13th floor, and setting up the general point of the article in a basic example: 'In large hotels, the floor right above the 12<sup>th</sup> floor is labelled the 14th. For those with an irrational fear of all things '13', this may give some consolation, though if there is any reasoning capacity left among those with such fears, certainly they must realise that the floor right above the 12th is still the 13th, whatever we might call it.' 25

<sup>82</sup> 198 U.S. 45 (1905)

<sup>83</sup> '*How Words Mislead Us*' 31

<sup>84</sup> '*How Words Mislead Us*' (n 81)

<sup>85</sup> It is worth noting, Bix does not say that it is a bad thing that minimum wage and maximum working hours are being offered. It may be desirable, but if we are going to allow these restrictions then we should be honest about it and not refer to 'freedom of contract' in these circumstances.

there are no restrictions involved.<sup>86</sup> Indeed, one could hardly imagine a circumstance where this would be the case; FREEDOM does not sit in a void where it is only applicable where it absolutely is the case. There is a spectrum upon which different instances of the use of freedom are more or less free; the concept FREEDOM is capable of conveying varying degrees<sup>87</sup> and it is sensible, and we are not ‘fooling ourselves’ to say something may be more or less free.<sup>88</sup> Susan Haack, whose ideas around TRUTH I return to in chapter two part II, puts forward that TRUTH is not susceptible to varying degrees, (is not a fuzzy predicate)<sup>89</sup>, as something is either true or not:

Zadeh’s claim that ‘true’ and ‘false’ are fuzzy predicates is supported, in part, by an appeal to linguistic evidence: that certain adverbial modifiers which apply to fuzzy predicates like ‘tall’ and which indicate the degree to which the predicate applies (e.g. ‘very’ ...) also apply to ‘true’ and ‘false’. I shall argue that Zadeh is wrong about this.<sup>90</sup>

The question of whether degrees are conveyed by a particular concept is informed by the huge philosophical literature surrounding vagueness in language and law, making the mistake one that one might reasonably raise an eyebrow at. FREEDOM’s role as a fuzzy predicate, in this way, accounts for the variance in its application. It’s quite possible that Bix did not neglect this relevant philosophy, and simply considers maximum working hours and minimum wage to be so invasive on the freedom of contracting bakers that it is wrong to describe them as having ‘freedom to contract’ as a matter of degrees. That is, these restrictions upon them are sufficiently far on the spectrum<sup>91</sup> of less free (rather

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<sup>86</sup> Such a concept would be useless.

<sup>87</sup> For further discussion see Timothy Williamson, ‘Vagueness in Reality’ in Michael J. Loux and Dean W. Zimmerman (eds), *The Oxford Handbook of Metaphysics* (1st, OUP 2005) and Jeremy Waldron, ‘Vagueness in Law and Language: Some Philosophical Issues’ (1994) 82 *California Law Review* 509.

<sup>88</sup> From Bertrand Russell, ‘Vagueness’ (1923) 1 *Australasian Journal of Philosophy* 84, Pierce ‘Issues of Pragmaticism’ (1905) 15 *The Monist* 481, and Frege (who I return to in detail in chapter two) (For initial commentary see Stephen Puyear, ‘Frege on Vagueness and Ordinary Language’ (2013) 63 *Philosophical Quarterly* 120, to Timothy Endicott, ‘Vagueness in Law’ (OUP 2000) and Matti Eklund, ‘Recent Work on Vagueness’ (2011) 71 *Analysis* 352. I do not have space to properly develop, nor is there a demand to, go into detail on the philosophy on this point as my claim here is quite uncontroversial. I do, however, return to the issue of vagueness in chapter four.

<sup>89</sup> Concepts such as TALL, JUSTICE and FREEDOM are clearly capable of expressing varying degrees of application, though only the former in an exact way (i.e. exactly six feet tall, measurable in relatively precise units). The latter concepts are necessarily fuzzy in the sense one might say ‘At least we had some justice’. Tall is capable of being fuzzy in this way as well as exact (i.e. ‘He’s very/quite tall’’).

<sup>90</sup> ‘Is Truth Flat or Bumpy’ in D.H. Mellor (ed), *Prospects for Pragmatism* (CUP 1980) 2

<sup>91</sup> There have even been attempts to explore exactly how a concept may be applied in this way if possible, (such as exactly six feet tall, rather than a vague remark upon someone’s height), explored by Max Black in

than more free). His position implies that this is the case, yet the obvious problem with his analysis lies undefended: that it is sensible, (and, crucially, people do), use FREEDOM in attachment to referents that come with restrictions upon that freedom.

Furthermore, Bix's errors here fall out under his general mistake of not fully appreciating the difference of a concept and the concept's application to a variety of referents. The issues of vagueness explored above are informed by separating FREEDOM and its various referents in application in the same way as Bix's treatment of NEED; his mistake falls into the exact framework used to address his misconceptions surrounding NEED.<sup>92</sup> Though he offers no particular example of what might constitute an appropriate use of FREEDOM, (as he does with NEED), Bix has a preferred (perhaps idealised) invocation of FREEDOM and consequently attempts to restrict its proper use to this preferred instance. The criticisms he makes of 'freedom of contract' likely flow from this initial misconception; he offers no immediately obvious preference in which FREEDOM most suitably applies, though speaks as if 'freedom of contract' would be present with 'two sophisticated parties negotiating out each significant term of an agreement'. This is to be contrasted with the following example he considers, (which are increasingly more invasive on freedom to contract in comparison to the bakers example), include online contracts,<sup>93</sup> technical contracts which normal consumers have no knowledge of and terms and conditions upon purchase being sent in the box it was sent in, to voting in a fascist state where there is only one party to choose from.<sup>94</sup> These all sit on varying points on the scale of how free contract is understood in these contexts.<sup>95</sup> Some of them may infringe the freedom of contract to such an extent we would not want to describe it as freedom to contract at all (i.e. maybe in overly-technical contracts or certainly in one-party state elections). Yet Bix suggests that almost *any* level of infringement upon freedom means that it would be deceptive to describe it as such, perhaps because of the associations it carries, beneficial or not, and/or simply because it is descriptively inaccurate. Both these positions are deeply misguided. When we analyse whether we want to or should describe someone or something as

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*Vagueness: an exercise in logical analysis* (1937) 4 Philosophy of Science 427. See the Black-Hempel debate, Williamson *Vagueness* (Taylor & Francis 2002) 73

<sup>92</sup> To reiterate for clarity: 1) a preferred, particular invocation of a concept, is identified, that is considered to be especially important. 2) The features of this preferred invocation are brought to mind. 3) These features are transferred onto the concept itself, as opposed to the particular referent that initially evoked those features. 4) The originally flexible and well understood concept is tainted in applications that are not consistent with the features of one, (seemingly random and personal), referent that concept might occasionally have. We shall go on to see how the framework is applicable, and of aid generally, in solving perceived philosophical problems in a variety of contexts.

<sup>93</sup> '[C]lickware' 'How Words Mislead Us' 30

<sup>94</sup> 'How Words Mislead Us' 30

<sup>95</sup> Which is perfectly well explained by basic attention to the necessarily vague application of concepts.

being free or having freedom, we are examining the referent of FREEDOM; be it variations of baker's contracts, one-party states or 'two sophisticated parties negotiating out each significant term of an agreement'.

It is also not clear why the supposed associations that cause 'freedom of contract' difficulty are not to be associated with CONTRACT instead. It is certainly not a given that they pertain to FREEDOM alone, but this is a symptom of a wider problem; that the influence of 'the power of mere labels' is considerably subjective.<sup>96</sup> Lifting a relevant quote from a case I consider in chapter three:

Needs do not exist in a vacuum: there must be a need for something.<sup>97</sup>

This judicial remark relates indirectly to what I refer to as the intension and extension of NEED, which does not 'exist in a vacuum', a real world point of reference is required; an extension for the intension to link with. This is the base problem, from which all others flow, within Bix's analysis. FREEDOM and NEED have almost limitless available extensions, but until attached to one specifically in a particular context it can not be analysed in the way that Bix puts forward. Paying heed to this distinction has allowed me to clear up the rather confusing mess that '*Law and Language: How Words Mislead Us*' leaves of NEED and FREEDOM. Timothy Endicott developed theory around the necessarily vague nature of language in a legal context,<sup>98</sup> and it is natural that some instances of a concept sit on the edge<sup>99</sup> of whether we ought to apply them descriptively or not. It is *not* a working solution to view concepts abstractly, affixing importance to preferred invocations, and finding their use distasteful or wrong if they are used when they do not cohere with these invocations. As with Bix's treatment of NEED then, his treatment of freedom is illuminated by utilising intension and extension to inform foggy issues that would otherwise be impossible to articulate exactly and dissect with sufficient clarity.

This first chapter has served a core purpose in the development of my wider argumentative arc. The detailed inspection of Bix's errors places my evaluations into the frame of contemporary conceptual

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<sup>96</sup> This is not always the case, i.e. where negative or positive connotations are almost universally shared, but these instances still rely on what the extension of the relevant concept is as many exceptions exist (n 69).

<sup>97</sup> *R v Gloucestershire CC and Another, Ex parte Barry* [1997] 2 WLR 459 (HL) 590

<sup>98</sup> Endicott, 'Vagueness in Law' (n 88)

<sup>99</sup> Wittgenstein's notion of 'family resemblance' well articulates this capability of concepts to sit on the edge of their application; *Philosophical Investigations*: 'And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail. 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.' 67

analysis. Without this step, our understanding would be incomplete; the similar errors encountered further in might appear to stand in isolation, mere blips in an otherwise well understood landscape. This is far from the case. We start here at the top of the pyramid, and as we descend, casting off the misconceptions promoted in the highest level of jurisprudence, it becomes apparent they are not contained here alone, but manifest themselves within the application of legal principles themselves. The specific instances of the errors in question are entirely solvable, and this can not be fully achieved without attention to some of the general considerations prompted by such a solution. This, along with the provision of more examples in the form of other theorists, is the aim of the following chapter.



## Chapter Two- A Stronger Understanding and a Better Alternative

### Introduction

This chapter will develop a wider account of the relevant philosophical ideas and issues I have begun to delineate, and of those to come. I will, for the sake of necessary succinctness, be highly selective in what is included and the following will be split into three parts. Part I identifies and examines the purpose of conceptual analysis within the remit of this thesis and explores the basis on which one account may be preferable to another. Also dealt with is how the notion of talking past one another is relevant to my criticisms of Bix in chapter one, and generally of others I go on to discuss. Part II provides evidence and commentary of how the misconceptions I highlight are committed elsewhere, in other philosophical and legal contexts, drawing on work conducted other theorists. Part III sets aside concerns that my thesis is beholden to questions pertaining to the esoteric meaning of a concept, as opposed to a disregard of the relation between a concept and that concept's possible referents. This is necessary in side-stepping irrelevant issues that might otherwise be perceived to bear on my analysis, and is helpful in distinguishing the role intension and extension have within modern conceptual analysis. Finally, the relation that intension and extension hold with other important philosophical distinctions is inspected.

### Part I- On the Defence: Conceptual Claims, Why and How?

I speculatively suggest, though by no means attempts to demonstrate conclusively, (for this would involve an investigation far larger), that if a disregard for intension and extension is made at some of the highest levels of philosophical analysis, it is at least conceivable, if not probable, that the same mistake occurs elsewhere. I present instances where heed ought to have been paid to intension and extension, but this is often in contexts where analysis of language is not the primary aim in mind (i.e. in a court case where language is a means to an end, rather than within philosophical discourse where it is an end in itself).<sup>100</sup> It is significant that the basic philosophical errors of which I speak occur in philosophical analysis where the *aim* of that analysis is at least partly for its own sake. One can imagine conceptual mistakes being made in other contexts, by those who have not studied conceptual analysis in any particular depth, but what we have seen in the previous chapter is the same mistakes

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<sup>100</sup> This is not to imply that such discussions are entirely academic. Bix is right to say in 'Conceptual Questions and Jurisprudence' that we ought to remind ourselves of the practical usefulness of the role of conceptual analysis: 'Although I by no means want to encourage a dismissive or cynical approach to legal theory, I do believe that the sceptical question-"what is the point" and the like- should always be kept in mind, and that it is only by keeping such questions in mind that the issues (and the theorists) can be understood clearly and in depth.' 466

being made in the pursuit of conceptual analysis itself. This is little comfort, however, when these misconceptions cause problems in courts.

In *'Conceptual Questions and Jurisprudence'*,<sup>101</sup> also written by Bix, some relevant and intriguing remarks are made on the role of conceptual analysis in jurisprudence. He attempts 'to elaborate upon some of the differing reasons for conceptual analysis and what consequences may follow from choosing one objective rather than another'.<sup>102</sup> These reasons are made particularly relevant considering the focus of chapter one. *'Conceptual Questions and Jurisprudence'* asks what the point of conceptual analysis is. This is a question worth considering in a little detail here, considering the nature of this thesis. He rightly asks:

Although I by no means want to encourage a dismissive or cynical approach to legal theory, I do believe that the sceptical questions-"what is the point?" and the like- should always be kept in mind, and it is only by keeping such questions in mind that the issues (and the theorists) can be understood clearly and in depth.<sup>103</sup>

This is agreeable. And that:

The merit of a conceptual claim can only be evaluated once it is clear what the purpose of the claim is. The thesis I am defending in this article is that (descriptively or historically speaking) different conceptual claims have different purposes.<sup>104</sup>

*'How Words Mislead Us'* has the following 'purpose': 'explore some of the ways in which we have been led astray, particularly in contract law and family law, by our legal language.'<sup>105</sup> I contend in the previous chapter that the conceptual claims made regarding NEED are false (in the sense an oversight is committed), despite the claim in *'Conceptual Questions and Jurisprudence'* that 'A conceptual claim, as opposed to a claim that is meant to be predictive or explanatory, is not testable or falsifiable, at least not in any obvious way.'<sup>106</sup> The important caveat here being 'not in any obvious way'; Bix goes on to consider in what ways this may be the case. In my rebuttal of his criticism of NEED in alimony law I would associate my critique with what he professes a little further on:

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<sup>101</sup> Brian Bix, 'Conceptual Questions and Jurisprudence' *Legal Theory* (1995) 1 465

<sup>102</sup> *Ibid* 465

<sup>103</sup> *Ibid* 466

<sup>104</sup> *Ibid* 467

<sup>105</sup> 'How Words Mislead Us' 26

<sup>106</sup> 'Conceptual Questions and Jurisprudence' 467

One possible basis for claiming that one conceptual theory was superior to another would be that the definition proffered better reflects the way we actually use the term.<sup>107</sup>

This is quite crucial, for this is taken from Bix's own work and is an agreeable reason for preferring one 'conceptual theory'<sup>108</sup> over another. It is on this basis that I claim my treatment of NEED is superior to Bix's in the context of American alimony law; my conceptual theory 'better reflects the way we actually use the term'. Bix's conception of NEED in *Law and Language* is overly restrictive, and inaccurate when applied to how a concept is actually used, as chapter one explored.

Moreover, Bix concludes that:

(O)ne might not be able to say that a particular conceptual analysis was right or true (at least not in the sense that there would be only one unique right or true theory for all conceptual questions), but I do not see this as a significant loss. It should be sufficient that one can affirm (or deny) that an analysis is good (or better than an alternative) for a particular purpose.<sup>109</sup>

This is a troubling conclusion in some regards, as it may give leeway for the claim that Bix's treatment of NEED in alimony law is good for the purpose he sets out to achieve: to identify how language can detrimentally mislead in a legal context.<sup>110</sup> Though, as I show in a moment, our purposes directly confront each other. An interesting side note is that the above extract potentially breeds an uncomfortable type of relativism with regard to conceptual claims. I would maintain that my analysis of NEED's use is correct universally, not only for a particular purpose; (though this is not necessary to challenge Bix's claim, since our aims coincide with one another, it is sufficiently relevant to remark upon). This is because my analysis accounts for the generality and flexibility, (or stretchiness to use Bix's intended criticism in a positive manner), of concepts, and all instances in which they may be deployed. This claim to universality is consistent with how Bix<sup>111</sup> describes that a 'definition... better reflects the way we actually use the term',<sup>112</sup> since consideration of intension and extension is a method of directly assessing the context of a particular invocation.

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<sup>107</sup> *Ibid* 472

<sup>108</sup> *Ibid* 471

<sup>109</sup> *Ibid* 479

<sup>110</sup> How Words Mislead Us: 'In this article, I will explore some of the ways in which we have been led astray, particularly in contract law and family law, by our legal language.' 26

<sup>111</sup> And also according to Brian Leiter in *Naturalising Jurisprudence* (OUP 2007)

<sup>112</sup> Accordingly this is not to raise issues surrounding relativism or the existence, (or lack thereof), of various kinds of objective truth of the type as explored by, for instance, Finnis in 'Natural Law and Natural Rights', and his surrounding essays. See also John Hasnas, 'Toward a Theory of Empirical Natural Rights', (2005) 22 *Social Philosophy and Policy* 111

Accordingly, under this structure, Bix and I are not ‘talking past each other’, as can often be the problem in conceptual analysis.<sup>113</sup> This is worth some consideration as it is not always apparent if this is the case, and I am keen to dispel any idea that we may be; especially considering the comments considered above from Bix’s 1995 article about the purpose/objective of conceptual analysis being a means of measuring its success. ‘*Concepts, Terms and Fields of Enquiry*’, by Andrew Halpin, responds to Bix. In this, Halpin measures how we can identify whether we share a ‘field of enquiry’<sup>114</sup> in competing analyses. Naturally, my consideration of both Halpin’s article and Bix’s ‘*Conceptual Questions and Jurisprudence*’ will be limited to the points that are relevant to this thesis, for much of what they consider falls outside its remit. Yet there are some key issues of direct relevance. On the face of it, it seems clear that Bix and I are not talking past each other or attending to different ‘fields of enquiry’ when investigating alimony law, partially because we use the same concept in the same context. However as Halpin says:

We start as we must do, with a field of enquiry. The failure to identify our field of enquiry means that we cannot be sure of engaging in meaningful discussion with others, as there is always a danger that we are investigating different fields of enquiry. Even though the field of enquiry may be identified by a particular term, we cannot simply assume that identifying the field of enquiry with a term guarantees a common field of enquiry with those whose field is identified by the same term.<sup>115</sup>

Operating within different fields of enquiry is very closely connected to the idea of talking past one another in conceptual analysis.<sup>116</sup> The above quote illustrates why simply using the same term will not ensure commentators are not attending to different fields of enquiry or talking past one another. Bix and I avoid talking past one another not only because we use the same concept, but also because of the context in which we use it; with the shared aim of inspecting the language used by the courts in alimony law and assessing whether they should do so or not. One might, churlishly, suggest that Bix’s aim is more specific than this, (investigating areas where language misleads us), and his analysis has merit under his objective and my analysis has merit under mine; but there is not scope for each competing analysis to both be correct, due to them having directly competing aims. It is worth noting that the notion of talking past one another is usually used in a way that applies to concepts such as

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<sup>113</sup> Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) and *Law’s Empire* (Hart Publishing 1998)

<sup>114</sup> ‘Concepts, Terms and Fields of Enquiry’ 190

<sup>115</sup> *Ibid* 190

<sup>116</sup> Halpin proposes six criteria for the successful development of a field of enquiry, but it is not necessary to consider them all here; they can be found listed throughout Halpin’s article as A-G starting at 190.

law,<sup>117</sup> democracy<sup>118</sup> and art.<sup>119</sup> However, the same difficulties are quite capable of applying to NEED, making such consideration necessary in defence of my claims in this thesis. The primary significance of Halpin's assessment, for my purposes, is contained in the following:

This general point applies across the three principal purposes in Bix's classification. Bix himself points out the "unresolvable disagreement" that occurs when two theorists are apparently debating the nature of law but have separately identified law with a different feature that the term is capable of conveying. This will apply equally where a different understanding of linguistic usage is taken, or where different criteria for an evaluative test are associated with the term. In his own introduction to legal theory, Bix is forced to limit the term "law" to "municipal, institutional law."<sup>120</sup>

Bix certainly has a different understanding of the linguistic usage of NEED to a degree. Yet this understanding of the linguistic issue is where our disagreement lies. Bix has a 'different understanding of linguistic usage' regarding NEED, and in this small way one may entertain the conclusion that actually we are talking past one another, as his understanding of NEED's use is different to mine, and accordingly this may raise the question how we can sensibly discuss NEED in any meaningful way. Such a contention is baseless; my very criticism is, broadly, that Bix's understanding of how NEED is

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<sup>117</sup> I.e. 'Bix is forced to limit the concept "law to "municipal, institutional law"' *Ibid* 190. If I am talking about international law and you domestic criminal but making competing claims about jurisdiction, for example, in this basic example we are talking past each other.

<sup>118</sup> What need be established for a state to be called a democracy may depend on differing criteria. If we do not agree on these criteria, we may well be talking past each other when talking about whether a state is a democracy or not. The philosophy behind essentially contested concepts was initially developed by W.B. Gallie, 'Essentially Contested Concepts' (1956) 56 *Aristotelian Society* 167, and 'Art as an Essentially Contested Concept' (1956) 6(23) *The Philosophical Quarterly* 97; David Collier, Et Al, in 'Essentially Contested Concepts: Debates and Applications' (2006) 11(3) *Journal of Political Ideologies* 211 put it so: 'Gallie offers an explicit definition, along with seven criteria for identifying, understanding, and reasoning about such concepts. He thereby provides a basis for exploring the connections between the normative focus of these concepts and a series of other characteristics. The criteria are identified throughout his essay with Roman numerals: (I) their appraisive character, (II) internal complexity, (III) diverse describability, (IV) openness, (V) reciprocal recognition of their contested character among contending parties, (VI) an original exemplar that anchors conceptual meaning, and (VII) progressive competition, through which greater coherence of conceptual usage can be achieved.' 212

<sup>119</sup> *Ibid*, the same applies as said with regard to democracy here. The rule of law is another popular example: Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) *Law and Philosophy* March 21 137

<sup>120</sup> 'Concepts, Terms and Fields of Enquiry' 190

used linguistically is a misunderstanding, so it is not possible to conclude that because of this we are talking past each other or investigating different fields of enquiry.

## **Part II- Multiple Truth Concepts: Making them Stick Together**

As we move away from defending against these potentially perceived issues, and on to consider how other theorists have applied intension and extension to unravel philosophical errors, it is worth bearing in mind the following from Halpin's article:

(A) term is frequently capable of conveying different meanings, so that theorist 1, in investigating field X with meaning 1, is involved in a totally different enterprise to that engaged by theorist 2, who is investigating field X with meaning 2.<sup>121</sup>

As we will see, commentary around coherence theories appears to suffer from precisely this, and much more. The misconceptions besetting NEED can be seen, in some ways, in the work done on COHERENCE by Stephen Pethick. He demonstrates in '*Solving the Impossible: The Puzzle of Coherence, Consistency and Law*'<sup>122</sup> and in an article for Ratio Juris, '*On the Entanglement of Coherence*'<sup>123</sup> that philosophical discussion surrounding COHERENCE has wrapped itself in knots for not paying heed to the intension and extension of COHERENCE, leading to baffling conclusions.<sup>124</sup> He puts it so:

(D)espite the grave legal significance of the outcomes that are claimed for its employment, nobody has been able to agree what coherence actually is. Naturally enough, the difficulty encountered in setting down the meaning of the concept has been leapt upon by those sceptical of the claims made for it in application, for it can scarcely be solid ground to employ coherence in, say, reasoning to a verdict of guilt on a capital charge, if coherence itself remains an "elusive", "complex", or even "mystical" notion. Indeed, the small legion of its detractors is now so confident that one writer recently proclaimed (in a monograph entitled *Against Coherence*) that "defining coherence is logically impossible".<sup>125</sup>

The literature surrounding COHERENCE is a harsh indictment of how neglecting intension and extension can result in the creation of philosophical approaches that only serve to complicate the

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<sup>121</sup> *Ibid* 190

<sup>122</sup> (2008) 59 N. Ir. Legal Q. 395

<sup>123</sup> (2014) 27 Ratio Juris 116

<sup>124</sup> For example that 'there are so many different 'coherences' that the prospect of conceptual definition is ruled out altogether' 119 or that finding a meaning is 'logically impossible'. 124

<sup>125</sup> 59 N. Ir. Legal Q. 395 (2008) 1

conceptual questions at play. As Pethick remarks in the above quote, this is particularly concerning in legal theory where the relevant concept is relied on in a legal context, yet is not properly understood, (universally, Pethick suggests),<sup>126</sup> by theorists specifically examining the concept. Pethick claims this is caused by a lack of attention to the intension and extension of COHERENCE:

This thesis is that jurists and others have disregarded the distinction between the intension and extension of coherence, and have thus come routinely to elide the meaning of coherence with various other features of the objects taken to instantiate it.<sup>127</sup>

The similarities between this and my criticism of Bix's treatment of NEED is no accident; Pethick's paper is further demonstration of how attention to intension and extension can help elucidate apparently (falsely) complicated issues in language. Susan Haack, as we will see, demonstrates the same in relation to TRUTH. In Bix's treatment of NEED this disregard led him to conclude that the American courts were misusing NEED and FREEDOM, and different coherence theories have been led to various other untenable conclusions due to this neglect. As Pethick says in his paper:

I argue that *all* present accounts of coherence suffer from a particular weakness, whether they are written "against coherence"... or are offered by advocates of its use... My contention is that legal theorists and other writers in philosophy, linguistics, literary criticism, and elsewhere have happened universally to misidentify characteristics of objects of which coherence may be predicated as characteristics of coherence itself.<sup>128</sup>

Pethick displays evidence for three distinct claims, by a variety of theorists,<sup>129</sup> which are made of COHERENCE as a result of this misunderstanding:

(T)hat there is a single true coherence, in virtue of which other accounts or uses of coherence must be mistaken; or that there must be *kinds* or *types* or *concepts* of coherence; or that there

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<sup>126</sup> 'On the Entanglement of Coherence': 'My contention is that legal theorists and other writers in philosophy, linguistics, literary criticism, and elsewhere have happened universally to misidentify characteristics of objects of which coherence may be predicated as characteristics of coherence itself. This mistake is due to the failure to distinguish carefully between aspects of the intension of coherence and aspects of its extension.' 118-119

<sup>127</sup> *Ibid* 131

<sup>128</sup> *Ibid* 118, citing Erik Olsson, *Against Coherence: Truth, Probability and Justification* (Clarendon Press 2005) and Amalia Amaya, 'Legal Justification by Optimal Coherence' (2011) 24 *Ratio Juris* 304

<sup>129</sup> To name a few: Laurence Bonjour, *The Structure of Empirical Knowledge* (HUP 1985); Paul Thagard, *Coherence in Thought and Action* (MIT Press 2000); Erik Olsson, *Against Coherence: Truth, Probability and Justification* (Clarendon Press 2005) and Stefano Bertera, 'The Arguments from Coherence: Analysis and Evaluation' [2005] 25 *Oxford Journal of Legal Studies* 369

are so many different ‘coherences’ that the prospect of conceptual definition is ruled out altogether.<sup>130</sup>

Each of three claims leads down an unnecessarily complex and winding path, causing theorists to become wrapped up in semantics, and ultimately a defective understanding of COHERENCE in various fields. Balkin slips into one of these misconceptions, that occur without a careful distinction between a concept and what that concept is capable of being predicated:

However, before we can begin our discussion of the specific form of understanding involved in judgments of legal coherence, we must first distinguish several different types of coherence. The first is the coherence of a set of factual beliefs, the second is the coherence of a normative system like the law, and the third is a question of logical or narrative coherence.<sup>131</sup>

While Olsson reaches the opposite conclusion:

(T)hat defining coherence is *logically* impossible, that there is no formula or statement, however long, which could do the job adequately... Just as there are no square circles, there is nothing out there that could play the role coherence is supposed to play. The description of that role is itself incoherent. Small wonder that there has been so little progress in defining coherence!<sup>132</sup>

The claim by Olsson that COHERENCE is ‘logically impossible’<sup>133</sup> to define<sup>134</sup> stands in contrast to the solution offered by Balkin, (that ‘we must first distinguish several different types of coherence’) but both solutions are unnecessary, as they are ultimately solving a problem that does not exist. Both proposed solutions are bizarre conclusions to draw from an analysis of COHERENCE as a concept when paying heed to its intension and potential extensions, which comfortably explains the variance in application of COHERENCE. As rebutted by Pethick:

Any scepticism is understandable, for it can seem as if I am merely accusing theorists of misspeaking. It is as if jurists and others could simply shuffle some of what was taken for

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<sup>130</sup> *Ibid* 119

<sup>131</sup> Jack Balkin, ‘Understanding Legal Understanding: The Legal Subject and the Problem of Coherence’ (1993) 103 *Yale L.J.* 105 115

<sup>132</sup> ‘On the Entanglement of Coherence’ 124, citing Erik Olsson, *Against Coherence: Truth, Probability and Justification* (Clarendon Press 2005)

<sup>133</sup> There is the additional argument made, that is criticised by Pethick as falling out under the same error, that there is a ‘single true coherence’ but these extracts are sufficient for my demonstration.

<sup>134</sup> Pethick posits a definition roughly of ‘sticking together’ and ‘(If) an argument is said to cohere, then what is proposed is that it sticks together. How, or in consequence of what, some thing or some things ‘stick together’ is then answered by the nature of, or particular relationship between the object(s) that cohere.’ 130



intension into the category of extension, and we could proceed much as before, only now with more accurate labelling of parts. To combat this perception I conclude by pulling together and emphasising the damage caused by the mistake to some of the claims made for coherence in the legal literature.<sup>135</sup>

My considerations in chapter one, and what I go on to examine in chapter three and four, make it apparent the difficulty is not simply one of categorising and ‘shuffling’ precisely what falls into intension and what into extension then moving smoothly onwards. Errors in reasoning are directly attributable to the neglect, and need to be substantially addressed. Pethick draws on commentary by Jonathan Morgan who claims within *‘Tort, Insurance and Incoherence’*:

Legal coherence, one would have thought, must be shared as a universal aspiration by lawyers (and even legal philosophers) ... Quite what ‘coherence’ requires, however, is immensely controversial.<sup>136</sup>

What COHERENCE requires linguistically is, despite claims to the contrary, clearly understood, not immensely controversial. It is not as if barristers arrive at court and are incapable of effectively employing coherence in discussion with a judge due to the controversial nature of COHERENCE. The multitude of deeply confused claims around COHERENCE share characteristics with the mistake I highlight by Bix in the previous chapter, and this is because it is the same error that is being made, just in a different context. He explains precisely what this error is:

(I)n articulating coherence, C, theorists all happen to have in mind some x that instantiates it, and then draw on features of Cx in their attempt to determine C, causing the inadvertent imputation to C of characteristics possessed otherwise by the x in question. Consequently, attempts to articulate the meaning of coherence have succeeded only in providing more or less detailed sketches of particular things that theorists suppose cohere, and which they happen to have in mind when bringing coherence into view. This confusion accounts for the full range of problems and puzzles that are commonly held to beset the conceptual analysis of coherence, and which have, in turn, been taken to weaken the case for its use in law and other fields.<sup>137</sup>

In a similar manner, Susan Haack explores confusion around TRUTH, and concludes the perceived difficulties that beset it can suitably be understood by separating TRUTH itself as a concept, the various extensions of which it is capable of being predicated:

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<sup>135</sup> *Ibid* 26-27

<sup>136</sup> Johnathon Morgan, ‘Tort, Insurance and Incoherence’ (2004) 67 MLR 384, 21

<sup>137</sup> *Ibid* 6

My thesis, with respect to this use, will be that there is one truth, but many truths: i.e., one unambiguous, non-relative truth-concept, but many and various propositions, etc., that are true. One truth-concept: to say that a claim is true is to say (not that anyone, or everyone, believes it, or that it follows from this or that theory, or that there is good evidence for it, but) simply that things are as it says. But many truths: particular empirical claims, scientific theories, historical propositions, mathematical theorems, logical principles, textual interpretations, statements about what a person wants or believes or intends, statements about grammatical, social, or legal roles and rules, etc., etc.<sup>138</sup>

Haack identifies that TRUE has a multitude of distinct uses and offers numerous examples of how each meaning can differ.<sup>139</sup> She makes the claim that there is ‘one truth-concept’:

Someone might deny that there is one truth-concept either because he thinks that there is more than one such concept, or else because he thinks that there is none.<sup>140</sup>

Such a denial would be to miss the point: a symptom of having mistakenly dug so deep into the pursuit of what TRUTH’s ‘meaning’ is, (or NEED and COHERENCE’s meaning, for that matter) without regard for the dual nature of such concepts; a dual nature that is encapsulated in intension and extension. The similarities with the criticisms of COHERENCE we just saw are readily apparent in relation to Haack’s analysis of TRUTH here. The claim by Haack that accounting for our use of concepts like COHERENCE and NEED can be achieved optimally by stating there is one ‘truth-concept’ and multiple propositions which are capable of being true is, for all practical purposes, identical to articulating it via intension and extension. If we recall from chapter one, Bix’s misunderstanding, and everything that fell out underneath it, could be resolved by attention to the same division. In addition, the perceived problems and proposed solutions found in literature regarding COHERENCE are practically identical. Haack summarises:

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<sup>138</sup> ‘The Unity of Truth and the Plurality of Truths’ (2010) 9 *Principia* 87 87; As I remarked earlier Haack makes some intriguing points regarding the postmodern and relativist accounts of truth in the same article; this is not what I am concerned with. My comments are restricted to the errors that fall out under a lack of attention to the intension and extension of truth, as opposed to getting tied down in questions of what it is to say something is true or not in a metaphysical sense, (further in I speak a little of the correspondence theory of truth though where relevant).

<sup>139</sup> The article does concern other arguments as well, for example the objectivity of TRUTH (‘truth is objective, but our efforts to discover truths about the world are fallible’ 104) but these are obviously not of concern in my thesis.

<sup>140</sup> *Ibid* 3

(T)here have been many who have held that all real truths, or perhaps all ultimate truths, are of just one kind<sup>141</sup>

And:

(P)erhaps it is no wonder that it has sometimes been supposed that true propositions are *so* varied and *so* heterogeneous that there can't be just one concept of truth, but must be many – mathematical truth, scientific truth, legal truth, literary truth, and so forth. But the heterogeneity of true propositions doesn't require a plurality of truth-concepts.<sup>142</sup>

In a later paper entitled *The Whole Truth and Nothing but the Truth*<sup>143</sup> Haack demonstrates conclusively that her position is to be found entirely within the frame of intension and extension:

The word “truth” is sometimes used as an abstract noun: so used, it refers to the concept of truth or, as some might prefer to say, to the property of being true, or to the meaning of the word “true” and its synonyms in other languages. It is also sometimes used to refer to the things that fall in the extension of this concept; i.e., to true propositions, beliefs, statements, theories, etc.<sup>144</sup>

Before moving on to a closer consideration of intension and extension, one of her opening remarks is well worth highlighting:

Put like this, my thesis sounds almost embarrassingly simple, even naive. Still -- as Frank Ramsey said in a closely related context -- "there is no platitude so obvious that eminent philosophers have not denied it" ... it becomes apparent that my initial, simple formulation disguises many complexities.<sup>145</sup>

Having to reiterate and unwind oversights caused by not properly parting a concept, and what that concept is able of being predicated, does indeed sound ‘almost embarrassingly simple, even naïve.’ But when applied to the mistakes I have considered so far, and will go on to consider, ‘it becomes apparent that my initial, simple formulation disguises many complexities.’ Pethick remarked that, like COHERENCE, ‘many ordinary concepts might feel equal pressure just where much stands to be gained or lost under their use’<sup>146</sup> and in a legal context many ordinary concepts certainly do have much to be

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<sup>141</sup> ‘The Unity of Truth and the Plurality of Truths’ 29

<sup>142</sup> *Ibid* 5

<sup>143</sup> (2008) 32(1) *Midwest Studies in Philosophy* 20

<sup>144</sup> *Ibid* 1

<sup>145</sup> *Ibid* 3

<sup>146</sup> ‘On the Entanglement of Coherence’ 117

gained or lost in their application. My suggestion that the neglect is wide spread can not, for practical reasons, be demonstrated conclusively; I provide evidence and reason to properly raise the question of whether it is wide spread beyond the examples I examine. My thesis has no greater aim than that, but covers a range of concepts, some in detail and some more briefly, to show the plausibility of this suggestion. After all, if Bix's conceptual analysis suffers from the errors I highlight then that alone ought to be enough to raise the suggestion the same errors might be happening elsewhere and, as we have seen and will see, they are, in a variety of contexts. The role of intension and extension is well established in philosophy and grammar, it is not some abstract and poorly understood notion that has applicability in only a few niche areas. On the contrary, the notion is entirely applicable to all concepts and assists in solving a range of problems in conceptual analysis. It provides the tools to properly analyse language, through separating a concept and what that concept is properly able to attach to in extension, and assists in articulating what would otherwise be very difficult and laborious to communicate, if not impossible.

The remaining chapters of this thesis will explore how spurious judgments can be reached if the intension and extension is neglected, and show how awareness of potential extensions leads to greater clarity in language and thought across all concepts. The neglect of intension and extension with regard to NEED goes further, and is neglected with other, legal and otherwise, concepts; increasing the need for a greater understanding.

### **Part III- Making Sense of Concepts Related to Intension and Extension**

I have put forward the claim that my thesis is not dependent, nor stands or falls, on an esoteric understanding of meaning.<sup>147</sup> Somewhat ironically, we have seen precisely this pursuit lead theorists to devalue and disregard intension and extension. To expand how my position does not rely on the specific or technical identification of meaning, it is worth examining an extract from Hilary Putnam in 'The Meaning of "Meaning"' (a fitting title, considering the point):

Now consider the compound terms "creature with a heart" and creature with a kidney."  
Assuming that every creature with a heart possesses a kidney and vice versa, the extension of these two terms is exactly the same. But they obviously differ in meaning. Supposing that there is a sense of "meaning" in which meaning = extension, there must be another sense of "meaning" in which the meaning of a term is not its extension but something else, say the "concept" associated with the term. Let us call this "something else" the *intension* of the term.  
The concept of a creature with a heart is clearly a different concept from the concept of a

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<sup>147</sup> A typical example might be the denotative theory of meaning: see Russell Wahl, 'Russell's Theory of Meaning and Denotation and "On Denoting"' (1993) 31 *Journal of the History of Philosophy* 71

creature with a kidney. Thus the two terms have *different* intension. When we say they have different “meaning,” meaning=intension. *Intension and extension*. Something like the preceding paragraph appears in every standard exposition of the notions “intension” and “extension.” But it is not at all satisfactory. Why it is not satisfactory is, in a sense, the burden of this entire essay. But some points can be made at the very outset: first of all, what evidence is there that “extension” *is* a sense of the word “meaning”? The canonical explanation of the notions “intension” and “extension” is very much like “in one sense ‘meaning’ means *extension* and in the other sense ‘meaning’ means *meaning*”. The fact is that while the notion of “extension” is made quite precise, relative to the fundamental logical notion of *truth* (and under the severe idealizations remarked above), the notion of intension is made no more precise than the vague (and, as we shall see, misleading) notion “concept.”<sup>148</sup>

There are two relevantly significant points made. Firstly, that ‘meaning’ is not easily located in intension, (nor extension), and attempts to use intension in this way is flawed.<sup>149</sup> My thesis has a more basic target than such questions. Rather, it is an analysis of a perceived lack of attention to distinguishing between *a concept* and *the object of which the concept is predicated*. Or put alternatively, between the intension and extension of a concept. Questions like: ‘(W)hat evidence is there that “extension” *is* a sense of the word “meaning”?’ are of a different nature to the discourse I undertake here.

He remarks that ‘the notion of intension is made no more precise than the vague (and, as we shall see, misleading) notion “concept”’. The fact that Putnam acknowledges ‘intension’ is no more precise than ‘concept’ is significant, as ‘concept’ itself is actually precise enough for my analysis. I frequently distinguish a concept in abstract and whatever that concept is predicated of in context, relying on expressions such as ‘the concept NEED’ (for instance) to refer to NEED itself, unattached to any particular proposition. By ‘the intension of NEED’, I am effectively communicating the same idea.

Putnam’s position is in relation to looking toward the intension, (or extension), to find a concept’s meaning; as opposed to any general criticism of its precision for other purposes. What intension constitutes *precisely* is comfortably left aside in analysing issues that might arise out of failing to discern between an object a concept is predicated of and that concept itself; which is as far as I rely on the notion of intension in confronting the problems I do. It is entirely irrelevant in my task to assess the ability for intension to bear the weight of abstract questions of meaning, or to articulate with exactness, in the way Putnam imagines, what intension constitutes.

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<sup>148</sup> Hilary Putnam, ‘The Meaning of “Meaning”’ (1975) 7 *Minnesota Studies in the Philosophy of Science* 131

<sup>149</sup> *Ibid*, ‘We saw at the outset that meaning cannot be identified with extension. Yet it cannot be identified with “intension” either, if intension is something like an individual speaker’s *concept*’. 164

There have been many methods developed in such a pursuit of meaning within a variety of philosophical traditions, (though it is typically associated with the analytic school of thinking), for instance that sought by the logical positivists: the reductive analysis of concepts in an attempt to identify the sum of their parts, with statements that were not empirically verifiable being cognitively insignificant.<sup>150</sup> The verification principle<sup>151</sup> held that a statement would not be *cognitively meaningful* unless its truth is empirically justifiable.<sup>152</sup> Logical positivism was informed by a number of key philosophers and texts, including early Wittgenstein in ‘*Tractatus Logico-Philosophicus*’,<sup>153</sup> Rudolf Carnap<sup>154</sup> in ‘*The Logical Structure of the World*’,<sup>155</sup> Frege, and Bertrand Russell who wrote the influential ‘*Principia Mathematica*’.<sup>156</sup> Even late Wittgenstein concerned himself with this, in essence, despite his recommendations to abandon such pursuits as meaning is to be derived from the use, hence why he considered himself to be ending philosophy. Really, if he succeeded in this aim, it was an ending of a *particular type* of philosophy- the pursuit of meaning that dominated philosophy.<sup>157</sup> In response to *Principia Mathematica* Nicholas Rescher wrote ‘*The Distinction*

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<sup>150</sup> Carl Hempel, ‘The Concept of Cognitive Significance: A Reconsideration’ (1951) 80 Proceedings of the American Academy of Arts and Sciences 61, in which Hempel reconsidered the: ‘possibility of restating the general idea in the form of precise and general criteria which establish sharp dividing lines (a) between statements of purely logical and statements of empirical significance, and (b) between those sentences which do have cognitive significance and those which do not.’ 61

<sup>151</sup> Alfred Ayer, *Language, Truth and Logic* (first published 1936, Penguin 2001)

<sup>152</sup> Hempel, ‘The Concept of Cognitive Significance’ (n 150): ‘It is a basic principle of contemporary empiricism that a sentence makes a cognitively significant assertion, and thus can be said to be either true or false, if and only if either (1) it is analytic or contradictory- in which case it is said to have purely logical meaning or significance- or else (2) it is capable, at least potentially, of test by experiential evidence- in which case it is said to have empirical meaning or significance.’ 61; Metaphysical claims naturally fell outside this remit (i.e. Immanuel Kant, *Critique of Pure Reason* (first published 1781, 2<sup>nd</sup> edn, Palgrave Macmillan 2007) and Friedrich Hegel: see Robert Stern, *Hegelian Metaphysics* (OUP 2009)

<sup>153</sup> (*Annalen der Naturphilosophie* 1921); Irving Copi and Robert Beard (eds), *Essays on Wittgenstein’s Tractatus* (Routledge 1966)

<sup>154</sup> Carnap also developed his particular idea of intension and extension, mostly within formal logic; his aims regarding logical positivism are not relevant to my analysis here, but I return to him later in relation to intension and extension.

<sup>155</sup> Rudolf Carnap, (Open Court Publishing Company 1928)

<sup>156</sup> Bertrand Russell and Alfred Whitehead (Cambridge University Press, Vol I, II and III each published 1910, 1912, 1913 respectively).

<sup>157</sup> And not just philosophy, naturally it was and still is the concern of linguistics: ‘According to Mona Baker (1992), every word or utterance has something that makes it different from any other word – lexical meaning. According to Cruse (1986), we can distinguish four main types of meaning in words: propositional meaning, expressive meaning, presupposed meaning, and evoked meaning... According to him, a lexical unit has 7 types

*between Predicate Intension and Extension*<sup>158</sup> which takes the position that philosophy can learn important lessons from intension and extension:

I propose here to give some indications why the distinction between intension and extension, although of no critical significance for mathematics, not only is useful, but quite important for philosophical purposes.<sup>159</sup>

And:

For philosophical purposes — for which, unlike mathematics, such contexts are clearly of fundamental importance — it is necessary to insist upon maintenance of the distinction between properties in intension as opposed to properties in extension. Such considerations indicate that for philosophical uses the distinction between intension and extension is needed, and must be drawn with care, despite the fact that it does not arise in mathematics.<sup>160</sup>

It is generally accepted that the principal aim of analytic philosophy is to elucidate conceptual questions,<sup>161</sup> ‘a kind of intellectual taking to pieces of ideas or concepts; the discovering of what elements a concept or idea is composed and how they are related’.<sup>162</sup> This concern with the elements of a concept or idea, what it is composed of, often formulates itself in the pursuit of information about the concept itself. Issues surrounding the intension of a given concept are frequently the aim of analysis. My claim is based on something more simplistic than the nature of such questions: the failure to pay attention to the relationship between a concept and its potential referents. Intension and extension simply expresses the, (one would imagine), uncontroversial view that concepts have both an intension, or conception, independent of any particular context, and a range of contexts of which the concept is capable of linking with in extension. It is in this way that the general argument of my paper

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of meaning...’ Zhala Jalfarli, Ali Rahimi, ‘An In-depth analysis of the Manifestation of Emotions and Ideas through Similies in Short Stories by Somerset Maugham’ (2013) 3 Research on Humanities and Social Sciences 14

<sup>158</sup> (1959) 57(56) *Revue Philosophique de Louvain* 623, (Written concerning formal logic: ‘It remains to consider the question of how this distinction can be assimilated within modern formal logic.’ 630)

<sup>159</sup> *Ibid* 623

<sup>160</sup> *Ibid* 626-627

<sup>161</sup> Strawson, *Analysis and Metaphysics* (OUP 1992): ‘The analytical philosopher, on the other hand- at least as I conceive him- promises no such new and revealing vision. His aim is something quite different. ‘What is it then, his aim? What is he concerned with? Well, with ideas or concepts surely. So his self-awarded title of ‘analytical philosopher’ suggests ‘conceptual analysis’ as the favoured description of his favoured activity...So we have the picture of a kind of intellectual taking to pieces of ideas or concepts; the discovering of what elements a concept or idea is composed and how they are related.’ 2

<sup>162</sup> *Ibid* 2

flies under the radar of these more removed and theoretical disputes that exist over the notion of meaning. Pethick puts it attractively in his treatment of COHERENCE:

In this paper I am deliberately cavalier about the distinctions between meanings, concepts, conceptions, intensions and the like, precisely because my criticism has a more rudimentary target; i.e. the lack of interest in the relation between such meanings, concepts, intensions, etc., and their multiple referents in extension.<sup>163</sup>

Like Pethick's article my thesis concerns 'the lack of interest in the relation between such meanings, concepts, intensions, etc., and their multiple referents in extension' as opposed to any questions holding to these other ambitions. This 'rudimentary target'<sup>164</sup> Pethick writes of however, does not take away from the seriousness of the error in question. If anything it makes it more important to correct mistakes surrounding it, as it is a fundamental building block of language use that is being ignored or abused. This is fitting with Wittgenstein's statement that: 'What we find in philosophy is trivial; it does not teach us new facts, only science does that. But the proper synopsis of these trivialities is enormously difficult, and has immense importance. Philosophy is in fact the synopsis of trivialities.'<sup>165</sup>

That troubled philosophical discourse can be unravelled and solved by utilising the intension and extension tool is made even more surprising by the fact similar distinctions (although by no means identical)<sup>166</sup> have been present for a long time in philosophy through sense and reference:

A proper name (word, sign, sign combination, expression) *expresses* its sense, *stands for* or *designates* its reference. By means of a sign we express its sense and designate its reference.<sup>167</sup>

The German philosopher, Gottlob Frege, coined the term. The 'sense and reference', distinction, or 'Sinn and Bedeutung', in his famous 1892 paper 'Über Sinn und Bedeutung'<sup>168</sup> ('On Sense and Reference'). The relevance of this to intension and extension is undoubtable; as David Chalmers

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<sup>163</sup> 'On the Entanglement of Coherence' 129

<sup>164</sup> *Ibid* 15

<sup>165</sup> Wittgenstein, *Wittgenstein's Lectures Cambridge, 1930-1932* (Desmond Lee (ed) UCP 1982) 26; Bertrand Russell also claimed, in a more accusatory manner, that Wittgenstein went on to 'trivialise' philosophy: Ilham Dilman, 'Wittgenstein, Philosophy and Logic' (1970) 31 *Analysis* 33

<sup>166</sup> David Chalmers, 'On Sense and Intension' (2002) 16 *Philosophical Perspectives* 135

<sup>167</sup> Gottlob Frege, 'On Sense and Reference' (first published 1892, A.W. Moore (ed) *Meaning and Reference* OUP 1993)

<sup>168</sup> *Ibid*



opens *On Sense and Intension* with: 'I think Frege was closer to the truth: one can articulate an aspect of meaning with many, although not all, of the properties that Frege attributed to sense.'<sup>169</sup>

Frege's paper opens:

Equality gives rise to challenging questions which are not altogether easy to answer. Is it a relation? A relation between objects, or between names or signs of objects? In my *Begriffsschrift* I assumed the latter. The reasons which seem to favour this are the following:  $a = a$  and  $a = b$  are obviously statements of differing cognitive value;  $a = a$  holds *a priori* and, according to Kant, is to be labelled analytic, while statements of the form  $a = b$  often contain very valuable extensions of our knowledge and cannot always be established *a priori*. . . . Now if we were to regard equality as a relation between that which the names 'a' and 'b' designate, it would seem that  $a = b$  could not differ from  $a = a$  (i.e. provided  $a = b$  is true).<sup>170</sup>

I open by considering this extract because it raises a key issue that surrounds the notion of sense and reference, historically speaking. What Frege means by equality in this context is nothing more than the notion of two things being equal in a technical sense; that a equals a ( $a = a$ ), and, a equals b ( $a = b$ ) in some contexts are equal when it comes to denoting objects in the world. Frege uses numerous examples throughout the essay, some in particular I will consider below, but for now I will pose a hypothetical to bear in mind. It is unproblematic to assert Spiderman = Spiderman,<sup>171</sup> ( $a = a$ ), and as Frege points out at the start of 'On Sense and Reference' the truth value of this statement can be determined a priori. It is different, at least in some ways, to say Spiderman = Peter Parker, ( $a = b$ ). Explaining the significance of this puzzle in conceptual analysis was a significant issue and 'On Sense and Reference' was partly a discussion of this issue. This puzzle, referred to as the issue of substitutivity,<sup>172</sup> described the problem that philosophy once had of trying to explain how using different terms to describe the same referent could have different cognitive significance. The problem of substitutivity supposedly emerges when we replace these two terms with each other in certain sentences, that is, two co-referential terms. Peter Parker and Spiderman are co-referential terms in that they share the same referent, and Superman and Clarke Kent for the same reason. For instance 'Lois

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<sup>169</sup> 'On Sense and Intension' 135

<sup>170</sup> 'On Sense and Reference' 23

<sup>171</sup> To adopt a popular way of exploring the issue in textbooks. Batman being Bruce Wayne, and Superman being Clarke Kent for example are provided in Lawrence Goldstein, Andrew Brennan, Max Deutsch and Joe Lau, *Logic: Key Concepts in Philosophy* (Bloomsbury 3PL 2005). More typical (and historical) examples may be Mark Twain and Samuel Clemens, or Cicero and Tully as in Anthony Grayling, *Introduction to Philosophical Logic* (first published 1982, 3<sup>rd</sup> edn Wiley-Blackwell 1997).

<sup>172</sup> 'Logic: Key Concepts in Philosophy' 101

Lane believes superman can fly' and Lois Lane believes Clark Kent can fly'<sup>173</sup> are clearly distinct, but explaining how this may be the case (in a theory that was consistent in other areas of philosophy) eluded philosophers. Frege's proposed solution was to draw a distinction between what he described as the sense and reference of a concept. This essentially distinguishes the cognitive significance of the co-referents, (Clark Kent, and Superman).

The usefulness of making a distinction of sense and reference was significant to philosophers in the 19<sup>th</sup> and early 20<sup>th</sup> century partly because they were attempting to solve the particular issue of substitutivity. Intension and extension is as much a grammatical distinction as that of a philosophical one, (one could hardly successfully analyse language philosophically without close attention to grammar usage),<sup>174</sup> yet its usefulness was perhaps overlooked with the overhaul of conceptual analysis that Wittgenstein and others caused in the 20<sup>th</sup> century.<sup>175</sup> This may have been due to the seemingly overly-technical nature of intension and extension (in the sense that Putnam considers them above, for instance). It is not difficult to imagine the movement that rejected the hunt for meaning, beyond looking at how a concept is used, might casually discard intension and extension without appreciating its full value; though once again we are faced with a great irony: intension and extension possibly fell by the wayside during this transformation in philosophy, yet is a powerful means of analysing a concept's specific, contextual use. While there are differences between sense/reference and intension/extension, what they fundamentally signify, that there is an important difference between concept and referent, is the common thread.<sup>176</sup> It can be seen that intension and extension is

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<sup>173</sup> *Ibid* 101

<sup>174</sup> *Philosophical Investigations*: 'Grammar does not tell us how language must be constructed in order to fulfil its purpose, in order to have such-and-such an effect on human beings. It only describes and in no way explains the use of signs.' 496

<sup>175</sup> There has been, as Stephen Laurence and Eric Margolis examine in 'Concepts and Conceptual Analysis' (2003) 67 *Philosophy and Phenomenological Research* 253, 254 a 'revival' of conceptual analysis in recent years. Their paper's focus is on a particular defence of conceptual analysis as conducted by Jackson, (which they conclude is insufficient reason), but they claim that: 'Conceptual analysis has had a long and venerable history tracing back to the very origins of philosophy, but it took on a particularly heavy burden in the early 20th century when it was widely thought, following Carnap and others, that scientific concepts must be definable a priori and that it's philosophy's job to furnish the definitions. However, in the 1950s and 1960s, W.V.O. Quine and Hilary Putnam convinced many philosophers that this is a mistaken view. Quine and Putnam highlighted the limits of a priori inquiry, noting that science sometimes overturns even our most cherished beliefs.' 254

<sup>176</sup> A similar distinction exists between connotation and denotation, expanded by Mill in his *System of Logic*. As put forward by William Parry and Edward Hacker: 'Little standardization of terminology has been achieved in this area of logic. Some logicians use "extension as a synonym for "denotation", and "connotation" or "comprehension" as synonymous for "intension". *Aristotelian Logic* (State University of New York Press 1991) 503. There is no value in dissecting these relationships for the purposes of my analysis. To do so would be to

not used consistently in modern conceptual analysis; while an interesting question, whether, and to what degree, this neglect is attributable to the rise of ordinary language philosophy is difficult to say. What can be said with certainty is that there is such neglect, and the consequences are significant for jurisprudence and law.

So far, I have accounted for a few particular instances in which intension and extension resolves conceptual errors, in an article by a theorist prominent enough to question the potential pervasiveness of the neglect. This contention is supported by evidence from the literature surrounding both TRUTH and COHERENCE, enabling a wider scope for the idea that intension and extension has been abandoned in important ways within conceptual analysis. I have defended against potential critiques that may otherwise be perceived to damage my claims, and examined the notion of intension and extension in the necessary detail. On the back of this analysis, I now proceed to explore the neglect of intension and extension within community care cases; examining how subtle changes to the extension NEED and NECESSITY can change how the concepts are understood in a legal context. The consequences of this vary from the needless complication of the legal issues at hand, to the potential for erroneous decisions to be reached.

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begin to account for a general theory of what intension is constituted of, which as I have just explored, is an entirely different undertaking.

## Chapter Three- ‘Need’ In Community Care

### Introduction

In this chapter I will examine needs assessments;<sup>177</sup> they determine the care provided for patients in social welfare and community care law, and can be better understood and applied through awareness of the split between NEED’s intension and extension. What I have put forward thus far will be considered in a directly legal context, though the core ideas developed in previous chapters remain the same. In certain circumstances, in order to determine a course of treatment for a patient, care givers are under a statutory duty to provide an assessment of their needs<sup>178</sup> and provide treatment accordingly.<sup>179</sup> Some of the problems I identify here are either incredible linguistic oversights by judges, or attempts to manipulate language to arrive at the conclusion they want, with scant regard for the legal decision that might otherwise properly be reached. I will draw particularly on a trio of cases concerning resource allocation: *R(McDonald) v Kensington and Chelsea RLBC*,<sup>180</sup> and also *R v Kirklees Ex P Daykin*<sup>181</sup> and *R v Gloucestershire CC Ex P Barry*.<sup>182</sup> *McDonald* will be the primary focus of my analysis as it well demonstrates the point this chapter tries to make, and provides a good focal point to demonstrate how needs assessments can be analysed and helpfully informed by reliance on intension and extension.

Judicial commentary around needs assessments has lacked necessary attention to the intension and extension of NEED, and many points of consideration spiral from this basic premise. A manipulation of what NEED is predicated of within an original needs assessment results in the demonstrable potential for needs assessments to be unenforceable by claimants against care providers. Initially, consider the following hypothetical. A health authority needs to allocate a certain level of financial support to a patient, patient X. Patient X, a competitive athlete, has a badly sprained leg and a decision has to be made as to what level of financial support will be offered. To simplify matters, let’s say the local authority have concluded to either: provide a crutch and recommend rest, or regular physiotherapy to speed up recovery. They are under a statutory duty to conduct a needs assessment to make this

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<sup>177</sup> <[http://www.nice.org.uk/media/150/35/health\\_needs\\_assessment\\_a\\_practical\\_guide.pdf](http://www.nice.org.uk/media/150/35/health_needs_assessment_a_practical_guide.pdf)> accessed 9 October 2013

<sup>178</sup> S 47 National Health Service and Community Care Act 1990

<sup>179</sup> Needs may include ‘psychological needs’. *R v Avon County Council, Ex parte M.* [1994] 2 F.L.R. 1006; *R v Gloucestershire CC Ex P Barry* [1997] A.C. 584

<sup>180</sup> [2011] UKSC 33

<sup>181</sup> [1996] EWCA Civ J1126-5

<sup>182</sup> [1997] 2 WLR 459 (HL) 610

decision.<sup>183</sup> This, as one would expect, involves analysing the patient's needs and providing a suitable treatment. Unsurprisingly, whether the needs assessment is satisfied or not will result in what the extension of NEED is, in the context of their needs assessment. If the need is to 'achieve a full recovery', then rest and a crutch will satisfy the requirement stating that NEED states. On the other hand, if it is 'the level of support that will be necessary to achieve the speediest recovery to enable patient X to compete in a tournament next month' they will need to allocate a physiotherapist to satisfy the need put forward by the test.<sup>184</sup> Were it decided that recovery to compete was his specific need and he sought to enforce his needs assessment in court, one would expect that in court this is the particular extension of NEED that would be relied on in assessing whether a care giver breached their duty. Yet as we will see this is not always the case, and a general need is substituted for the specific one identified in the original needs assessment. This is not just to take issue with the use of NEED based treatment on a solely linguistic level. It *is* a linguistic issue, but the consequences are extralinguistic; faulty decision making can potentially flow from the careless use of NEED within needs assessments.

This leads the way for decision makers to ignore established treatment guidelines and provide the level of support they are comfortable to with scant regard for a patient's actual needs. To quote the Supreme Court: '(I)t has been established that a local authority could lawfully take account of its resources when making an assessment of needs';<sup>185</sup> the case *R v Gloucestershire CC Ex P Barry*<sup>186</sup> and a string of other cases<sup>187</sup> in the House of Lords held that a decision maker, when making a needs assessment, can legally take account of the availability of their resources when allocating treatment. I am not suggesting it is a *problem* that decision makers have to make a decision based on the circumstances of their available resources. It could hardly be any other way, but the distinction made by the courts that supposedly resolves this issue, that of initially identifying a need and meeting said need, is less clear cut than commentary may suggest. These points will become much clearer when applied to case examples, but this preliminary statement is enough to be going on with; it is much better explained via demonstration.

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<sup>183</sup> (n 178)

<sup>184</sup> Although this is a simplification, it is a good basic example to begin my illustration with.

<sup>185</sup> *McDonald* 1267

<sup>186</sup> [1997] A.C. 584

<sup>187</sup> *R. v Lancashire CC Ex p. Royal Association for Disability and Rehabilitation*

*R. v Islington LBC Ex p. McMillan*

*R. v Gloucestershire CC Ex p. Grinham*

*R. v Gloucestershire CC Ex p. Dartnell*

Before going on to consider how *McDonald* and other cases fit into this picture, it will be of aid to provide a brief summary of the relevant legislation regarding community care needs assessments. The principal legislation concerning this is s 47 of the National Health Service and Community Care Act 1990, containing the following:

Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority—

(a) shall carry out an assessment of his needs for all those services; and

(b) having regard to the results of that needs assessment, shall then decide whether his needs call for the provision by them of any such services.<sup>188</sup>

There are other pieces of legislation which have general relevance (i.e. legislation which concerns disability care such as the National Assistance Act 1948, and the Chronically Sick and Disabled Persons Act 1970 s 2) but to go into detail on them here would be gratuitous. The relevant legislation, for the purposes of this analysis, is that which has bearing on needs assessments specifically. It is not possible to consider these other pieces of legislation in detail here, but I do explore them where they become relevant. I highlight the National Health Service and Community Care Act now so the quotes and considerations that follow are clearer when they make reference to it.

### **The Disambiguation of Needs Assessments**

Social welfare has a strong reliance on the performance of needs assessments. The allocation of resources relating to social services, child care and medical resources all incorporate them. A failure to fulfil a patient's need after a needs assessment may be actionable<sup>189</sup>, and a lack of such fulfilment was the claim made by *McDonald*. Needs assessments are commonly and systematically relied on in community and social care, and within many sub-categories of these two areas:

Assessment has always been integral to social work practice. Since the 1990's there has been a steady increase in interest in the field of child care social work assessment, its importance in

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<sup>188</sup> The rest is: (2) If at any time during the assessment of the needs of any such person under subsection (1)(a) it appears that the local authority that he is a disabled person, the authority—

(a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and

(b) shall inform him that they will be doing so and of his rights under that Act."

<sup>189</sup> [2010] EWCA Civ 1109

social work practice is widely acknowledged. Assessments are undertaken by social workers to gain access to resources such as family support workers and social grants; and they are used by managers, courts and panels to inform the decision making process, consequently the social work assessment can have a lasting and profound impact upon children and their families.<sup>190</sup>

The rather tragic circumstances of *McDonald* concerned Elaine McDonald, who was the prima ballerina of Scottish Ballet, until she suffered a stroke in 1999, leaving her with numerous disabilities, and unable to perform this role. This was not the direct subject of the proceedings before the court; McDonald also had a neurogenic bladder which led her to need to urinate more frequently than usual, (between two or three times in a night). Initially, as part of her care package provided by Kensington and Chelsea Royal London Borough Council, ('the council' from here on), she was identified to have the need of 'assistance to use the commode at night',<sup>191</sup> being unable to access it alone. After a while, the council started to suggest that instead of a night time carer to take care of her, McDonald could rely on incontinence pads instead. As Lord Brown put it 'Whether night-time care can be provided on this revised basis is the critical issue in these proceedings.'<sup>192</sup> In 2008 the level of support provided was communicated to McDonald and she sought judicial review of the decision in the same year, being 'appalled' at the thought of being treated as incontinent (which she is not) and having to use pads.<sup>193</sup>

The first instance of *McDonald* contains alarming remarks that directly threaten the sound applicability of needs assessments. These are not well handled by the Court of Appeal and scarcely mentioned by the Supreme Court nor the, recent, European Court of Human Rights decision.<sup>194</sup> Consequently the dangerous judicial reasoning is not properly resolved, and legal reliance on needs assessments is not properly protected from the error in question. The needs assessment that McDonald sought to rely upon contained help for 'assistance to use the commode at night'.<sup>195</sup> Initially the High Court held that within this assessment of McDonald's needs a permissible reading of this is 'a need

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<sup>190</sup> Susie Hawkes, 'The Assessment of Need and the Assessment of Risk: The Challenges for Child Protection' [2005] (8) SHoP <[http://www.shef.ac.uk/polopoly\\_fs/1.71407!/file/8hawkes.pdf](http://www.shef.ac.uk/polopoly_fs/1.71407!/file/8hawkes.pdf)> accessed 15 May 2014

<sup>191</sup> *McDonald* 1271

<sup>192</sup> *Ibid* 1270

<sup>193</sup> *Ibid* 1270

<sup>194</sup> *McDonald v United Kingdom* (2015) 60 E.H.R.R. 1; as far as the European Court of Human Rights is concerned this is quite forgivable; it's hardly the place indirectly relevant issues, so localised to the UK judiciary, would be addressed. The Supreme Court on the other hand, ought to take more of an interest and resolve the difficulty encountered in the High Court and Court of Appeal.

<sup>195</sup> *Ibid* 1271

for safe urination at night'.<sup>196</sup> I start by examining the commentary in the High Court, which refused the application to bring a case for judicial review,<sup>197</sup> and go on to dissect how the Court of Appeal and the Supreme Court each handled this 'very narrow'<sup>198</sup> issue themselves.

The needs based assessment that classified McDonald's need as 'assistance to use the commode at night' was dated 2 July 2008 and completed on 26 October 2008, and the alleged violation of this assessment followed in McDonald's application for judicial review which was initially heard in 2009. Regarding the decision, the deputy judge said:

The fundamental issue here is: what is the assessed need? Whatever it is, the defendant is obliged to meet it based on the application of the FACS criteria and its own eligibility criteria. It follows that at the end of the day there is a very narrow issue before me. The July needs assessment, which was carried out, and to which I have referred, described the need as being "needs assistance to use the commode at night". *The issue is whether that is to be taken literally, which would give rise to the claimant requiring assistance by way of a night-time carer, or whether one is to examine the underlying problem of need that gives rise to that assessment.*<sup>199</sup> (My emphasis)

The end of that quote has great significance. The two options presented are either that needs assessments are taken literally, or the 'underlying problem of need that gives rise to that assessment' is read into the assessment, and the higher courts decide that the former is the correct approach. Lord Brown put the position so:

A needs assessment dated 2 July 2008, completed on 28 October 2008, on which the impugned decision had been based, had described the appellant's needs as "assistance to use the commode at night" and the deputy judge resolved in the respondents' favour what she described as the "very narrow" issue arising, namely whether that need fell to be read literally or whether, as the respondents contended, it was permissible to examine its underlying rationale and treat it as a need for safe urination at night. Given that it was the latter, the deputy judge held that it was open to the respondents to meet that need in the more economical manner, ie by the provision of pads.<sup>200</sup>

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<sup>196</sup> *Ibid* 1271

<sup>197</sup> 'It is right, as Mr Rutledge reminds me, that we have in fact had a hearing, which would have been no different had it been the substantive hearing' [2009] EWHC 1582 (Admin) 83

<sup>198</sup> *Ibid* 1271

<sup>199</sup> [2009] EWHC 1582 34

<sup>200</sup> *McDonald* [2011] UKSC 33 1271



There is no reasonable justification for it being ‘the latter’: that it was permissible to examine the needs assessments underlying rationale and treat it as a need for safe urination at night. If this is the case then there is no purpose to conducting a needs assessment, of which the specific referent in extension, ‘assistance to use the commode at night’, was established. The council would be in violation of their duty if they did not keep to the needs assessment, and the needs assessment concluded McDonald required assistance to use the commode at night. How this can be read to mean supplying incontinence pads is not clear. The court decided that the council are allowed to meet McDonald’s needs in a ‘more economical manner’;<sup>201</sup> if they were to be frank they would admit that the council has not been able to, or does not want to, fulfil the obligations set out by the 2008 needs assessment, and allow the application for judicial review accordingly. Or alternatively, do not allow the application and be candid about the reason for not: because the original needs assessment was set too high and is too difficult for the authority to maintain. What happens instead is the court attempts to argue the original needs assessment can be read in a way that providing incontinence pads would continue to satisfy the terms of the needs assessment. If McDonald’s need could have been identified in this way at the time of assessment, and the council wished to rely on it as such, then the ‘deliberately chosen language’<sup>202</sup> ought not to have been chosen in the first place. The deputy judge in *McDonald* outlines her argument in the following quotation:

As the judgment of Collins J in *Daykin* makes clear, in the circumstances of that case it was impossible to regard the provision of a stair lift at home as the need. It was the need to be able to get in and out of the premises, in that case, which was actually the need. Likewise, in this case, in my judgment, it is right to examine the underlying rationale for what is described as the assessed need. Here it is the consequence of the claimant’s neurogenic bladder which means that she experiences frequency of urine. Because of that, she needs to get up and use the commode. Because of her physical impairment and frailty, she cannot do that without assistance, or she is exposed to a real risk of injury, as has happened in the history that I have set out, with serial hospital admissions as a result of her falls. The core need, then, is the safety of the claimant, in my judgment.<sup>203</sup>

Here we are introduced to the dubious ‘core need’ of the ‘safety of the claimant’. Let us recap. So far we have seen the development of the original needs assessment (‘assistance to use the commode at night’), to ‘the underlying rationale’ of the assessment, to a general ‘safety of the claimant’. With each step we move further away from the purpose and entire point of undertaking an assessment. An

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<sup>201</sup> *Ibid* 1271

<sup>202</sup> The Court of Appeal in *McDonald* share this view, and criticised the High Court for doing so: ‘(The) language of the July 2008 needs assessment was deliberately chosen, and was not the result of any error.’ 49

<sup>203</sup> *McDonald* (High Court) 35

argument is being made here that the July needs assessment was actually some form of general needs assessment, rather than a specific solution to McDonald's problem, but *surely* this is always to be the case in the allocation of care resources. The alternative to this is if care givers did not take into account the conditions of the patient and allocated random treatments that are irrelevant to patient's conditions, rather than paying general attention to their 'core needs'.<sup>204</sup> That the needs of a patient should be taken account of generally is a given, needs assessments are to determine specific needs and solutions. In other words, making a needs assessment presumes attention to the individual's general needs in the first place; the nature of the assessment made in July was to arrive at a *specific* solution to McDonalds needs, taking into account her condition and what options are available, and the decision they arrived at was to have assistance to use the commode at night. It is this which patients are meant to be able to rely on, yet the analysis offered in *McDonald* undermines the fundamental way in which the whole process of needs assessments operates to the severe detriment of patients everywhere.

The higher courts briefly cast aside this linguistic issue, recognising that *something* has gone wrong in the analysis of the High Court but are in no way thorough, specific or explore the consequences, and dangers, of avoiding this kind of thinking in judicial decision making. In *Barry* it is said:

Section 47(2) ensures that a local authority when conducting an assessment of the need for community care services make a specific finding in respect of the need for community care services make a specific finding in respect of the needs of a disabled person for services under section 2 of the Act of 1970.<sup>205</sup>

The lack of value in needs assessments is evident if only general needs are considered. Failing to provide a 'specific finding in respect of the needs of a disabled person' means that one can play around with the referent of the assessment and any support option will be acceptable, based on the general assessment. McDonald's general need to urinate safely could be met by providing incontinence pads, but her need to use a commode at night, with assistance, can not. The significance of this distinction is clear enough and must be properly examined and defended against. Describing the issue as 'very narrow' is correct, but not just in the way that the judge suggests. There is little room for manoeuvre within the needs assessment provided by the council: assistance to use the commode at night. The only way out (generally) for a court that wants to decide against supporting the original referent of NEED within a needs assessment is to rescind on the needs assessment that was established, or as the option that was taken, illegitimately reinterpret the assessment.

Since the legality of care givers actions can be decided by the satisfaction of a needs assessment, careful attention to whether they actually have done so is, naturally, essential. Unfortunately, as we

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<sup>204</sup> *Ibid*

<sup>205</sup> *Barry* 591

are beginning to see, manipulating the extension of NEED in the assessment enables this element of legal protection for patients to be potentially ineffective. The Court of Appeal in *McDonald* hold that the council did have to conduct a new assessment in order to change McDonald's treatment, since the 2008 needs assessment was sufficiently clear to not be allowed to be read in a general way:

However, the language of the July 2008 assessment was deliberately chosen, and not the result of any error. Accordingly, the local authority had been in breach of its duty in deciding not to provide means to meet the assessed need of assistance to access the commode at night.<sup>206</sup>

The Court of Appeal was correct to hold this point of view, although the reasons why are not nearly sufficiently explored in the judgment. The reasoning of the High Court was dangerous in two ways. Firstly, needs assessments become unable to be relied upon in any meaningful manner. Secondly it demonstrates either a judicial misunderstanding of key legal issues, or more speculatively and malevolently, a willingness to exploit language to reach decisions it otherwise legally could not, or at least, would have to justify in a different, more honest, way. Both these are a cause for concern, the first of which raises more immediate and direct concerns for those seeking to enforce and rely upon their own needs assessments.

On appeal to the Supreme Court, the decision of the Court of Appeal was upheld, despite a minority disagreement.<sup>207</sup> There are a few distinct legal issues that were in dispute in this case, partly relating to McDonald's contention that the decision of the council violated her article 8 rights; an issue that recently went all the way to Strasbourg,<sup>208</sup> though none of the issues considered in the ECtHR decision are relevant to my focus, the court held in favour of McDonald insofar as there was an article 8 breach, but that:

The Court is satisfied that the national courts adequately balanced the applicant's personal interests against the more general interest of the competent public authority in carrying out its social responsibility of provision of care to the community at large. It cannot, therefore, agree with the applicant that there has been no proper proportionality assessment at domestic level and that any reliance by it on the margin of appreciation would deprive her of such an assessment at any level of jurisdiction.<sup>209</sup>

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<sup>206</sup> *McDonald* 49

<sup>207</sup> In which some worthwhile points for consideration were made, which I return to later.

<sup>208</sup> *McDonald v United Kingdom* (2015) 60 E.H.R.R. 1

<sup>209</sup> *Ibid* 57

These aspects of the trial are irrelevant to the remit of this paper, for they don't influence the issues being discussed here in any significant way. Much of the case deals with other issues, i.e. whether it is desirable to legally allow the council to make this decision with regard to human rights,<sup>210</sup> or whether relying on incontinence pads in place of a night time carer is a proportionate means of achieving a legitimate aim.<sup>211</sup> Both these are issues which the case *ought* to revolve around in an attempt to best resolve them, but this task is made more difficult by problems prompted by misunderstandings of language that can adequately be pushed aside by attention to intension and extension. Confusion encountered in these judicial misconceptions can be accounted for by a lack of attention to the intension and extension and its application to NEED. Unravelling the issues that arise through this inattention requires close examination, but yields interesting conclusions.

So, the judge at first instance resolved the case in favour of the council, commenting on the described needs of McDonald being the need for 'assistance to use the commode at night' and making the point that 'it was open to the respondents to meet that need in a more economical manner'.<sup>212</sup> It is at this point that the significance of the mistake begins to fully bare its teeth. The assessment of McDonald's needs resulted in her requiring 'assistance to use the commode at night'; a very specific need. The general need that McDonald faced was assigned this specific solution. That the council may, by providing incontinence pads, be able to meet this 'in a more economical manner' is a strange claim, and the Court of Appeal does not address this. They are not meeting it at all; it is being ignored for a different solution; not providing assistance to use the commode at night, but providing incontinence pads. This may be necessary due to funding or some other reason but there is no justifiable reason to undertake the farce that the original needs assessment, *with the specific extension of need to use the commode at night*, is being met when it simply is not. If, to meet the needs assessment in a more economical manner, the council hired a cheaper, less qualified carer then this would make sense. It would be meeting the identified need in a more economical manner. But to simply pursue a different aim entirely by changing the extension NEED attached to in the original needs assessment, in an effort to maintain the integrity of the original needs assessment, is deeply misguided. The influence of resources in identifying needs in needs assessments is a relevant consideration, to which I return shortly.

At the Court of Appeal the decision again went against McDonald, but the court took issue with the High Court's point that the 'deliberately chosen' language of the assessment, (assistance to use the commode at night), could be read in the narrow sense of allowing incontinence pads to meet this

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<sup>210</sup> *McDonald* 1271/1272 para H 'The issues before this court'

<sup>211</sup> *Ibid*

<sup>212</sup> *Ibid* 1271

need.<sup>213</sup> The High Court's approach is not, however, a matter of reading the need to have access to a commode in a narrow way, it is reading it in a nonsensical way. Although the Court of Appeal is right to comment and criticise the reasoning of the High Court, the inaccuracy, brevity and lack of substantial criticism around this fundamental mistake, which threatens the functional reliability of needs assessments, is not sufficient. The vague argument by the Court of Appeal, that the language used by the council was 'deliberately chosen' is a legitimate one, and not recognising this severely undermines the integrity of needs assessments. A court may wish to disregard a needs assessment that a local authority/decision maker agreed on, and refuse to enforce the assessment; but to claim that the original needs assessment is being satisfied by changing what referent NEED is predicated of in extension within the assessment is misleading and bewildering.

Not to take the original needs assessment literally is not simply a matter of general methods of *statutory* interpretation, such as literal, golden, mischief, etc, although the court hints at the similarities.<sup>214</sup> Literal interpretation is a form of statutory and judicial interpretation of course,<sup>215</sup> as are the aforementioned but my contention rests on the idea that taking the needs assessment in any other form than its literal meaning leaves scope to effectively make the assessment redundant and unenforceable. Except in the obvious way that a needs assessment is not a statute, literal interpretation in judicial reasoning generally is only indirectly relevant to the point here (there is a legitimate argument to be had about whether taking Parliament's intent is preferable or not, but this is an entirely separate question).<sup>216</sup> There is no other sensible position other than to take a needs assessment at its literal value, due to the error I highlight.<sup>217</sup> When implementing needs assessments taking the assessment any other way than literally greatly undermines the usefulness (and enforceability) of any such assessment.

I do not suggest that it should not open to the court to make a decision that conflicts with the original assessment, it may well be on a case by case basis, but it should be admitted that the needs assessment, in light of the availability of resources, etc, is unable to be upheld. This is starkly different to changing the referent of the assessment to be very wide that allows one to arrive at any non-

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<sup>213</sup> However McDonald was held to have no substantial complaint because the council had an interim care plan put in place pending the result of the trial.

<sup>214</sup> 'The issue is whether that is to be taken literally, which would give rise to the claimant requiring assistance by way of a night-time carer, or whether one is to examine the underlying problem of need that gives rise to that assessment.' 34

<sup>215</sup> See Richard Elkins, *The Nature of Legislative Intent* (OUP 2012)

<sup>216</sup> *Ibid*

<sup>217</sup> The same does not necessarily apply to the interpretation of contractual terms, for example, Geraldine Elliott and Matthew Dando, 'Contractual construction: black and white from shades of grey' (2012) 23(11) P.L.C 15

ridiculous treatment option that fits with an extremely general 'core need' of the patient. By way of analogy, the High Court compared the position of *McDonald* to *Daykin*:

(I)n the circumstances of that case (*Daykin*) it was impossible to regard the provision of a stair lift at home as the need. It was the need to be able to get in and out of the premises, in that case, which was actually the need. Likewise, in this case, in my judgment, it is right to examine the underlying rationale for what is described as the assessed need.<sup>218</sup>

The claim that *McDonald* is analogous to *R v Kirklees Ex P Daykin* in this way consequently requires scrutiny, and is fruitful in its own regard. *Daykin* involved an elderly couple, the wife suffered from rheumatoid arthritis, the husband from chronic obstructive airways disease, both of which left the couple with 'an inability to use stairs of any sort; an absolute inability in the case of Mr Daykin, a virtual inability in the case of Mrs Daykin'.<sup>219</sup> Upon assessment the following options were considered:

Following considerable discussion, three options were suggested in order to meet Mr Daykin's need:

1. Rehousing - Mr and Mrs Daykin do not wish to be rehoused.
2. Vertical lift shaft.
3. Curb stair lift to incorporate both flights of stairs.<sup>220</sup>

A recommendation, and formal recommendation, respectively was made that:

In the course of consideration of their needs, the occupational therapist a Mrs Hirst, who is employed by the Health Authority recommended that instead of a moving to other premises they should have either a shaft lift or a stair lift installed at the premises thus enabling both of them to get in and out without having to climb.<sup>221</sup>

And:

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<sup>218</sup> *McDonald* 35

<sup>219</sup> *Daykin* 2

<sup>220</sup> *Ibid* 5

<sup>221</sup> *Ibid* 2

Mrs Hirst, the Senior Occupational Therapist, made a formal recommendation that there should be an installation of a stair lift and the additional works as discussed on a joint site visit with the surveyor to the council<sup>222</sup>

Based on these the occupational therapist recommended that a stair lift be installed opposed to moving to the ground floor of the building, estimated at £15,000 instead of £3000 for moving.<sup>223</sup> It is of note that part of the case in *Daykin* was that a formal needs assessment was never undertaken:

The problem in this case, as it seems to me, is that the local authority never carried out their duty under section 47 and section 2 to assess the needs and to indicate what were the services that needed to be provided to meet those needs. Mr Friel submits that the recommendation made by the Social Services person responsible and the requisition, as it were, put to the Housing Department constitute an assessment and the necessary decision to provide the services which, in this case, involved the provision of the stair lift.<sup>224</sup>

This lack of a formal needs assessment under s 47 and s 2, however, changes very little in demonstrating the philosophical and legal point. Whether the official recommendation made constituted a needs assessment in technical terms is a separate question for the court to decide, and it is argued over:

Mr Straker points out that there is no delegated right for the person making the recommendation to make a decision which is the responsibility of the Council.<sup>225</sup>

But as Judge Collins says:

I do not think it is necessary to go into the details. Suffice it to say that the purpose of such a care plan is clearly to indicate the needs and to indicate what is to be done in order to meet those needs. This particular care plan is put forward by Janet Hallas, the Advocate Officer, but, so far as I can see and indeed there is no suggestion to the contrary, is not specifically approved by anyone in the council who had power to approve it. Nevertheless, it seems to have been acted upon and care in accordance with it was provided.<sup>226</sup>

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<sup>222</sup> *Ibid* 5

<sup>223</sup> *Ibid* 7

<sup>224</sup> *Ibid* 17

<sup>225</sup> *Ibid* 18

<sup>226</sup> *Ibid* 7

Accordingly the lack of a formal needs assessment is irrelevant for my analysis; besides the fact it is analogously referred to in *McDonald*, what the occupational therapist recommended is identical to what a needs assessment is.

A claim for judicial review was made after the original recommendation of installing a stair lift was changed to that of having a ground floor flat. Whether it is impossible 'to regard the provision of a stair lift at home as the need' refers to whether the stair lift is the need, or the means of meeting a need, a distinction made in *Barry* and continued in *Daykin* and *McDonald*. It is clear that the availability of resources for a local authority is a relevant, and potentially confusing, factor for needs assessments. Attempts to meet needs economically have caused difficulties of the type I explore above. In order to prevent resource concerns leaking into needs assessments inappropriately, there exists a distinction between 'identifying a need' and 'meeting a need'.

*Barry*, which I have already cited, makes clear, financial considerations cannot enter into the assessment of needs whereas they can enter into the question as to how those needs are to be met.<sup>227</sup>

While it is sensible for decision makers to have the ability to consider available resources when conducting a needs assessment<sup>228</sup> there are procedures in place to ensure resources do not become a factor too invasive on properly assessing a patient's needs. This is attempted by splitting a first stage of identifying a patient's needs (regardless of resources available), and secondly meeting said need and what may be done to address it. For instance *McDonald* concerned two competing treatment options: assistance to use a commode at night or incontinence pads. Initially the council decided her needs were best dealt with by assistance to use a commode but later wished to change this to the use of incontinence pads. Judicial commentary around this is quite revealing and it is a crucial distinction, a focus point within some key cases:

[Section 47\(1\)](#) of the Act of 1990 establishes a two-stage framework for local authorities considering a community care provision for an individual person, viz, the assessment stage (paragraph (a)) and the provision stage (paragraph (b)). The language of the subsection suggests that the identification of need in the assessment decision is not necessarily

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<sup>227</sup> *Ibid* 17

<sup>228</sup> *Barry H/L* 'It is difficult to see how an authority can reach eligibility criteria without regard to resources. The circumstances of the individual are central to the process, of prime importance, but they are not the only factor in determining whether arrangements should be made. However, the council may not be entirely correct in saying that there can be "unmet needs." If, as the result of proper decision-making under section 2, it is decided that there is a need, that need must be met: there is a duty to do so.' 590



determinative of whether services will be provided to meet all or some of the assessed needs<sup>229</sup>

Legally the assessment stage should not take heed of available resources, but the provision stage should: 'Confusion arises if the stages are telescoped'.<sup>230</sup> If resources are considered in the provision stage they will play a strong role and potentially dictate the treatment offered, but if they are considered in the assessment stage, this is a near certainty since as the analysis of the existence of the need will be influenced by the availability of resources in providing for that need.

Collins J in *Daykin* puts it so:

Once the needs have been established, then they must be met and cost cannot be an excuse for failing to meet them. The manner in which they are met does not have to be the most expensive. The Council is perfectly entitled to look to see what is the cheapest way for them to meet the needs which are specified.<sup>231</sup>

They are 'entitled to meet the needs which are specified', using the cheapest methods available, but if this is not to meet the needs specified by the needs assessment, then there is little point in conducting one in the first place when it comes to litigating on the basis of a failure to meet that specific need. Recall how 'assistance to use the commode at night' was, in *McDonald*, read in a way that incontinence pads could be considered meeting the need in a 'more economical manner'. Yet, confusion is encountered in determining where the line between identifying a need and meeting a need may be drawn:

In the context of section 2 of the 1970 Act, it is not always easy to differentiate between what is a need and what is merely the means by which such need can be met. I say that because if one looks at the judgments in the *Barry* case one sees that Swinton Thomas LJ at page 439 pointed out that some of the matters in section 2(1) of the 1970 Act may be regarded as themselves needs as opposed to the means of meeting the needs. For example, he says, if the need is a provision for the TV set (that is within section 2(1)(b)) that need can be met by the provision of a new or a second-hand set. It may be said that the need is a need for contact with the outside world in some form or another and that the television set provides that contact. Thus the television set is the means whereby the need is to be met.<sup>232</sup>

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<sup>229</sup> *Barry* 591

<sup>230</sup> *Barry* 597/598

<sup>231</sup> *Daykin* 18

<sup>232</sup> *Ibid* 18

Lord Lloyd in *Barry* provides some disconcerting commentary over the role NEED plays linguistically and legally:

(T)he starting-point of the whole exercise is the assessment of his individual needs. The assessment is, to adopt the departmental jargon, "needs-led." The word "need" like most English words has different shades of meaning. You can say to an overworked Q.C. at the end of a busy term "You look as though you need a holiday." The word "need" in section 2 is not used in that sense; which is not to say that there may not be disabled people living in very restricted circumstances who may not *need* a holiday in the sense which Parliament intended. To need is not the same as to want. "Need" is the lack of what is essential for the ordinary business of living.<sup>233</sup>

There are two key points to be extracted here. Firstly, that NEED has 'different shades of meaning. You can say to an overworked Q.C. at the end of a busy term "You look as though you need a holiday.'" and that 'To need is not the same as to want. "Need" is the lack of what is essential for the ordinary business of living.' On the face of it these seem like contradictory claims but Lord Lloyd's statement here probably means simply that NEED is to be used restrictively within needs assessments; that is to say the extension of NEED in that context is limited to the ordinary business of living, not needing/wanting holidays, (I return to this). It is not that need has many different meanings in intension, that here is articulated as having 'different shades of meaning',<sup>234</sup> it is simply that there are multiple referents it is capable of linking with in extension. The vagueness that attaches to this is not necessarily a problem,<sup>235</sup> and being clear on what referent NEED is relying on in a legal context helps to get to the substantial, root issues of the case; rather than getting wrapped up in confusing dialogue about whether the claimant *really needs* a certain form of treatment. One can imagine meetings of people who end up debating NEED itself in this way without realising it,<sup>236</sup> with a variety of disastrous consequences. In this way they may end up talking past one another through separate reliance on competing definitional scopes of NEED, potentially missing the core issues that are up for discussion, debating them through a faulty lens of NEED.

This dichotomy between WANT and NEED is not solved, when Lord Lloyd says "'Need" is the lack of what is essential for the ordinary business of living', only greater confusion is found. The perceived difficulty of deciding what is a NEED is merely shifted onto ESSENTIAL. The same problem presents itself, just represented by different terminology!

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<sup>233</sup> *Barry* 598

<sup>234</sup> Recall how COHERENCE and TRUTH suffered from this misconception.

<sup>235</sup> (n 273)

<sup>236</sup> I develop this idea further in chapter four part II.

Greater difficulty is encountered when we consider arguments put forward in *Barry*:

On a plain reading of "needs" and "necessary" (in section 2 of the Chronically Sick and Disabled Act Persons Act 1970) according to their ordinary meaning and dictionary definitions, the cost and availability of what is said to be wanting may be a relevant and sometimes a decisive consideration in deciding whether a need exists and whether it is necessary to supply something to meet it. None of the dictionary definitions excludes the availability of resources as a consideration.' The relative cost, etc., will be balanced against the relative strength of the requirement. In answer to the question, "Do you need a car, coat, drink (or any domestic article)?" a person may sensibly and relevantly respond "How much will it cost?" So too with services, domestic examples may be given.<sup>237</sup>

One should take issue with the claim that 'the cost and availability of what is said to be wanting may be a relevant and sometimes a decisive consideration in deciding whether a need exists and whether it is necessary to supply something to meet it'. It is agreeable that the identification of a need is capable of being influenced by resources, but it shouldn't. The cost and availability is potentially a '*decisive*' consideration in deciding whether a need exists, but the influence from any such resources is illegitimate in the pursuit of identifying a patient's need. It is absurd to say that simply seeing if someone has a need will 'be balanced against the relative strength of the requirement'. The identification of a need will only be 'balanced against'<sup>238</sup> the referent in extension- i.e. 'I need to get to town on time if I am to make my haircut appointment'. Whether I have enough money to actually do this does not, even remotely, enter into whether the need exists or not. In meeting the need I may decide to run, (not recommended), take a bus, or a taxi depending on my *available resources* but this is quite surely a matter of meeting the need (getting to town in time), not identifying it. This simple example highlights how the identification and meeting of a need in needs assessments is divided, and

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<sup>237</sup> *Barry* 585/586; Although I am not able to go further into it in this paper, it is interesting to consider if the dictionary merely documents language use, noting that need and necessity are sometimes reserved for this special meaning, or if it prescriptively promoting the idea. Also, to what degree is the dictionaries method of documenting a words use effective, in light of the intension and extension. In relation to need an 'urgent need' is used as one possible meaning, yet this separation of meanings (attempting to account for multiple intensions of NEED) is not required- all that be noted is that need means to meet a requirement and this can be anything for a full understanding of the variety of contexts in which need can be employed. The field of lexicography is concerned with this question: Henning Bergenholtz, Rufus Gouws 'A functional approach to the choice between descriptive, prescriptive and proscriptive lexicography' [2010] *Lexicos* 26 (<http://scholar.sun.ac.za/handle/10019.1/10205>); Henri Béjoint, *The Lexicography of English* (OUP 2010) is an authoritative, contemporary book on the subject.

<sup>238</sup> To use counsel's phrasing, it is better put accordingly: its truth value can be determined by the referent in extension.

the way in which resources influence the identification of a need can be demonstrated further if we extend the example. In originally identifying my need for a haircut I might (aware of the fact I only have £1.20 on me and can't even afford a bus) question whether I even really need one in the first place; I would, by my initial formulation, still need a haircut, but I would be shifting the referent in extension to something more difficult to satisfy. NEED has not changed; the referent has. Lord Lloyd by no means lets this argument slide, and does a reasonable job of explaining the error,<sup>239</sup> given the brevity with which he addresses the issue, but it is not, once more, comprehensive enough, allowing the heart of the problem to go unexamined. Instead only the symptom is addressed, paving the way for further misunderstanding since the potential fundamental unreliability of needs assessments is not dealt with in any substantive manner.

Thus we arrive at the final chapter, which takes a fresh perspective on what I have accounted for so far. Each chapter up to here has developed different aspects of my overall premise. Chapter one set us on the road, displaying misconceptions at the top of legal theory; a theme continued in chapter two in part, through investigation into what other theorists account for under those same misconceptions. Alongside this, in contrast to the specificity of my other chapters, chapter two delved into general issues raised by my investigation in order to bolster my defences and arm my assault where necessary. This led us into the current chapter, where we saw how, in at least one wide area of law, what is seemingly an esoteric and semantic contention has caused assessable (and, happily, repairable) damage. Chapter four might appear to move away from my focus on NEED, with considerations on the defence of necessity, though we actually remain right next to NEED throughout. The following chapter relies on all I have accounted for so far, and it will become apparent that the ailment NEED suffers is closely informed by analysing NECESSITY generally and as an aspect of the defence of necessity. The defence also brings a unique perspective to the mistakes that beset NEED, while still providing a new context in examining what is at stake when we neglect intension and extension.

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<sup>239</sup> 'Resources can, of course, operate to impose a cash limit on what is provided. But how can resources help to measure the need? This, as it seems to me, is the fallacy which lies at the heart of the Council's argument. The point can be illustrated by a simple example. Suppose there are two people with identical disabilities, living in identical circumstances, but in different parts of the country. Local authority A provides for his needs by arranging for meals-on-wheels four days a week. Local authority B might also be expected to provide meals-on-wheels four days a week, or its equivalent. It cannot, however, have been Parliament's intention that local authority B should be able to say "because we do not have enough resources, we are going to reduce your needs." His needs remain exactly the same. They cannot be affected by the local authority's inability to meet those needs. Every child needs a new pair of shoes from time to time. The need is not the less because his parents cannot afford them.' 599



## Chapter Four- ‘Necessity’ in Criminal Law

### Part I- Judging a Predicate on its Subject

Necessity, that great refuge and excuse for human frailty, breaks through all law; and he is not to be accounted in fault whose crime is not the effect of choice, but force.<sup>240</sup>

Though only recently developed,<sup>241</sup> and existing in various forms,<sup>242</sup> there is a defence of necessity, or duress,<sup>243</sup> in the criminal law: “‘necessity’ will excuse all act(s) which would otherwise be a crime’.”<sup>244</sup> The points made in this paper about NEED can be applied equally to NECESSITY and, firstly, I will explore their relation to each other. We saw in chapter one that Bix would track NEED’s use in one context, (destitution, for instance), and apply the associations it has there in an entirely different invocation. This is prevalent in relation to many concepts. Although the bulk of this paper focuses on examining NEED, it is not to deviate from this analysis to discuss NECESSITY. NECESSITY and NEED share a particular affinity with regard to the analysis this paper undertakes. Both have a distinct role in the application of legal tests, upon which trials may entirely hinge. Thus, a full and comprehensive understanding of their application both in civil and criminal law is desirable. While this is true of a vast range of concepts, and intension and extension can inform these as well, NEED and NECESSITY have a particularly close relationship, and the examination of the latter enhances my analysis of the former in a unique way.

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<sup>240</sup> Attributed to Seneca in Pierre Charron, *Of wisdom: The Second and Third Books* (Translated by George Stanhope, London: 1707) 28 and in Watson Adams, *The Rule of Life: A Collection of Moral Sentences* (Hartford: 1834) 17

<sup>241</sup> Conor Gearty, ‘Necessity: A Necessary Defence in Criminal Law?’ (1989) 48 *The Cambridge Law Journal* 357

<sup>242</sup> Christopher Clarkson, ‘Necessary action: a new defence’ (2004) 2 *Crim. L.R.* 81, in which Clarkson discusses and argues for a marriage of the various sub-sets of necessity based defences: ‘What has been sought to be demonstrated is that the distinction is not helpful when considering the relationship between self-defence, duress by threats and circumstances and necessity. The present separate classification of these defences has meant that they have developed differently--but the differences in the rules are not necessarily rational or sustainable. A new defence of necessary action would have the advantage of simplicity and, most importantly, would enable the focus to be on the true issue that unites the present defences.’ 26-27

<sup>243</sup> ‘A significant development over this same period has been the emergence of a new defence of “duress of circumstances”. While the contours of this defence have been largely linked to those of duress by threats, it has long been conceded that this is in reality a defence of necessity.’ *Ibid* 13

<sup>244</sup> *Dudley* 227

One of the primary misconceptions I have highlighted in different ways so far, (the accidental imputation of properties one particular extension a concept is capable of having onto the concept itself), is closely informed by judicial application of the defence of necessity. Through this scope I push further the idea that the reason NEED and NECESSITY are sometimes jealously guarded in support of preferred invocations, (invocations such as ‘basic minimal requirements of life’, and others like ‘survival’ seen in this chapter), is simply because those particular extensions are perceived as *more important*. Consequently, the sense of urgency that properly attaches to the isolated referent in extension permanently mars the concepts application elsewhere, leading to misconceptions of the concept in these other contexts.

I will examine what the courts have to say about NECESSITY in criminal law: exploring how the potential referents of NECESSITY within the legal defence are very limited; and to instances of relative importance. As we will see, the defence of necessity in criminal law is generally restricted to what one would fairly conceive of as important circumstances: roughly what actions were necessary for the preservation of life. Judges, in applying the defence, have a much firmer grasp of the problems that would otherwise be caused by ignoring intension and extension simply due to a lack of variety in what NECESSITY can attach to in the defence. It is not necessarily that judges understand the value in separating a concept and referent particularly well in the defence; it is, at least in part, that there is less room for error due to the legally acceptable<sup>245</sup> referents happening to be highly constrained. Moreover they are limited to relatively untroubled territory for NECESSITY: the prevention of serious physical harm or death. Where a legal concept like NECESSITY or NEED has very few available extensions in which legal enforceability is possible, and these are restricted to important extensions only, mistakes around language are less liable to occur. Crucially though, and herein partly lies the value of comparing the defence of necessity with my previous considerations, this clarity need not be present solely where the potential extensions of a legal concept are extremely limited, and to important situations. It is possible to achieve this state of precision at all times through attention to the intension and extension of the relevant legal concept.

While this point remains the same, the defence is not necessarily immune to confusion even where the referent is as constrained as it is. It may be the case that judges *do* impute properties of one particular referent onto NECESSITY, but the mistake is hidden since the defence is not applied to other referents beyond this particular conception. In this way, associations or connotations evoked by the particular invocation of NECESSITY remain attached to this context alone. This would be seemingly inconsequential, since the features being imputed onto NECESSITY would be relevant in context: any features being imputed from a preferred important referent would only be present in the context of

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<sup>245</sup> (n 35): Extensions of necessity that, if they can be demonstrated to be factually consistent with the case through evidence, will allow the defence to apply.

said important referent, and thus not infecting other invocations as far as the defence of necessity is concerned, (since the defence will not apply in these other invocations anyway). It is not obvious that the imputation of properties of this important referent is occurring, since the judges have no cause to leave the safe ground upon which all agree the defence applies. One might reasonably, on the face of it, further assume that it doesn't matter if they are since, as I say, any properties invoked by a particular referent would not escape to taint the use of NECESSITY in relation to other referents. In this way the defence operates somewhat like quarantine, where everyone locked in is immune to the disease, but would otherwise spread it should they interact with others. It is not inconceivable though, to imagine two catastrophic consequences of the error in question. Firstly, if the defence is ever extended to properly protect defendants in more trivial contexts quarantine will be breached, and the full brunt of the error will leak throughout attempts to apply the defence. Secondly, it is possible, and judicial commentary at least suggests this, that the common law development of the defence to include less serious instances has already been stunted as a result of this mistake! If NECESSITY has been presumed to primarily attach to certain extensions, it is not a large leap to imagine attempts to restrict it substantially within these boundaries, based on a superficial linguistic misconception. This is, of course, speculation, though by no means out of the question; and a striking possibility of the level of harm that can be caused by this mistake.

Depending on how a sentence is phrased both NEED and NECESSITY are potentially interchangeable with one another,<sup>246</sup> and our understanding of how the concepts work in a technical sense is improved when we consider the two concepts in the frame of their existence as modal operators. The two concepts are interchangeable in certain contexts, i.e. "I need shelter" and "The 'necessity' of shelter", and they can be used to express the same idea in this way. For something to be necessary is for it to focus on a certain need; more than this, NEED and NECESSITY both function as modal operators. NEED is a modal operator *of necessity*, and this function they share. When understood through modal logic<sup>247</sup> the role of both NEED and NECESSITY becomes clearer than observation of the two concepts can achieve alone.<sup>248</sup> Modal operator has been claimed to attach to numerous expressions within different theories of logic,<sup>249</sup> but within the most limited conception refers to NECESSITY and POSSIBILITY, with different concepts coming under these two expressions. NECESSITY includes

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<sup>246</sup> Such as 'It is necessary for me to cross the road to reach my house', or, 'I need to cross the road to reach my house'.

<sup>247</sup> Which has important value in conducting some philosophical analysis, developed particularly by Carnap in *Meaning and Necessity* and 'Modalities and Quantification' (1946) 11 *Journal of Symbolic Logic* 64

<sup>248</sup> Although this is sufficient by itself, it is beneficial to make the connection in a more sophisticated way through NEED and NECESSITY's roles as modal operators.

<sup>249</sup> For instance within deontic logic: *obligatory, forbidden, and permitted*. Temporal, and doxastic logic, etc.



concepts such as *need, will, must*<sup>250</sup> and POSSIBILITY concepts such as *might, could, maybe*, etc. Other expressions that might be considered modal operators, (and accordingly have their own subset of concepts within them, with some overlap), are *obligatory, permitted and forbidden* within deontic logic. There are other types of modal operators within various logics, but all that need be explored for the purposes of my analysis here is the modal operator of NECESSITY.<sup>251</sup>

Modal logic has great significance for analytic philosophy, (developed largely from the work of Saul Kripke<sup>252</sup> and C.I. Lewis),<sup>253</sup> though formal logic (in the sense that symbolism is the aim)<sup>254</sup> is not within the purview of this thesis. Whether a modal proposition is true or not depends both on the modal operator that is being used and the correspondence of this proposition to reality.<sup>255</sup> So if I live in Canada, and during winter I lose my coat, I may make the modal proposition '*I need a new coat or I will be unable to go out without being extremely cold*', and the truth of this will be drawn from whether it is the case that it is necessary for me to have a new coat to fit the referent NEED attaches to here.<sup>256</sup> In casual everyday language it would be usual to omit the latter of course, and simply say 'I

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<sup>250</sup> '(T)he guiding idea in our constructions of systems of modal logic is this: a proposition p is logically necessary if and only if a sentence expressing p is logically true. That is to say, the modal concept of the logical necessity of a proposition and the semantical concept of the logical truth or analyticity of a sentence correspond to each other.' 'Modalities and Quantification' 34

<sup>251</sup> Edward N. Zalta, *Basic Concepts in Modal Logic*, <<http://mally.stanford.edu/notes.pdf>> accessed 15 February 2014

<sup>252</sup> Saul Kripke, 'Semantical Considerations on Modal Logic' (1963) 16 *Acta Philosophica Fennica* 83

<sup>253</sup> Who founded modal logic in its initial form in *A Survey of Symbolic Logic* (University of California Press 1918) and with Cooper Langford in *Symbolic Logic* (The Century Co 1932), although Aristotle explored it in a systematic way in *De Interpretatione*. (First published 350 B.C.E, OUP 1963)

<sup>254</sup> For example  $\square$  is the symbol for 'it is necessary that' and  $\diamond$  for 'it is possible that'. What I say in chapter two on general pursuits of meaning and the aim of constructing an artificial logical language has relevance to this, yet the subtleties of such a language are clearly not of substantial concern to my argument.

<sup>255</sup> I am here of course relying on a correspondence theory of truth, and necessarily avoiding the vast discourse surrounding general questions of truth-- (what is it to say something is 'true', etc)-- and more particular issues surrounding the concept such as those explored by Haack, (as seen in chapter two), and as explored by Kripke 'Outline of a Theory of Truth' (1975) 72 *Journal of Philosophy* 690.

<sup>256</sup> A tautology such as '*If I am to have a new coat I need a new coat*' is an example of a modal proposition which can not be untrue, but tells us nothing useful. This proposition is *necessarily* true as opposed to *contingently* true- we can determine its truth value without investigation into the world, that is, it can be determined a priori, unlike the Canada coat example which can not. Contingent and necessary truths are related closely to the pairing analytic and synthetic statements (essentially revolving around truths that can be determined a prior and those that require investigation into the world to determine), but to examine them further does not benefit my analysis.

need a new coat', which is unproblematic; but in legal tests precision and understanding can be critical.

We saw in chapter one attempts to restrict the use of NEED to certain important referents, and while they can be used in other ways, they are somehow stretched when applied to any various non-life threatening referents. To reiterate, it's worth revisiting how the misconception can be accounted for at a basic level, the framework for which I set out in introduction of chapter one: firstly, a preferred, particular invocation of a concept is identified, that is considered to be especially important. Secondly, the features of this particular invocation are brought to mind. Thirdly, these features are transferred onto the concept itself, as opposed to the particular referent that initially evoked those features. Finally, the originally flexible and well understood concept is tainted in applications that are not consistent with the features of one, (seemingly random and personal), referent that concept might occasionally have. We encounter the same misunderstanding regarding NECESSITY. NECESSARY is capable of being used in relation to trivial extensions, but also 'important' extensions. What NECESSARY conveys is the idea that X is 'required', or 'essential', to achieve Y. X can be as mundane as needing a pen to achieve Y (where Y= write notes in a lecture), or X can be needing a first aid kit to avoid Y (where Y= preventing blood loss resulting in death). In chapter two, part I, I set out the framework that my theory is preferable because it 'better reflects the way we actually use the term'.<sup>257</sup> While it is easy, prima facie, to simply claim any use outside this limited conception is a stretch of the concept, it doesn't solve any problems; it just ignores them by artificially limiting both concepts.

The following quote by C.S. Lewis shows the limited perception I have explored in a different context:<sup>258</sup>

Friendship is unnecessary, like philosophy, like art... It has no survival value; rather it is one of those things that give value to survival.<sup>259</sup>

This has rhetorical impact, but under scrutiny<sup>260</sup>, does not stand. It is not clear the way in which NECESSARY is to be kept out in the dark should it not fulfil some arbitrary perception of 'having survival value'; one could easily say friendship is necessary for happiness, or that at least a rudimentary understanding of philosophy is necessary for intellectual fulfilment and the performance

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<sup>257</sup> (n 107)

<sup>258</sup> I include it merely to demonstrate the existence, elsewhere, of the idea that necessity (and need) have this important meaning, and to develop further the role necessity plays as a modal operator though my counter examples.

<sup>259</sup> *Four Loves* (Geoffrey Bles 1960)

<sup>260</sup> It is significant to note that under Bix's analysis of need, for example, (although he deals with NEED not NECESSITY the same principle applies), this would not be highlighted as a mistake.

of successful arguments.<sup>261</sup> The suggestion that NECESSITY and NEED apply exclusively to maintaining survival or the like is encountered here, as it often mistakenly is. This may initially seem pedantic, but in fact illustrates the problems one faces in any attempt to categorise anything within or without ones preferred conception. Such a categorisation could be tediously attempted but would always have holes; the relentless flexibility of language would find a way to seep through. Fortunately, there is no reason to since the whole perceived problem is resolved through a separation of concept and referent. It is not required to demonstrate that friendship and philosophy could be considered necessary for survival, as NECESSITY has no requirement that it be used only to describe meeting a requirement of survival. So friendship, for instance, could be described as necessary for happiness, without questions of survival even being relevant. This strange mistake is a bizarre but pervasive phenomenon, and one that is entirely solved by the simple act of distinguishing intension and extension.

In the same vein, consider this extract from D.H. Lawrence's poem '*Humiliation*':

God, that I have no choice!  
That my own fulfilment is up against me  
Timelessly!  
The burden of self-accomplishment!  
The charge of fulfilment!  
And God, that she is *necessary*!  
*Necessary*, and I have no choice!<sup>262</sup>

Although a poem and analytic accuracy is not the prime aim by any means, when the character says NECESSARY, the implicit referent is something important, such as necessary to maintain happiness. It is significant that it is not to do with survival or requirements of life, demonstrating the random and personal nature of any personally important invocation of a concept. There is no consistency with preferred conceptions, simply individual perceptions of importance. The imputation of this importance onto NECESSITY, in invocations which have nothing to do with the singular preferred conception, is hardly a useful measurement of the concepts applicability.

We now begin to move on to judicial treatment of NECESSITY. In line with what has been discussed thus far a high standard exists for the defence of necessity to apply:

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<sup>261</sup> And even in the event of this arbitrary restriction, philosophy could have survival value in international communication between two nations with atomic bombs: an understanding of moral philosophy and humanitarian arguments may well be necessary for survival in these circumstances.

<sup>262</sup> D.H. Lawrence, *The Complete Poems of D.H. Lawrence*, (Wordsworth Editions Ltd 1994) 162-163

Throughout the history of the common law, 'necessity' has been a ground available as a defence in certain circumstances. The common law has allowed trespass to land or to goods in order to save life. It has allowed trespass in self-defence.<sup>263</sup>

This high standard limits what particular extensions NECESSITY can have in the legal context of the defence. Its legal limitation here is similar to Bix's proposed conventional meaning, making it a fruitful point of comparison in analysing how we understand NEED and NECESSITY in a legal context. In the following extract from *Esso*,<sup>264</sup> the importance of the circumstances the defence can apply is discussed in explicit detail:

The defence of necessity would therefore have called for close examination if in fact it had been based solely on the saving of property and if in law I had thought that the plaintiffs' rights of ownership in the foreshore were unqualified by their proximity to the sea. But apart from the law, on which I have already expressed my view, the facts of this case, when examined, show that the peril said to justify the discharge of the cargo is that the ship was in imminent danger of breaking her back. The consequence of that would be not merely that the ship herself would become a total loss, but that in the circumstances of this case the lives of the crew would have been endangered. The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the 'necessity' for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property.<sup>265</sup>

This quote demonstrates an agreeable proposition; that human life is to be valued above property, and accordingly, due to the reluctance for the law to allow a wide applicability of the defence of necessity, the defence will be limited to these extreme circumstances.<sup>266</sup> Whether the defence of necessity was available in *Esso* depended on whether the discharge of the cargo was to solely prevent damage to the ship or to also save the lives of the crew. '(N)ecessity' knows no law'<sup>267</sup> and the law is willing to recognise this, within circumstances that are severe enough. The maxim, however, that NECESSITY knows no law, only usually applies in life threatening circumstances. The general defence of necessity would not automatically fail if something like 'to save lives' was not the extension of NECESSITY in an individual case, but as the judge in *Esso* says it will call for 'close examination' if it is. In *Re A*

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<sup>263</sup> *Southwark London Borough Council v Williams and Another* [1971] Ch. 734 737

<sup>264</sup> *Esso Petroleum Co. Ltd. v. South port Corporation* [1956] A.C. 218

<sup>265</sup> *Esso* 227

<sup>266</sup> *R v Kitson* [1955] 39 Cr App R 66

<sup>267</sup> *Southwark* 737

(*Children*) (*Conjoined Twins: Surgical Separation*)<sup>268</sup> Brooke LJ quotes Sir James Stephen, saying the defence should only apply where an act was ‘done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil’.<sup>269</sup> Such is the important nature of the circumstances of which the defence of necessity will apply to.

A quote from the issues raised by needs assessments in chapter three ties in with the idea that some extensions of NECESSITY and NEED are simply considered to be more important than others:

(R)eferring to the assessment of needs for community care services, indicates that the process is concerned with the identification of the need for some service that can be provided by the local authority, not some basic human need such as the need for sustenance, shelter, etc.<sup>270</sup>

What is surely meant by ‘basic need’ here is, considering the examples of a basic need offered, relatively consistent with what Bix refers to as ‘basic minimal requirements of life’. While it is fine for these notions to be a little vague,<sup>271</sup> distinguishing between a basic human need and the type of needs a local authority may otherwise provide for a patient would in many cases be arbitrary.<sup>272</sup> This is so in a similar way the phalacrocorax paradox<sup>273</sup> demonstrates problems with vagueness: like the balding man, it is not clear at what point are we to consider a need ‘basic, ‘core’ or any other means of articulating the idea.<sup>274</sup> The separation of two different types of NEED and NECESSITY, important and unimportant, clearly occurs but it is no way helpful to do so, and needlessly complicates (potentially derailing) the linguistic and legal application of very simple concepts. The whole issue leaks into legal

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<sup>268</sup> [2001] 2 WLR 480

<sup>269</sup> James Stephen, *A Digest of the Criminal Law* (4<sup>th</sup> edn Macmillan and co 1887) 24-25

<sup>270</sup> *Barry* 591

<sup>271</sup> That a more specific referent is possible is not an issue. A restriction of all invocations to a general heading (such as survival) includes a huge range of potential extensions; but what matters is that they all cohere within a relatively limited general category which is given prominence in the mind of the speaker.

<sup>272</sup> The primary problem is not that the notion of a basic human need, or something of the like, is vague: Timothy Williams, *Vagueness in Reality* (n 87); Matti Eklund, ‘Recent Work on Vagueness’ (n 88). It is rather that the issues caused by this vagueness, when attempting to categorise exactly what is to be considered a basic human need, are completely unnecessary and sidestepped through attention to intension and extension.

<sup>273</sup> The thought experiment concerning a balding man, at what point is a man bald if you remove a hair from a full head one by one, as initially conceived by Eubulides; Bertil Rolf, ‘Sorites’, (1984) 58 *Synthese* 219. For further discussion see Max Black, ‘Reasoning with Loose Concepts’ (1963) 2(1) *Dialogue* 1. One might fairly ask at what point a ‘basic need’ cross the boundary into a non-basic one; the dichotomy creates an unneeded lack of clarity.

<sup>274</sup> This criticism is quite apart from that just discussed: that one’s preferred conception is likely to be entirely inconsistent with someone else’s, despite both being relatively important.

rhetoric in a pervasive way and is as simple as making a distinction between NEED and what NEED is being predicated of in a particular instance. Some strange hierarchy of NEED and NECESSITY based on the particular extension that is being employed only serves, as I have shown, to confuse the otherwise intuitive idea of how the concepts actually work.

## **Part II- Judicial Understanding of ‘Necessity’**

The problems assaulting NEED are seemingly less liable to occur regarding the defence of necessity; or at the least they are invisible, hidden within the restricted, exclusively important referents the defence applies to; potentially lurking should the defence ever apply generally beyond its current limited remit. Despite this distinct possibility, the defence demonstrates that where the extension is not vulnerable to manipulation, errors in language, (and consequently judgments), are less likely to occur. In such cases judges have a firmer grip on linguistic issues that might otherwise hound a trial, as they do in needs assessments. Firstly, the high threshold imposed by the defence of necessity, in circumstances where life is in danger, means that it has an exclusively important referent. Secondly, this inflexibility of what circumstances the defence of necessity can apply to limits potential mistakes; since the extensions NECESSITY is capable of having in the defence are so limited, there is little scope for error. It could be limited to extensions that are considered to be less important (i.e. property damage), not loss of life, and this point would remain partly true. However, that it is limited *and* consistent with this supposed ‘important’ conception of NEED and NECESSITY only makes it more remarkable in contrast with the points made in the earlier chapters of this thesis. Firstly, where the extension of NEED or NECESSITY is limited within a legal principle of some sort,<sup>275</sup> with little variety of invocation, mistakes revolving around this are less likely, which can be seen through relative judicial competence around linguistic issues, that in other contexts cause confusion. Whether this competence is due to actual judicial awareness, or a symptom of the restricted potential extensions within the defence, is not important for the sake of this point. If the mistake is occurring but invisible,<sup>276</sup> due to the limited potential referents, the judicial understanding is still present; and can be throughout all its legal invocations. Secondly, the circumstances in which the defence is available, i.e. life threatening circumstances, are relevant to what I have argued throughout this paper: that where one conceives of a preferred referent for a concept, it is not the case that this meaning is more or less conventional than other applications of the concept. It is more the case that the importance of one referent in one context is being imputed onto NECESSITY and NEED themselves as concepts, even when utilised elsewhere. (Or, as I say, imputed from an extension of which these concepts are capable

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<sup>275</sup> Such as needs assessments or the defence of necessity

<sup>276</sup> As explained in full on pages 69-70.

of being predicated, to the intension). This is not an issue in the defence of necessity where the available extensions of NECESSITY are limited to these important referents alone.

The lack of immediate linguistic problems, comparably with what was discussed previously, supports the value of distinguishing the intension and extension of important legal concepts like NEED where there are multiple and varied available extensions. The clarity within the defence, whether accidental and hidden or genuine, can be achieved with any legal concept through appreciating the difference between the relevant concept and what the concept is predicated of.

The availability of the defence is well established within these 'important' parameters, and is demonstrated by *Esso Petroleum Co. Ltd v South port Corporation* when the judgment is quoted in *Southwark London Borough Council v Williams and Another*<sup>277</sup> to make the following point:

(N)ecessity as a defence was considered in *Esso Petroleum Co. Ltd. v. South port Corporation [1956] A.C. 218*. "The safety of human lives belongs to a different scale of values from the safety of property": *per* Devlin J. at p. 228. It is established that if at a particular time there is proved to be imminent danger to life, steps that involve trespass are justified. Neither the cases relating to the protection of goods, nor the right of way of 'necessity' are relevant here. The doctrine which justifies taking steps to save life does not extend to injury to health.<sup>278</sup>

The court in *Southwark* here distinguishes between what referents NECESSITY ought to have in the defence of necessity. Whether to save lives or prevent injury, these two general referents lead to opposite legal outcomes. With attention being paid to what the extension of NECESSITY is in such cases there is little scope for mistakes in language having negative effects on the legal outcome of cases. It is helpful to contrast what is said here with the approach taken by the deputy judge in *McDonald*<sup>279</sup>, who took the specific extension of NEED within the needs assessment and attempted to change it and interpret it in a general way, looking at McDonald's general need opposed to the specific need identified in the assessment. The potential to substitute an alternative extension of NEED to reach an alternate legal conclusion about whether something was a need is much less present with the role NECESSITY plays in the defence of necessity. There is more to be learned about this if we re-examine the above quote from *Esso*:

The defence of necessity would therefore have called for close examination if in fact it had been based solely on the saving of property and if in law I had thought that the plaintiffs'

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<sup>277</sup> [1971] Ch. 734 (CA)

<sup>278</sup> *Southwark* 737

<sup>279</sup> In chapter three, see (n 199).

rights of ownership in the foreshore were unqualified by their proximity to the sea. But apart from the law, on which I have already expressed my view, the facts of this case, when examined, show that the peril said to justify the discharge of the cargo is that the ship was in imminent danger of breaking her back. The consequence of that would be not merely that the ship herself would become a total loss, but that in the circumstances of this case the lives of the crew would have been endangered. The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the ‘necessity’ for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property.<sup>280</sup>

Likewise, the defendant in *R. v Quayle (Barry)*<sup>281</sup> invoked the defence in support of his growing of cannabis for medical conditions, and it was rejected. Jane Creaton makes a relevant point in a case commentary:<sup>282</sup>

The Court of Appeal's judgment clarifies the uncertainty over the availability and extent of the defence of medical ‘necessity’ in drugs cases. Although the court conceived of some unlikely scenarios where defence of necessity would be available (e.g. a person being forced to smoke cannabis at gunpoint), the general rule was that it is not available as a defence.<sup>283</sup>

The particularly relevant point here is the unlikely situation of a person being forced to smoke cannabis at gunpoint. That this is the case is due to the requirement of extreme circumstances for the defence of necessity to be relied upon. However, while NECESSITY can not typically be relied on in different contexts within the legal defence, in conventional language it is perfectly capable of being predicated of a myriad of extensions. This (accidental or not) awareness of the potential applications of NECESSITY allows the court to, clearly and without undue linguistic confusion, explore the substantial issues<sup>284</sup> before it. In cases that concern the defence of necessity so much revolves around what the extension of what was necessary is (although, no more than it does in needs assessments), that errors are not affordable;<sup>285</sup> and this was precisely what *Esso* boiled down to: ‘In discharging the cargo the ship, he contends, was doing no more than was reasonably necessary for the safety of the crew and of the ship and cargo’.<sup>286</sup> ‘(T)he safety of the crew and of the ship and cargo’ is the relevant

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<sup>280</sup> *Esso* 227

<sup>281</sup> [2005] EWCA Crim 1415

<sup>282</sup> Jane Creaton, ‘Defence of Necessity’ (2005) 78 *Police Journal* 159

<sup>283</sup> *Ibid* 172

<sup>284</sup> That is, the factual and legal concerns of the case.

<sup>285</sup> The same is of course true for what was considered in chapter three regarding need in community care.

<sup>286</sup> *Esso* 223



extension of which NECESSITY is predicated here, and the verdict depends on it being the case factually (and least with regard to the safety of the crew).

The famous case *The Queen v Dudley and Stephens* revolved around the defence of necessity and involved three men stranded at sea in a boat with rapidly diminishing food supplies. Two of the passengers decided the only way to survive was to kill and eat the third member of the group: the cabin boy. Four days after they committed the act they were rescued by a passing vessel, tried and convicted for murder, and consequently put to death. They attempted to rely on the general defence of necessity as a legal justification for their actions. Lord Coleridge had this to say in his judgment:

Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called ‘‘necessity’’.<sup>287</sup>

*Dudley* offers a straightforward extension for NECESSITY and its simplicity helps avoid talking cross purposes with regard to other potential extensions (as occurred in *McDonald*)<sup>288</sup> or playing with language to achieve the verdict a judge desires. That is because it is obviously *to survive*. The question is, or is near enough, *was it necessary to kill and eat the cabin boy to survive/avoid starving to death?* That this is clear from the offset goes a long way to offsetting some of the confusion that arises in *McDonald*, as there is no risk of playing with language to subtly change the referent and claim that it is or is not necessary accordingly. Whether a judge wants to allow the defence of necessity to apply in these circumstances, (or, in *McDonald*, what level of support the authority should give considering their resources, etc),<sup>289</sup> is clearly not in the purview of this paper, but its successful consideration in a court room requires that there be no mistakes in precisely what NECESSITY is legally and factually predicated of, and what consequences this has. A clear and agreeable extension must be arrived at before productive discourse on the applicability of the defence can be had. Proof of whether an act was or was not necessary, once this has been considered (often it is a given, as in *Dudley*) is a separate question, but relies on this being achieved.

Despite this general understanding and simplification of what the extension of NECESSITY is in a particular case, the concept still encounters confusion. In *Dudley* Lord Coleridge, CJ, toward the end of his judgment asks the question:

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<sup>287</sup> *Dudley* 286/287

<sup>288</sup> The question of whether the referent of NEED within the needs assessment was assistance to use the commode at night or to generally urinate safely.

<sup>289</sup> As discussed in chapter three.

Was it more necessary to kill him (the cabin boy) than one of the grown men? The answer must be “No”.<sup>290</sup>

This is, whether intended or not, an abuse of language to make an ethical point in a rhetorical fashion. To say nothing on whether the law should protect the defendants here, whether it was more necessary to kill the cabin boy depends on the extension NECESSITY has, and if one phrased it so: “In order to achieve the highest odds of survival for two of the three men, it is necessary to kill the weakest and least likely to survive” then it quite clearly could be described as more necessary to kill the cabin boy over one of the grown men. But NECESSITY could be predicated of any number of other reasonable objects, such as “If one must die in order to prolong the survival of the others for as long as possible, it is necessary to sacrifice one of the larger men”. In convicting the men, using necessary in this rhetorical fashion is unfair; the two defendants could quite sensibly and fairly describe it as being more necessary to kill the weaker younger man over either of them;<sup>291</sup> the cabin boy had less chance of surviving even with food. Lord Coleridge is misusing NECESSITY to make an ethical position (that valuing one life over another is wrong) appear more than an ethical position by claiming that it is not even necessary to do so. But by this stipulated definition one could quite easily describe it as necessary within the parameters offered. If this faulty line of reasoning is accepted it leaves the potential for rhetorical excess to trump linguistic accuracy at the expense of the lives of defendants.

Like Lord Coleridge, in the previous quote, when participants in a conversation argue about whether something was necessary or not, what is often the case is they are arguing about whether it is *morally correct or not* to do something. The conversation, after A does something particularly cruel or petty to B (i.e. kicking him after knocking him over with a punch) may prompt C to say something like ‘stop it, that isn’t necessary.’ This simplified example is identical in general principle to what Lord Coleridge is doing in his moral evaluation of the actions of the defendants. The significant point C is putting forward is not about NECESSITY, but about the referent of NECESSITY in this instance: kicking someone when they are down (literally). By A’s standards it may be perfectly well described as necessary, if the requirement is to humiliate or cause further pain to his victim. If A disagrees with C on this they are not disagreeing about what is necessary or not, (and if they are they are just talking

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<sup>290</sup> Dudley 287-288

<sup>291</sup> I said earlier that it is possible to describe killing and eating the larger men as necessary if the referent is to survival for the longest period possible, this example is also a legitimate way of utilising necessity. This is, again, due to the flexible nature of the concept- it will be true if an act was necessary depending on what the referent is, and how this corresponds to reality, (all this is to do is account for the synthetic or a posteriori nature of a statement i.e. it is necessary to eat my sandwich or I will be hungry in my next meeting).

past one another),<sup>292</sup> they are disagreeing about whether A should or should not be doing what he is doing. This can be applied to limitless examples, but the point remains the same throughout any of them, and can also be the case with NEED. A rich businessman may purchase a Ferrari, and friends/colleagues/strangers may question ‘But do you really need that?’ If NEED is predicated of having a very impressive car for whatever reason, then sensibly the businessman could reply with ‘Yes, I do’. If, instead, NEED is predicated of getting to work in a reasonably economic fashion, then no. The same applies to the purchase of a yacht for the sake of enjoyment, etc. What is actually being stated by the person asking if you really need these things is making, in part, an *evaluative proposition* of potentially varying qualities; maybe expressing envy, or disgust for what they consider to be greed, etc. What is in dispute is the referent of NEED that is in mind: that people should be minimalistic in their travelling expenses, not be excessive in their expenditure when many people are starving in the world, etc. The argument about whether the businessman *needs* the new car or yacht is simply a vehicle, (no pun intended), for this discussion, and if it is actually about NEED or NECESSITY, then they are simply talking past one another.

The consequence of errors here can be severe; for Dudley and Stephens, it was a life or death issue. As Bix says in the conclusion to *Law and Language*, ‘Because we only rarely have an Oliver Wendell Holmes, Jr or a Felix Cohen to keep us in line, we need to learn to do the important work ourselves’.<sup>293</sup> And that:

We may never entirely escape the tendency of our own language to mislead us, but clarity in thought and analysis is something towards which we should struggle constantly, and with determination.<sup>294</sup>

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<sup>292</sup> In the sense that they would both be right by their own distinct definitions, and as a consequence not be engaging in meaningful discourse (see chapter two part I). Not unlike how a room of medical professions may be mistakenly arguing about what need means instead of the substantial issues before them, as we explored in chapter three.

<sup>293</sup> ‘How Words Mislead Us’ 38

<sup>294</sup> *Ibid* 38

## Conclusion

I have evidenced my core premise: that philosophical and linguistic problems in law result from a lack of appreciation for the distinction between a concept and its referent in extension. The consequences of this lack of appreciation are varied and numerous, reaching across a wide array of concepts and legal fields. The claim is significant not because of the notion intension and extension itself, but because inattention to it demonstrably causes harmful reasoning in important contexts. Alarming abandon of the division turns the otherwise simple into the significant. In order to best attend to the issues at hand I separated consideration of legal theory and practice, as well as the relevant wider ideas engaged by my inquiry. The structure of this thesis facilitated my approach in handling the diverse and sometimes complex issues raised. It was important to begin at the top, so to speak, with chapter one investigating prominent legal theory. The errors in question are not localised to a singular or niche area of law, in fact they are seemingly wide spread; and beginning my inquiry with Bix's contributions to legal theory immediately raises the question of where these potentially pervasive misunderstandings may otherwise be encountered. Bix's article holds the primary aim of exploring the consequences of our misuse of language, and is conducted by a significant figure in modern analytic legal theory. My investigations in chapter one led to many general issues being raised that needed addressing, and strongly prompted the consideration of other theorists. Both of these are achieved in the second chapter, establishing a strong framework with which to tackle the problems besetting case law; which I moved on to do in two distinct ways in chapters three and four. My claims are not restricted to NEED or NECESSITY alone, but they are lucrative focus points in legal theory and case law. They make for a strong focus as what is said about the concepts themselves is worthwhile in its own regard, yet the ideas discussed prompt a wider significance for the errors under scrutiny. I will here succinctly redraw the main points from each chapter, and following this, tie the themes together. This will necessarily involve returning to the issues with broad brush strokes; the precise subtleties of many of the points are not appropriate here.

Bix's article, *Law and Language: How Words Mislead Us* contributed significant motivation for pursuing this inquiry. Brian Bix is a prominent figure in contemporary conceptual analysis, and his article was written with the intent of clearing up linguistic issues surrounding a variety of legal concepts. However, it suffered from some key failures revolving around his neglect of intension and extension. I began to develop, in relation to his specific mistake, a framework with which other linguistic difficulties could be applied to and resolved. This framework being that, firstly, a preferred and limited invocation of a concept is ascribed importance, (typically based on strong emotive associations toward the particular referent being relied upon). Secondly, the characteristics of this preferred referent are brought to mind. Thirdly, these characteristics are transferred onto the concept itself in intension, as opposed to the particular referent that initially evoked those features. Finally, the

originally flexible and well understood concept is tainted in applications that are not consistent with the characteristics of one, (seemingly random and personal), referent that concept might occasionally have. Ultimately then, features of an object of which a concept is capable of being predicated in extension are associated with the concept itself in intension; leading to misunderstandings concerning its application in contexts that do not cohere with the preferred invocation. We saw how Bix fits into this idea, with his preference for NEED attaching to meeting ‘even basic minimal requirements of life’. He also encountered the same problem regarding FREEDOM, and exploration of his error in part II brought us into contact with philosophy surrounding vagueness in language. Ultimately Bix’s errors were caused by not keeping separate the dual nature of NEED; that it has an intension *and* a variety of referents in extension of which they may be predicated.

Chapter two split into three parts to examine in more depth the various philosophical notions which particularly hold to my analysis. Part I addressed the point of conducting conceptual analysis in the way I do and examined how the notion of talking past one another does not block the applicability of my arguments. Part II of the same chapter investigated how the philosophy discussed here in relation to NEED, and NECESSITY, is widely applicable. This is demonstrated in part by the treatment given to these ideas by other philosophers. An (initially) surprisingly large amount of philosophical discourse has suffered needlessly for inattention to intension and extension; in both coherence theories and regarding TRUTH. Though, after consideration in this piece, it is not a shock that this is the case; if the mistake is being made at the highest levels of conceptual analysis by Bix for *Jurisprudence*, in an article dedicated to solving linguistic issues, it is probable that it is happening elsewhere. Pethick’s and Haack’s research shows that this is so with theorists in other academic fields. Part III examined why esoteric questions of meaning do not hold to my argument, as it is more fundamental than such questions and concerns: quite simply: the value in distinguishing what a concept is capable of affixing to and the concept in abstract. I explored the relationship between key concepts that relate to intension and extension, (such as sense and reference), to clear up the concepts I rely on in articulating my criticisms in this piece.

It became foreseeable, at this point, that the neglect present in theory is also likely occurring in court as well. The potential trickle-down effect of this mistake, from theory to cases, is to be expected, and my thesis is only able to conduct analysis of some key theorists and cases if it is to be sufficiently thorough. Still, I suggest, through these examples, that the problem is likely far reaching and ought to be investigated beyond the remit this thesis allows. I have shown how the mistake is the same in relation to various concepts such as NEED, NECESSITY, FREEDOM, COHERENCE and TRUTH. This is more than sufficient to raise the serious question of whether other concepts in other fields, (as well as the same concepts under consideration here), unnecessarily remain misunderstood, and what unknown consequences this may have. Though the errors under investigation in this thesis are of a similar

nature to each other, the consequences differ, with varying degrees of severity, in each instance. Bix's misunderstanding leads him to make erroneous criticisms of American alimony law; not as immediately serious a result as we may see elsewhere, but noteworthy due to the context in which the mistake is made. Similarly for Haack and Pethick, the theory they criticise has wound itself up in knots and needs attention through the scope of intension and extension. The concepts I examine are all relied on in significant legal contexts; rife misunderstanding within dedicated theory potentially raises alarms for judicial understanding. We see more directly damaging results in needs assessments, with the functional reliability of the assessment under threat for those receiving care and social welfare. Similarly, the defence of necessity may seriously suffer from subtle and insidious problems, of which I return to in summary shortly. We have seen that, despite the similar nature of the issues besetting each example, the complications that arise are varied and in need of clarification.

Chapter three directly applied what has been said of legal theory and philosophical analysis to case law. Needs assessments are fertile ground for the type of mistakes this paper explores, as they involve a legal principle which relies heavily on the language used. Judicial commentary either suffered from or ignored linguistic issues that, if left unchecked, allow for the subtle re-categorisation of an individual's needs when they seek to rely on their original needs assessment in or out of court. The problem, if not properly analysed, causes needs assessments to be unenforceable by claimants where they would otherwise be likely to succeed. Confusion presents itself within key community care decisions such as *McDonald*, *Daykin* and *Barry*; at best getting in the way of the real legal issues being discussed, and at worst complicating them to the point mistakes are made in law. I also examined how two different stages of assessing an individual's needs, (identifying a need and meeting a need), prompt confusion if one does not account for a distinction between the referent NEED is attaching to in extension and NEED as a concept in intension. We saw how, (in both chapter three and four, which I consider next), it is possible to fall into false disagreements about the nature of NEED in intension, (what NEED 'means'), when such disagreement is actually caused by the referent in dispute. In this way participants will talk past one another, avoiding the root of their contention; a formidable concern should it occur in legal discourse.

Chapter four takes the criminal defence of necessity to provide contrast with the cases considered that surround community care. The relationship between NEED and NECESSITY is intimate; both in formal logic and natural language; providing opportunity to explore the nature of NEED and how its varied application is explained. Their role as modal operators was considered within the frame of my inquiry. Additionally, judicial commentary around the defence informed us further of how particularly important extensions of NECESSITY might influence our thinking. When potential referents are highly restricted, and constrained within what one may consider to be a particularly important extension, mistakes are, naturally, less likely to occur. That said, we explored how issues that might otherwise

beset the defence of necessity are potentially invisible. The referents NECESSITY might have are limited to things like prevention of serious harm or death, so any imputation of features that properly are evoked from these referents onto NECESSITY itself are, on the face of it, unproblematic, since the context makes the features relevant anyway. As we saw, this might seem to be without consequence for the defence, but there are a few points of consideration that arise out of it. Firstly, if the defence is ever extended to less important contexts, other than preventing serious harm or death, the issues that otherwise rest harmlessly will rear their ugly heads. Secondly, and more speculatively, the misconceptions around NECESSITY might currently stunt the growth of the defence in common law to include less serious referents. After all, if necessity is supposed to inherently relate to something akin to survival it is no stretch at all to imagine it should only protect a defendant when acting in interests of his survival. This subtle linguistic turn leaves us facing the possibility that defendants, who might otherwise be protected, (rightly or wrongly), are left defenceless.

On top of this, judicial competence, in the application of the defence within its current boundaries, is informative in contrast with needs assessments. The clarity maintained in the defence, (even if it is incidental and accidental due to an artificial legal restriction), is achievable in all legal invocations of NEED and NECESSITY, simply by attention to the concept itself as a separate entity to the referent it attaches to in extension. NECESSITY also provided a strong ground of comparison for the points made prior to this in the thesis, and allows exploration of how NEED functions, (through the close similarity of the two concepts), in a different context.

To display the wide applicability of the ideas discussed in solving philosophical problems I relied on a broad range of legal areas; both in legal theory and case law. Chapter one devoted space to family and contract law, and chapter two legal and philosophical theory. Chapter three concerned social welfare and public law, and chapter four criminal law; it is partially by relying on this wide array of practices that the applicability of the philosophy discussed is demonstrated. This wide application is not superficial; I deploy the intension and extension distinction in meaningful examples to solve problems in all but chapter two, in which I instead exhibit how others have done the same. Sufficient demonstration of my position is well satisfied by applying intension and extension to these distinct and diverse areas. This assortment goes a considerable way in showing the general applicability of the theory, within any relevant philosophical problem that may arise for law. Consequently, while the misconceptions NEED and NECESSITY currently face are troublesome in their own right, it is far from a weak speculation to make that what I am able to discuss in this thesis only begins to scrape the surface of the problems that are caused by a neglect of intension and extension.

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