THE SONG REMAINS THE SAME - THE SEARCH FOR INTERPRETIVE CONSTRAINT AND THE RHETORIC OF LEGAL THEORY IN HART AND HUTCHINSON

MARK BURTON*

The theory of interpretation advanced by HLA Hart is often portrayed in terms of the core/penumbra dichotomy while his discussion of the relevance of legislative intention and communal morality are overlooked. This article embraces the diversity within Hart's discussion of legal interpretation, developing the argument that the perceived ongoing relevance of HLA Hart's work is largely attributable to the rhetorical appeal of his eclectic theory of interpretation. Further, each component of Hart's theory of interpretation is critically reviewed in arguing that, whilst his inclusion of disparate interpretive theories has contributed to the success of his work, it also produces an implausible account of legal interpretation. The article concludes by noting the shortcomings of a recent reinterpretation of Hart's work advanced by Allan Hutchinson.

I. INTRODUCTION

This article developed out of a larger project critically examining liberal legal theories, and in particular offering a critique of the theories of language adopted by certain liberal legal theorists. Owing to the ongoing significance of his work to liberal and non-liberal legal scholarship,[1] such a project could not bypass the

* LLB (Hons)(Tas), Lecturer in Law, University of Canberra I wish to thank Jeffrey Goldsworthy of Monash University and Dirk Meure of the University of New South Wales for their thoughtful comments upon earlier drafts of this article. I also wish to thank Don Fleming of the University of Canberra, for his comments and encouragement. Any errors and omissions, of course, are solely my responsibility.

1 See, for example, P Leith, "Common Usage, Certainty and Computing" in P Leith and P Ingram (eds), *The Jurisprudence of Orthodoxy: Queen's University Essays on HLA Hart*, Routledge (1988) p 85; N MacCormick, *HLA Hart*, Edward Arnold (1981) p 12; R Sartorius, "Hart's Concept of Law" in R Summers (ed), *Essays in Legal Philosophy*, University of California Press (1968) p 131; John Kelly notes that the authors of *Lloyd's Introduction to Jurisprudence* refused to include extracts from the *Concept of Law* on the basis that it should be read in its entirety; see J Kelly, *A Short History of Western Legal Theory*, Clarendon Press (1992) p 403.

work of HLA Hart.[2] Given my interest in 'postmodernist'[3] legal theory, and in particular the importance of language theory to contemporary legal theory, it was with considerable interest that I turned to Allan Hutchinson's purportedly sceptical critique of Hart's work.[4] A key assertion of Hutchinson's critique is that Hart is fundamentally a formalist,[5] and that Hart therefore contradicted himself by adopting a pragmatic theory of language.[6] This characterisation of Hart as primarily a formalist is not new in the critical appraisal of his work, the usual depiction of his work being that he argued that there was a core of formal legal meaning supplemented by a relatively insignificant penumbral zone of free ranging judicial discretion.[7] Hutchinson also adopts the common strategy of rebutting this interpretation of Hart's work by arguing that the formal core collapses into the penumbral zone, leading to the rule sceptic conclusion that judges have an unfettered discretion in every case.[8]

Hutchinson's critique of Hart is therefore not new, but the fact that Hutchinson's article was considered worthy of publication and the ongoing recourse to Hart's work does raise the question of how Hart's theory can have retained such prominence. It is clear that the numerous rebuttals of Hart's work have not dissuaded many, particularly in the legal community,[9] from continuing to endorse much of Hart's work.[10] Is the ongoing, widespread acceptance of Hart's theory of relative determinacy[11] in the face of these rebuttals merely a

---

2 The most significant work for the purposes of this article being found in HLA Hart, *The Concept of Law*, J Raz and PA Bulloch (eds), Clarendon Press (1994) (*Concept*); HLA Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press (1983), HLA Hart, *Essays on Bentham*, Clarendon (1982)

3 I place "postmodernist" within quotation marks to indicate my reservations as to whether we truly are beyond modernism and in a postmodernist phase which embraces relativism or nihilism and therefore denies any prospect of critical theory For thoughtful essays on this topic see J Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, F Lawrence (trans), Polity Press (1987); R Williams, "When was Modernism?" in R Williams, *The Politics of Modernism*, Verso (1989) pp 31-5; C Calhoun, *Critical Social Theory*, Blackwell (1995) pp 97-131, C Norris, *Deconstruction and the Interests of Theory*, Pinter Publishers (1987)

4 A Hutchinson, "A Postmodern's Hart. Taking Rules Sceptically" (1995) 58 *Modern Law Review* 788

5 In the sense that language is envisaged as a formal code of determinate meanings, *ibid* at 801

6 *Ibid*

7 See, for example, P Goodrich, *Legal Discourse - Studies in Linguistics, Rhetoric and Legal Analysis*, Macmillan (1987) p 57; P Fitzpatrick, *The Mythology of Modern Law*, Routledge (1992) p 207, A Hutchinson, note 4 *supra* at 800.

8 See, for example, P Goodrich, note 7 *supra*, p 57: a conclusion which leads to the uncritical mire of relativism and nihilism, and from which Hutchinson is attempting to retreat in his more recent work

9 Note that I do not intend to adopt Fish's definition of the legal community, but rather a wider grouping of people with some interest in the operation of law who have formed an opinion upon, in this case, legal interpretation, see S Fish, *Is There a Text in This Class?*, Harvard University Press (1980); S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Clarendon Press (1989); S Fish, *There's No Such Thing As Free Speech and It's A Good Thing, Too*, Oxford University Press (1994)

10 As Hutchinson comments, often such endorsement will be implicit; note 4 *supra* at 788 See, for example, M McHugh, "The Law-Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 24

11 By *relative determinacy* I mean the thesis that there is a core of determinate meaning supplemented by a penumbra in which law is judicially or administratively 'created'. The extent to which Hart allowed judges to make law in an unconstrained way will be considered below.

case of widespread delusion?[12] Or is it symptomatic or constitutive of some Gramscian hegemonic apparatus?[13] Or is there more to Hart's theory of interpretation which explains the ongoing perception of the relevance of his work? This article applies an original theory of discursive practice in arguing that it is the latter, and in the process offers a revised reading of Hart's consideration of legal interpretation.

Contrary to the beguiling simplicity of readings of Hart such as that proffered by Hutchinson, and in an endeavour to answer de Man's call for readings of texts which explore their rhetorical ploys,[14] the first part of my argument is that Hart's theory of language is more eclectic than that portrayed by the clichéd core/penumbra dualism. The second part of my argument is that the perceived ongoing relevance of Hart's work stems from his use of several disparate theories of language in such a manner that his theory of law offers something to everyone, whether they be a formalist, an intentionalist, a pragmatist or even a nihilist.[15] Such disparate interpreters of Hart, it will be argued, emphasise those aspects of his work which suit their purpose. But whilst this complexity has enhanced the rhetorical power of Hart's work through its appeal to a multiplicity of interpretive sub-communities, the third part of my critique maintains that such rhetorical success was only achieved by Hart's failure to unite the disparate strands of his discussion of legal interpretation in a coherent way. Whilst Hart apparently offers something to the formalist, the intentionalist, the pragmatist and the nihilist, he is none of these himself. Finally, as a result of the shortcomings of each limb of his consideration of legal interpretation, and also because of his self contradictions, I will argue that Hart offers an implausible account of legal interpretation.

This reading of Hart's work therefore differs from earlier critiques of Hart such as that offered by Hutchinson. First, because it argues that Hutchinson's rebuttal of core cases is flawed and must accordingly be reframed. Second, it acknowledges the tripartite nature of Hart's treatment of language theory. Third, it examines the intricacies of Hart's often misunderstood treatment of penumbral decision-making. Finally, it argues that it is the complexity of Hart's theory which both accounts for much of its success and also constitutes its principal weakness.

---

12 Or, as Dworkin puts it, are judges simpletons or liars or is there an alternative explanation, R Dworkin, *Law's Empire*, Belknap Press (1986) p 41

13 A Gramsci, "Notes on Italian History", Q Hoare and G Nowell Smith (eds), *Selections from the Prison Notebooks* (1971) pp 55-60, 268ff For a critique of Gramsci's theory of hegemony see P Anderson, "The Antinomies of Antonio Gramsci" (1977) 100 *New Left Review* 5; WL Adamson, *Hegemony and Revolution: A Study of Antonio Gramsci's Political and Cultural Theory*, University of California Press (1980).

14 P de Man, "The Resistance to Theory" in *The Resistance to Theory*, University of Minnesota Press (1986) p 19.

15 In some ways this argument develops the hermeneutic thesis of Edgeworth, which portrays Hart as a product of his era who responded to the consciousness of his era see, B Edgeworth, "HLA Hart, legal positivism and post-war British Labourism" (1989) 19 *UWALR* 275 Nevertheless, this article differs substantially from Edgeworth's in its focus upon language theory and also the important fact that it acknowledges the multiplicity of discursive communities to which Hart's rhetoric must appeal.

But this article offers more than a critique of Hart's work. At the more fundamental level of a theorisation of discursive practice, it is a case-study of Hart's work from the perspective of an alternative theory of discursive practice which combines rhetoric, pragmatism and the recognition of our fractured community acknowledged by Bakhtin[16] and more recently reflected in Calhoun's 'politics of identity'.[17] Furthermore, although the focus of this article is Hart's theory of language, I will argue that Hutchinson's 're-reading' of Hart offers little that is new from Hart's work. In many respects reminiscent of the strengths and weakness of Hart's work, Hutchinson's rhetorical claim to have met the objections of arch positivists, natural lawyers and nihilists[18] is symptomatic of his willingness to cater for all tastes by adopting what proves to be an eclectic theory of interpretation. The article therefore concludes by acknowledging the complexity and rhetorical appeal of both Hart's and Hutchinson's respective discussions upon legal interpretation, but argues that notwithstanding suggestions to the contrary,[19] in achieving rhetorical success they relinquished any rightful claim to a critical theory of law.

Given the central importance of legal determinacy to Hart's theory, this article will begin by introducing the importance of determinate rules to the prevailing liberal theories of law.[20] As the context of twentieth century language theory is all too often overlooked or oversimplified[21] in accounts of legal interpretation, the tension within modern philosophy between nihilism, relativism and various theories of meaning, and the implications of these tensions for Hart's theory of legal determinacy, will then be noted. After a brief overview of the salient points of Hart's theory relevant to this article, I will turn to a detailed critique of his theory of language. Although I will initially be retracing ground already traversed by Hutchinson, it is necessary to revisit Hart's theory in some detail in order to develop an alternative reading of Hart's work. Finally, in a brief critique of Hutchinson's theory of adjudication, parallels with Hart's ambivalence upon a theory of language will be drawn.

---

16 See especially M Bakhtin, "Discourse in the Novel" in M Holquist (ed) *The Dialogic Imagination: Four Essays*, C Emerson and M Holquist (trans), University of Texas Press (1981) 259.

17 C Calhoun, note 3 *supra*

18 A Hutchinson, note 4 *supra* at 789

19 J Goldsworthy, "Is Jurisprudence Liberal Ideology?" (1993) 13 *Oxford Journal of Legal Studies* 548 at 561

20 The discussion of legal rules will be framed in terms of legislative rules, although the discussion is generally equally applicable to rules derived from the common law.

21 Thus, for example, in textbooks dealing with legal theory there is an understandable need to characterise a person's work as 'deconstructionist', without taking account of the considerable differences between deconstructionists, let alone the difference within the work of one deconstructionist such as Derrida See, for example, R Hunter, et al (eds), *Thinking About Law*, Allen & Unwin (1995) pp 128-9

II. LIBERAL LEGALISM AND THE IMPORTANCE OF DETERMINATE RULES

Despite concerted attacks from, most notably, the realist and critical legal studies 'schools',[22] liberal legalism remains the dominant legal discourse in the Australian community. Of course, speaking of *a* theory of liberal legalism as a unity is an oversimplification; 'liberal legalism' describes a range of theories which comprise variations upon several themes. Further, any one liberal legal theory will focus upon certain aspects of the liberal worldview while leaving many other aspects of that worldview as implicit assumptions.[23] Nevertheless, a fundamental characteristic of liberal legalism is that while it accepts that the creation of law is inevitably a political process, the application of law is considered to be wholly or mostly segregated from any political considerations. This segregation depends upon the purported ability of neutral arbiters to ascertain the determinate meaning of authorised legal texts without recourse to political considerations.[24] A central proposition of liberal legalism is therefore that law generally comprises determinate rules[25] of general application of which citizens have prior notice.[26] Some liberal legalists such as HLA Hart acknowledge that law can be created retrospectively by authorised officials, but nevertheless contend that the bulk of law consists of the application of preexisting meanings of legal rules.[27]

One reason why legal determinacy is so important to liberal legalism is that the rule of determinate law is considered a necessary, but not sufficient,

---

22 The critical legal studies literature is considerable, however for an overview of the fractured nature of critical legal studies see D Kairys (ed), *The Politics of Law: A Progressive Critique*, Pantheon, (1982), A Hunt, "The Theory of Critical Legal Studies" (1986) 6 *Oxford Journal of Legal Studies* 1, A Hutchinson and P Monahan, "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 *Stanford Law Review* 199; R Unger, *The Critical Legal Studies Movement*, Harvard University Press (1986) There has been substantial debate as to whether the critical legal studies critique of 'liberal legal theory' is in fact based upon misinterpretations of the work of several quite different liberal legalists; see, for example, W Ewald, "Unger's Philosophy. A Critical Legal Study" (1987-8) 97 *Yale LJ* 665, M Krygier, "Critical Legal Studies and Social Theory - A Response to Alan Hunt" (1987) 7 *Oxford Journal of Legal Studies* 26 at 28

23 R Gordon, "Critical Legal Histories" (1984) 36 *Stanford Law Review* 57 at 58-9, note 8.

24 For the development of a generic theory of liberal legalism in similar vein, see A Altman, *Critical Legal Studies A Liberal Critique*, Princeton University Press (1990) p 27

25 The reference to rules is to rules in the broadest sense, such that even statutory "rules" susceptible to a 'creative' Dworkinian/Gadamerian interpretation fall within the definition of liberal theory; see R Dworkin, note 12 *supra*

26 This definition of legalism is substantially similar to that adopted by N MacCormick in "The Ethics of Legalism" (1989) 2 *Ratio Juris* 184 at 184.

27 HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 595 at 614 For differing expressions of the determinacy thesis, see. L Fuller, *The Morality of Law*, Yale University Press (rev ed, 1969) ch 2, N MacCormick, "Reconstruction after Deconstruction" (1990) 10 *Law and Philosophy* 539 at 549, J Shklar, *Legalism*, Harvard University Press (1964); D Kennedy, "Legal Formality" (1976) *Journal of Legal Studies* 351; R Unger, *The Critical Legal Studies Movement*, note 22 *supra*, p 1 Unger notes that there are few adherents of 'strong' formalism today, suggesting that a more modern version of formalism maintains "a commitment to, and a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary" (p 1).

condition to the fulfillment of liberal values centring upon individual autonomy.[28] Determinate law enables individuals to plan their affairs with certainty, knowing that they are acting within the confines of the law and therefore free from state or private intervention.[29] This rationale for legal determinacy suggests that for a legal rule to be 'determinate' the meaning must be fixed *from the inception of the rule*. Under this rationale, a liberal legalist could not accept a theory of language under which meaning may change over time, even if the law is determinate at any particular time, because such ephemeral meaning is of no use to citizens wishing to plan their affairs with some assurance as to their legality *in the future*. This requirement for prospective rules will be called 'prospective determinacy'.

An alternative rationale for legal determinacy might de-emphasise the need for the individual to plan for the future, but would emphasise the need to protect the individual from arbitrary decision making by the administrative and judicial arms of government.[30] By contrast to the first rationale of legal determinacy, such a rationale could accommodate a theory of language which acknowledged that meaning may change over time, but would nevertheless require that meaning be determinate at the particular time that the law is applied to the circumstances of a particular case. This approach could be called one of retrospective determinacy - the determinacy only applies retrospectively from the time of judgment.

The liberal theorisation of the implementation of determinate law draws considerable power from the post Enlightenment faith in critical rational thought.[31] Under either rationale, arbitrary decision making can be segregated from law. This is possible because legal texts can be univocal in most, if not all, cases.[32] According to this view, the primary role of the judge is generally not to make law but merely to enforce it. Given that the law is generally found, not made, by judges, the application of legal rules according to this view is always subject to rational critique. The courts are the chosen vehicle for such rational adjudication upon legal rights because it is judicial impartiality which is the vital condition of the possibility for rational judgment uninfluenced by 'political' considerations.

Interpretive determinacy is therefore the linchpin of the liberal ideals of the rule of law and the separation of powers, for in the absence of such determinacy, the concept of law collapses into open ended political contests. There can be little doubt that the liberal depiction of law as more or less determinate so informed the general understanding of law in post war England that it was treated as axiomatic, as indeed it continues to inform the general understanding

---

28 A Altman, note 24 *supra*, p 13 For a fascinating genealogy of the concept of the autonomous individual see C Taylor, *Sources of the Self. the Making of the Modern Identity*, Harvard University Press (1989); see also D Kennedy, note 27 *supra* at 370ff.

29 See, for example, J Rawls, *A Theory of Justice*, Harvard University Press (1971) pp 239-40.

30 For the origins of the separation of powers doctrine, see W Holdsworth, 10 *A History of English Law*, Sweet & Maxwell (1964) pp 255-6.

31 Although, of course, the concept of the rule of law can be traced back to Plato and Aristotle.

32 See, for example, R Dworkin, note 12 *supra*; the extent to which Hart's penumbral zone of judicial decision making comprised an area of unfettered judicial discretion will be discussed below

of law to this day. Having apparently accepted the existence of legal determinacy, one crucial question confronting Hart was how this phenomenology of determinacy could be explained in terms of a language theory which was acceptable to an audience of sufficient size as to ensure the success of his theory. To understand the power of Hart's answer to this problem, it is necessary to briefly survey the context of twentieth century theories of language confronting Hart.

III. THE FRACTURING OF THE INTERPRETIVE COMMUNITY AND THE ROLE OF RHETORIC

Prior to the twentieth century, the existence of legal determinacy was rationalised by the assumption that language was an objective means of describing the objective world.[33] There was no question of polysemicity because language conveyed what was 'there'. Earlier forms of liberal legalism took this referential theory and maintained that law consisted of an autonomous body of rules which could be objectively applied to a determinate range of factual circumstances.[34] Although there was the pragmatic undercurrent of dissent,[35] in the main this referential theory of language spawned the slot machine jurisprudence characterised by epithets such as "think things not words".[36]

For the first decades of the twentieth century, logical atomists and logical positivists modified this referential theory by arguing that ordinary language offered but a partial description of the world because it was recognised that there is not necessarily a referent for every sign. Logical atomists and their positivist descendants therefore set about breaking the code of language by defining the necessary and sufficient conditions for a statement to be true.[37] But for reasons

---

33 See, for example, JS Mill, *A System of Logic*, Longmans Green (1947) pp 48-9.

34 For one expression of rule formalism in the legal context, see the work of C Langdell, first Dean at Harvard Law School. For commentary upon Langdell's work see TC Grey, "Langdell's Orthodoxy" (1983) 45 *University of Pittsburgh Law Review* 1; MH Hoeflich, "Law and Geometry: Legal Science from Leibniz to Langdell" (1986) 30 *American Journal of Legal History* 95. The discussion of Hart's work below will show that at times Hart also appeared to embrace rule formalism, although note MacCormick's attempt to downplay the significance of rules in Hart's theory - N MacCormick, note 1 *supra*, ch 10 For a rebuttal of formalist language theory in the context of law, see M Moore, "The Semantics of Judging" (1981) 54 *Southern California Law Review* 151 at 202-26

35 See, for example, CS Pierce, "How to Make our Ideas Clear" (1878) 12 *The Popular Science Monthly* 276.

36 OW Holmes, "Law in Science and Science in Law" (1899) 12 *Harvard Law Review* 443 at 460 Note the relevance of Bentham's theory of legislation as a detailed codebook minimising judicial discretion based upon a theory of language comprising a system of "neutral appellatives"; J Bentham, *The Theory of Fictions*, Routledge & Kegan Paul (1932). For a discussion of Bentham's theory of language see K Burke, *A Rhetoric of Motives*, University of California Press (1969). For a critique of this referential theory of meaning see, for example, G Ryle, "The Theory of Meaning" in C Mace (ed), *British Philosophy in the Mid-Century: A Cambridge Symposium*, Allen & Unwin (2nd ed, 1966) 239 at 256.

37 For the classic statement of logical atomism, see L Wittgenstein, *Tractatus Logico-philosophicus*, CK Ogden (trans), Routledge (1990); this was subsequently adapted by logical positivists such as AJ Ayers, *Language Truth and Logic*, Penguin Books (1971).

beyond the scope of this paper, attacks upon this analytic theory gathered momentum in the early twentieth century.[38]

A. Formalism

Ferdinand de Saussure[39] offered an alternative source of interpretive determinacy by focusing upon *langue* rather than *parole*, thereby emphasising the formal aspects of language as a system of signifiers.[40] Saussure argued that the meaning of a sign does not depend upon it referring to any aspect of the material world. Rather, he argued, the meaning of each signifier is formally determined by its relationship to all other signifiers within the particular language.[41] Thus, the signifier 'cat' is differentiated from 'cap', 'cad', 'dog' and so forth, and 'cat' is arbitrarily assigned the function of conveying the idea of a fluffy thing which commonly purrs and meows. A message consisting of signifiers could be sent and be decoded by the recipient, provided that the appropriate communicative methods were adopted.

The height of twentieth century formalism was reached when structuralists adapted Saussure's work by theorising humanity as located within a complex array of contingent social structures, not all of which are necessarily apparent to the social actors.[42] Born into a particular lifeworld organised by such structures, they argued, our perceptions of the world are determined by those structures. On this view, determinacy was assured because the language system was a self maintaining system in which the meaning of each signifier was capable of objective analysis,[43] at the least by an appropriately qualified person.[44] But this structuralist perception that language determines our understanding of the world was criticised for several reasons.[45] One problem was the apparent assumption that language systems came into existence with a 'big bang' - structuralists simply seemed to be willing to assume the existence of some timeless underlying system of signifiers. Objection was also taken to the assumption by structuralists that systemic response to social change in the use of signifiers would quickly achieve a new equilibrium within the one communal language - there was simply no room for a theory of multiculturalism which acknowledged the prospect of multiple discourses. Furthermore, it has been argued that structuralism fails to explain the perceived slippage of meaning in daily discourse. Just as Saussure had excluded consideration of *parole* in favour of *langue*, structuralists excluded

---

38 For a critique of logical atomism and logical positivism, see H Putnam, 2 *Mind, Language and Reality*, Cambridge University Press (1975) pp 1-33 For general histories of language theory see J Passmore, *A Hundred Years of Philosophy*, Penguin Books (1968); J Passmore, *Recent Philosophers*, Open Court Publishing Co (1990), T Eagleton, *Literary Theory*, Basil Blackwell (1983), J Thompson, *Critical Hermeneutics*, Cambridge University Press (1981) ch 1.

39 F de Saussure, *Course in General Linguistics*, McGraw Hill (1966) pp 67ff.

40 *Ibid*, p 9.

41 *Ibid*, pp 114ff.

42 See, for example, C Levi-Strauss, *The Savage Mind*, Weidenfeld & Nicolson (1966).

43 *Ibid*, p 75

44 For a discussion of this aspect of structuralist theory, see C Norris, *Deconstruction. Theory and Practice*, Routledge (rev ed, 1993) pp 5-6.

45 T Eagleton, note 38 *supra*, p 113

consideration of context and the response of the recipient in order to 'scientise' the study of language as an objectifiable system.[46]

B. Pragmatism

With a growing rejection of the assumptions underpinning formalist linguistic theory, language was increasingly perceived as socially constructed and constitutive of the social world - the pragmatic aspects of language were increasingly acknowledged.[47] Accepting the inability of logical positivists to break the code of language, in his later work Wittgenstein resiled from a formalist theory of language by accepting that linguistic theory should examine the pragmatic *use*[48] of language perceived as a system of signifiers[49] underpinned by social agreement.[50] The significance of ordinary language theory[51] was this turn to the conventional foundations of meaning - in how words were used in particular contexts.[52] Learning about language use in a particular social context was to place oneself in the role of a participant, to learn the 'rules of the language game' such that appropriate usages could be determined.

But the contextualisation of language meant that a word potentially possessed multiple meanings - for example, the statement 'I've been tripping' could be made by, at the least, a holiday-maker, a user of drugs, a happy person who has been skipping, a person who had stumbled through a speech or a person who has walked over rough ground.[53] Moreover, not all of these meanings came into existence at the same time and in the same historical contexts. The meanings

---

46 S Clarke, *The Foundations of Structuralism*, Harvester Press (1981) pp 173ff.

47 For an early recognition of the shortcomings of formalist linguistic theory from a Marxist perspective, see VV Volosinov, *Marxism and the Philosophy of Language*, L Matejka and I Titunik (trans), Seminar Press (1973); M Bakhtin and PN Medvedev, *The Formal Method in Literary Scholarship, a Critical Introduction to Sociological Poetics*, A Wherle (trans), Johns Hopkins University Press (1978).

48 Wittgenstein, for example, noted that "for a large class of cases - though not for all in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language. And the meaning of a name is sometimes explained by pointing to its bearer". L Wittgenstein, *Philosophical Investigations*, GEM Anscombe (trans), Basil Blackwell (3rd ed, 1968) at [43]. Wittgenstein therefore opined "let the use of words teach you their meaning" at [220]. Note that there was debate within the ordinary language academy as to what *use* meant - Austin thought that *use* was hopelessly ambiguous see JL Austin, *How to Do Things with Words* in JO Urmsen and M Sbisà (eds), Oxford University Press (2nd ed, 1976) p 100 In propounding the social construction of language, Wittgenstein had his antecedents Malinowski, for example, had recognised the pragmatics of language in "The Problem of Meaning in Primitive Languages" in CK Ogden and IA Richards, *The Meaning of Meaning*, Routledge & Kegan Paul (1929) as had VV Volosinov, note 47 *supra*.

49 L Wittgenstein, *Philosophical Remarks*, R Hargreaves and R White (trans), Blackwell (1975) p 110.

50 L Wittgenstein, note 48 *supra*, vol 1, at [242] For discussion of this aspect of Wittgenstein's pragmatics see G Hallett, *A Companion to Wittgenstein's "Philosophical Investigations"*, Cornell University Press (1979)

51 For a critical appraisal of ordinary language theory, see J Thompson, note 38 *supra*, ch 1.

52 "In order to explain what can go wrong with statements we cannot just concentrate on the proposition involved (whatever that is) as has been done traditionally. We must consider the total situation in which the utterance is issued - the total speech-act - if we are to see the parallel between statements and performative utterances, and how each can go wrong ": JL Austin, note 48 *supra*, p 52

53 The multiplicity of meanings arising from a pragmatic account of communication similar to that adopted by Hart was noted in F Cohen, "Field Theory and Judicial Logic" (1950) 59 *Yale LJ* 238 at 240-1

were pragmatically created and so we can never assume that the class of meanings for this statement is closed.

Of course, the context of an utterance may assist in eliminating certain potential meanings. The statement 'I've been tripping' may have been made in the context of a long talk about holidays, and so it might be reasonable to exclude some of the possible meanings, but not all. But this recourse to context leaves open the definition of what we mean by 'context'. If 'context' includes the background of the speaker, the circumstances of the utterance, and also the background of the recipient, it is difficult to see how such a broadly defined 'context' can enable us to say that meaning is determinate at the time the message is 'sent' unless we are prepared to assume that the speaker and the recipient have complete knowledge of the entire context. In other words, the pragmatics of language use may resolve ambiguity to some extent, but it has also been argued that this appeal to pragmatics need not conclusively resolve ambiguity and indeed may only serve to increase ambiguity.[54]

C. Intentionalism

In the quest for determinacy, some language theorists suggested that authorial intention was another aspect, and "not just one among others",[55] of the context of a particular utterance.[56] Thus, under Austin's speech act theory,[57] authorial intention was fundamental to determining the "sense"[58] in which a particular speech act was to be understood. A 'valid' or, to use Austin's terminology, "felicitous" or "happy"[59] performative utterance required the author to intend the act, use appropriate forms and make the speech act in the appropriate context. The assumption in this theory of speech acts is that the author has an intention which he or she frames in terms of language and sends the encoded message to the recipient who deciphers it to produce what is hopefully the same concept as that originally thought of by the author.[60] In any particular context, the meaning will be determined by the author's intention even if the mode of expression is 'unhappy'.

---

54 M Moore, note 34 *supra* at 186-7, see also T Eagleton, note 38 *supra*, pp 6-7; F Cohen, note 53 *supra* at 240.

55 J Derrida, "Signature Event Context", (1977) 1 *Glyph* 172 at 187

56 This inclusion of authorial intention under the pragmatic domain contrasts with Moore's suggestion that authorial intention is just another brand of formalism because it purportedly produces one answer; M Moore, note 34 *supra*, pp 157, 246

57 For a discussion of speech act theory see VV Volosinov, note 47 *supra*, J Habermas, *Communication and the Evolution of Society*, Heinemann (1979) ch 1; J Passmore, *A Hundred Years of Philosophy*, note 38 *supra*, ch 18; P Goodrich, note 7 *supra*, pp 48ff; J Derrida, note 55 *supra*, passim; for a response to Derrida see J Searle, "Reiterating the Differences" (1977) 1 *Glyph* 198 and for Derrida's rejoinder see J Derrida, "Limited Inc abc" (1977) 2 *Glyph* 162.

58 JL Austin, note 48 *supra*, p 99

59 *Ibid*, p 14ff

60 Oliver Wendell Holmes had posited the centrality of authorial intention. OW Holmes, "The Theory of Legal Interpretation" (1899) 12 *Harvard Law Review* 417 at 418. Glanville Williams had also adopted this theory of language. G Williams, "Language and the Law" (1945) 61 *LQR* 71 at 73; see also HP Grice, "Meaning" (1957) 66 *Philosophical Review* 377

D. 'Postmodernism'

Ordinary language theory therefore sparked a trend towards theorising language as a pragmatic, context dependent enterprise rather than a formal structure autonomous from and descriptive of 'objective reality' as depicted in earlier language theory.[61] There were two important consequences for legal theory arising from this linguistic turn. The first was that an emergent pragmatic linguistic theory historicised language, and played an important part in decentring the knowing subject as the impartial observer of an objective reality.[62] In terms of legal theory, one important consequence of this pragmatic turn was that it implicated legal exegetes in the social construction of meaning rather than merely accepting that the law was some objective entity 'out there' awaiting judicial discovery.[63] After the linguistic turn, then, legal theory is often perceived as but one scene upon the broader canvas of social theory such that a theory of law must recognise and account for the social forces which create law. This linkage of social and legal theory opened the way for some branches of sociology to challenge the autonomy of law[64] and for some legal historians to challenge the liberal teleology of the rise of liberal legalism.[65]

But more importantly for present purposes, the widespread acceptance of the arbitrariness of the sign and the contextualisation of meaning raised the spectre of a linguistic nihilism. Under such a model I could understand a criminal statute as a recipe for Christmas puddings, while the next person might read the same statute as a guide to rockclimbing and there would be no possibility of saying that either or both of us were reading the statute incorrectly. Complete interpretive freedom therefore threatened the ideal dualisms of modernism which had formerly been sustained in part by a formalist theory of meaning.[66] The denial of these dualisms threatened liberal theory which, as already noted, emphasises the ability of individuals to reach agreement in a determinate language in a world where politics and law are more or less separated. Further, such interpretive freedom contradicted any theory of history falling under the

---

61 Thus, for example, the central theme of JL Austin's *How to Do Things with Words* (note 48 *supra*) was the elucidation of the performative or illocutionary aspect of language by way of contrast with the constative theory of language which had preoccupied philosophy for the first decades of the twentieth century "performance of an act *in* saying something as opposed to performance of an act *of* saying something ..". p 99.

62 See, for example, T Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press (1970); P Feyerabend, *Against Method*, Verso (rev ed, 1988), P Feyerabend, *Farewell to Reason*, Verso (1987), R Rorty, *Philosophy and the Mirror of Nature*, Princeton University Press (1979).

63 A proposition with which Hart would agree, as core meanings, he suggested, are those which are adopted time and again in judgments, see the discussion of this aspect of Hart's theory in text accompanying notes 94-100 *infra*.

64 See, for example, A Hunt, *Explorations in Law and Society*, Routledge (1993); A Hunt and G Wickham, *Foucault and Law. Towards a Sociology of Law as Governance*, Pluto Press (1994).

65 HW Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England*, University of Toronto Press (1985); JW Auerbach, *Justice Without Law?*, Oxford University Press (1983) More generally, see H Butterfield, *The Whig Interpretation of History*, Norton & Co (1965).

66 As already discussed, the politics/law dualism is fundamental to liberal legalism, see text accompanying notes 22-31 *supra*.

Marxist materialist banner and also denied any prospect of a critical social theory.[67] The prospect of such interpretive freedom was therefore anathema to both liberals and a broad spectrum of the political left alike. Most contemporary language theorists therefore acknowledge that there is some constraint in language - even Derrida in his more recent work has suggested that deconstruction is not a passport to nihilism.[68]

It is this navigation between the nihilistic Scylla of complete interpretive freedom and the mechanical Charybdis of formalist constraint which is at the core of modern language theory. In terms of legal theory, the spectre of nihilism had to be addressed if it was not to wreck the liberal theory of law founded upon objective, determinate rules interpreted by objective methods. Accordingly, modern liberal legalists have sought to accommodate the pragmatic theories of language underpinning the linguistic turn, but at the same time rationalise the liberal legalist faith in the rule of law by finding some alternative basis for sufficient interpretive constraint to justify the liberal claims to the existence of determinate law applied impartially.[69]

It is in this context of the search for interpretive constraint that Hart's theory of law must be understood. It might have been easier for Hart to sustain his thesis of a widespread understanding of legal rules had he been writing three decades earlier, when referential and atomistic theories of language prevailed. He could then have argued that language was a widely understood system of symbols with synchronic meanings applied in a mechanical way.[70] But by the time that Hart put pen to paper in developing his theory of law, twentieth century language theory had fractured into various powerful schools ranging from descendants of the logical positivists, through an increasingly powerful structuralism to the pragmatics of Wittgenstein and JL Austin and beyond to the coterie of indeterminacy theorists. There was no one dominant paradigm in the field of language theory. In such a fractured environment, the more schools of thought to which Hart's theory might appeal, the more likely that his theory would win widespread support. Whether Hart cynically set out to win multilateral support is beside the point for the purposes of this article, it is the fact that he did so which contributed significantly to the considerable rhetorical appeal of his theory. Hart's eclectic inclusion of competing theories of language under the one umbrella of his legal theory, and the shortcomings of this approach, will be explored in the next section of this article.

---

67 There is a wealth of material on this issue For recent discussion of attempts to ground a critical theory after the linguistic turn, see DC Hoy and T McCarthy, *Critical Theory*, Blackwell (1994), see also C Calhoun, note 3 *supra*, R Wolin, *Labyrinths*, University of Massachusetts Press (1995)

68 J Derrida, *Specters of Marx*, P Kamuf (trans), Routledge (1994) p 59 For the view that Derrida has never subscribed to nihilism, see, for example, C Norris, note 44 *supra*. For a scathing attack upon Derrida's duplicity in positing deconstruction while at the same time offering the 'right' reading of Paul de Mann's wartime writings sympathetic to Nazism, see R Wolin, note 67 *supra*, pp 1-12.

69 Thus, for example, Ronald Dworkin finds the Neptune of integrity in institutional texts as the source of interpretive constraint, for Dworkin's most comprehensive work, see R Dworkin, note 12 *supra*, while Stanley Fish finds institutional culture to be the foundation for constraint, note 9 *supra*.

70 See the discussion accompanying notes 33-36 *supra*.

IV. HART'S THEORY OF LAW

Despite what might be described as an inauspicious beginning,[71] the legal philosophy of Hart most comprehensively set forth in *Concept* has been widely lauded as one of the most important contributions to legal theory.[72] Notwithstanding the substantial critical commentary directed against it[73] and the recognition of some of its shortcomings by Hart's supporters,[74] Hart's theory of law remains a salient feature upon the landscape of liberal legal theory and continues to attract its defenders.[75]

A. The Importance of Rules in Hart's Theory of Law

Hart's theory of law is well known and will therefore only be briefly summarised before turning to a more detailed examination of his theory of language and his analysis of statutory interpretation.

Hart's theory focuses upon law as a hierarchy of rules.[76] For a rule to exist there must first be a pattern of social behaviour; second, there must be social pressure to comply with the behavioural pattern; third, that social pressure must be justified by recourse to the rule; and finally, there must be what Hart describes as an "internal aspect" of rules.[77] Legal rules are distinguishable from rules of morality because the former are systematised under a regime of primary and secondary rules.[78] Secondary rules may confer power upon officials to make, apply, modify, and/or change the law and they may also confer power upon citizens to make law in terms of contracts etc.[79] Primary rules are not considered at length by Hart, but they comprise all of the remaining legal rules

---

71 For a discussion of the early negative reception of *Concept*, see C Campbell, "The Career of the Concept" in P Leith and P Ingram (eds), note 1 *supra*, pp 1-25

72 See material cited at note 1 *supra*

73 See, for example, R Moles, *Definition and Rule in Legal Theory: a Reassessment of HLA Hart and the Positivist Tradition*, Basil Blackwell (1987); P Fitzpatrick, note 7 *supra*.

74 See, for example, N MacCormick, note 1 *supra*; W Waluchow, "Herculean Positivism" (1985) 5 *Oxford Journal of Legal Studies* 187, W Waluchow, "Review of Definition and Rule in Legal Theory A Reassessment of HLA Hart and the Positivist Tradition" (1988) 8 *Canadian Philosophical Reviews* 181; W Waluchow, *Inclusive Legal Positivism*, Clarendon Press (1994)

75 Although such defenders offer only qualified support see, for example, M Bayles, *Hart's Legal Philosophy*, Kluwer (1992), N MacCormick, "The Concept of Law and *The Concept of Law*" (1994) 14 *Oxford Journal of Legal Studies* 201, W Waluchow, *Inclusive Legal Positivism*, note 74 *supra* in which Waluchow argues for a version of positivist theory which accepts a significant role for morality in determining the content of law but nevertheless proclaims his allegiance to Hart's theory (p 4); J Goldsworthy, note 19 *supra* (although note that Goldworthy accepts that positivism is a flawed theory of law).

76 HLA Hart, *Concept*, note 2 *supra*, p 80; for a critique of Hart's failure to adequately define rules see R Moles, note 73 *supra*, pp 83ff

77 HLA Hart, *ibid*, pp 55-6.

78 *Ibid*, pp 94, 170 This categorisation has been criticised as vague; see, for example, N MacCormick, note 1 *supra*, pp 105-6. For criticism of Hart's more general failure to establish a theory grounded upon properly defined terms, and comparison with Max Weber's theory of law, see C Campbell, note 71 *supra* at 15-16.

79 HLA Hart, *Concept*, note 2 *supra*, p 81

which he suggested "impose duties" and concern 'actions involving physical movement or changes'.[80]

A central aspect of Hart's theory of law was an explanation of legal obligation in positivistic, non-moral terms while simultaneously denouncing the Austinian theory of obligation founded upon 'objective' motivations such as the fear of sanctions.[81] Hart believed that his concept of a rule, and most importantly the internal aspect of rules, was the key to this positivist rejection of the gunman theory.[82] Hart noted that, normally at least, a majority of members of the community would understand what the law meant, presumably a necessary precondition for a widespread critical reflective attitude to exist.[83] However, as is apparent from other passages in *Concept*, Hart considered that only some members of the community need possess the requisite understanding.[84]

Hart therefore seemed to acknowledge the existence of at least two interpretive communities. This failure to conclusively identify the relevant interpretive community which 'understands' the legal rules (and hence is the foundation for the meaning of legal rules)[85] undermines his assertion that rules are generally determinate,[86] a matter which will be considered further below.[87] Nevertheless, it is sufficient for present purposes to note that much of Hart's consideration of legal interpretation suggests that he envisaged core legal meanings to be founded upon generally accepted usages of language. Hart's claim to have rejuvenated the science of jurisprudence with his "fresh start"[88] therefore depended upon a theory of language which explained how such a "Protestant"[89] understanding of legal rules was possible in modern Occidental communities which are characterised by cultural diversity.[90]

---

80 *Ibid*

81 Hart argued that authoritative legal rules can only be explained having regard to "the whole distinctive style of human thought, speech, and action . which constitutes the normative structure of society": *ibid*, p 88. For a critique of Hart's portrayal of Austinian theory, see R Moles, note 73 *supra*, ch 3.

82 HLA Hart, *Concept*, note 2 *supra*, p 81 For a critique of Hart's internal aspect of rules see N MacCormick, note 1 *supra*, pp 36-40; P Fitzpatrick, note 7 *supra*, pp 197-206, P Goodrich, note 7 *supra*, pp 48ff The similarity of this theory to Austin's, and hence the failure of Hart's search for a positivist, non gunman theory of obligation, has been noted, R Moles, note 73 *supra*, ch 3. For the view that Hart's later work developed an alternative theory of obligation not so dependent upon sanctions, but which nevertheless departs from the model of a rule grounded upon the critical reflective attitude, see A O'Neill, "The Legal Philosophies of HLA Hart" (1989) *The Juridical Review* 32; but for a reconciliation of Hart's apparently disparate theories of obligation, see A Oladasou, "HLA Hart on Legal Obligation" (1991) 4 *Ratio Juris* 152.

83 HLA Hart, *Concept*, note 2 *supra*, pp 90, 124, 135.

84 *Ibid*, pp 60-1, 114, 203. This segregation of 'participants' and 'subjects' was endorsed by W Waluchow, *Inclusive Legal Positivism*, note 74 *supra*, pp 27-8

85 For a discussion of the role of an interpretive community in a conventional theory of communication, see the work of S Fish, note 9 *supra*.

86 HLA Hart, *Concept*, note 2 *supra*, p 135.

87 See text accompanying notes 117-19, *infra*.

88 HLA Hart, *Concept*, note 2 *supra*, p 80.

89 A term applied in a similar context by R Dworkin, note 12 *supra*, p 413.

90 Although Hart was developing a general theory of law and therefore purportedly not directly concerned with Occidental legal systems, clearly, his theory must explain those systems: see HLA Hart, *Concept*, note 2 *supra*, p 230

Speech act theory[91] was the vehicle which Hart adopted to accommodate his adherence to the rule of law and the criticisms of rule formalism by the realist school.[92] In his earlier work, Hart considered that in making a speech act a speaker (the legislature) has a prelinguistic intention which is expressed by selecting appropriate signifiers with conventionally determined meanings.[93]

B. Core Meanings

Hart developed this compromise between pragmatic and formalist theory in *Concept* by arguing that linguistic signifiers had a core of conventionally settled meaning supplemented by a penumbra of "open texture"[94] which gave rise to hard cases of interpretation.[95] According to Hart, the core meaning is a relatively stable denotation of the general legislative terms[96] and consists of the conventional usages of the author's society.[97] It was this conventionalist aspect which underpinned his view of law as a pragmatic practice motivated by the needs of society.[98] As the core meaning is the objectively verifiable expression of the legislative intention, there is no need to *interpret* 'vehicle' in considering

---

91 It has been noted that Hart and others who followed Austin have been somewhat selective in their use of JL Austin's work in developing speech act philosophy Austin's Harvard lectures, if anything, emphasised the need to understand language in the particular context in which it is used, and it was within this matrix that authorial intention was significant Hart certainly adopted these notions of context and authorial intention, but in a manner which would seem to be quite inconsistent with Austin's theory. For a discussion of this aspect, see C Norris, *The Contest of Faculties*, Methuen (1985) pp 183ff.

92 For examples of the realist critique of rule formalism, see J Frank, *Law and the Modern Mind*, Stevens (1949); K Llewellyn, *The Bramble Bush*, Oceana Publication (1960) For consideration of the amalgam of pragmatism and formalism within Hart's theory, see N MacCormick, note 1 *supra*, pp 121-2, S Livingstone, "HLA Hart and American Legal Realism" in P Leith and P Ingram (eds), note 1 *supra* at 147-72.

93 "Thus two notions are essential to an analysis of the meaning and understanding of words . . The first is that of the listener recognising from the speaker's utterance the speaker's intention that he should respond (eg believe or do something) in certain ways, but recognising it without necessarily responding in these ways; the second is that of the speaker intending when he uses words that the listener should thus recognise his intention " HLA Hart, "Signs and Words" (1952) 2 *Philosophical Quarterly* 59 at 62. This view is consistent with some passages in HLA Hart, *Concept*, note 2 *supra*; see, for example, p 126 For a critique of this language theory in the context of Hart's categorisation of the internal and external attitude to rules, see J Jackson, "Hart and the Concept of Fact" in P Leith and P Ingram (eds), note 1 *supra* at 61.

94 HLA Hart, *Concept*, note 2 *supra*, p 127 Hart was by no means the first to suggest that language is open textured, Wittgenstein having renounced his earlier picture theory of language in favour of the view that language is open-textured, see L Wittgenstein, note 48 *supra*, at [147]-[202]; Waissman developed and applied Wittgenstein's language theory to various problems concerning the possibility of making verifiable sense datum statements, see F Waissman, "Verifiability" (1945) 19 (Supp) *Proceedings of the Aristotelian Society* 119 at 121-4, F Waissman, *The Principles of Linguistic Philosophy*, Macmillan (1965), see especially pp 68-86, 221-5

95 See, particularly, HLA Hart, *Concept*, note 2 *supra*, ch 7, HLA Hart, "Law and the Judicial Decision - Problems of Legal Reasoning" in P Edwards (ed) (1967) 6 *Encyclopaedia of Philosophy* 264 at 270-1, HLA Hart, note 27 *supra*.

96 Hart refers to "settled" meanings, see HLA Hart, *Concept*, note 2 *supra*, pp 129-30

97 *Ibid*, p 126

98 *Ibid*, pp 128-9 For a fuller description of Hart's perception of this passage between Scylla and Charybdis, see HLA Hart, "American Jurisprudence Through English Eyes The Nightmare and the Noble Dream" (1983) 11 *Georgia Law Review* 969

the 'vehicleness' of a car to determine that a car is a vehicle, because it is simply a fact that a car is a vehicle.[99] Once confirmed, the doctrine of precedent would cement those determinations into the legal text such that only specific legislation could overturn a particular ruling.[100]

Such a theory of core meanings resembles the formalist theories of language criticised by ordinary language theorists such as JL Austin.[101] However, Hart had cleverly made some concession to conventionalism by accepting that the meaning of a signifier was conventionally determined. This compromise between formalism and pragmatism was doubtless instrumental in garnering support from the legal fraternity accustomed to speaking in terms of the 'plain' or 'literal' meaning of legislation, those who adhered to formal theories of language and also those who had adopted the pragmatism of the ordinary language 'school'. But whilst such a compromise between conflicting language theories constituted a rhetorical success, it introduced irresolvable tensions into Hart's work.

C. Adjudication Upon the Core Meaning

(i) The Pragmatic Requirement of Legal Flexibility

It might be thought that the instability of core cases arising from this tension between formalism and pragmatism is discernible in Hart's pragmatic assertion of the need for flexibility in the law. In condemning the 'vice' of formalism, Hart noted that to freeze the meaning of a rule:

> We may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequences of applying the rule in this way.... We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified. We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which open textured terms of our language would have allowed us to exclude, had we left them less rigidly defined.[102]

Although this assertion is made in the context of Hart's rebuttal of a formalist theory of legislation, the perceived need to exclude predetermined cases might equally be understood to require that judicial pronouncements upon the law not become 'frozen' by the ascertainment of a core of meaning.

Nevertheless, this desire for flexibility in the law does not mean that precedents will be frequently overruled.[103] Hart seems to assume that there are innumerable identical cases, and that once one case has been determined to fall within a legal rule then all succeeding identical cases will also fall within the

---

99 *Cf* R Dworkin, note 12 *supra*, p 42.

100 HLA Hart, *Concept*, note 2 *supra*, p 135, see also p 129; *cf* W Waluchow, *Inclusive Legal Positivism*, note 74 *supra*, p 65. For further consideration of the polysemicity of language and its impact upon Hart's core meanings, see M Wood, "Rule, Rules and Law", in P Leith and P Ingram (eds), note 1 *supra*, p 27.

101 JL Austin, note 48 *supra*, pp 1-2

102 *Ibid*, pp 129-30; HLA Hart, *Essays in Jurisprudence and Philosophy*, note 2 *supra*, p 104

103 HLA Hart, *Concept*, note 2 *supra*, pp 134-5.

rule. The law will generally only 'grow' out from the core, and only rarely contract.[104] In this way, the ascertainment of the core of meaning does not breach Hart's call for legal flexibility because the application of legal rules to many unique factual scenarios is yet to be performed.

(ii) Reconciling Determinacy with a Conventionalist Theory of Meaning

An alternative basis for suggesting the instability of Hart's core meanings is that no matter what is accepted as falling within the core meaning of a rule today, a conventionalist theory of language accepts that, at least theoretically, that core may be changed by communal agreement tomorrow. Hart clearly expressed his faith in a social consensus as the foundation of the determinate core:

> The clear cases are those in which there is general agreement that they fall within the scope of a rule, and it is tempting to ascribe such agreements simply to the fact that there are necessarily such agreements in the use of the shared conventions of language. But this would be an oversimplification because it does not allow for the special conventions of the legal use of words, which may diverge from their common use, or for the way in which the meaning of words may be clearly controlled by reference to the purpose of a statutory enactment which itself may be either explicitly stated or generally agreed.[105]

If the meaning of every rule is subject to convention, anything can change and quite clearly language use does change over time. According to such conventionalism, a motor car may be accepted to fall within the category 'vehicle' today, but tomorrow the community or an authorised sub-community *may* agree that a motor car should no longer be a vehicle. This transient nature of conventionally determined meaning seems to pose a significant threat to Hart's apparent endorsement of prospective determinacy.[106] If any core meaning is susceptible to being overruled as a result of a change in convention, the core meaning may easily unravel and the rule of law founded upon permanent meaning in the majority of cases would collapse.[107]

Hutchinson highlights this conflict between prospective determinacy and conventionalism within Hart's theory.[108] Focusing upon Hart's treatment of the genesis of core cases, Hutchinson interprets Hart to be taking the strong view that convention can only create meanings and that convention cannot destroy meaning.[109] Although he acknowledges the conventionalist aspects of Hart's theory to some extent, Hutchinson characterises Hart as an aspiring formalist before dismissing Hart's theory as a "well-intended but unsuccessful attempt to contain the subversive implications of a thoroughly contextual and sceptical approach to law and language".[110]

---

104 *Ibid*

105 HLA Hart, "Law and the Judicial Decision - Problems of Legal Reasoning", note 95 *supra* at 271.

106 HLA Hart, *Concept*, note 2 *supra*

107 For the argument that legal obsolescence does not necessarily undermine the liberal creed of legal determinacy, see G Calabresi, *A Common Law for the Age of Statutes*, Harvard University Press (1982)

108 A Hutchinson, note 4 *supra* at 803.

109 As opposed to the more moderate view that, in the main, conventionally derived meanings will be stable

110 A Hutchinson, note 4 *supra* at 801.

But there is an alternative interpretation of Hart's work which rejects Hutchinson's 'all or nothing' approach to characterising Hart as a formalist or a pragmatist. Such an interpretation would accept Hutchinson's observations upon the dynamism of law necessarily imported by a conventionalist theory of meaning, but nevertheless maintain that meaning would *for all practical purposes* be prospectively determinate in the majority of cases. Hart might therefore be interpreted as accepting the retrospective determinacy for which Hutchinson argues, but such retrospectivity would nevertheless retain a considerable degree of prospectivity *in practice*. This reading of Hart's work might concede that conventionally established meaning can change, but that such change is slow and relatively insignificant in terms of the frequency with which words change meanings; such cases merely fall into the numerically insignificant penumbral zone of the law. Such an interpretation would seemingly give Hart the best of both worlds; he could explain legal change while maintaining that the law was determinate at any particular time. This defence would therefore reconcile the existence of prospective determinacy, in the vast majority of cases, with conventionalism, by suggesting that the past usage of a term or phrase in a broadly comparable context gives rise to an inference that the term or phrase will have a similar meaning in the future. The fact that a bicycle has been categorised as a vehicle for the past x years in all manner of contexts will suggest that that categorisation will remain into the future, although this need not *necessarily* be the case. The odd 'hard' case, where 'core' precedents are restricted or distinguished, will arise from time to time, but in the main, convention produces a stable code.[111] As will be discussed below, this interpretation of Hart substantially aligns his work with what Hutchinson portrays as an alternative theory of interpretation.

But the reinterpretation of Hart as adopting a theory of retrospective determinacy seems to open the door to a theory of indeterminacy in which there is no stability of meaning; legal meanings could theoretically change every minute. But defenders of this interpretation of Hart's theory maintain that there is clearly considerable stability within legal meanings and that it is for those propounding theories of legal indeterminacy to prove their case by showing that there is no stability within legal meanings. The frustrating aspect of such demands for empirical evidence of legal indeterminacy is that the theory of relative determinacy is unfalsifiable. No matter how broad the empirical study and how conclusive the results supporting the denial of prospective determinacy, it is always possible for liberal legalists to argue that the empirical study took too small a sample and that the sample focused upon hard cases where we all accept that judges make law.[112] The liberal legalist defence is insurmountable because an empirical study requires data and the vast majority of legal 'decisions' (such as personal decisions, legal advice, magistrates' decisions, administrative decisions) have not been recorded in any manner accessible to the legal

111 HLA Hart, *Concept*, note 2 *supra*, pp 134-5

112 By contrast, an indeterminacy thesis is more clearly falsifiable - it would only take one case of determinacy to rebut this thesis and it is therefore understandable that the onus of proof, rightly or wrongly, tends to shift to those propounding an indeterminacy thesis

researcher. Thus even if all reported judgments are found to support the indeterminacy thesis, liberal legalists can point to the vast bulk of unreported decisions and maintain that those unreported decisions are the determinate core which support the liberal determinacy thesis.[113] The mere fact that meaning can change therefore does not refute Hart's argument for prospective determinacy which applies in the bulk of cases.

Reading Hart as solely a proponent of prospective determinacy, as Hutchinson does, attempts to deny the strength of this defence by de-emphasising the existence of the penumbral zone, in which it is generally accepted that Hart thought judges would make law, and emphasising the permanence of Hart's core meanings. But interpreting Hart in this formalist way sets him up as a straw person and characterises him as a 'country bumpkin', a characterisation which Hutchinson at one point stresses Hart does not deserve.[114] The linchpin of Hutchinson's critique is that Hart maintained that meaning would be permanently settled by social convention when Hart's theory of core and penumbral cases can be interpreted as requiring no such thing. Of course, to sustain the defence against Hutchinson's attack dictates that Hart's statements suggesting that core meanings are *permanent* features of the legal edifice would have to be tempered somewhat by accepting that core meanings are *relatively* permanent, but this is no different to interpreting (or ignoring) Hart's many acknowledgements of legal dynamism in order to characterise Hart as a formalist.

Critiques such as Hutchinson's have therefore been rejected by those more sympathetic to the determinacy thesis on the basis that the critique unduly focuses upon the formalist aspects of Hart's work to the virtual exclusion of the pragmatic elements of his work.[115] Whilst Hart's statements regarding the permanence of core meanings would suggest that he maintained that law ought to be purely prospective in application, many sympathisers have expressed their preparedness to resile from this position, maintaining instead that Hart's work can be interpreted as consistent with the view that the core of meaning is merely determinate at the time of judgment.[116]

D. An Alternative Critique of Core Meaning

(i) Hart's Ambivalence

But even this revised theory of core meanings framed in terms of retrospective determinacy is susceptible to attack. A major hurdle for this revised version of Hart's determinacy thesis is that in a key passage[117] he implied that all cases will be penumbral, because he does not explain how the basis of meaning in general

113 The implicit assumption being that if all cases were indeterminate and therefore 'hard', then all cases would be litigated because we all have the right to bring anl action to ascertain our legal rights and liabilities By contrast, the indeterminacy thesis is falsifiable because it would require just one case of indeterminacy to disprove it

114 A Hutchinson, note 4 *supra* at 789.

115 See, for example, N MacCormick, note 27 *supra*.

116 See the earlier discussion of legal determinacy accompanying notes 22-34 *supra*

117 See extract accompanying note 105 *supra*.

agreement is possible.[118] Firstly, Hart implicitly acknowledged the impossibility of general agreement upon the core of settled meaning by suggesting alternative foundations for a "core meaning" when he referred to "general agreement", "special use" and "legislative purpose". Reference to the "special conventions of the legal use" of words seems to anticipate Fish's identification of a legal institution as the foundation for a more limited institutional consensus upon legal meaning.[119] But agreement within such a legal institution is some distance from the 'general agreement' of which Hart wrote.

Hart is also vague about the origins of the 'general agreement' which underpins his conventionalism. General agreement of whom? The general populace? Lawyers? Judges? Voters? Interest groups? Or some other group? It would seem that Hart meant that 'general agreement' is agreement by the entire community, and assumed that there is an infinite regression of 'general agreement' so that discussion leading to agreement is possible - agreement is assumed to be 'always already' there in a social contractarian leap of faith. In the absence of such an ultimate agreement, it is hard to see how there could be any general communal agreement upon meaning at any time. If this were the case, all decisions upon meaning would be penumbral, 'hard' cases.

(ii) Social Pluralism

A further shortcoming of Hart's notion of general agreement is that he does not explain how such agreement is possible in a pluralist community, even hinting at his recognition of multiple interpretive communities ('common usage', 'technical language', 'speaker's intention'). A cursory glance at modern Western societies (let alone communities generally) confirms that such societies are quite frequently characterised as multicultural - there is a plurality of subcommunities with different moral outlooks.[120] Whilst liberal political theory seeks to resolve this plurality by allowing the supreme lawmaking agency to make compromises expressed in neutral language, the assumption has always been that such language itself was neutral or that linguistic meaning was somehow the subject of general agreement. A fragmentation of interpretive communities, each with different perceptions of the meaning of particular terms, raises the question of how universal agreement upon the meaning of a rule is possible.[121] This fragmentation would dissolve Hart's core of meaning, even if he is interpreted as adopting a theory of retrospective determinacy, because he did not explain which interpretive community dictates meaning, let alone why just one segment of the community would be authorised to dictate that meaning.

---

118 For a differing analysis of the inconsistencies of Hart's language theory revealed by the passage associated with note 105 *supra*. See also C Norris, note 91 *supra*.

119 See the work of S Fish, note 9 *supra*

120 For a discussion of the politics of identity, and the implications of this for a theory of communication, see C Calhoun, *Critical Social Theory*, note 3 *supra*, ch 2; M Bakhtin, note 16 *supra*

121 A problem with which Fish struggled see S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, note 9 *supra*, p 32 The theorisation of universal agreement across incommensurable lifeworlds remains a central issue in contemporary social theory; for further discussion see references cited at note 67 *supra*.

But leaving aside this cultural pluralism, twentieth century psychoanalysis has focused upon the fractured nature of the self. Freud's id, ego and superego, and Lacan's imaginary and the real, point to an inner conflict within all of us which has serious consequences for the stability of any agreement upon meaning. There is a 'pluralism within' not even considered by Hart in his theorisation of general agreement.[122] Hart assumes that agreement arises between social beings with coherent persona, when psychoanalytic theory suggests that any general agreement, if such exists, is much more unstable than portrayed by Hart.

At this point the falsifiability of Hart's determinacy thesis is once again problematic. Hart's sympathisers might respond to the threat of indeterminacy born of the politics of identity by requiring indeterminacy theorists to prove that value dissensus invariably produces indeterminacy such that there can never be a core of meaning. But such a request for empirical proof of the indeterminacy thesis would misunderstand the nature of the pluralist challenge to Hart's theory. A pluralist might, and perhaps usually will, acknowledge the epistemological shortcomings of empirical 'proofs'. Those who theorise indeterminacy in terms of value dissensus and the fractured self merely ask how Hart would explain the confinement of such dissensus to the political, lawmaking sphere. After all, the liberal recognition of social pluralism is reflected in the fact that the issue of toleration within a pluralist community has been a central issue within liberal legal theory for at least two centuries.

On this issue Hart was silent, but in more recent times Altman has attempted a defence of Hart against the pluralist challenge.[123] Embracing the real prospect of a pluralist community, and recognising the dangers that this poses to Hart's theory of conventionally determined core meanings, Altman argued that a secondary rule of meaning would apply when the value dissensus of a community engendered debate as to the meaning of any particular rule.[124] Such a secondary rule would operate "to pin down the authoritative interpretation of the binding primary rules".[125] The import of such secondary rules, Altman explains, is that certain officials (seemingly judges) will declare which meaning is to be taken as authoritative.[126] Altman suggests that such a secondary rule protects judges from the charge of politicised judging on the basis that once a judge has declared the meaning of a rule, it is unlikely that there would be any person who did not understand the judgment.[127]

But this approach concedes that such a secondary rule of meaning can only have a retrospective effect, and does not explain how the making of the judgment with retrospective effect can be the application of determinate law and therefore apolitical. Further, Altman does not explain how the value dissensus which he

122 For further discussion of the relationship between psychoanalysis and literary theory, see T Eagleton, note 38 *supra*, ch 5; C Calhoun, "Social Theory and the Politics of Identity" in C Calhoun (ed), *Social Theory and the Politics of Identity*, Blackwell (1994) pp 9-36

123 A Altman, note 24 *supra*, p 81

124 Altman bases the existence of secondary rules of meaning upon a brief reference to such rules by Hart in *Essays in Jurisprudence and Philosophy*, note 2 *supra*, p 106.

125 A Altman, note 24 *supra*, p 81

126 *Ibid*, p 84.

127 *Ibid*, pp 84-5

contemplates can be restricted to a relatively small number of 'hard' cases. Such value dissensus could infect all decisions upon meaning and thereby render all language indeterminate. Altman therefore fails to provide a plausible defence of the determinacy thesis in the face of the politics of identity.

E. Concluding Comments on Core Meanings

Hart's work therefore does not necessarily support Hutchinson's interpretation that he was a formalist dressed in conventionalist clothing. His work is equally capable of supporting an interpretation that he was a conventionalist who accepted that conventionally determined meanings can change over time. But even after this rescue, Hart's core meanings thesis is short-lived. Hart cannot account for how general communal agreement upon legal meaning is possible in a multicultural community of fractured selves. Although Hart derides the rule sceptics for their denial of determinate rules, he has not given a valid reason for accepting the existence of core meanings capable of preinterpretive, 'automatic' application to particular circumstances. All cases therefore fall into the penumbra.

But the collapse of Hart's core cases into the penumbral zone does not necessarily spell the end of his theory of determinate law if it can still be maintained that the adjudication of penumbral cases follows some path such that the outcome is determinate. It is therefore necessary to turn to the adjudication of penumbral cases according to Hart's theory.

V. ADJUDICATION OF PENUMBRAL CASES

As was noted in the introduction, Hart's critics and his supporters, for one reason or another, have generally ignored the intentionalist aspects of his theory of penumbral decision-making. To them, the rejection of core meanings plunges us into a world of 'radical' indeterminacy because all cases will then be penumbral and the penumbral zone is where judges have an unfettered free play with the legal text. The argument that I wish to make here is that Hart clearly contemplated the existence of various forms of constraint in the determination of penumbral cases and, in doing so, appealed to a wider interpretive community in garnering support for his own theory.

A. Authorial Intention and the Penumbra

In developing his theory of speech acts, Austin recognised that not all statements are referential statements of fact, what he called 'constative' speech acts, but that there was a category of 'performative' speech acts whereby the author sought to achieve a desired result. Ascertaining the intention of the author was crucial to determining whether such performatives were 'happy' or 'unhappy', or whether they were appropriately executed to achieve their desired purpose. Although Austin ultimately recognised that his categorisation of

speech acts into performatives and constatives was flawed,[128] the importance of authorial intention in determining the meaning of speech acts became a significant aspect of theories of meaning, subsequently developed by Hirsch.[129]

The relevance of authorial intention had long been recognised in the interpretation of legal texts, but this theorisation of linguistic meaning brought renewed impetus to the search for meaning behind the words of the particular text. One reading of Hart's work would suggest that he maintained that it was necessary to look to the author's intention behind a legal text, because the regulation of a large and complex society dictated that rules intended to be of general application ought to be framed in general language. The application of such general language, he argued, would inevitably give rise to hard cases which recourse to the author's intention would resolve:

> When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of the rule, of a general word.[130]

The reference to "initial aim" is important, as it was in the determination of penumbral cases that authorial intention came to the fore as the criterion for ascertaining which cases fell within the particular rule.[131]

However, other passages suggest that Hart considered that recourse to legislative intention was founded upon a myth of omniscience which ought be supplanted by a pragmatic lawmaking power vested in officials.[132] In these passages the importance of authorial intention as a critical constraint upon judicial discretion in the adjudication of penumbral cases was downplayed, being just one factor taken into account in the exercise of judicial discretion:

> The discretion thus left to him [the judge] by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and *on the aims or purpose which may be attributed to the rule.* To characterize these would be to characterize whatever is specific or peculiar in legal reasoning.[133]

Significantly, in this extract the intention of the legislation was moderated by the purpose which may be attributed to the rule, suggesting that such purpose may have nothing to do with the legislative intention at all but rather the pragmatic needs of the particular community at the time of judgment. Hart does not consider what he meant by 'legislative purpose'. Some commentators

---

128 JL Austin, note 48 *supra*, p 149

129 ED Hirsch, *Validity in Interpretation*, Yale University Press (1967)

130 HLA Hart, *Concept*, note 2 *supra*, p 129, Hart's reference to the unenvisaged case is problematic, given his apparent reliance upon authorial intention as the determinant of legislative meaning.

131 In core cases authorial intention is the implicit constraint, as the legislature is taken to have intended to include within the scope of the rule the core meanings of the words used

132 HLA Hart, *Concept*, note 2 *supra*, pp 128-9.

133 *Ibid*, p 127 added emphasis, see further HLA Hart, *Essays in Jurisprudence and Philosophy*, note 2 *supra*, pp 4-5, 103

assimilate legislative intent with legislative purpose,[134] while others suggest that legislative purpose is the desired consequences of the legislation regardless of the intended meaning,[135] while others suggest that the purpose of the legislation is the function that it serves.[136]

Hart was therefore somewhat ambivalent regarding recourse to legislative intention in statutory interpretation. The slippage from intention to a purpose 'attributed to a rule' was critical to Hart's pretensions to have discovered a theory of largely determinate law. But it seems that such determinacy was framed upon inconsistent grounds. Determinacy founded upon legislative intention would be prospective, at least according to the sense of intentionalism which Hart appears to have adopted. But this is inconsistent with the potentially retrospective operation of interpretation according to the pragmatic standard of the purpose attributed to the rule *at the time of its operation*. In the absence of a close reading of his text which highlights such inconsistencies, Hart's work could appeal to both intentionalists and those adopting the standard of legislative purpose.

B. Shortcomings of a Theory of Interpretation Founded upon Authorial Intention

But notwithstanding repeated modern appeals to legislative intention as the foundation of meaning, there are substantial theoretical and practical obstacles to the operation of such a theory of meaning.

If Hart is taken to suggest that 'intention' is synonymous with meaning, it has already been noted that Hart's conventionalism is irreconcilable with his acceptance of authorial intention as the foundation of meaning. The problem is that if the meaning of legislative words is determined by social convention,[137] Hart does not explain how the author's intention can differ from the conventionally determined meaning(s) of the words used, given that the author has presumably selected those words on the basis that they best conveyed the original intention.[138]

Even if legislative intention can differ from the assumed single conventional meaning of the words, there must be some reason for allowing legislative intention to usurp any conventional meaning. This highlights a critical assumption of intentionalists; they assume that it is possible to intend something in prelinguistic form such that there can be a difference between the author's

---

134 Q Johnstone, "An Evaluation of the Rules of Statutory Interpretation" (1954) 3 *Kansas Law Review* 129 at 134.

135 W Landis, "A Note on Statutory Interpretation" (1930) 43 *Harvard Law Review* 886 at 891.

136 M Radin, "Statutory Interpretation" (1930) 43 *Harvard Law Review* 863 at 875; M Moore highlighted the various meanings of legislative purpose, note 34 *supra* at 262-3.

137 A proposition with which Hart would agree; see, for example, extract accompanying note 105 *supra*.

138 See, for example, R Unger, *Knowledge and Politics*, Free Press (1975) p 93. For a similar shortcoming in literary theory see the intentionalist approach of ED Hirsch, note 129 *supra*, p 82 Hirsch's approach to literary interpretation was criticised in S Fish, *Is There a Text in This Class?*, note 9 *supra*, chs 14-15.

intention and their words.[139] On the basis of this assumption of an intention beyond the words, intentionalists embark upon an inquiry to determine what the legislature 'really meant'. This assumption has been subjected to telling criticism even by those with whom Hart had expressed general agreement.[140] Whilst it is true that communication cannot take place without the 'formal necessity' of the author's intentional act, this does not justify in itself the assumption that the author is the specifier of meaning.[141] There is, as Derrida suggests, a myth of prelinguistic origins in the intentionalist approach which is unsustainable.[142] Furthermore, the assumption of prelinguistic origins precludes both Hart and JL Austin from providing the methodology by which we can test the accuracy of a particular reading against the author's intention.[143]

But even if the preceding shortcomings of an intentionalist theory can be overcome, the problem of ascertaining the identity of the 'author' of a statute remains.[144] Is it the government of the day? Those that voted for the bill? The originator of the bill? The parliamentary draftsperson? The person who drafted the instructions for the draftsperson? Interest groups who have had a substantial input into the final bill? Any of these represent a relatively limited pool of potential authors when compared with a bill which has been subjected to substantial public debate before being passed by Parliament. Such circumstances could support the view that the 'authors' at least included those who had made public comment with respect to the bill.

Hart could also be interpreted as suggesting that meaning is synonymous with legislative purpose in the sense of the intended consequences of the legislation. Once again, such an approach encounters the same hurdles as those faced by an intentionalist approach: there must be some normative justification for preferring this purpose to the favoured conventional meaning of the legislation and it is

---

139 ED Hirsch, for example, suggests that verbal meaning be defined as "whatever someone has willed to convey by a particular sequence of linguistic signs and which can be conveyed (shared) by means of those linguistic signs": *ibid*, p 31.

140 L Wittgenstein, note 48 *supra* at [33] argued for a dialectical interaction between subject and the object language which envisages language as a diachronic social process, see also the structuralist approach beginning with Saussure who emphasised the all enveloping nature of the system of language which depicts language as a synchronic social system. For a discussion of these aspects of language theory, see P Goodrich, note 7 *supra*, ch 2; the assumption that meaning can precede language is inconsistent with the widely accepted view that it is language which precedes and shapes our experience, see T Eagleton, note 38 *supra*, pp 60, 67-71; R Rorty, "Indeterminacy of Translation and of Truth" (1972) 23 *Synthese* 448 at 461 note 20; VV Volosinov note 47 *supra*; J Derrida, *Speech and Phenomena*, D Allisson (trans), Northwestern University Press (1973); S Fish, *Doing What Comes Naturally*, note 9 *supra*, p 15, R Dworkin, *Law's Empire*, note 12 *supra*, pp 57-9 For a critique of interpretation according to authorial intention on this basis, see H Gadamer, G Barrett, J Cumming (eds), *Truth and Method*, Seabury Press (1975) pp 148-9, J Habermas, 1 *Theory of Communicative Action*, T McCarthy (trans), Heinemann (1984) p 275.

141 ED Hirsch, note 129 *supra*, pp 225-6 By "specifier of meaning" I mean the person from whose perspective alone meaning is to be determined

142 See particularly J Derrida, *Of Grammatology*, G Spivak (trans), Johns Hopkins University Press (1976), p 56: "I would wish rather to suggest that the alleged derivativeness of writing, however real and massive, was possible only on one condition: that the 'original', 'natural', etc language had never existed, never been intact and untouched by writing, that it had itself always been a writing."

143 Hirsch acknowledges that such a test is impossible: ED Hirsch, note 129 *supra*, p 173.

144 R Dworkin, note 12 *supra*, pp 318-20

unclear how purpose can be prelinguistic such that an interpreter is justified in looking beyond the carefully selected legislative words.

An alternative approach to adopting the purposive construction of the legislation as a branch of intentionalism is to suggest that it is the purpose of the legislation as revealed by the legislative text, thereby excluding any assumption of prelinguistic purpose. But even if this is the case, the legislation will rarely, if ever, be enacted to achieve just one purpose. Legislation is far more likely to represent a compromise between competing conceptions of the good. It is in identifying the compromise between these often conflicting purposes that courts are increasingly authorised to look beyond the legislative text. The identification and fulfillment of the purpose of the legislation will therefore generally require the interpreter to weigh a range of purposes underlying the legislation. Taking the Commonwealth income tax legislation, for example, the structuring of such legislation is the result of a delicate balancing of a number of broad imperatives such as the need to raise public revenue, wealth redistribution, fostering business investment, minimising compliance costs, achieving enforceable legislative outcomes and so forth. Moreover, as Radin notes, it could be said that a purpose underlying all legislation is to ensure the stability of the political system.[145] Recognising the existence of such purposes does not assist the interpreter in identifying just one 'meaning'. At best, the interpreter can consider the various purposes of the legislation in examining the various consequences of alternative interpretations and choose the 'meaning' of the legislation which is appealing for any number of pragmatic reasons (self interest, altruistic etc) and which appears reasonable to some influential sections of the community or even, although perhaps rarely, the entire community. This is not the time to embark upon the development of an alternative theory of adjudication; the point is that the examination of legislative purpose inevitably draws the interpreter into a political choice between more or less desirable outcomes.

Moreover, Dworkin has noted the artificiality of ascertaining the legislative 'purpose' in a Parliament of hundreds of members who will vote for legislation for a host of reasons. What if some members agree with what they believe the legislation will achieve, others agree for strategic purposes, others disagree but vote along party lines, etc?[146]

There are therefore seemingly insurmountable theoretical and practical shortcomings in Hart's theory of law if he is interpreted as relying upon authorial intention or legislative purpose as the foundation of determinate legal meaning.

C. Broadening the Foundations of Interpretive Constraint

But throughout his work Hart was ambivalent about the role of determinacy, whether founded upon some semantic theory of meaning or authorial intention.[147] In *Concept* he suggested that the judiciary had a much more free

145 M Radin, note 136 *supra* at 877.

146 *Ibid*, ch 9, see also M Moore, note 34 *supra* at 248ff

147 HLA Hart, "Positivism and the Separation of Law and Morals" in R Dworkin (ed), *The Philosophy of Law*, Oxford University Press (1977) at 29

ranging discretion essential to the pragmatic operation of the legal system. Such a lawmaking power was necessary, Hart thought, because it enables the courts to exclude cases from the operation of the rules "in order to give effect to reasonable social aims".[148] Indeed, an alternative reading of Hart's work to the one proffered above[149] would suggest that Hart's references to "aims" and "purposes" do not reflect a reliance upon authorial intention, but rather demonstrate his recourse to some pragmatic theory of adjudication. But this rejection of formalism and acknowledgment of pragmatism threatened to push Hart over the brink into the void of absolute indeterminacy in relation to penumbral cases, a demise from which Hart withdrew by placing his faith in the neutrality of impartial, informed judges to reach an "acceptable" decision:

> Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning. Very often, their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision [sic] explains why some feel reluctant to call such judicial activity 'legislative'. These virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected, and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice.[150]

If the core of legal rules collapses into the penumbra, and the penumbra cannot be determined according to authorial intention or legislative purpose, then Hart's final safe harbour of interpretive constraint appears to be the ability of a judge (we are no longer talking about 'officials') to produce an 'impartial' and 'neutral' decision sufficiently marketable as to be considered 'acceptable', but acceptable to whom is left unanswered.

Whereas Hart's penumbral zone of adjudication is portrayed by critics such as Hutchinson as an area of unfettered judicial discretion which infects all core cases as well, Hart does not consider that this rhetorical turn underpinning penumbral adjudication collapses the distinction between law and the exercise of political power because he is prepared to assume that presumably all of the community would consider a judgment 'acceptable' once it had been made by an

148 HLA Hart, *Concept*, note 2 *supra*, p 126: see also pp 107, 272-6; see also HLA Hart, note 27 *supra*. Note that MacCormick argues that Hart downplayed the significance of standards in the exercise of this judicial discretion, and therefore criticises Hart for overemphasising the role of rules to the exclusion of such standards in his theory of law, N MacCormick, note 1 *supra*, p 132

149 See the discussion immediately following the heading "Adjudication of Penumbral Cases", *infra*

150 HLA Hart, *Concept*, note 2 *supra*, pp 204-5, see also at 275; see also HLA Hart, note 95 *supra* at 271.

'impartial' judge.[151] But there has been sufficient literature of the legal realist school[152] and also in the philosophy of knowledge[153] to warrant the assertion that judicial impartiality in terms of absolute neutrality is impossible. If Hart's assumption of impartiality is rejected, and one would think that his defenders ought at least be put to the defence of this proposition, even a judge who has acted according to the highest standards of judicial office is always susceptible to the claim that a case was decided in a particular way because of some inherent judicial bias. The prospect of such bias suggests that Hart cannot ground the rule of law upon communal consensus regarding judicial impartiality alone, unless he is taken to be arguing for the Orwellian conclusion that impartiality exists despite contrary beliefs held by at least some members of the community.

Until a foundation for communal consensus upon the apolitical character of adjudication is identified, Hart's theory of adjudication reflected in the preceding extract merely supports the view that 'the law' is nothing more than the ability of a judge to wield sufficient rhetorical skill as to convince influential segments of the community that any particular decision, founded upon political assessments of consequences, is 'right'. Notwithstanding Hutchinson's preferred re-reading of Hart which focuses upon communal consensus, this theory of law as rhetoric, bereft of any need for consensus, constitutes a far stronger foundation for a theory of interpretation.

VI. THE POWER OF HART'S RHETORIC

Having outlined the diversity of theories of language in Hart's era, and having traced Hart's attempt to assimilate the disparate theories of language into his concept of law, a theory of interpretation which combines pragmatism with rhetoric can be tested by applying it to Hart's theory of adjudication.

It has already been noted that the determinacy thesis was treated as more or less axiomatic by much of the postwar legal community, in common law countries at least. But whilst Hart's emphasis upon legal determinacy doubtless contributed to his popularity, it was also his consideration of the foundations of such determinacy which substantially contributed to his success.

From the preceding critique of Hart's work on interpretation, it may be seen that he offered several explanations of legal determinacy by drawing upon quite different theories of language ranging from conventionalism through intentionalism to pragmatism. All of these theories envisaged considerable constraint upon the 'lawmaking' power of judges, whether they were deciding core or penumbral cases. No one of Hart's explanations of determinacy is necessarily consistent with any other. This begs the question of how such an

151 The parallel between this and Tushnet's supposedly nihilist normative theory of adjudication that judges ought rely upon the "currently fashionable" theory of adjudication is all too clear: M Tushnet, "Does Constitutional Theory Matter? A Comment" (1987) 65 *Texas Law Review* 777 at 782

152 See, for example, material cited at note 92 *supra*

153 See, for example, the concessions to bias or "prejudice" in the theories of H Gadamer, note 140 *supra*, p 266, J Habermas, note 140 *supra*, p 336.

eclectic theory can have attracted such rhetorical force if it truly consisted of such irreconcilable elements.

The rhetorical beauty of Hart's work is that it contains sufficient references to the major theories of language as to enable an interpreter to emphasise some aspects and de-emphasise others. This persistent tendency to overlook the internal contradictions of Hart's work stems from the preparedness of commentators to strive for a coherent reading in what Eagleton considers to be a carryover of Gestalt psychology.[154]

Whilst Hart did not adopt many key tenets of formalist language theories, for the formalist and the structuralist there is at least the reassurance that the vast majority of cases is decided automatically according to the core meanings of words. For those who endorse the pragmatism of recourse to authorial intention, there is the affirmation of the importance of authorial intention in both core and penumbral decisions. For those who accepted that there was a core of meaning which needed supplementation by judicial lawmaking,[155] Hart included reference to core and penumbral cases and even offered some encouragement to those who believed in the various permutations of purposive interpretation. Even nihilists may find some comfort in the assertion that judges make law according to what is popular at the time.[156]

Whilst no one grouping of language theorists could be completely satisfied with Hart's work, there is considerable scope to interpret Hart's work as more consistent with any one of a number of alternative theories of language. Critical legal scholars therefore emphasise the formalist aspects of Hart's theory to the diminution of the pragmatic aspects,[157] while on the other hand some of Hart's liberal critics criticise his work by emphasising what is perceived to be the excessive indeterminacy contemplated by his theory.[158] Meanwhile, defenders of Hart's work such as MacCormick acknowledge that Hart overemphasised the role of permanently established core meanings, but nevertheless find sufficient textual support for alternative readings of Hart which focus upon his references to communal values implicit in his portrayal of pragmatic adjudication.[159] Upon the basis of such an interpretation of Hart's work, such defenders question whether there really is any difference between Hart's work and so called 'postmodernist' legal theory.[160]

The continuing widespread support for Hart's theory of adjudication is therefore largely attributable to his ambivalence upon crucial aspects of language theory, an ambivalence which only strengthened the rhetorical power of his work by enabling his defenders to adjust the relative weight of various aspects of his theory in response to more recent developments in language theory.

---

154 T Eagleton, note 38 *supra*, p 81.

155 See, for example, M McHugh, note 10 *supra* at 24.

156 Compare HLA Hart, *Concept*, note 2 *supra*, p 129, M Tushnet, note 151 *supra*.

157 See, for example, A Hunt, *Explorations in Law and Society*, note 64 *supra*, p 301; A Hutchinson, note 4 *supra* at 801, P Fitzpatrick, note 7 *supra*, p 207.

158 See, for example, R Dworkin's critique of Hart in *Law's Empire*, note 12 *supra*, ch 1; see Hart's response in *Concept*, note 2 *supra*, pp 244-54

159 See especially the work of W Waluchow cited at note 74 *supra*.

160 N MacCormick, note 27 *supra* at 558.

VII. HART'S POSITIVISM, ORDINARY LANGUAGE METHODOLOGY AND CRITICAL THEORY

Up to this point I have been arguing that the apparent popularity of Hart's work is at least in part attributable to his incorporation of several irreconcilable theories of language in his attempt to theorise legal determinacy. When considered as a whole, I have argued that Hart's theory of interpretation collapses in a mire of self contradiction and fails to explain determinacy in a pluralist society. When considered separately, each element of Hart's theory of adjudication also fails to offer a plausible account of legal determinacy. I now wish to turn to a second argument, which is that, notwithstanding some suggestions to the contrary,[161] Hart's theory of adjudication is inconsistent with a critical theory of law.

A. The Positivist Claim to Critical Theory

The central aspects of Hart's work were the positivist claims that the truth of statements of the law in a particular jurisdiction was a matter of social fact unless moral norms are expressly incorporated within the law,[162] the recognition that the law thus identified may or may not comply with the moral norms of the relevant community and, finally, that legal obligation was distinct from moral obligation.[163] Hart's theory of law may therefore be contrasted with that of one group of his protagonists, the natural law theorists, who broadly argued that a binding law must be consistent with social morality.[164] The result of this assimilation of law and morality, Hart maintained, is that 'the law' is prima facie beyond moral criticism, a proposition which did not seem to make sense after the 'legal' persecution of the Holocaust.[165] Hart therefore argued that it was necessary to segregate what the law is from what it ought to be, because this segregation overcomes the prima facie assumption of moral validity and therefore enables "us"[166] to more readily critically appraise the morality of the law.[167]

---

161 J Goldsworthy, note 19 *supra* at 561

162 See HLA Hart, *Concept*, note 2 *supra*, p 269, W Waluchow, *Inclusive Legal Positivism*, note 74 *supra*, N MacCormick, note 27 *supra* For the argument that this inclusion of moral considerations in the grounds of law within positivist legal theory precipitates its self destruction, see B Hoffmaster, "Professor Hart on Legal Obligation" (1977) 11 *Georgia Law Review* 1303, J Goldsworthy, "The Self Destruction of Legal Positivism" (1990) 10 *Oxford Journal of Legal Studies* 449, *cf* E Colvin, "The Sociology of Secondary Rules" (1978) 28 *University of Toronto Law Journal* 195.

163 See, for example, HLA Hart, *Essays on Bentham*, note 2 *supra*, p 147, for a 'hard' version of this aspect of positivist theory, see J Raz, *The Authority of Law*, Clarendon (1979) pp 37-8.

164 See, for example, L Fuller, *The Morality of Law*, Yale University Press (1964)

165 HLA Hart, *Concept*, note 2 *supra*, p 208

166 *Ibid*, p 209

167 *Ibid*, pp 198, 205-7. Hart recognised that some moral principles were the ultimate foundation of positive law, see, for example, *Concept*, pp 188, 199. It has been argued that Hart's theory of law is not a normative theory and cannot be criticised for rationalising law as it is because all Hart set out to do was to analyse the internal operation of legal systems without embarking upon a wider social theory of law. See, for example, Goldsworthy, note 19 *supra* where he criticises Valerie Kerruish for failing to recognise the limited scope of Hart's enquiry in her *Jurisprudence as Ideology*, Routledge (1991). For

B. Ordinary Language Philosophy as an Explanatory Tool

This positivist separation of 'is' and 'ought' was supported by Hart's realist assumption that the social world is 'there', awaiting exposition by a dispassionate observer wielding the appropriate analytical instruments.[168] In this regard, Hart was swept up in the first wave of the linguistic turn, believing that ordinary language philosophy provided the key to social science. Underpinning ordinary language philosophy was the proposition that meaning was made, not inherent in language. It was this "sharpened awareness of words to sharpen our awareness of phenomena"[169] which Hart brought to the hitherto largely analytical project of English jurisprudence. The certainty which a combination of analytical jurisprudence and ordinary language philosophy brought to legal theory was, Hart considered, superior to the contribution of young social sciences such as sociology and psychology, which he suggested were characterised by "an unstable framework of concepts and ambiguity".[170] The excitement of being a part of this new boom is almost tangible in his earlier work[171] and explains his description of *Concept* as an essay in "descriptive sociology".[172] Clearly, Hart saw his relatively modest analytical project of developing a concept of law to be an essential prolegomenon to a broader critical social theory of law.[173] Thus Goldsworthy observes that it is surprising that legal scholars count Hart as an adversary rather than an ally.[174] But in light of the preceding critique of Hart's theory of language, what use is his theory of law to the wider critical project to which he supposedly believed he was making a significant contribution?

---

the argument that Hart's theory of law failed to achieve the purpose of facilitating the moral criticism of positive law because Hart ultimately left only insubstantial elements outside of the field of 'law', see FC DeCoste, "Radical Discourse in Legal Theory: Hart and Dworkin" (1990) 21 *Ottawa Law Review* 679.

168 For an assessment of the contradiction between Hart's assumption of the dispassionate observer and his commitment to explaining what law means to participants in a social context, see H Hammer Hill, "HLA Hart's Hermeneutic Positivism. On Some Methodological Difficulties in the Concept of Law" (1990) 3 *Canadian Journal of Law and Jurisprudence* 113.

169 HLA Hart, *Concept*, note 2 *supra*, p v

170 HLA Hart, "Analytical Jurisprudence in Mid-Twentieth Century A Reply to Professor Bodenheimer" (1957) 105 *University of Pennsylvania Law Review* 953; for a critique of Hart's methodology on the basis of its subjectivity, see B Edgeworth, "Legal Positivism and the Philosophy of Language: A Critique of HLA Hart's Descriptive Sociology" (1986) 6 *Legal Studies* 115

171 See, for example, HLA Hart, "Definition and Theory in Jurisprudence" (1954) 70 *LQR* 37 at 60: "But though the subject of legal definition has this history, it is only since the beneficial turn of philosophical attention towards language that the general features have emerged of that whole style of human thought and discourse which is concerned with rules and their application to conduct." See also HLA Hart, note 170 *supra*.

172 Hart's theory of law is therefore an analytical approach founded upon description of how the concept of law is used in ordinary languge. It is therefore inaccurate to describe Hart's theory as merely conceptual and not descriptive; *cf* EP Soper, "Legal Theory and the Obligation of a Judge. The Hart/Dworkin Dispute" (1977) 75 *Michigan Law Review* 473

173 For a discussion of the limitations of the scope of Hart's analytical approach to jurisprudence and "Oxonian Legal Philosophy" more generally, see WL Twining, "Academic Law and Legal Philosophy" (1979) 95 *LQR* 557; for a circumspect defence of Hart's sociological pretensions, see M Krygier, "The Concept of Law and Social Theory" (1982) 2 *Oxford Journal of Legal Studies* 155, see also E Colvin, "The Sociology of Secondary Rules" (1978) 28 *University of Toronto Law Journal* 195

174 J Goldsworthy, note 19 *supra* at 561.

C. The Failure of Hart's Theory

From the foregoing discussion of Hart's theories of language underpinning his theory of law, it may be seen that he sought to combine conventionalism, formalism, intentionalism and law as rhetoric within his description of a purportedly generic legal system.

But much as this eclecticism enhanced the rhetorical appeal of Hart's work by attracting supporters from all sides, upon closer analysis it engendered crippling shortcomings in Hart's theory if it is to be applied as the foundation for a critical analysis of adjudication. Hart's failure to reconcile the disparate threads of his language theory frustrates the sociological project for which Hart claimed to be laying the groundwork because such a project requires more precise tools than Hart's eclecticism offers. Perhaps the strongest defence against this criticism would reconcile the apparently disparate language theories by arguing that, at a more general level, Hart's thesis is that meaning is ultimately grounded upon universal agreement.[175] This assumption of what amounts to a social contract upon linguistic meaning is not necessarily wrong, but if Hart's claim to a descriptive sociology with greater epistemic weight is to be sustained,[176] he must fend off all challengers by demonstrating that his theory offers considerable epistemic power.

Whilst Hart accepted that meanings may change, he seems to have assumed that such change would only arise from social agreement, and that discourse producing such agreement was possible because of the preexisting agreement as to linguistic meaning. But as with the structuralists discussed above, Hart did not explain how the original agreement upon linguistic meaning was possible without the assumption that language has always already been there. Furthermore, Hart assumed a cultural homogeneity capable of sustaining a universal language system and also capable of generating universal agreements upon linguistic change. There is no hint of the social forces which create and maintain meaning - Hart offers weak allusions to 'social agreement' without any explanation as to how this agreement came to be in the first place. Hart's reliance upon social agreement offers nothing to those wishing to establish a foundation for a critical project which examines why one 'meaning' prevailed over alternative 'meanings' in a pluralist world where the attribution of meaning is an exercise of political choice.[177] Contrary to Goldsworthy, then, Hart's theory cannot be interpreted as consistent with a critical theorisation of law

175 The intentionalist aspects of Hart's theory may or may not rely upon social consensus, at least as to the contemporary meaning of the words used by the author, to the extent that those words are relevant to the intentionalist inquiry.

176 The definition of law, Hart suggested, is a question of how "law may most illuminatingly be characterised": HLA Hart, *Concept*, note 2 *supra*, p 91, or "the most fruitful way of regarding a legal system": p 117; see also p 155.

177 For a succinct statement of the Critical Legal Studies view of the assimilation of law and politics, see D Kairys, "Law and Politics" (1984) 52 *George Washington Law Review* 243.

simply because he is too willing to adopt the Wittgensteinian assumption that judgments are ultimately founded upon some hypothetical agreement.[178]

Aside from the shortcomings of Hart's concept of law for a critical theorisation of law, his methodology is also inappropriate for such a critical project. Consistent with the analytical English heritage, Hart assumed that a compartmentalised social world was 'there', awaiting piecemeal, dispassionate description of 'the facts'. As may be seen from the earlier overview of twentieth century language theory, Hart's assumption that ordinary language theory provided the path to truth has been challenged by subsequent waves within the linguistic turn. Modern critical social theory recognises the centrality of theory in influencing all aspects of social inquiry; the identification and characterisation of 'facts' is itself widely perceived to be a theory laden process.[179] By asserting the impossibility of universal truth,[180] more recent critical social theory takes a pragmatic approach to its task, dispensing accolades to the theory with the greatest epistemic weight.[181] Goldsworthy's defence of Hart on the basis of this functional criterion is therefore consistent with the foundation of modern critical social theory, but misconceived in the assertion that Hart's methodology is consistent with the scope of the modern critical project. The critical legal studies 'movement' has long since dispensed with Hart, not only because he is not critical, but because his analytical methodology is grounded upon obsolete assumptions which render his theory of little use to a critical theorisation of law.

VIII. HUTCHINSON'S 'RE-VIEW' OF HART

Although the focus of this article has been the work of Hart, I would like to briefly draw a parallel between the ambivalence of Hart and that of Hutchinson. The reason for drawing this parallel is to suggest that Hutchinson's latest contribution has all the hallmarks of repeating the mistakes of Hart, notwithstanding that Hutchinson purports to be offering a better theory of law. This is particularly important given Hutchinson's prominence within the critical legal studies fold, and if his perceived error is allowed to pass uncorrected I fear that the only result can be a major setback to the theorisation of law.

178 See the material cited at note 50 *supra* For a defence of Hart on the grounds of his purported contribution to social theory, see L Green, "Philosophy and Law: *The Concept of Law* Revisited" (1996) 94 *Michigan Law Review* 1687

179 See references cited at note 62 *supra*.

180 Even Habermas asks that we assume an ideal speech situation as the foundation for assessing truth claims see J Habermas, *Communication and the Evolution of Society*, T McCarthy (trans), Heinemann (1979) p 2. For a fuller elaboration of Habermas' theory of communication see, J Habermas, note 140, *supra*.

181 See Taylor's analysis of how ideas take hold and influence our perceptions of the world, C Taylor, note 28 *supra*, pp 199-207.

A. An Overview of Hutchinson's 'Scepticism'

At some points in his article, Hutchinson affirms the postmodernist creed that law is indeterminate "all the way down"[182] such that "judges will no longer be able to claim that 'the rule made me do it'".[183] The source of such indeterminacy is variously traced to the infinite process of contextualising a rule[184] and also the importance of rhetoric in creating and applying rules.[185] In some parts of his article Hutchinson therefore paints a normative vision of activist adjudication in which accolades are awarded to lawyers for engendering "local hope in the struggle to transform experience, to overcome suffering and to endow others with opportunities to remake their own world."[186] Accepting that the social world is marked by conflict rather than consensus, he states that judges "must nurture a sense of social justice and a feel for political vision unless they are to become only hired hands for vested interests."[187] Hutchinson's normative vision of activist judges embroiled in a world of social conflict upon meaning reflects his acceptance that there can be no conventionalism founded upon general agreement. Further, activist adjudication is clearly inconsistent with conventionalism because a conventionalist would maintain that it is for the relevant community to determine what interpretations will win the accolades, and if that means exploiting the poor and enriching the rich, so be it.

But in an apparent contradiction with these suggestions of radical indeterminacy, (an illness of which Hutchinson claims to have been cured),[188] Hutchinson includes a considerable degree of constraint in his theory of interpretation. Judges, he suggests, will be constrained from exercising a broad discretion to reach a decision which appeals to them because of the fact that they must adopt a good faith reading of the relevant text,[189] the context of the rule will militate against a strong discretion,[190] agreements within some part of the community will ground the particular interpretation[191] and finally that judges can be characterised by their "connectedness" with the world[192] and so will be governed by "market constraints", "popular tastes", and their "audience".[193] Such constraints, Hutchinson suggests, will mean that in some cases there is no scope for judicial creativity because in some contexts "a car is a vehicle" and nothing more need be said.[194]

---

182 A Hutchinson, note 4 *supra* at 808; see also at 814, 818.
183 *Ibid* at 814.
184 *Ibid* at 804
185 *Ibid.*
186 *Ibid* at 816
187 *Ibid* at 815
188 *Ibid* at 798 (note 37).
189 *Ibid* at 805, 813
190 *Ibid* at 797, 803, 807, 809, 811, 814
191 *Ibid* at 802, 806, 809, 811, 815 Hutchinson at some points seemed to adopt Fish's notion of the "legal institution" as the relevant interpretive community. see 807, 809.
192 *Ibid* at 815-16.
193 *Ibid* at 816.
194 *Ibid* at 811.

Hutchinson reconciles these apparently contradictory assertions of determinacy and indeterminacy by adopting the conventionalist view that 'indeterminacy' arises from the flow of social convention,[195] but meaning is determinate at any one point in time because social convention can presumably only say one thing at any one point in time. The assumption underpinning this conventionalism is that at any one point the community will speak with one voice upon meaning, and so identifying meaning entails empirical observation of the prevailing social convention, "agreements are always the basis of rules".[196] This is clearly little different from the revised reading of Hart's work offered by MacCormick and other liberal legalists who also accept the relative determinacy thesis.[197] There is no need to revisit a critique of this approach from the standpoint which acknowledges the politics of identity. This prompts the question of whether Hutchinson intended to join with most modern liberal legalists in accepting a theory of relative determinacy.

Hutchinson's theorisation of legal interpretation is therefore strangely reminiscient of Hart's theory in that, as with Hart's work, it incorporates disparate elements without resolving the tension thereby created. On the one hand, Hutchinson adopts the liberal legal project by explaining legal determinacy in terms of social agreement, a critique of which we need not revisit. On the other hand, he resorts to the nihilism of radical indeterminacy, which fails to explain why some interpretations are accepted as 'right' by at least some sections of the community. In either case, there can be no prospect of a critical appraisal of interpretation because Hutchinson denies the existence of any critical standpoint.

IX. CONCLUSION

One of the most powerful rhetorical tools is to take your opponent's argument and incorporate it into your own. Hart's response to the shortcomings of theories which respectively embraced the Scylla of interpretive freedom and the Charybdis of semantic determinacy was not to seek some reconciliation, but merely to include all of the various theories of language in an eclectic description of legal interpretation.[198] Hart sought to pacify various strands of legal theory by combining rule formalism, intentionalism, conventionalism and wide ranging discretion into the one theory of adjudication. There is therefore a far greater degree of complexity in Hart's theory of interpretation than that generally contemplated by critics such as Hutchinson. Although the proportions might be varied, Hutchinson also incorporated rule formalism, conventionalism

195 *Ibid* at 796, 808.

196 *Ibid* at 802.

197 See, for example, N MacCormick, note 27 *supra*.

198 For the argument that Hart's theory of interpretation is founded upon pragmatic concerns rather than his theory of language, see B Bix, "HLA Hart and the 'Open Texture' of Language" (1991) 10 *Law and Philosophy* 51.

and discretion into his 'sceptical' theory of adjudication. Under both theories, if nothing else, Hart and Hutchinson certainly catered for all tastes.

Notwithstanding their ambivalence, the significance of both theories is that they acknowledge the importance of the linguistic turn in modern philosophy and its implications for social, and hence legal, theory. Once language is seen as a social, as distinct from a referential or analytical process, the question becomes 'what social processes interact to produce and/or impose meaning in a given context?'. The failure of Hart and Hutchinson springs from the alacrity with which they were prepared to assume that legal meaning is determined by social consensus and discovered by judges. If this assumption were correct, there would be no prospect of a critical appraisal of legal interpretations (or legal theories for that matter) because we would be unable to escape the omnipresence of 'our' consensual culture to an external standpoint. What this assumption of social consent ignored was the difficulty of theorising universal social agreement in a world characterised by the politics of identity.

A new approach to legal theory which does not rely upon assumptions such as that of 'general social agreement', yet is capable of explaining the phenomena of freedom and constraint in the interpretation of legal texts, must be advanced. This paper has foreshadowed the key elements of such a theory of discursive practice by explaining the success of Hart's interpretation of the legal process. In the absence of a 'right' answer, it has been argued that the power of Hart's work stems from its rhetorical appeal to numerous interpretive sub communities. Such appeal does not necessarily produce universal assent, but it has created a coalition of interests sufficiently powerful to enable Hart's work to attract considerable support over a long period.