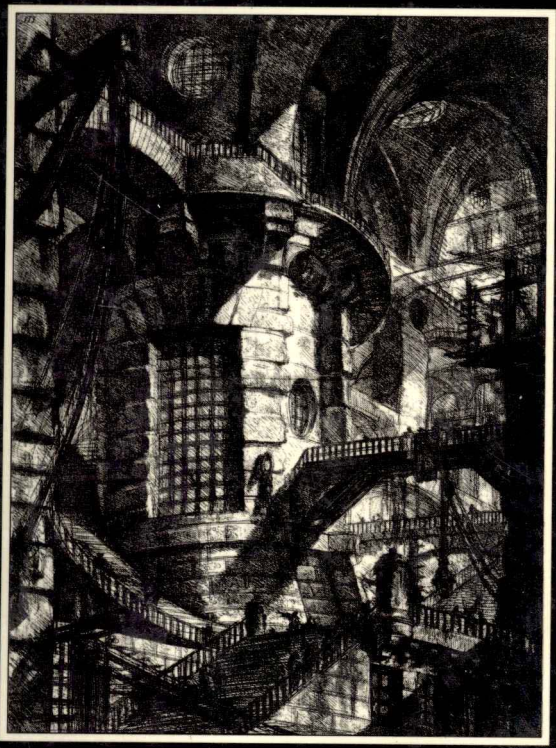
LAW, LANGUAGE, AND LEGAL DETERMINACY



BRIAN BIX

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Preface

This book began life as a doctoral thesis, although I hope that it has transcended its origin in that limited genre. There are many people I would like to thank for their assistance. My greatest debts are to Joseph Raz and A. M. Honoré, who supervised the work on the thesis, and continued to offer their help at later times. I am also greatly indebted to Ronald Dworkin, Joseph Raz, and John Finnis, for the way that their writings and lectures have showed me how subtle and meticulous legal theory can be at its best; I hope that my work has improved by trying to reach those standards, though I know that substantial room for further progress remains. Finally, I would like to thank Gordon Baker, John Finnis, Ronald Dworkin, John Bell, Andrei Marmor, Simon Blackburn, Stephen Mulhall, John Tasioulas, Mark Addis, John Gardner, Alan Thomas, Sophie Botros, Kenneth Campbell, Kent Greenawalt, David Helman, and Adam Tomkins for their helpful comments on earlier drafts of various parts of this book.

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Contents

Introduction

LANGUAGE AND LAW

Language is the medium through which law acts. The nature of the medium necessarily has a pervasive effect on what purposes can be achieved through the law and how well those purposes can be forwarded. Part of my present task is to consider the relationship between language and law, focusing on how the two interact within the question of legal determinacy. In looking at the question of legal determinacy, I use examples from three different approaches to legal theory: H. L. A. Hart's legal positivism, the interpretative approach of Ronald Dworkin, and the metaphysical realism of Michael Moore. Each of these approaches appears to have a different view of the role of language within law. Roughly and generally—the details are to follow—Hart saw language as placing a limit on legal formalism and explaining the inevitability of judicial discretion; Dworkin believed that any problems created by language could be circumvented; and Moore viewed language, alternatively, as a path to finding the correct result and as a temptation towards the wrong result that must be overcome.

Like Wittgenstein's image of 'family resemblance',[1] in which a number of separate threads interweave to constitute a single rope, a number of separate but interrelated themes run through this text. First is the issue of legal determinacy: whether law always (or most of the time or never) provides unique correct answers to legal questions. Second is the role of language within law, and third is the use (or misuse) of Wittgenstein's approach to the philosophy of language within the jurisprudential debate.

One disclaimer: while aspects of my argument depend on a particular interpretation of the work of Wittgenstein (and occasionally other philosophers as well), and while on some occasions I will argue that some other legal theorist has interpreted a philosophical theory incorrectly, I do not put forward this book

[1] L. Wittgenstein, *Philosophical Investigations*, sec. 67 (New York: Macmillan, 1968).

as a text about the philosophy of language. What I do claim is that I discuss legal theory in a way that tries to be serious about philosophy (not that I am the first to do so). I believe that my claims about law and legal theory are sufficiently independent of my interpretations of various philosophers of language that one could agree with the former even while disagreeing with the latter.

Regarding in particular my reading of the later Wittgenstein, while little in that work is uncontroversial (either by way of exegesis or evaluation), the part on which most of my discussion is based, the rule-following considerations, is relatively unproblematic compared to other parts (for example, the private language argument). However, it is inevitable that occasionally I will offer an interpretation (or evaluation) of the later Wittgenstein with which some readers might disagree. To the extent that I have underestimated the difficulty of certain writings, or the controversy of certain claims, I apologize in advance.

INTERPRETATION IN CONTEXT

John Finnis has warned that an undue emphasis on legal interpretation tends to distort one's understanding of law.[2] Finnis's point is that if one is to follow H. L. A. Hart, Joseph Raz, and many other modern theorists in positing the guidance of future conduct as a principal point or function of law, then the interpretation of texts (constitutions, statutes, contracts) must be considered relatively unimportant compared to the initial creation of those texts and the deliberation which precedes that creation. This is not to imply a naïve distinction—between, say, a statute as pure object and a statute as an interpreted object—that neither he nor I intend.[3] It is a matter of considering what percentage of choices regarding the (legal) co-ordination or regulation of action are attributable primarily or entirely to the legislature or executive as against those attributable primarily or entirely to the judiciary. In Finnis's words: 'Interpretation resists being taken for the whole of practical reasoning.'[4] The initial legislative choices, which create reasons for action both for judges and for other citizens, do

[2] J. Finnis, 'On Reason and Authority in *Law's Empire*' (book review), 6 *Law and Philosophy* 357, 361–3 (1987).

[3] See ibid. 361.

[4] Ibid. 363.

not comfortably fit within the category of 'interpretation' or 'interpretation of a practice'.[5]

When the focus is judicial interpretation, there is a danger of overemphasizing the theoretical aspects of the topic. It is too easy for theorists to project their activity on to the subject of their work: for example, to see legal interpretation as being abstract and philosophical, analogous to or constituted primarily by theories of legal interpretation. Legal interpretation cannot be fully understood unless its context of institutional processes, politics, and coercion is also considered. It is not being melodramatic to conclude, with Robert Cover, that '[l]egal interpretation takes place in a field of pain and death'.[6] By its place and function, legal interpretation is inextricably linked to the signalling of or the justification for deprivations of a person's goods or the imposition of violence or forcible constraints upon a person.[7]

As interpretation, the issue of legal interpretation involves enquiries into the nature of language. However, as legal interpretation, these enquiries occur against a background of political debates and practical problems. For example, issues of judicial practice within a particular legal system often turn on how much power should be delegated to the judiciary, to what extent the judiciary should co-operate with the legislature, and how clearly the legislature must speak in order for citizens to be bound by the enactments.

'Language questions' and 'political questions' seem to occur at different levels of discourse, separable within a discussion of legal interpretation. Under this view, one would first ask what range of interpretations of a text are allowed given the nature of language, and then one would delimit that range in the name of judicial restraint, due notice, parliamentary sovereignty, and so on. However, this distinction does not in fact hold up on closer inspection. Even a superficial look at the relevant literature is enough to show that the two levels of discourse cannot be kept apart. The debate in the legal literature often occurs simultaneously on various levels: for example, to the conservative claim that judges have been acquiring too much power, some writers reply that given the nature of language and legislation judges can

[5] Ibid.
[6] R. Cover, 'Violence and the Word', 95 *Yale Law Journal* 1601, 1601 (1986).
[7] Ibid.

(should) do no less than they have done; and to the claim that judges should respect the rights of parties in hard cases, other theorists answer that given the nature of language and practical reasoning, in such cases neither party can be said to have a legal right to succeed.

Legal interpretation is (1) an interpretation, (2) in aid of practical reasoning, (3) which is both influenced by and influences the distribution of power among branches of government and between the government and the citizenry. My emphasis in this thesis will be primarily on the first aspect, with considerable attention given also to the second, but relative inattention to the third; I leave the latter to political philosophers. However, this last statement requires some clarification. The distribution of power within government would be relevant to my discussion in at least one way. A judge will have a particular conception of what role the judiciary does play and should play within the legal system and within society. That conception cannot but affect the way he or she proceeds: for example, how much deference the judge gives to the legislature when interpreting a statute. What I am disclaiming in this paper is the taking of any position on what role the judiciary *should* play in particular legal systems.

LANGUAGE AND CONTEXT

Legal philosophy, like many forms of philosophy, is a hybrid of conceptual analysis and empirical description. Many of the misunderstandings in the field—both among theorists and between theorists and their readers—can be ascribed to a failure to distinguish the two aspects. For example, a discussion of the role moral principles play in law may focus on the way judges actually act within a legal system or the way people actually use the term 'law', or it may focus on a conceptual analysis of that term. Admittedly, the two types of analysis are normally linked. The conceptual analysis is usually meant to reflect, or at least be constrained by, the empirical observations, and the empirical observations usually support, explicitly or implicitly, some conceptual point. None the less, the two types of investigation should not be confused. I see my work as primarily, though not exclusively, conceptual. Most of my conclusions are meant to turn on the nature of language (and on the interpretation of particular

philosophical theories) rather than on how legal officials generally act or on how legal terms are generally used.

The extent to which problems of legal interpretation often do not turn on the nature of language was exemplified by A. W. B. Simpson's comment: 'difficulties in interpretation . . . seem to be difficulties about words [but] are really difficulties about the applicability of rules to facts.'[8] While judges and legal commentators claim to be trying to discover (and be bound by) what the words of a statute or a constitutional clause actually mean, something else entirely may be going on. In one type of situation, for which H. L. A. Hart's hypothetical applications of the rule 'no vehicles in the park'[9] were examples, there may be no answer forthcoming from language. Neither the usage nor the authoritative definitions of the term 'vehicle' may be sufficiently clear or narrow conclusively to include or exclude (say) skateboards. A decision must still be made in the relevant case, and the decision will be a binding precedent for the correct interpretation of 'vehicle' (for the purpose of that statute) in the future, but it would be misleading to attribute the decision to (or to blame it on) language.

A second type of situation is Dworkin's favourite example of *Riggs* v. *Palmer*,[10] where a murderer claimed the murdered man's estate under a simple wills statute. There was no difficulty about what the words of the statute meant; there was only an unease about the outcome the words seemed to command in that particular case, which would have allowed someone to benefit from a murder he had committed. These are the situations Frederick Schauer discussed extensively in his article 'Formalism': in extreme cases, where the clear application of a rule to particular facts seems to lead to a particularly unjust result, decision-makers are (often) authorized to decide contrary to the rule's clear meaning.[11]

The point is that while understanding language plays an

[8] A. W. B. Simpson, 'The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent', in *Oxford Essays in Jurisprudence*, 158 (A. Guest, ed., Oxford: Oxford University Press, 1961) (emphasis omitted).

[9] See H. L. A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* 593, 607 (1958).

[10] *Riggs* v. *Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889); see R. Dworkin, *Law's Empire*, 15–20 (Cambridge, Mass.: Harvard University Press, 1986).

[11] F. Schauer, 'Formalism', 97 *Yale Law Journal* 509, 515–20 (1988).

important role in understanding law, many other factors play significant roles in the legal process, so that even a major change in one's philosophy of language may not require a substantial shift in how one believes a legal system does—or should—work. My narrow focus on language and interpretation in law may mean that my conclusions about law will not be radical or surprising, but that does not detract from the value of the inquiry.

AN OVERVIEW

Chapter 1 offers a close reading of H. L. A. Hart's discussion in *The Concept of Law* of 'open texture', while also comparing Hart's notion of 'open texture' with similar ideas in the writings of Ludwig Wittgenstein and Friedrich Waismann. Chapter 2 summarizes Wittgenstein's rule-following considerations and criticizes the way various legal theorists have tried to apply those arguments to the problem of legal determinacy. Chapter 3 considers the paradigmatically uncontroversial 'easy cases' in law, and investigates what such cases can show us about the role of language within law and about the problem of legal determinacy. Chapter 4 discusses various aspects of Ronald Dworkin's right answer theory and his interpretative approach to law. Chapter 5 offers a critique of Michael Moore's metaphysically realist approach to law. Finally, Chapter 6 offers an overview of some of the book's ideas and themes.

I

H. L. A. Hart and the 'Open Texture' of Language

HART'S DISCUSSION OF 'OPEN TEXTURE'

In *The Concept of Law*,[1] H. L. A. Hart argued for a position on judicial interpretation half-way between formalism and rule-scepticism.[2] Hart's middle position was based on—or, at least, was justified by—a theory of the open texture of language.[3] This concept comes from the work of Friedrich Waismann,[4] which was in turn probably based on a constructivist view of language Wittgenstein put forward in the early 1930s.[5]

In a chapter in *The Concept of Law* called 'Formalism and Rule Scepticism', Hart argued that legal rules, whether promulgated by a legislature or derived as the *ratio* of a prior case, characteristically have a core of plain meaning. The decision whether a rule applies to a particular situation often turns on the meaning—on delimiting the range of meanings—of a general term. For example, the application of the rule, 'no vehicles in the park', will usually turn on whether a particular object is a 'vehicle' for the purpose of the rule (or whether a particular area is a 'park' for the purpose of the rule). In plain cases, 'the general terms seem to need no interpretation . . . the recognition of instances seems unproblematic or "automatic" . . . there is a general agreement in judgments as to the applicability of the classifying terms'.[6] However, in cases in the 'penumbra' of the term's meaning (for the purpose of the rule), it no longer seems clear whether the general term should apply or not. '[T]here are reasons both for and against our use of

[1] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).
[2] Ibid. 121–44. [3] Ibid. 120–32.
[4] See ibid. 249; F. Waismann, 'Verifiability', *Proceedings of the Aristotelian Society*, suppl. vol. 19, 119–50 (1945).
[5] See G. P. Baker, 'Defeasibility and Meaning', in *Law, Morality, and Society*, 51 and n. 76 (P. M. S. Hacker and J. Raz, eds., Oxford: Clarendon Press, 1977).
[6] Hart, *The Concept of Law*, 123.

the general term, and no firm convention or general agreement dictates its use.'[7]

The tendency of rules to have 'a fringe of vagueness',[8] to become indeterminate in their application to borderline cases, Hart called the 'open texture' of rules (and of language in general).[9] Hart added that the 'open texture' of legal rules should be considered an advantage rather than a disadvantage, in that it allows rules to be interpreted reasonably when they are applied to situations and to types of problems that their authors did not foresee or could not have foreseen.[10] (Compare Anthony Quinton's discussion of Waismann's idea of the 'open texture' of concepts: '[T]he kind of linguistic indeterminacy it implies is a positive advantage. It allows for the continuous development of a language to accommodate new discoveries, as exemplified by the progressive amplification of the scope of the concept of number from the positive integers to complex numbers.')[11]

Hart was concerned with the problem of social control through law: not questions of strategy or political theory, of how social control could best be effected, but the preliminary question of how social control could even be possible. How can a government guide its population's actions on the basis of legislation and precedent, and to what extent will those means necessarily need supplementation? Hart stated: 'If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist.'[12]

He considered two forms of guidance, corresponding to two sources of law: examples, analogous to precedent, and verbal instructions, analogous to legislation.[13] Compared to verbal instructions, examples seem far less clear and determinate. When someone tells us to do as he does, we cannot be certain what aspects of his performance must be imitated and where deviation is condoned because irrelevant. Transforming the example into a verbal rule seems to avoid these problems. Now the citizen need

[7] Hart, *The Concept of Law*, 123–4.
[8] Ibid. 120.
[9] Ibid. 124–5.
[10] Ibid. 125–6.
[11] A. Quinton, 'Introduction', in F. Waismann, *Philosophical Papers* p. xiii (B. McGuinness, ed., Holland: D. Reidel, 1977). I discuss the similarities and differences between Hart's and Waismann's ideas of 'open texture' below.
[12] Hart, *The Concept of Law*, 121.
[13] Ibid.

'only "subsume" particular facts under general classificatory heads and draw a simple syllogistic conclusion'.[14] However, Hart showed how general rules can take on both the character and the problems of guidance by example. According to him, when the rule (for example, 'no vehicles in the park') is enacted, both the legislators and the public have in mind a particular problem, particular situations that are to be brought about or avoided. In the 'no vehicles' example, the image is of excluding normal car, bus, and motor-cycle traffic from the park.[15] Interpretation of the rule is thus seen as similar to reading a rule off an example, here the example being the problem the legislation was meant to meet.

Hart used a mixture of a paradigmatic and a criteriological approach to meaning. According to his analysis, our first move in defining a general term for the purpose of a rule is to invoke the image, example, or particular situation at which the rule was aimed. In interpreting the rule 'no vehicles in the park', we might begin by thinking: 'If anything is a vehicle a motor-car is one.'[16] In deciding whether, for the purpose of the rule, 'vehicle' applies to roller-skates or toy cars, one would 'consider . . . whether the present case resembles the plain case "sufficiently" in "relevant" respects'.[17] We begin with the plain case or the paradigm (the car) and then consider a list of criteria which allow us to begin to evaluate how similar a purported extension would be. For example, like a car, roller-skates make noise (but not nearly as much) and they threaten safety and order (though the threat is on a much lower scale). Further dissimilarities include the facts that roller-skates are far smaller than cars and that they do not pollute the air. There are both similarities and dissimilarities; some criteria are fulfilled, others are not. In Hart's language, 'there are reasons both for and against our use of a general term'.[18] This is the 'open texture' of rules, that particular situations arise that we are not thinking of when proffering the rule and which are different in some ways from the situation we had in mind (the paradigm) at that time.

Sometimes the extension of a general term from the original paradigm case to a different case is clear, not because there are no differences between the two cases, but because the problem of

[14] Ibid. 122. [15] Ibid. 125–6. [16] Ibid. 123.
[17] Ibid. 124. [18] Ibid. 123.

extension has come up many times before, and a consensus has developed as to whether the term should apply. Hart noted: 'The plain case[s] . . . are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.'[19] For him, the problem of 'open texture' will recur regularly, because there are 'fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack'.[20] The slow building of a consensus about whether to apply a general term to particular, relatively common, borderline cases will do little to mitigate the problem of 'open texture', for life will soon provide more uncertain borderline cases to replace those convention has transformed into 'plain cases'.

WAISMANN'S DISCUSSION OF 'OPEN TEXTURE'

I want to digress briefly to consider the intellectual origins of Hart's concept of 'open texture'. I will trace the concept back to the writings of Friedrich Waismann, and will also consider whether it can be traced one step further back to the work of Ludwig Wittgenstein.[21]

To understand Waismann's concept of 'open texture', it is useful to see it within the context of his work in general. Waismann's work was devoted largely to presenting Wittgenstein's ideas in a more accessible form; however, some of Waismann's concepts were his own extension of Wittgensteinian ideas. The concept of

[19] Hart, *The Concept of Law*, 123. [20] Ibid.

[21] While Hart's idea of 'open texture' derived from Waismann, his talk of 'a core of certainty and a penumbra of doubt' (Hart, *The Concept of Law*, 119) may have come from Bertrand Russell, though no attribution for those ideas was given nor was there any reference to Russell. Note the following from a 1923 Russell article: 'The fact is that all words are attributable without doubt over a certain area, but become questionable within a penumbra, outside which they are again certainly not attributable', B. Russell, 'Vagueness', in *Collected Papers of Bertrand Russell*, vol. ix. 149 (J. Slated, ed., London: Unwin Hyman 1988). I learned of the possible connection between Russell and Hart from F. Schauer, *Playing by the Rules*, 213 n. 9 (Oxford: Oxford University Press, 1991). Compare also Waismann's comment that for some concepts one could speak of 'a nucleus of meaning surrounded by a haze of indeterminacy', F. Waismann, *The Principles of Linguistic Philosophy*, 222 (R. Hare, ed., London: Macmillan 1965).

'open texture' belonged to the second group; it exemplified his particular approach to the philosophy of language.[22] Waismann, like Wittgenstein, disagreed with the metaphysically realist approach to language but also distanced himself from many of the positions that had been offered as alternatives to metaphysical realism. For example, the concept of 'open texture' was presented as an argument against the phenomenalist position that material-object statements are equivalent to (can be reduced to) some combination of sense-datum statements.[23]

'Open texture' was introduced to elucidate a particular problem for verification theory. It is because of the 'open texture' of empirical concepts, Waismann argued, that material-object statements cannot be translated into sense-datum statements and that empirical statements cannot be conclusively verified.[24] He wrote: 'a term like "gold", though its actual use may not be vague, is non-exhaustive or of an open texture in that we can never fill up all the possible gaps through which a doubt may seep in.'[25]

Like Hart, Waismann wrote about uncertainty arising from situations we have not foreseen: 'there will always remain a possibility, however faint, that we have not taken into account something or other that may be relevant to [the] usage [of terms in a statement]; and that means that we cannot foresee completely all the possible circumstances in which the statement is true or in which it is false.'[26] Elsewhere, Waismann wrote that a complete definition of a term cannot be constructed: because 'we can never eliminate the possibility of some unforeseen factor emerging', 'the process of defining and refining an idea' to meet each new factor 'will go on without ever reaching a final stage'.[27]

To try to understand Waismann's argument better, I will

[22] See Quinton, 'Introduction', pp. xii–xiii.

[23] Waismann, 'Verifiability', 120–1.

[24] Ibid. 121–3. Waismann's concept of 'open texture' should not be confused with more recent writings about vagueness, where it is argued that many concepts are 'boundaryless'. See, e.g. R. M. Sainsbury, 'Is There Higher Order Vagueness?', 41 *Philosophical Quarterly* 167 (1991), and 'Tolerating Vagueness', 89 *Proceedings of the Aristotelian Society* 33 (1988–9). (I briefly discuss Sainsbury's ideas about vagueness in a later section of this chapter.) 'Boundaryless' concepts would probably also be impossible to translate into a sum of finite sense-datum statements, but for different reasons. One could think of 'open texture' as describing the potential vagueness (in extreme or unusual circumstances) of terms that are not otherwise vague.

[25] Waismann, 'Verifiability', 123.

[26] Ibid.

[27] Ibid. 125.