*Croatian Journal of Philosophy*
Vol. XVII, No. 52, 2018

# *Thought Experiments in the Theory of Law: The Imaginary Scenarios in Hart's* The Concept of Law

MIOMIR MATULOVIĆ
*University of Rijeka, Rijeka, Croatia*

*H. L. A. Hart's* The Concept of Law *is an important and influential work in the modern philosophy and theory of law. In it, Hart introduced and discussed three imaginary scenarios: the absolute monarchy under the Rex dynasty; the pre-legal society governed by primary rules of obligation; and the worlds in which rules would be different from those in our actual world. Although Hart did not use the expression "thought experiments" in his work, some of his interpreters refer to the imaginary scenarios as thought experiments. However, interpreters do not go into the question of whether the imaginary scenarios in Hart's work do indeed satisfy a general characterization of thought experiments. In this article, the author first summarizes the three imaginary scenarios in Hart's work and points to the context within which we encounter each of them. Then, he makes use of a general characterization of thought experiments in the contemporary philosophical literature and briefly examines the way and the extent to which the imaginary scenarios in Hart's work can satisfy its requirements.*

**Keywords**: Thought experiments, philosophy of law, H.L.A. Hart, imaginary scenarios.

## 1. *Introduction*

Are there any thought experiments in law? If we look for an answer to this question in the recently published prestigious *The Routledge Companion to Thought Experiments* (hereinafter *RCTE*), we will not find one. Its Part II contains discussions on thought experiments in particular disciplines, such as political philosophy, economics, theology, ethics, physics, biology and mathematics, but not in law.[1] Neither

[1] The editors of *RCTE* advocate a further expansion of the discussion to thought experiments in other disciplines, including law (see Stuart, Fehige and Brown (2018: 3, 5)).

does the ambitious work on the history of philosophy and theory of law, their orientations and main topics, *A Treatise of Legal Philosophy and General Jurisprudence* (hereinafter *TLPGJ*) in 12 volumes, contain a discussion on thought experiments in law. It uses the expression "thought experiment" twice: first, to refer to Otfried Höffe's state of nature thought experiment (Hofmann 2016: 335) and, second, to refer to F. K. von Savigny's idea of the process of statutory interpretation (Chiassoni 2016b: 584). However, when discussing the contribution to the legal theory of the two great contemporary philosophers, John Rawls and Jürgen Habermas, *TLPGJ* fails to inform us that the original position of the first and the idealized speech situation of the second are also thought experiments (Riley 2009). Considering that these two publications, each highly respectable in its field of research, are silent or scarcely informative about thought experiments in law, any further information about the topic is welcome.

I will be focusing here on H. L. A. Hart's *The Concept of Law*, (hereinafter *CL*), (1961 [1994]). It is an important and influential work in the modern philosophy and theory of law.[2] In *CL*, Hart introduced and discussed, among other things, several imaginary scenarios: the absolute monarchy under the Rex dynasty (52–66); the pre-legal society governed by primary rules of obligation (91–99); and the worlds in which rules would be different from those in our actual world (193–200). These imaginary scenarios are designed by Hart to dismiss the theories of law of some other authors, such as John Austin (1832 [1954]),[3] and to present some of the main ideas of his own theory. First, in his discussion of the imaginary absolute monarchy under the Rex dynasty, Hart demonstrates the inadequacy of the central notions of Austin's theory of law, those of sovereignty and general habit of obedience, and the indispensability of the idea of rules for the understanding of law. Then, in his discussion of the imaginary pre-legal society governed by primary rules of obligation and the imaginary worlds in which rules would be different from those in our actual world, Hart presents two other main ideas of his theory of law, in addition to the idea of rules, that is, the idea of law as the union of primary rules of obligations and secondary rules of power, and the idea of minimum content of natural law. Thus, all the three main ideas of Hart's theory of law turn around imaginary scenarios.

Although Hart did not use the expression "thought experiments" in *CL*, some of Hart's interpreters refer to his imaginary scenarios as thought experiments and/or suggest that the method of thought experimentation is coequal to linguistic methods in his work. For ex-

[2] On Hart's life and work, see the following books and collections of essays in English: d'Almeida, Edwards and Dolcetti (2013); Postema (2011); Simpson (2011); Kramer, Grant, Colburn and Hatzistavrou (2008); MacCormick (2008); Lacey (2004); Coleman (2001); Bayles (1992); Leith and Ingram (1988); Gavison (1987); Moles (1987); Hacker and Raz (1977). For other works on Hart's *CL*, see references.

[3] He should not be confused with Hart's philosopher colleague J. L. Austin.

ample, Nicos Stavropoulos argues that Hart in *CL*, in addition to an examination of the semantics of imperatives,[4]

> … further employs less obviously linguistic methods, namely, the pursuit of philosophical argument as to the true content of the key concepts, by means of the familiar techniques of drawing distinctions and defending them through thought experiments. (2001: 67)

Another author, Pierluigi Chiassoni, claims that "Hart regards the method of philosophical imagination as a major tool in the game of descriptive metaphysics", the method that "[i]n Hart's understanding … requires the working out of thought experiments meant to explain how our actual conceptual and institutional structures are, and why, by comparing them with alternative imaginary situations" (2011: 65; 2013: 456).[5]

Unlike Stavropoulos, who does not give any concrete example of thought experiments in Hart's *CL*, Chiassoni lists three thought experiments in Hart's work: the simple model of law as coercive orders; the idealized picture of a primitive, pre-legal, society ruled only by a set of unconnected primary rules of obligation; and the theory of the minimum content of natural law. (They are the same as the imaginary scenarios that I have mentioned above under slightly different appellations.) However, Chiassoni does not discuss the thought experiments in detail. Still, other authors (Priel 2013: 544; Giudice 2015: 59; von Daniels 2016: 109–112; and Houlgate 2017: 51) refer to some of the imaginary scenarios in Hart's *CL* as thought experiments.

These authors usefully draw attention to the imaginary scenarios in Hart's *CL* as thought experiments and the thought experimentation as an integral part of the methodology that underlies his work.[6] However, they do not go into the question of whether Hart's imaginary scenarios in *CL* do indeed satisfy a general characterization of thought experiments. Until we have an answer to this question in the first place, we cannot say whether their interpretation of Hart's work is on the right track.

[4] According to Stavropoulos (2001: 67), Hart's examination of semantics of imperatives consists of an analysis of "… the meaning of expressions such as 'to order' … and 'to give an order' … 'to address', as applied to commands … and to laws … 'obedience' … 'being obliged', 'having an obligation', and 'duty' … and 'valid'. It also results in the truth conditions of propositions such as 'a legal system exists' … 'it is the law that X' and 'in England they recognize as law X' … 'rule X is valid' … or those expressing the existence of obligations … and a number of other expressions and propositions" (page references to Hart's *CL* are omitted).

[5] Chiassoni (2016: 64) also uses expressions "mental experiments" and "experiments in 'philosophical imagination'".

[6] In her biography of Hart, Nicola Lacey tells us that Hart was famous for inventing games of wit or ingenuity that he and his wife Jenifer used to play with their friends Isaiah and Aline Berlin: "The game consisted in a thought experiment in which the Harts' and the Berlins' guests wake up to find themselves with the other family, and involved wry comparisons of the comportment of their respective guests" (Lacey 2004: 340). However, Lacey says nothing about Hart's attitude towards thought experimenting in his professional work as opposed to his leisure-time activity.

In the section 2, I will first summarize the three imaginary scenarios in Hart's *CL* and point to the context of his work within which we encounter each of them, Then, in the section 3, I will make use of a general characterization of thought experiments in the contemporary philosophical literature, including the aforementioned *RCTE*, and briefly examine the way and the extent to which the imaginary scenarios in Hart's work can satisfy its requirements.

Before I do this, let me note that in other works of his, Hart introduced and discussed several other imaginary scenarios: the criminal law without excusing conditions (1958 [2008]: 47–8); the counterfactual causation (1959 [1985]) and the pure theory of imperatives (1970 [1983]: 312–13). Hart has also discussed some imaginary scenarios and thought experiments invented by other authors: F. W. Maitland's state of Nusquamia (1954 [1983]: 37–39); L. L. Fuller's Rex the lawmaker (1965 [1983]: 347–53); Rawls's original position (1973 [1983]); Robert Nozick's emergence of minimal state (1976 [1983]: 150–51) and Ronald Dworkin's Hercules the judge (1977 [1983]: 139, 154; 1961 [1994]: 264). Hart termed "Gedankenexperiment" ("thought experiment"), (1958 [2008]: 47) an imaginary situation in which criminal law is operating without excusing conditions, this being the only occasion in his works, as far as I know, that he used the expression. Of course, from the fact that Hart terms the criminal law without excusing conditions as a "thought experiment", it still does not follow that it really is a thought experiment. If we want to argue that the latter is a thought experiment, we will require a characterization of a genuine thought experiment. We will also require such a characterization, if we want to argue that other imaginary scenarios in Hart's works are thought experiments, even though Hart does not call them thought experiments. I have already said I will examine here only the imaginary scenarios in Hart's *CL* as possible candidates for thought experiments. Last but not least, it has to be noted that Hart is credited with having revived the contemporary debate on the doctrine of double effect (1967 [2008]) from which some famous thought experiments emerged, such as the terror bomber and strategic bomber thought experiment and the tram/trolley thought experiment (Di Nucci 2004).

## 2. *Three imaginary scenarios*

In this section, I summarize the imaginary scenarios in Hart's *CL* that this article deals with and point to the context of his work within which we encounter each of them. They are:

– the absolute monarchy under the Rex dynasty;
– the pre-legal society governed by primary rules of obligation; and
– the worlds in which rules would be different from those in our actual world.

*The absolute monarchy under the Rex dynasty*

In Chapters II–IV of *CL*, Hart states and criticizes Austin's theory of law.[7] On Austin's theory, Hart writes in the first of these two chapters:

> … there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent. If, following Austin, we call such a supreme and independent person or body of persons the sovereign, the laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign. (25)

In Chapter III, Hart criticizes Austin's notion of general orders backed by the threat of sanction by arguing that it is inadequate to account for the content, the mode of origin and the range of application of many laws that modern legal systems contain. He then goes on in Chapter IV to criticize Austin's theory on the ground that its notions of sovereignty and general habit of obedience are inadequate to account for the continuity and the persistence of law, as well as legal limitations on legislative authority.

In this context, Hart introduces and discusses the imaginary absolute monarchy under the Rex dynasty. He asks the reader to imagine a society in which Rex is an absolute monarch or sovereign (52). Rex is habitually obeyed by the bulk of his subjects, but he habitually obeys no one else. He exercises power over his subjects by issuing general orders backed by the threat of sanction, requiring them to do various things and to abstain from doing certain other things. Although some incidents of disobedience took place during the early years of the reign of Rex, the problems have resolved themselves and the subjects settled into a habit of obeying his orders. Hart asks the reader to suppose further, namely, that after a long successful reign, Rex dies leaving a son, Rex II, who immediately starts to issue orders (53). The questions of continuity and persistence of law arise: "Would the orders of Rex II be already law?" and "Would the orders of the dead Rex still be law?" (62). Answering these questions in the manner Austin's theory requires, leads to an absurd conclusion. First, Rex II has not reigned long enough for the subjects to have had time to develop a habit of obeying his orders. More importantly, the mere fact that the subjects habitually obeyed the orders of his father does not confer on Rex II any right to succeed him and issue orders in his place (59–60). Therefore,

[7] Hart claims (1961 [1994]: 18) that he is considering and criticizing a modified version of Austin's theory in its strongest form, and not the theory as Austin formulated it in *The Province of Jurisprudence Determined* (1832 [1954]). In a lengthy note (1961 [1994]: 282–283). Hart enumerates the additions, modifications and qualifications he made to Austin's theory.

Rex II would not be a sovereign and his orders would not already be law. On the other hand, being dead, Rex is no longer habitually obeyed. Therefore, neither would he be a sovereign nor would his orders still be law. The absurd consequence is that, on Austin's theory, the imaginary absolute monarchy over which Rex has reigned would end up without a sovereign and without law, at least until the subjects settle into a habit of obeying Rex II and his orders.

However, even in an absolute monarchy, Hart claims, there must be

> some accepted fundamental rules specifying a class or line of persons whose word is to constitute a standard of behaviour for the society, i.e. who have the right to legislate. Such a rule, though it must exist now, may in a sense be timeless in its reference: it may not only look forward and refer to the legislative operation of a future legislator but it may also look back and refer to the operations of a past one. (62–3)

The same is true of the imaginary absolute monarchy under the Rex dynasty:

> Each of a line of legislators, Rex I, II, and III, may be qualified under the same general rule that confers the right to legislate on the eldest living descendant in the direct line. When the individual ruler dies his legislative work lives on; for it rests upon the foundation of a general rule which successive generations of the society continue to respect regarding each legislator whenever he lived. In the simple case Rex I, II, and III, are each entitled, under the same general rule, to introduce standards of behaviour by legislation. (63)

The answer to the questions of continuity and persistence of law, "Would the orders of Rex II be already law?" and "Would the orders of the dead Rex still be law?", leads now to no absurd consequence. The absurdity is removed by assuming that there is a general rule recognizing the enactments of each legislator in the direct lineal succession, Rex I and Rex II, as law.[8]

In the rest of Chapter IV, Hart questions the necessity of a sovereign with legally illimitable power for the existence of law as well as the very possibility in modern legal systems of a sovereign in Austin's sense. As a substitute for Austin's notions of sovereignty, general orders backed by the threat of sanction and general habit of obedience, Hart introduces the idea of rules, without which "we cannot hope to elucidate even the most elementary forms of law" (80).

## *The pre-legal society governed by primary rules of obligation*

After demonstrating the inadequacy of Austin's theory for the understanding of law, Hart announces in Chapter V of *CL* "a fresh start" (79, 80). The starting point of such a fresh start is the distinction between two types of rules:

[8] On his discussion of the continuity and the persistence of law in the context of extended imaginary scenario where Rex dynasty has been overthrown in revolution and Brutus becomes new sovereign, see Hart (1965 [1983]: 362–63).

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations. (81)

Hart claims that

> in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence.' (81)

In the rest of Chapter V, Hart examines the two types of rules. Firstly, he characterizes the primary rules of obligations in terms of seriousness of social pressure for compliance, importance for the preservation of social life, and conflict with self-interests of those controlled by them. In addition, Hart elaborates the distinction between the internal and external point of view (introduced earlier in *CL* (see 56–7). He then goes on to examine the secondary rules of power.

In this context, Hart introduces and discusses the imaginary society without sovereign and his subordinates (91). He is asking the reader to imagine a primitive society governed by a set of primary rules of obligation that forbid the free use of violence, theft, and deception, prescribe performance of various services and contributions to the common life, etc. (See more on the content of these rules below.) Some members of society reject these rules or conform to them only out of fear of sanction. They take the rules from the external point of view. However, the vast majority of society's members accept the rules and obey them. They "live by the rules seen from the internal point of view" (92). Unless such a society is small, made up of a close-knit population sharing common sentiment and belief, and placed in a stable environment, Hart contends, its formal structure "must prove defective and will require supplementation in different ways" (92). One defect would be the uncertainty of the rules. If doubts were arisen as to what the rules are or as to the precise scope of a given rule, there would be no procedure for settling this doubt, either by reference to an authoritative text or to a society's institution whose declarations on this point are authoritative. Another defect would be the static character of the rules. There would be no means of deliberately introducing new rules or adapting or eliminating old ones in the light of changing circumstances in a society. In an extreme case, which "never perhaps fully realized in any actual community", the obligations, specified in the rules, "in particular cases could not be varied or modified by the deliberate choice of any individual" (93). The last defect would be the inefficiency of the rules. If

disputes were arisen as to whether a rule has or has not been violated, there would be no society's institution specially empowered to ascertain finally and authoritatively the fact of violation (93–4).

The remedy for each of these defects of primary rules of obligation, Hart claims, would consist in the introduction of secondary rules of power. First, the remedy for the uncertainty of primary rules would be the introduction of the rule of recognition. It "specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts" (94). For example, in the imaginary absolute monarchy under the Rex dynasty, the rule of recognition would be that whatever Rex I enacts is law (96). Second, the remedy for the static character of primary rules would consist in the introduction of the rules of change. They empower "an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules" (95). Again, in the case of the imaginary absolute monarchy under the Rex dynasty, the rule of change would be that the eldest living male descendant, in the direct line, of Rex I, has the right to legislate. A further remedy for the static character of primary rules would be the introduction of rules that confer on individuals the power to vary their initial positions under the primary rules. These rules are akin to the rules of change involved in the notion of legislation (96). Third, the remedy for the ineffectiveness of the primary rules would consist in the introduction of the rules of adjudication. They empower "individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken" (97).

Hart marks the introduction of all these secondary rules of power into society as "the step from the pre-legal into the legal world,"[9] and equates its importance for a society with the invention of the wheel (42).

In Chapter VI of *CL*, Hart examines the rule of recognition in more detail and still further elaborates the distinction between the internal and external point of view. Of particular interest here is his remark about a legal system in which only officials take the rules from the internal point of view:

> The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system. (117)

The point is, as Hart makes clear later in *CL*, that the step from the pre-legal society to one with law would bring with it not only gains (cer-

[9] There would be borderline cases where some, but not all, secondary rules of power are introduced Namely, Hart claims that the introduction of each of the secondary rule of power "might, in itself, be considered as a step from the pre-legal into the legal world", since each one "brings with it many elements that permeate law", while "certainly all three [secondary rules of power] together are enough to convert the regime of primary rules into what is indisputably a legal system" (94).

tainty, dynamism and efficiency of rules), but also the cost of risk that "the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not" (202). Does not the same point hold true for all inventions? Think of the above-mentioned analogy with the invention of the wheel.

### *The worlds in which rules would be different from those in our actual world*

After considering law as the union of primary and secondary rules, Hart redirects his attention in Chapters VIII and IX of *CL* to the consideration of the relation between law and morality.[10]

In the first of these two chapters, he discusses the relevance of the idea of justice to law, the main features (importance, immunity from deliberate change, voluntary character of offences, and the form of pressure) that distinguish moral rules from legal rules and other types of social standards, and the role that moral ideals and principles play in a society and life of individuals.

Hart then goes on in Chapter IX to consider the contention that there is no necessary connection between law and morality. This contention is most closely associated with the tradition of legal positivism. Hart distinguishes between two forms in which the contention has been rejected.

> One of these is expressed most clearly in the classical theories of Natural Law: that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid. The other takes a different, less rationalist view of morality, and offers a different account of the ways in which legal validity is connected with moral value. (186)

Hart devotes most of the chapter to an examination of the traditional natural law theory. Although he rejects its teleological view of nature, he accepts its claim about human survival as a goal of law and morality:

> We are committed to it as something presupposed by the terms of the discussion; for our concern is with social arrangements for continued existence, not with those of a suicide club. (192)

Proceeding on this assumption, Hart begins to specify what he calls the "*minimum content* of natural law" (193).[11]

In this context, Hart introduces and discusses several imaginary worlds in which rules would be different from those in our actual world.[12] First, he asks the reader to imagine a world in which human

[10] Although the "union of primary and secondary rules is at the centre of a legal system", Hart claims, "it is not the whole" (99).

[11] Hart stresses (1961 [1994]: 303) that his idea of minimum content of natural law is based on Thomas Hobbes's and David Hume's accounts of laws of nature.

[12] See also Hart's slightly earlier work (1958 [1983]: 79–81).

beings were to become invulnerable to attack by each other, were armored perhaps like "animals whose physical structure (including exoskeletons or a carapace) renders them virtually immune from attack by other members of their species" or were incapacitated like "animals who have no organs enabling them to attack" (194). In such a world there would be little point, Hart claims, "for the most characteristic provision of law and morals: Thou shalt not kill" (195). Second, the reader is asked to imagine a world of human beings "immensely stronger than others or better able to dispense with rest, either because they are far above the present average, or because most were far below it" (195). In such a world of "giants among pygmies", there would be no special system of organized sanctions, but only a system "in which the weak submitted to the strong on the best terms they could make and lived under their 'protection'" (198). Third, Hart asks the reader to imagine still another world with devils "dominated by a wish to exterminate each other" and an opposite world with angels "never tempted to harm others" (196). In the former world, rules requiring forbearances would be impossible, while in the latter one they would be unnecessary. Fourth, the reader is asked to imagine a world in which the "human organism … have been constructed like plants, capable of extracting food from air, or what it needs … have grown without cultivation in limitless abundance" (196). In such a world, there would be no point in having rules that protect property. The last imaginary world is a pre-legal world that we encountered above. In this world human beings were approximately equal in physical strength and vulnerability, and live under "a system of mutual forbearances". Because of obvious advantages of submission to such a system, "the number and strength of those who would co-operate voluntarily" in its maintance would "normally be greater than any likely combination of malefactors" (197–98; see also 218–19). In such a world there would be no need for a special system of organized sanctions.

Considerations of these imaginary worlds enable Hart to make five "very obvious generalizations" or "truisms" about the human nature and the character of physical world in which they live: human vulnerability; approximate equality; limited altruism; limited resources and limited understanding and strength of will. Given these five truisms, Hart claims, certain rules necessary for human survival can be determined. They include rules that "restrict the use of violence in killing or inflicting bodily harm" (194), require "mutual forbearance and compromise" (195) and respect for property (196), enable "men to transfer, exchange, or sell their products" and secure the recognition of promises as a source of obligation" (197), and create a special organization for the detection and punishment "of those who would … try to obtain the advantages of the system without submitting to its obligations" (198). Hart calls these rules the minimum content of natural law.[13]

[13] These rules, Hart writes, "are so fundamental that if a legal system did not have them there would be no point in having any other rules at all" (1958 [1983]: 80).

## 3. *Reconstructing legal theoretical thought experiments*

After having summarized, the three imaginary scenarios in Hart's *CL* and pointed to the context within which we encounter each of them in his work, I turn now to the main question of my article: Do the three imaginary scenarios in Hart's *CL* constitute thought experiments? In the discussion of this question, I rely on a general characterization of thought experiments in philosophy according to which they are:

– imaginary;
– counterfactual scenarios;
– designed for special cognitive purposes.[14]

Consider how Hart's scenarios satisfy the requirements of the above characterization.

First, Hart's scenario of the absolute monarchy under the Rex dynasty describes the imaginary monarchy. Hart claims that it is "probably far too simple ever to have existed anywhere" (53) and interchangeably calls it "imagined community" (52), "imaginary monarchy" (54), "imaginary simple world" (67), "imagined society" (68), and "imaginary kingdom" (96). As we saw in the previous section, the scenario reveals absurdities inherent in Austin's notions of sovereignty and general habit of obedience, and suggests that the reader would consider the idea of rules as the way out of the absurdities.

Second, there is a certain ambiguity in Hart's scenario of the pre-legal society governed by primary rules of obligation. Hart writes that

> there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation. (91)[15]

However, the scenario does not describe primitive communities without law which ever did or do now exist, but the imaginary pre-legal regime of primary rules of obligation. In "Postscript" to *CL*, Hart calls it "imagined simple regime consisting only of primary rules of obligation" (249) and "imagined pre-legal regime of custom-type primary rules of obligation" (251). As we saw in the previous section, the scenario's essential elements are defects of such a regime, even those that "never perhaps fully realized in any actual community" (93). These defects are uncertainty, unchangeability and inefficiency, and the remedies for them are secondary rules of recognition, change and adjudication. Furthermore, the introduction of all these secondary rules of power together makes the step from the pre-legal into the legal world. The scenario suggests

[14] For more on this general characterization of thought experiments, see Gendler (2004: 1155), Roux (2011: 19–27), and Goffi and Roux (2018: 440–41). See also Miščević's discussion on thought experiments in political philosophy (2018; 2017) and Brun's discussion on thought experiments in ethics (2018).

[15] Hart cites several such works in an accompanying note (1961 [1994]: 291).

that the reader would consider the idea of law as the union of primary rules of obligations and secondary rules of power.

Several authors have noticed a certain similarity between Hart's scenario and John Locke's account of the state of nature (Sartorius (1966 [1971]: 140); Bobbio (1968 [1988]: 70); Hacker (1977: 11); Fitzpatrick (1992: 193); Postema (2011: 306); Simpson (2011: 174–77); Chiassoni (2013: 456)). Namely, in the *Second Treatise of Government*. Locke claims that the state of nature is defective, inconvenient to use his euphemism, because it lacks "an *establish'd*, settled, known *Law*", "*a known and indifferent Judge*" and "*Power* to back and support the Sentence when right, and to *give* it due *Execution*" (1689 [1988]: 351). For these defects of the state of nature, Locke writes, "*Civil Government* is the proper Remedy" (276). However, Hart does not mention Locke nor take any notice of the state of nature in *CL*.

Third, Hart's scenarios of imaginary worlds in which rules would be different from those in our actual world are glaring examples of philosophical fantasy (195).[16] As we saw in the previous section, these scenarios refer to specific features of animals, fantastic beings and natural conditions, such as invulnerability, inequality, unlimited altruism, unlimited selfishness, unlimited resources, unlimited understanding and strength of will, which make them different from actual human beings and the world in which they live. The scenarios suggest first that the reader would consider the most characteristic rules of law and morality to be different, if human beings and their natural conditions had any of the specific features above. Furthermore, they suggest that in considering this, she would also consider these rules as rooted in the physical world and our human nature. Finally, the scenarios suggest that the reader would consider the ongoing survival of a human society as contingent upon the most characteristic minimum content of natural law.

The germ of Hart's scenarios of imaginary words in which rules would be different from those in our actual world can be found in Plato's story of Gyges' ring. Namely, in *The Republic*, Plato has Glaucon tell story about the ring which makes its wearer invisible to others human beings. One of the lessons to draw from this story is that in a world in which one were invisible there would be little point for the most characteristic rules of law and morality.[17] Hart in CL mentions Plato twice (162, 186), but does not make use of his story.

## 4. *Conclusion*

Taking all the above points together, I conclude that Hart's imaginary scenarios in *CL* fulfill the requirements of the general characterization of thought experiments that we can find in the contemporary philo-

[16] The discussion of these worlds, Hart writes, "involves the use of a philosophical fantasy" (1958 [1983]: 79).

[17] On Plato's story of Gyges' ring as a thought experiment, see Becker (2018) and Miščević (2012).

sophical literature. Thus, it is revealed that Hart's interpreters are right, namely those who draw attention to the imaginary scenarios in Hart's *CL* as thought experiments and the thought experimentation as an integral part of the methodology that underlies his work. Hart's work should really be considered as a great example of the thought experimentation in the contemporary theory of law. However, the question remains as to how much Hart's thought experiments fulfill the basic desiderata for good or successful thought experiments. I have to leave this question to be considered on another occasion. Its discussion would also require the consideration of various objections to Hart's ideas of rules, union of primary and secondary rules and minimum content of natural law that are contained in the almost immeasurable literature on Hart's *CL* published in the last fifty and more years after its first edition.

As always, the advice of Nenad Miščević has proved to be more than useful, while on this occasion I am especially grateful to him for his immense patience shown while waiting for this article to be finished.

## *References*

Austin, J. 1832 [1954]. *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*. London: Weidenfeld and Nicolson.

Bayles, M. D. 1992. *Hart's Legal Philosophy*. Dordrecht: Kluwer Academic Publisher.

Becker, A. 2018. "Thought Experiments in Plato." In Stuart, Fehige and Brown 2018: 44–56.

Bobbio, N. 1968 [1988]. "Ancora sulle norme primarie e norme secondary." *Rivista di Filosofia* 59: 35–53. Translated in, and cited from, Norberto Bobbio, *Eseji iz teorije prava*, edited by N. Visković. Split, Logos, 1988: 63–74.

Brun, G. 2018. "Thought Experiments in Ethics." In Stuart, Fehige and Brown 2018: 195–210.

Chiassoni, P. 2011. "The Simple and Sweet Virtues of Analysis. A Plea for Hart's Metaphilosophy of Law." *Problema. Anuario de Filosofía y Teoría del Derecho* 5: 53–80.

Chiassoni, P. 2013. "The Model of Ordinary Analysis." In L. D. d'Almeida, J. Edwards and A. Dolcetti (eds.). *Reading HLA Hart's* The Concept of Law. Portland: Hart Publishing: 444–82.

Chiassoni, P. 2016a. "Supporting The Force of Law: A Few Complementary Arguments Against Essentialist Jurisprudence." In Ch. Bezemek and N. Ladavac (eds.). *The Force of Law Reaffirmed. Frederick Schauer Meets the Critics*. New York: Springer: 61–71.

Chiassoni, P. 2016b. "The Heritage of the 19th Century: The Age of Interpretive Cognitivism." In E. Pattaro and C. Roversi (eds.). *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 12: *Legal Philosophy in the Twentieth Century: The Civil Law World*, Tome 2: *Main Orientations and Topics*. New York: Springer: 565–600.

Coleman, J. (ed.). 2001. *Hart's Postscript*. Oxford: Oxford University Press.

d'Almeida, L. D., Edwards, J. and Dolcetti, A. (eds,). 2013. *Reading HLA Hart's* The Concept of Law. Portland: Hart Publishing.

Di Nucci, E. 2004. *Ethics Without Intention*. London: Bloomsbury.

Fitzpatrick, P. 1992. *The Mythology of Modern Law*. London—New York: Routledge.

Gavison, R. (ed.). 1987. *Issues in Contemporary Legal Philosophy. Essays for H. L. A. Hart*. New York: Oxford University Press.

Gendler, T. S. 2004. "Thought Experiments Rethought—and Reperceived." *Philosophy of Science* 71: 1152–1163.

Giudice, M. 2015. *Understanding the Nature of Law. A Case for Constructive Conceptual Explanation*. Cheltenham: Edward Elgar Publishing, Inc.

Goffi, J.-Y. and Roux, S. 2018. "A Dialectical Account of Thought Experiments." In Stuart, Fehige and Brown 2018: 439–53.

Hacker , P. M. S. 1977. "Hart's Philosophy of Law." In P. M. S. Hacker and J. Raz (eds.). *Law, Morality and Society. Essays in Honour of H. L. A. Hart*. Oxford: Oxford University Press: 1–25.

Hart, H. L. A. 1954 [1983]. "Definition and Theory in Jurisprudence." *Law Quarterly Review* 70: 37–60. Reprinted in, and cited from, Hart 1983: Essay 1.

Hart, H. L. A. 1958 [1983]. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71: 593–629. Reprinted in, and cited from, Hart 1983: Essay 2.

Hart, H. L. A. 1958 [2008]. "Legal Responsibility and Excuses." In S. Hook (ed.). *Determinism and Freedom. In the Age of Modern Science*. New York: Collier Books: 95–116. Reprinted in, and cited from, Hart 2008: Chapter II.

Hart, H. L. A., Honoré, T. 1959 [1985]. *Causation in the Law*. Second Edition. Oxford: Clarendon Press.

Hart, H. L. A. 1961 [1994]. *The Concept of Law*. Second Edition with a Postscript edited by P. A. Bulloch and J. Raz. Oxford: Oxford University Press.

Hart, H. L. A. 1965 [1983]. "Lon L. Fuller: *The Morality of Law*." *Harvard Law Review* 78: 1281–1296. Reprinted in, and cited from, Hart 1983: Essay 16.

Hart, H. L. A. 1967 [2008]. "Intention and Punishment." *Oxford Review* 4: 5–22. Reprinted in, and cited from, Hart 2008: Chapter V.

Hart, H. L. A. 1970 [1983]. "Kelsen's Doctrine of the Unity of Law." In H. E. Kiefer and M. K. Munitz (eds.). *Ethics and Social Justice*. Albany: State University of New York Press: 171–99. Reprinted in, and cited from, Hart 1983: Essay 15.

Hart, H. L. A. 1973 [1983]. "Rawls on Liberty and Its Priority." *The University of Chicago Law Review* 40: 534–55. Reprinted in, and cited from, Hart 1983: Essay 10.

Hart, H. L. A. 1976 [1983]. "1776–1976: Law in the Perspective of Philosophy." *New York University Law Review* 51: 538–551. Reprinted in, and cited from, Hart 1983: Essay 5.

Hart, H. L. A. 1977 [1983]. "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream." *Georgia Law Review* 11: 969–989. Reprinted in, and cited from, Hart 1983: Essay 4.

Hart, H. L. A. 1983. *Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press, Essay 1.

Hart, H. L. A. 2008. *Punishment and Responsibility. Essays in the Philosophy of Law*, Second Edition with an Introduction by J. Gardner. Oxford: Oxford University Press.

Hofmann, H. 2016. "The Development of German-Language Legal Philosophy and Legal Theory in the Second Half of the 20th Century." In E. Pattaro and C. Roversi (eds.). *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 12: *Legal Philosophy in the Twentieth Century: The Civil Law World*, Tome 2: *Main Orientations and Topics*. New York: Springer: Chapter 10.

Houlgate, L. D. 2017. *Philosophy, Law and the Family. A New Introduction to the Philosophy of Law*. New York: Springer.

Kramer, M., Grant, C., Colburn, B. and Hatzistavrou, A. (eds.). 2008. *The Legacy of H. L. A. Hart. Legal, Political and Moral Philosophy*. Oxford: Oxford University Press.

Lacey, N. 2004. *A Life of H. L. A. Hart. The Nightmare and the Noble Dream*. Oxford: Oxford University Press.

Leith, Ph. and Ingram, P. (eds.). 1988. *The Jurisprudence of Orthodoxy. Queen's University Essays on H. L. A. Hart*. London: Routledge.

Locke, J. 1689 [1988]. *Two Treatises of Government*. Edited with an introduction and notes by P. Laslett. Cambridge: Cambridge University Press.

MacCormick, N. 2008. *H. L. A. Hart*. Second edition. Palo Alto: Stanford University Press.

Miščević, N. 2012. "Plato's Republic as a Political Thought Experiment." *Croatian Journal of Philosophy* 12: 153–165.

Miščević, N. 2017. "Accounting for Thought Experiments—25 Years Later." In B. Borstner and S. Gartner (eds.). *Thought Experiments between Nature and Society: A Festschrift for Nenad Miščević*. Newcastle upon Tyne: Cambridge Scholars Publishing: 11–29.

Miščević, N. 2018. "Thought Experiments in Political Philosophy." In Stuart, Fehige and Brown 2018: 153–70.

Moles, R. N. 1987. *Definition and Rule in Legal Theory: A Reassessment of H. L. A. Hart and the Positivist Tradition*. Oxford: Basil Blackwell.

Plato 1937. *The Republic, Two Volumes*. Translated by P. Shorey. Cambridge: Harvard University Press.

Postema, G. J. 2011. *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 11, *Legal Philosophy in the Twentieth Century. The Common Law World*. Dordrecht: Springer: Chapter 7.

Priel, D. 2013. "Law, Social Phenomenon of." In B. Kaldis (ed.). *Encyclopedia of Philosophy and the Social Sciences*. Los Angeles: Sage Publications: 543–46.

Riley, P. 2009. *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 10: *The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days*. Dordrecht: Springer: Chapter 17.

Roux, S. 2011. "Introduction." In K. Ierodiakonou and S. Roux (eds.). *Thought Experiments in Methodological and Historical Contexts*. Leiden: Brill: 1–33.

Sartorius, R. 1966 [1971]. "Hart's Concept of Law." *Archiv für Rechts-und Sozialphilosophie* 52: 161–94. Reprinted in, and cited from, R. S. Summers (ed.). *More Essays in Legal Philosophy*. Oxford: Basil Blackwell: 131–61.

Simpson, A. W. B. 2011. *Reflections on* The Concept of Law. Oxford: Oxford University Press.

Stavropoulos, N. 2001. "Hart's Semantics." In Coleman 2001: 59–98.

Stuart, M. T., Fehige, Y., and Brown, J. R. (eds.). 2018. *The Routledge Companion to Thought Experiments*. New York: Routledge.

Stuart, M. T., Fehige, Y., and Brown, J. R. 2018. "Thought Experiments: State of the Art." In Stuart, Fehige and Brown 2018: 1–28.

Szabó Gendler, T. 2000. *Thought Experiment. On the Powers and Limits of Imaginary Cases*. New York and London: Garland Publishing, Inc.

von Daniels, D. 2016. *The Concept of Law from a Transnational Perspective*. London and New York: Routledge.