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FINDING WITTGENSTEIN AT THE CORE OF THE RULE OF RECOGNITION

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H.L.A. Hart's 1957 Holmes Lecture at Harvard Law School, *Positivism and the Separation of Law and Morals*, was clearly an attempt by Hart to refocus the postwar debate over positivism.[1] The lecture dealt with challenges to positivism based on its alleged connections with a variety of unpopular jurisprudential views. Hart challenged the claim, made by many, that there was a necessary relationship between positivism and Bentham and Austin's "command theory," Langdellian formalism, and Nazi totalitarianism.[2] In doing so, Hart cleared the ground for a new picture of positivism based on the idea of law as a "union of primary and secondary rules" that did not ground law in either the threat of force or fictive abstractions, a picture that he would fully develop in *The Concept of Law*, which was published in 1961.[3] But *Positivism and the Separation of Law and Morals* was more than a critique of positivism's critics; it set out some of the elements that would form the backbone of *The Concept of Law*. In Section III of *Positivism and the Separation of Law and Morals*, Hart set out his view of discretion in adjudication, based, in part, on a certain picture of language.[4] Hart's view, that judges exercise no discretion in a law's "core" and legislate in its "penumbra," has captured the attention of many of positivism's critics since the lecture was published in the *Harvard Law Review*.[5] While Hart may have done much good for positivism by challenging those who would associate it with formalism and totalitarianism, he nonetheless opened up a whole new set of difficulties for positivism by associating it with a view of discretion rooted in the idea that language was characterized by the phenomena of the "core" and the "penumbra."

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1. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

2. *See id.*

3. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

4. Hart, *supra* note 1, at 606-15.

5. *See, e.g.*, STEVEN J. BURTON, JUDGING IN GOOD FAITH 181-83 (1992); RONALD DWORKIN, LAW'S EMPIRE 39 (1985); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 794-95 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1172-80 (1989); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 273-75 (1981); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

In this Article, I will examine the role that Hart's view of discretion played in the development of his theory of positivism. This Article has five sections. First, I will situate Hart's discussion of discretion in the larger argument of *Positivism and the Separation of Law and Morals*, and I will show that Hart's presentation of his views on discretion were directed mostly against Fuller's theory of the morality of law. Second, I will explain why Hart believed that his rejection of Fuller's theory of the morality of law presupposed that all rules possessed a core and a penumbra. Third, I will argue that Hart relied upon a Wittgensteinian concept of rules when he developed the picture of discretion that he used to attack Fuller. Fourth, I will argue that Hart's Wittgensteinian picture of rules, by itself, did a poor job of explaining legal discretion, and that this problem was pointed out by the legal process scholars Henry Hart and Albert Sacks. Fifth, I will argue that the problems with Hart's picture of legal discretion were cured once Hart adopted the distinction between primary and secondary rules in *The Concept of Law*. The point of this Article is simple: Hart's concept of discretion in *Positivism and the Separation of Law and Morals* was a profound but incomplete step in the right direction. Hart's distinction between the core and the penumbra should only be judged in the context of his model of rules, which he did not develop until after *Positivism and the Separation of Law and Morals* was published.

I.

It is important to remember the context in which Hart delivered *Positivism and the Separation of Law and Morals*. Positivism had been attacked from two sides. On one side, the realists had attacked Austin and Bentham for the sin of analytical jurisprudence, which they associated with Langdell and formalism. On the other side, various natural lawyers attacked Austin and Bentham for the sin of uncoupling law and morality, which they associated with totalitarianism and moral relativism. In Section III of *Positivism and the Separation of Law and Morals*, Hart discussed the realist attack. What is interesting, as we shall see, is that Hart had trouble keeping separate in his mind the difference between his realist and natural law critics, and his minor lapses of analysis here tell us something important about his own views on the nature of rules.

The realists, Hart noted, correctly understood that legal reasoning could not be "wholly logical."[6] At some point, observed Hart, a law-applier "must make a decision which is not dictated to him."[7] The reason why a legal decision cannot be wholly logical is because many of the rules upon which judges would base their logical operations cannot operate as premises in a classical syllogism. This is because many of these rules are sometimes irreducibly vague in their meaning: for example, the rule "no

6. *See* Hart, *supra* note 1, at 606.
7. *Id.* at 607.

vehicles in the park" (call this Rule P) may or may not mean that bicycles are prohibited from the park, and there is nothing in the words of Rule P that can tell us which it is.[8] If no legal rule can tell the rule-applier whether Rule P prohibits bicycles, and the rule-applier nonetheless answers that question, then according to Hart, the law-applier "must take the responsibility" of deciding what Rule P means by using a non-legal reason to pick a meaning.[9]

Hart quickly pointed out that nothing in the foregoing paragraph was inconsistent with Austin's views; in fact, a critical moment in analytical jurisprudence was when Austin had rejected the myth that legal reasoning was a matter of pure deduction and nothing more.[10] But why, then, had the realists been so convinced that positivism was committed to the myth of deduction? Hart offered this explanation:

> [If] men cannot live by deduction alone . . . what is it then that makes such decisions correct or at least better than alternative decisions? Again, it seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be; it is easy to slide from that into saying that it must be a moral judgment about what law ought to be. So here we touch upon a point of necessary "intersection between law and morals" which demonstrates the falsity or, at any rate, the misleading character of the [positivists'] emphatic insistence on the separation [between] law as it is and [law as it] ought to be.[11]

Under this reading, realists thought that positivism insisted on not just the analytical separation of law and morality but their practical separation as well. According to the realists, the positivist forbade judges from acting on the basis of social policy in order to prevent the confusion of law and morals, and the only way to prohibit judges from acting on social policy was to convince them that judging was a will-less, deductive process.[12] But, as Hart pointed out, a positivist could insist on the separation of law and morality if the consideration of social policy occurred only when legal meaning was vague and the judge used nonlegal reasons to choose between outcomes.[13] Why could the realist not see that?

According to Hart, the realist could not conceive of a jurisprudence that insisted on the separation of law and morality and permitted the consideration of social policy because the realist believed that:

> the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as

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8. *See id.*
9. *Id.*
10. *See id.* at 608-09.
11. *Id.* at 608.
12. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615-16 (1908) (citing Lochner v. New York, 198 U.S. 45 (1905)). I discuss the reasons behind the realists' misrepresentation of nineteenth-century positivism as a form of deductive conceptualism in Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2068-72 (1995).
13. *See* Hart, *supra* note 1, at 612.

> part of the law. . . . [Therefore] the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the [legal] rule what, if it is properly understood, is "latent" within it.[14]

It is highly questionable that this is how the realists saw their disagreement with positivism. When the realists criticized analytic jurisprudence's focus on the separation of law and morals, it was not because the realists thought that in adjudication judges "drew out" from precedent and statutes conclusions that were "latent" within them. When Felix Cohen called a judicial decision "a social event" he meant that the decision was rooted in a broad set of conditions surrounding the case, including, but not limited to, "human psychology, economics, and politics."[15] When Karl Llewellyn emphasized shared practices among both judges and the lay people affected by the law, he meant to include "mere" commercial custom and local habit.[16] When Jerome Frank emphasized the psychological sources of judicial decision, he drew attention to what was idiosyncratic and subconscious within the judge's mind.[17] Despite their differences, all the major realists shared a deep skepticism of the idea that the source of decision, whatever it was, was in the law alone. The differences between realism and positivism were not over whether "social policy" was imminent in the law, but over whether the law, regardless of its sources, could bind judicial decisionmaking at all.

In later writing Hart was much more clear about what compromised the real dispute between positivism and realism.[18] The section on realism in *Positivism and the Separation of Law and Morals* is much less clear than, for example, Chapter 7 of *The Concept of Law*, in which Hart clearly stated that the "rule-sceptic" believed that judges are not subject to legal rules, in the sense that the rules bind decisionmaking.[19] So what was Section III of *Positivism and the Separation of Law and Morals* about? If the realist did not think that judges are bound by the law "latent" within every vague legal rule, who did? The answer, obviously, is Lon Fuller. Section III of *Positivism and the Separation of Law and Morals* is fascinating partly because of the way Hart converted his discussion of realism into a discussion of Fuller's theory of the morality of law. Fuller rejected positivism because he rejected its "fundamental postulate . . . that law must be strictly severed from morality."[20] Fuller assumed Llewellyn's call for a "temporary" divorce of law and morals

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14. *Id.*

15. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843-44 (1935).

16. *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 445-46 (1930).

17. *See* JEROME FRANK, LAW AND THE MODERN MIND 60 (3d ed. 1935).

18. *See* HART, *supra* note 3, at 124-41; H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, *in* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123 (1983).

19. HART, *supra* note 3, at 138.

20. Fuller, *supra* note 5, at 656.

placed realism and positivism in the same camp and treated the two theories interchangeably.[21] Fuller believed that law could not be separated from morality because law, even "considered merely as order, contains . . . its own implicit morality."[22] Fuller thought that he was making a conceptual argument that, in other contexts, was quite unremarkable. We would agree, argued Fuller, that there are "natural laws" governing "particular kind[s] of human undertaking[s]" such as carpentry.[23] In the same way that there are natural laws governing good carpentry, there must also be natural laws that govern "the enterprise of subjecting human conduct to the governance of rules."[24]

Fuller called the natural laws of governance of rules the "internal morality of law."[25] The modifier "internal" was supposed to distinguish his theory from the more demanding forms of natural law that used moral philosophy to test the content of individual laws.[26] The internal morality of law therefore placed a limit on how laws were made and applied, not on what values they promoted.

> What I have called the internal morality of law is in this sense a procedural version of natural law . . . . The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.[27]

The internal morality of law blended the perspective of both a legislator and a judge: it demanded that the lawmaker focus not only on the substantive ends she wishes to achieve, but also on how those to whom the law is directed will come to know what those ends are. For Fuller, more traditional natural law theory had put the cart before the horse by asking what the law should achieve before fully understanding how the law was to achieve anything.

Fuller determined that the morality of law consisted of eight jointly necessary conditions.[28] These conditions represented the minimum floor below which a legal system could not fall, as well as the heights to which a

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21. *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 47 (1940).

22. Fuller, *supra* note 5, at 645.

23. LON L. FULLER, THE MORALITY OF LAW 96 (1964).

24. *Id.*

25. *Id.*

26. *See id.* at 104; Fuller, *supra* note 5, at 660; *see also* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE 130 (1989) (discussing Fuller's "distancing" himself from classical natural law).

27. FULLER, *supra* note 23, at 97-97.

28. (1) a legal system must have rules, since a legal system cannot decide everything on an "ad hoc" basis; (2) the rules must be publicized; (3) the rules may not be retroactive; (4) the rules must be comprehensible; (5) the rules may not contradict other rules in the same legal system; (6) the rules may not demand the impossible; (7) the rules may not be changed constantly; and (8) the rules's administrators may not ignore the rules. *See id.* at 39.

legal system could aspire.[29] A legal system that consistently failed most of the eight conditions simply had no law, while a legal system that satisfied most of the conditions most of the time had law, albeit in varying degrees.[30]

It is important to recognize that for Fuller, the opposite of the internal morality of law was a regime of "uncontrolled administrative discretion."[31] Fuller phrased this contrast differently at different points in his career, but the dichotomy always indicated the same stark choices: between reason and fiat,[32] adjudication and arbitration[33] law and "managerial direction."[34] In each of the second terms, the regime described is one in which the relevant conduct is simply not governed by a norm. Yet the demand that law be, if nothing else, a limit of a judge's scope of action, the opposite of the realist's position, seemed to be something that Fuller had in common with positivism, and this is exactly turned to this feature of Fuller's argument in the middle of Section III of *Positivism and the Separation of Law and Morals.* Without specifically referring to Fuller (and, ostensibly, still discussing realism), Hart noted that just because a theory of law provided for a judge to decide according to "what ought to be" in some cases, it did not follow that the theory endorsed "a junction of law and morals."[35] Hart cautioned that "[w]e must, I think, beware of thinking in a too simple-minded fashion about the word 'ought' . . . . The word 'ought' merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral."[36] Thus, even if Fuller were correct about the internal structure of law, it simply was not clear what the morality of law, as defined by Fuller, had to do with morality, and hence, why the truthfulness of morality of law proved that positivism was wrong. Hart argued that purposive behavior, including behavior in conformity with a norm, was compatible with evil ends. For example, he noted that there is no difference in the use of "ought" in the statement "you ought not to lie" to one's children and "you ought to have given her a second dose" to one's confederate in crime.[37] In the legal context, Hart argued, all the morality of law required

29. According to Fuller, all normative conduct took place on a spectrum that fell between "morality of duty" (the minimum required of a normative system) and the "morality of aspiration" (the end to which any normative system aspires). *Id.* at 5-10.

30. *See id.* at 39. The inner morality of law "confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worse pitied for the lack of it." *Id.* at 42.

31. Fuller, *supra* note 5, at 654.

32. *See* Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377-78 (1946).

33. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 397 (1978).

34. FULLER, *supra* note 23, at 207.

35. Hart, *supra* note 1, at 612.

36. Hart, *supra* note 1, at 612-13.

37. *Id.* at 613. As Hart later argued, using the same example, "poisoning is no doubt a purposive activity, and reflection on its purposes may show that it has its internal principles." H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281, 1286 (1965) (reviewing

was that judicial decisions promote the purposes of the regime, not that those purposes be morally justified.[38] Hart was basically saying to Fuller: "Positivism rejects legal power unconstrained by rules and so do you. Why do you insist on saying that a regime of legal rules is necessarily moral?"

Fuller felt quite strongly that there was a connection between the morality of law and substantive justice.[39] Much of his 1958 response to Hart's Holmes Lecture was devoted to showing that the Nazis in fact did not have a legal system. He argued, for example, that a German woman who was prosecuted in 1949 for turning her husband in to the Nazi police in 1944 in accord with anti-sedition laws passed in 1934 and 1938 (resulting in the husband's prosecution for the capital offense of slandering the Führer) was not acting under the valid law of the land when she turned her husband in because the 1938 law was never law.[40] Fuller subjected the Nazi anti-sedition laws to the test of the morality of law and found them wanting. The 1938 law, which forbade "publicly seek[ing] to injure or destroy the will of the German people [in wartime]," failed, at a minimum, the condition requiring that the administrator of the law follow the rules he sets down because the husband had spoken against Hitler in private with his wife, not in public.[41] The 1934 law, which forbade public or private statements that "disclose a base disposition toward the leading personalities of the nation or of the [Nazi] Party . . . and of such a nature as to undermine the people's confidence in their political leadership, shall be punished by imprisonment," failed the morality of law because it was so "overlarded and undermined . . . by uncontrolled administrative discretion" that a judge would have no choice but "to declare this thing not

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FULLER, THE MORALITY OF LAW (1964)). For example, one might command a poisoner in one's service to "avoid poisons however lethal if their shape, color or size is likely to attract notice." *Id.*

38. *See* Hart, *supra* note 1, at 613 ("Under the Nazi regime men were sentenced by courts for criticisms of the regime. Here the choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's tyranny effectively."). Ingo Müller has turned Fuller's position on its head and argued that the Nazi legal system would have been *less* evil had it been *more* positivist. According to Müller, German jurisprudence in the 1930s had adopted a view very similar to the theory of teleological reasoning demanded by Fuller's procedural natural law theory, that, when directed towards substantively evil ends, allowed Nazi judges to achieve far more evil than had they been acting like positivists. *See* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 220-22 (Deborah Lucas Schneider trans., 1991). One problem with Müller's argument is that he confuses classical legal positivism, which must include the separability thesis, the sources thesis, and the command theory, with a kind of judicial passivism, in which the judge is constrained by both formalistic reasoning and a crabbed form of textualism. *See* Markus Dick Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807, 1820-21 (1993) (reviewing MÜLLER, HITLER'S JUSTICE).

39. *See* FULLER, *supra* note 23, at 153-55.

40. *See* Fuller, *supra* note 5, at 653-55 (discussing Judgment of July 27, 1949, Oberlandesgericht Bamberg, 5 SÜDDEUTSCHE JURISTEN-ZEITUNG 207 (Germany 1950)); *Recent Cases*, 64 HARV. L. REV. 996, 1005 (1951).

41. Fuller, *supra* note 5, at 653-54 (citing section 5 of Kreigssonderstrafrecht Law of Aug. 17, 1938, [1939] 2 REICHSGESETZBLATT pt. I, at 1456).

a law."[42] Fuller offered other examples of Nazi "laws" that failed to satisfy the morality of law, such as the "Roehm purge" in which the Nazis tried, convicted, and then sentenced to death more than seventy party members after they had been killed,[43] and the "laws" that forced Jewish store owners to display signs saying "Jüdisches Geschäft" except in Berlin during international events (when the Nazis wanted to appear more humane for foreign visitors).[44] According to Fuller, the Roehm purge law failed to be "law" not because it was substantively horrific, but because it was retroactive (condition three); similarly, the "Jüdisches Geschäft" law failed because it was never publicly enacted (condition two).[45]

Elsewhere, Fuller suggested that other evil legal systems, or at least the substantively evil laws produced by those systems, would have failed to reach the floor set out by the morality of law.[46] However, classical legal positivism did not deny that evil regimes often cut corners and abandoned the rule of law, or that evil regimes abandoned the rule of law more often than good regimes. The separability thesis only claimed that there was no necessary relationship between substantively evil regimes and the presence or absence of the rule of law. For example, one might argue that post-war South Africa posed exactly this dilemma. Throughout the 1950s and 1960s, South Africa erected an evil, racist regime that, arguably, did satisfy the eight conditions of the morality of law. Fuller responded by noting that even South African law was infected by procedural immorality in that in its zeal to regulate the races according to the rule of law, the South African government created a set of rules that degenerated through their own complexity into a set of managerial dictates no less arbitrary than the Nazi anti-sedition laws.[47]

For Fuller, the fact that every modern regime that attempted to achieve substantively evil aims failed to conform to the morality of law evidenced a necessary relationship between substantive justice and procedural justice.[48] Fuller argued that the reason why evil regimes like Nazi Germany, Stalinist Russia, and South Africa could never, in principle, have law, is because "coherence and goodness have more affinity than coherence and

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42. *Id.* at 654-55 (citing Article II of A Law Against Malicious Attacks on the State and the Party and for the Protection of the Party Uniform, Law of Dec. 20, 1934, [1934] I REICHSGESETZBLATT 1269). Fuller highlighted the facts that, unlike the 1938 law, this law set out *only* imprisonment as punishment for its violation, and that the definition of a "leading personality" was left open to interpretation by the National Minister of Justice.

43. *See id.* at 650 (citing N.Y. TIMES, July 4, 1934, p. 3, col. 3 & July 14, 1934, p. 5, col. 2).

44. *See* FULLER, *supra* note 23, at 158.

45. *See* Fuller, *supra* note 5, at 650; FULLER, *supra* note 23, at 158.

46. *See* FULLER, *supra* note 23, at 160-61, 202. Fuller suggested that the Soviet's retroactive imposition of the death penalty for violations of currency regulations violated the morality of law, as did South Africa's racial classification laws, which relied on the unbridled discretion of the courts. *See id.*

47. *See id.* at 160. Fuller thought that the view that South Africa was a combination of "strict observance of legality" with "a body of law that is brutal and inhuman" arose from a confusion "between deference for constituted authority and fidelity to law." *Id.*

48. *See id.* at 153; *see also* Fuller, *supra* note 5, at 645.

evil":[49]

> [The positivist] seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption. . . . I [therefore] believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are.[50]

The connection, therefore, between the retroactivity condition of the morality of law and justice is that if the Nazi or Soviet lawmakers had been forced to frame in advance the general norm that governed the Roehm purge or the imposition of the death penalty for currency offenses, they would have, like Fuller's failed imaginary sovereign Rex, failed to make law and would have been forced to fall back on issuing managerial directives, not norms.[51] Furthermore, the demand of prospectivity, like the demand of publicity, forces the lawmakers to confront the substantive evilness of the ends served by the state's power. It is a natural reaction on the part of lawmakers, when confronted by the ugliness of their own handiwork, to try to hide their evil from others through secret laws and from themselves through retroactive laws (which legitimate, after the fact, acts that are often the result of inchoate, hidden passions such as cruelty, racism, or greed).[52]

Fuller's assumption that justice was more "coherent" than evil was the keystone to his attack on positivism. If the coherence thesis, as we may call it, is not true, then Fuller's theory about the morality of law could be absolutely true and yet entail nothing about positivism. Fuller admitted that he had not proven the coherence thesis, and it is obvious that it is a controversial claim that touches on some of the most difficult problems of moral philosophy.[53] Although the coherence thesis might have been supportable if one stayed at the level of crude historical generalization, it seemed to miss the point about what made certain uses of state power immoral. For example, Fuller argued that what made the laws ordering the extermination of Jews in concentration camps a violation of natural law was that they were passed in secret thus violating condition two of the morality of law.[54] But of course, Germany's actions would have been no less immoral had it chosen to exterminate the Jews after a long, public debate. The coherence thesis notwithstanding, it is not obvious that Ger-

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49. Fuller, *supra* note 5, at 636.

50. *Id.*

51. *See* FULLER, *supra* note 23, at 40-41.

52. *See* Fuller, *supra* note 5, at 652 ("But as with retroactivity, what in most societies is kept under control by the tacit restraints of legal decency broke out in monstrous form under Hitler. Indeed, so loose was the whole Nazi morality of law that it is not easy to know just what should be regarded as an unpublished or secret law.").

53. *See id.* at 636; *see also* COTTERRELL, *supra* note 26, at 132; Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202 (1981).

54. *See* Fuller, *supra* note 5, at 651 (citing Gustav Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8, 9 (Germany 1947)). Of the secret laws ordering the Holocaust, Fuller said, "[n]ow surely there can be no greater legal monstrosity than a secret statute." *Id.*

many would have retreated from the Holocaust had they been forced to engage in open and prospective lawmaking. Would the evil goals of the anti-sedition laws discussed above have been less achievable had they been written in conformity with the morality of law? According to Fuller, the 1938 law failed to be law because it did not explicitly forbid private slanders against the state.[55] Would the law have become more palatable had it been amended to take into account private statements? According to Fuller, the 1934 law failed because it delegated too much discretion to the Ministry of Justice in the definition of its scope of application.[56] If the problem therefore was that it was void for vagueness, it is not clear that the law really was infirm; the 1934 law did not look that different from certain American loyalty statutes such as the Alien and Sedition Acts and the Espionage Act during World War I.[57] As David Luban has pointed out, what made the Nazi anti-sedition laws "bad" laws was that they violated substantive moral principles, either because they were designed to defend an evil state, or, more controversially, because any law designed to limit dissent regardless of the moral status of the state is evil, but the Nazi laws were "law" just as much as America's (arguably evil) anti-sedition laws were law.[58]

II.

Hart's detour from his discussion of realism in Section III of *Positivism and the Separation of Law and Morals* was designed to show Fuller that the coherence thesis was wrong. But of what relevance was the coherence thesis to the realist's critique of positivism? Hart's argument that there is no relationship between the coherence of a set of legal rules and their moral content is simply unrelated to the realist claim that legal rules are never sufficient grounds for judicial decision making. Apparently, Hart thought that the positivist separation of law and morality (the rejection of the coherence thesis) was a precondition of the very idea of legal rules (the rejection of rule-scepticism). At the end of Section III, after he demolished the coherence thesis, Hart said, "We can now return to the main point"—the defense of positivism against realism.[59] What the realists and Fuller share, said Hart, is the view that the positivist's error was to insist on the separation of law "as it is and as it ought to be."[60] The rejection of the separation of law and morality resulted in "*all* questions being open to reconsideration."[61] It is interesting to note that Section III,

55. *See id.* at 653-54.
56. *See id.* at 654.
57. *See* NORMAN DORSEN ET. AL., 1 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 35-39 (3d ed. 1967) (citing The Alien and Sedition Acts, June and July 1798). For a discussion of the Espionage Act, see David Luban, *A Report on the Legality of Evil: The Case of the Nazi Judges*, 61 BROOK. L. REV. 1121, 1145-46 (1995) (citing ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 57-58 (1920)).
58. *See* Luban, *supra* note 57, at 1146.
59. Hart, *supra* note 1, at 614.
60. *Id.* at 615.
61. *Id.*

which began with Hart reminding his audience that Austin praised judicial legislation, ended with the claim that only positivism can keep judges from illegitimately revising the law. Hart obviously thought that there was something in Fuller's natural law theory that supported the realist's rule-scepticism. To see why he thought that, we will have to look at how he understood legal rules.

At the beginning of Section III, Hart argued that the reason why any legal rule (such as Rule P) was irreducibly vague was that every rule has a set of standard instances "in which no doubts are felt about its application"[62] and a set of "debatable" cases that "are neither obviously applicable nor obviously ruled out."[63] The former cases lie at the "core" of the rule, while the latter cases lie at their "penumbra."[64] When the rule is applied to a core instance, it is not vague, and when it is applied to a penumbral instance, it is vague with regard to that instance. The rest of Hart's defense of positivism against its realist critics followed from the core/penumbra distinction: when a legal rule is applied in a penumbral case, the law-applier must use a non-legal reason to determine how to apply the rule; that is why Austin could both see law as a system of legal rules and envision judicial legislation.

Hart's disagreement with realism was based on his disagreement over the proper way to think of the non-legal reason used by the law-applier in a penumbral case. The non-legal reason had to be "sound or rational" (it could not be the flip of a coin); it very likely would refer to social policy or morality.[65] There is a loose sense in which the reason used by the law-applier to settle a penumbral case reflects the law-applier's view of what the "law ought to be." After all, why would the law-applier have chosen it if he or she didn't believe that the law "ought" to reflect that reason? Thus, it is possible that in the case of Rule P, a judge who refuses to prohibit bicycles from the park reveals, in effect, that she does not think that the state "ought" to exclude bicycles from the park. But, says Hart, the non-legal reason the judge has for settling a penumbral instance of a rule is not part of the law. While it would be correct to say that the non-legal reason had an effect on the law (there is now a "precedent" that renders Rule P less penumbral and more core-like), the legal effect is part of the law, but the non-legal reason that produced it is not. Hart saw a great threat to legal rules from the idea that there was no difference between a reason for action in a penumbral case and a core case, stating that "if there are borderlines, there must first be lines."[66] The experience of the penumbral case is a reality, Hart seemed to be saying, and if it is a reality, then the difference between core and penumbra must be a reality also.

62. *Id.* at 607.
63. *Id.*
64. *See id.*
65. *See id.* at 608.
66. *Id.* at 614.

The significance of declaring all the non-legal reasons for filling in the penumbral cases part of "the law" seems at best semantic; the difference between a legal and non-legal reason would disappear and the set of legal rules would expand to include virtually all social norms. That does not entail either the realist's rule-scepticism or Fuller's natural law. Expanding the set of rules governing judges does not prevent those rules from constraining judicial decision, nor does it imply that all of those rules must necessarily correspond with morality. It was not the expansion of legal rules that concerned Hart; it was the mixing of legal reasons with reasons from policy and morality that concerned him. According to the core/penumbra distinction, a judge could appeal to a reason from policy or morality because there was no legal reason that could solve the question of penumbral application. The non-legal reasons did not compete with the legal reason, nor were they balanced against it. The difference between the core and penumbra was the type of reasons that counted in each category. The sort of reasons that governed decision making in the core were different in kind from the reasons permitted in the penumbra, and Hart feared that if the word "law" were applied to both sorts of reasons, the core would disappear and soon all legal reasons for action would be reduced to reasons of either social policy or morality. As Gordon Baker has said, one of the central elements of Hart's theory of law was that "legal concepts and legal statements are *sui generis*; i.e., that they cannot be shown to be logically equivalent to non-legal concepts and non-legal statements."[67]

The reason for Hart's concern was best illustrated by Fuller's argument for the morality of law. For Fuller there was no reason to distinguish between the core and penumbra because all legal rules have to be interpreted according to their "purpose."[68] But if the coherence thesis is correct, purpose referred not merely to the subjective intentions of the author of a statute, or even its conventionally held meanings, but its conformity with the morality of law. Recall that for Fuller, it was part of the very definition of law that it be directed towards some practical effect, and as we saw above, law that fails to strive towards the good tends toward incoherence, contradiction, and failure. If the purpose of law is to subject "human conduct to the guidance and control of general rules," then law cannot be just a "datum of nature" because the very idea of "guidance" presupposes a teleology or morality.[69] A sincere Fullerian interpreter would therefore attempt, like a good Dworkinian, to make the law the best it can be.[70] This means that the right way to interpret

67. G.P. Baker, *Defeasibility and Meaning*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 26 (P.M.S. Hacker & J. Raz eds., 1977).

68. *See* Fuller, *supra* note 5, at 662.

69. FULLER, *supra* note 23, at 146; *see also* Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697 (1956).

70. *See* Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 170 (1982); DWORKIN, *supra* note 5, at 67 (1986) (discussing interpretation of law in its "best light").

Rule P is to ask "which application brings this law closer to the legal system's internal morality of law?" It is possible that the system's internal morality of law may be indifferent to the question of bicycles in parks, but no judge would know that until he or she asked the question.[71] Therefore, all the conventional tools of statutory interpretation, such as inquiries into legislative intent, plain meaning, and precedent, must play an instrumental and hence secondary role to the legal system's ultimate value—the good.

In the case of common law, the Fullerian approach has a similar task when it approaches a question of doctrine. Do bystanders have a right to recover for emotional distress? Here too, the law-applier must construct a "purpose" for tort law that is based, ultimately, on the internal morality of law. At times Fuller suggested that the internal morality of a legal system could be indifferent to the distribution and definition of rights in civil actions, but this is not an obvious implication that we can draw from his theory.[72] Just as with Rule P, a judge must first test the application of any legal rule against the morality of law before he or she could know that justice is indifferent between two doctrinal alternatives. Even this answer, neutrality, must come from what is required by "the good." As in the case of statutory interpretation, all other "legal" doctrines, including precedent, serve an instrumental role and must be trumped, when necessary, by the ultimate fact that evil aims may have "as much coherence and inner logic as good ones."[73]

The realist, unlike Fuller, did not believe in the coherence thesis, but believed in its inverse: if social policy were incorporated into the rule governing judicial decisionmaking, then there could be no legal rules, since social policy reflected diverse and incompatible interests. Judicial decisionmaking was a product of "rules," to the extent that each judge's subjective commitment to social policy (however defined) formed a pattern of outcomes.[74] As with natural law, the introduction of the non-legal reason for the application of a penumbral case destroyed the separation between core and penumbra. The realists reflected on the fact that legal rules cannot govern decisionmaking in the penumbra and then denied

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71. *See* Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 295 (Andrei Marmor ed., 1995) (arguing that once a legal principle is selected as the ground of decision, that principle will determine its own application (or nonapplication)).

72. *See* ROBERT S. SUMMERS, LON L. FULLER 74-78 (1984) (explaining that it is a mistake to assume that Fuller's views on civil adjudication were mostly process-oriented).

73. Fuller, *supra* note 5, at 636.

74. Hart reproduced this quote from Llewellyn: "*rules* . . . are important so far as they help you . . . predict what judges will do . . . That is all their importance, except as pretty playthings." Hart, *supra* note 1, at 615 (quoting K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 3, 5 (1st ed., 1930)). Brian Leiter has recently argued that Llewellyn's "sociological" realism was "naturalistic" and nonsceptical, in that it endeavored to reduce jurisprudence into a branch of the natural sciences that can predict outcomes with tolerable accuracy. *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 283-86 (1997).

that "there are, or can be, any rules."[75] The realist came to this conclusion, Hart pointed out in *The Concept of Law*, because like the natural lawyer, he believed that if a rule existed it would govern practical action in all circumstances. Whereas Fuller was an "absolutist" when it came to practical reasoning (every judicial decision has to be tested against the morality of law), the realist was a "disappointed absolutist" who agreed with Fuller on what it meant to reason according to rule, but did not think that there were any rules, at least in law.[76] The realist argued that, since the basis for judicial decision in the penumbra was not legal rules but social policy, and social policy was part of the law, the basis for judicial decision in the core was no different than the basis for decision in the penumbra.[77] It is because of arguments like this that Hart became wary of agreeing that "social policy" was part of the set of legal reasons that governed judicial decisionmaking.

So Hart saw a very close connection between the coherence thesis (or its inverse, disappointed absolutism) and his argument for the core/penumbra distinction.[78] The question that I want to consider next is whether his linkage of the two can be defended. For purposes of this discussion, I want to focus on the coherence thesis, where I am more confident of my ability to show that a rejection of the coherence thesis implies an embrace of Hart's theory of rules. First we should understand what the coherence thesis stands for. It stands not just for the view that only a morally defensible set of legal rules can be coherent. Although that is what Fuller ultimately tried to argue, his specific conclusion reveals a deeper and broader claim about law: that whatever the ultimate end of a legal system, every rule within the system must be applied based on an interpretation that instantiates that end. Let us call this the "monist" approach to legal decisionmaking.[79] A Nazi judge could be a monist just as

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75. HART, *supra* note 3, at 139.

76. *See id.*

77. This is a summary of Hart's understanding of the realist position, and Hart was only partially correct. Certainly some realists, such as Jerome Frank, did not think that social policy necessarily played a major role in legal judgment. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (6th ed. 1948).

78. Baker noted that Hart tried to steer a "middle way between realism and reductionism." Baker, *supra* note 67, at 27. I would put it differently: Hart tried to steer a middle course between two types of reductionist theory, realism and natural law. It is important to note that Baker called American Realism a *reductionist* theory. Baker was correct to call realism a reductionist theory, in that it "reduced" the type of reasons that jurisprudence recognizes by replacing legal reasons with reasons of social policy. From this perspective, Baker's statement about the goals of Hart's theory supports my argument. Hart believed in "the possibility of non-trivial explanation of all legal concepts and the distinctive irreducible character of these concepts." *Id.*

79. Monism is a form of practical reasoning that can apply to any field of decisionmaking. A good example of monism is act-utilitarianism, which is monistic because ultimately every choice by the act-utilitarian should be evaluated according to the degree that it maximizes utility. *See, e.g.*, J.J.C. Smart, *An Outline of a System of Utilitarian Ethics, in* UTILITARIANISM: FOR AND AGAINST 9 (J.J.C. Smart & Bernard Williams eds., 1973). *See also* DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM 134-36 (1965). I discuss monism in law more fully in Anthony J. Sebok, *The Insatiable Constitution,* 70 S. CAL. L. REV. 417, 460-66 (1997).

much as a natural lawyer: both would demand that judicial decisions instantiate their respective "summum bonae."[80]

Monism requires a certain view about rules: that every act of rule-following is an interpretation of the rule. This is easy to see in the case of Fuller. In *Positivism and Fidelity to Law*, Fuller argued against Hart's theory of legal rules by proposing three counterexamples.[81] The first was a variation on Rule P: what if some local patriots wanted to erect a fully operational truck on a pedestal in the park to honor those who died in World War II?[82] The second hypothesized a statute that made it a misdemeanor "to sleep in any railway station," and a situation in which two men were arrested at 3 AM: an "orderly" man who had dozed off while waiting for a delayed train, and a man who "had brought a blanket and pillow . . . and had obviously settled . . . down for the night" but was arrested before he fell asleep.[83] The third was a fragment of a sentence that read: "All improvements must be promptly reported to . . . ," which then had to be given meaning.[84] In each of these cases, argued Fuller, the solution for the judicial-decisionmaker charged with applying these three "rules" was to develop a theory of the purpose of the rule. According to Fuller, we must ask ourselves, "What can this rule be for? What evil does it seek to avert? What good is it intended to promote?"[85] Only by knowing the purpose of the rule can we understand what it means in any particular instance. The three examples are designed to demonstrate the need for such a theory. In the first we have a case which is clearly a standard instance of the prohibition, and yet we know the law does not prohibit it. In the second we have two cases which present different versions of the standard instance of the law. In the third we have a case where the rule is vague, not because it applies to a penumbral case, but because it is missing a word. All these problems become tractable, argued Fuller, once we know the "purpose" and "structure" of the rule.[86] Because each rule sits within a network of rules (the legal system as a whole), each rule has a place within that network.[87] In the counterexamples, the vagueness in each rule could be dispelled through the application of each rule against "hypothetical cases":

> By pulling our minds first in one direction, then in another, these cases help us to understand the fabric of thought before us. This fabric is something we seek to discern, so that we may know truly what it is, but it is also something that we inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to

80. "The *summum bonum* view asks us to take notice of the fact that from the perspective of practical reasoning, every [legal system] is designed to achieve [an ultimate] good." Sebok, *supra* note 79, at 432.

81. Fuller, *supra* note 5, at 663-65.

82. *See id.* at 663.

83. *Id.* at 664.

84. *Id.* at 664-65.

85. *Id.* at 665.

86. *See id.* at 669.

87. *See id.* at 667.

make the statute a coherent, workable whole.[88]

As Fuller himself admitted, the activity of developing an account of the purpose of a rule is an interpretive activity: one "inevitably creates" as one "make[s] the statute part of a coherent, workable whole."[89] A monistic view of law relies on the claim that every rule must be interpreted because without the opportunity to interpret in every instance of its application, the law could not be rendered coherent. According to Fuller, every rule has at least two possible applications, and one of those applications is always "more" coherent than the other.[90] The act of interpretation involves the adoption of one application over at least one other. Monism needs a mechanism through which the coherence of law can be (potentially) achieved, and the view that every law must be interpreted—that in every act of judicial decision-making there is the opportunity to select between at least two applications—provides that mechanism.

Fuller's argument—that in order to apply a law one must know its "purpose"—really means that in order to apply a law one must interpret it in accordance with a theory that fits it into a single, coherent set of norms. That is why, at times, Fuller seemed less interested in authorial intent than one might expect, and why he insisted that "structure" can sometimes be as important in applying a rule as purpose.[91] In Fuller's theory, "purpose" was used in a very special way; it described the theory that would explain or justify the act of interpretation by a law-applier. The argument for the coherence thesis is therefore rooted in the claim that every application of a law is an act of interpretation. The demand that law incorporate non-legal reasons would be greatly strengthened if it were the case that every legal rule had to be interpreted, because, if the coherence thesis was correct, the ultimate ground for choosing between applications of a legal rule would have to be a reason that could be coherent within a single, morally defensible scheme of practical reason.[92]

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88. *Id.*; *see also* SUMMERS, *supra* note 72, at 127 (discussing Fuller's use of hypothetical cases to test and establish purpose).

89. Fuller entitled Section VII of *Positivism and Fidelity to Law*, "The Problem of Interpretation: The Core and the Penumbra" and throughout the section refers to his dispute with Hart as a dispute over the nature of legal interpretation. *See* Fuller, *supra* note 5, at 661-69. The parallels with Dworkin's theory of "constructive interpretation" are obvious. *See, e.g.*, DWORKIN, *supra* note 5, at 245 ("Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether [or not] it could form part of a coherent theory justifying the network as a whole.").

90. *See* Fuller, *supra* note 5, at 662-63.

91. *See* SUMMERS, *supra* note 72, at 120-21.

92. Conversely, if the realists were correct and the coherence thesis was a correct account of rules, but unachievable, then rule-skepticism would be the appropriate response since the application of every legal rule would still be a matter of choice between alternatives in which no rule governed the choice (although any one choice might be both subjectively rational and objectively predictable).

III.

As noted above, Fuller assumed that Hart's core/penumbra approach was a theory of the interpretation of legal rules. Fuller assumed too much. Hart used the word "interpretation" only with regard to the penumbra, not the core.[93] Hart was very clear that a core case was an "instance in which no doubts are felt about its application."[94] In *The Concept of Law*, Hart described "plain" cases as those that do not need interpretation because the recognition of what to do is "unproblematic or 'automatic.'"[95] One might be tempted to think that what made a "core" or "plain" case "easy" was that it more clearly fit into the coherent scheme of the legal system's values than a "hard" case, so judgement between available options just seemed automatic. But Hart clearly rejected that approach in *The Concept of Law*, stating that the only difference between a core and penumbral case is that the former is "familiar" and has been learned as a result of recurring experience.[96] Hart's rejection of the idea that law application in the core was interpretive, coupled with his references to Wittgenstein, reveal the central role that the concept of "ostensive" definition played in his theory.[97] When we teach another person by ostensive definition, we teach by example; understanding is ultimately measured by whether or not the student manifests understanding in the appropriate way.[98] One teaches a student through ostensive definition by way of concrete example and correction. "There is no mysterious something more that he must grasp, after he has understood all of this. . . .

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93. In *Positivism and the Separation of Law and Morals*, Hart first uses the term "interpretation" in the context of *McBoyle v. United States*, 283 U.S. 25 (1931), where he criticized Justice Holmes for failing to see that the case presented a penumbral instance of the statute in question ("He either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations . . . ."). Hart, *supra* note 1, at 610.

94. *Id.* at 607.

95. HART, *supra* note 3, at 126.

96. *Id.* The metaphor core/penumbra is misleading because it suggests that the applications of a legal rule can be mapped onto a single metric, and that there must be at least one quality that all correct applications of the rule possess. There is no reason to believe that Hart viewed rules this way, and some reason to believe that he accepted Wittgenstein's concept of "family resemblances." *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 67 (G.E.M. Anscombe trans., 2d ed. 1958), *cited in* Hart, *supra* note 1, at 628. The concept of family resemblance is compatible with Hart's view that the core is comprised of standard instances of the application of a rule: "Although no single defining feature shared by all the standard examples [in the core] can be specified . . . this does not mean that they are not standard examples." ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 133 (1992).

97. *See* HART, *supra* note 3, at 297 (citing WITTGENSTEIN, *supra* note 96, §§ 208-38); *see also* WITTGENSTEIN, *supra* note 96, § 6 (on "ostensive teaching of words").

98. *See* WITTGENSTEIN, *supra* note 96, § 210.

> But do you really explain to the other person what you yourself understand? Don't you get him to *guess* the essential thing? You give him examples,—but he has to guess their drift, to guess your intention."—Every explanation which I can give myself I give to him too.—"He guesses what I intend" would mean: various interpretations of my explanation come to his mind, and he lights on one of them. So in this case he could ask; and I could and should answer him.

Id.

There is *nothing* that I 'grasp' in my understanding of 'red' . . . which somehow *transcends* the concrete contextual examples and explanations of the concept in use and cannot be captured by them."[99]

Wittgenstein believed that when we make an intelligible statement in a language, there is no abstract or "superlative fact" that can govern the formation of the statement other than the language in which the statement is made.[100] There can be no "theory" behind a rule other than the practice that made the rule comprehensible to start with: "nothing . . . keeps our practices in line except the reactions and responses we learn in learning them."[101] If asked by Fuller why a core instance was a correct application of the Rule P, ultimately, for Hart, this question makes as much sense as if Fuller had pointed to a patch of red and asked "why" Hart had called it red.[102]

Thus, in the core, there is no interpretation, although different people may apply the same rule differently. Fuller thought that every act of rule application was an act of interpretation because he believed that every rule is open to at least two applications; one needed an interpretive theory to know "how to go on." Fuller used interpretation to escape a paradox that Wittgenstein had identified in his critique of traditional views about rules. Wittgenstein argued that it is impossible to explain a rule by reference to concepts that transcend our experience of the rule itself. Our application of a rule cannot be explained by reference to a concept revealed by our experience of the rule because there is (in theory) an infinite set of hypotheses that are compatible with our empirical experience of the rule. As Wittgenstein famously argued, any mathematical sequence is theoretically compatible with an infinite number of equations: for example, the sequence 2, 4, 6, 8, . . . might represent the rule "[a]dd 2," or it might represent the rule "[a]dd 2 up to 1000, 4 up to 2000, 6 up to 3000 and so on."[103] The "paradox" that interested Wittgenstein was that the view that a rule was an abstraction revealed by or contained in a set of empirically observable facts led to the skeptical conclusion that rules did not exist. "This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule."[104] There were at least three directions one could take in response to this paradox.

The first was to embrace scepticism, which is what Saul Kripke has rec-

99. Gene Anne Smith, *Wittgenstein and the Sceptical Fallacy*, *in* WITTGENSTEIN AND LEGAL THEORY 167 (Dennis M. Patterson ed., 1992); *see also* W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF 24 (2d ed. 1970).

100. *See* WITTGENSTEIN, *supra* note 96, at § 192; *see also* G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 171-72 (1985) ("The pivotal point in Wittgenstein's remarks on following rules is that a rule is *internally* related to acts which accord with it. The rule and nothing but the rule determines what is correct.").

101. John McDowell, *Non-Cognitivism and Rule-Following*, *in* WITTGENSTEIN: TO FOLLOW A RULE 149 (Stephen H. Holtzman & Christopher M. Leich eds., 1981).

102. *See* MARMOR, *supra* note 96, at 128.

103. WITTENGENSTEIN, *supra* note 96, § 185.

104. *Id.* § 201.

ommended, and many legal scholars have followed his lead.[105] The second path was to insist, as Fuller did, that there is a transcendental scheme of norms and that the meaning of a rule is determined by its place in that scheme.[106] The third path was to reject both scepticism and idealism, which is what Wittgenstein did, and to argue that rules could have meaning and could guide their own application, but that the rule application was a practice or a way of life, not an interpretation of another abstract entity.

As we saw above, Fuller opted for the second option: the task of the rule-applier was to determine the abstraction represented by previous applications of the rule; this is what Fuller called interpretation. But according to Wittgenstein, interpretation could not lead one out of the paradox: an interpretation of a rule could not tell you "how to go on" if the rule itself could not tell you "how to go on." Reliance on interpretation alone will never provide closure in the penumbra:

> [The problem with interpretation] can be seen . . . from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.
>
> Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another.[107]

According to Wittgenstein, meaning is communicated by action, whether this action is by example, correction, or other social practices. If the meaning of a rule cannot be communicated by the way the rule is

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105. Kripke has argued that Wittgenstein may not have realized the skeptical reach of the paradox presented in *The Philosophical Investigations*. According to Kripke, what Wittgenstein really proved was that there is no rule at all when we attempt to determine the meaning of a set of empirical facts, such as a set of numbers; that is to say, there is not "fact of the matter" to answer the question "how do I go on." The answer to that question is indeterminate, and may be fixed by factors such as community consensus, but not by the rule itself. *See* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 7-10 (1982). As Brian Bix has pointed out, Kripke's interpretation has been strongly criticized by many philosophers, including Peter Hacker, Gordon Baker, David Pears, John McDowell, and Simon Blackburn. *See* BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 38 (1993). Nonetheless, some legal academics have been drawn to Kripke's approach. *See, e.g.*, Charles M. Yablon, *Law and Metaphysics*, 96 YALE L.J. 613 (1986) (book review); *see also* Radin, *supra* note 5, at 781 (1983). Others have read Wittgenstein as a skeptic without necessarily relying on Kripke. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1982). For an approach sympathetic to Kripke's reading of Wittgenstein that rejects rule-skepticism, see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 570-72 (1993) (even if Kripke's reading of Wittgenstein is right, "the practice of rule-following—by judges or anyone else—remains intact.").

106. *See* Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 489-91 (1995).

107. WITTGENSTEIN, *supra* note 96, § 201.

used, there is no reason to believe that a theory about the rule can communicate the rule. Interpretation "cannot bridge the gap between rule and action. A rule, in other words, is a sign and its meaning cannot be determined by another sign."[108] Another way of putting this argument is that the move to interpretation must fail because it opens up the problem of infinite regress.[109] Hart recognized this problem: "Canons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties [of meaning]; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation."[110]

A Fullerian might object that if the meaning of a rule is grounded in its use, we never can know if we have complete knowledge of the rule (or if we "really" know it) because time and events might confront us with a choice of applications that leaves us not knowing how to go on. This objection shows that the Fullerian is still viewing a rule as something separate from an actual practice. The only question we can ask of a rule, said Wittgenstein, is whether it guides action in concrete circumstances: "[t]he sign-post is in order—if, under normal circumstances, it fulfills its purpose."[111] We can only ask that question from within our current practice because it is only within an existing practice that a rule can exist. The application of a rule is not, as Fuller would have it, a theoretical question:

> How is the application of a rule fixed? Do you mean 'logically' fixed? Either by means of further rules, or not at all! — Or do you mean; how is it that we agree in applying it thus and not otherwise? Through training drill and the forms of our life. This is a matter not of a consensus of opinions but of forms of life.[112]

Whether one is obeying a rule is a matter of fact determined by the grammar of the rule. It is not a matter of one's interpretation of one's actions; one cannot obey a rule "privately."[113] The fact that humans share a language presupposes the existence of the correct application of a rule.[114] A language game does not enable me to verify my interpretation of the world; "[i]t is required to give the context in which I can make meaningful judgments at all."[115] Therefore, a rule can only be true (or

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108. MARMOR, *supra* note 96, at 149; *see also* Smith, *supra* note 99, at 174.

109. *See* Smith, *supra* note 99, at 172 (Wittgenstein "sought to show that *all* comprehension could not be ultimately a matter of 'interpretation' . . . for we would then be led to an infinite regress of interpretations"); *see also* DENNIS PATTERSON, LAW AND TRUTH 88 (1996) ("If all understanding were interpretation, then each interpretation would itself stand in need of interpretation, and so on, infinitely regressing to infinity.").

110. HART, *supra* note 3, at 126.

111. WITTGENSTEIN, *supra* note 96, § 87.

112. BAKER & HACKER, *supra* note 100, at 258 (quoting Ludwig Wittgenstein, MS 160, 51 (unpublished manuscript)).

113. *See* WITTGENSTEIN, *supra* note 96, § 202 ("'[O]beying a rule' is a practice. And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately.'").

114. *See id.* § 242 ("If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments").

115. Smith, *supra* note 99, at 179; *see also* WITTGENSTEIN, *supra* note 96, § 241 ("'So you are saying that human agreement decides what is true and what is false?'—It is what

have "correct applications") to the extent that the form of life in which I operate permits. Does that mean that some rules may be "incomplete" in the sense that they may not clearly provide applications to all possible instances? Absolutely. But Wittgenstein argued that it was foolish to say that we cannot know something until we have banished from our minds the possibility of doubt.[116] Here too, all we can do is test our judgment within the practice in which we live, and all we can ask of a theory is that it function within that practice: "One might say: an explanation serves to remove or to avert a misunderstanding—one, that is, that would occur but for the explanation; not every one I can imagine."[117] We completely understand a rule if we currently understand what it requires of us now; the fact that it might not provide an answer under all circumstances is not proof that it is not complete. For the monist, we need to know a rule's purpose in order to be able to know (in theory, at least) all of the rule's actual and possible applications. But this demand that we must understand a rule's purpose in order to apply a rule is simply nonsense from the Wittgensteinian perspective.[118]

Hart adopted the Wittgensteinian idea that all rules are silent with regard to some possible set of applications. The core applications were the equivalent of the "standard instances," which Wittgenstein thought proved that the language user knew how to use the rule. Just as with other language games, a law-applier who got enough of the standard instances wrong would be judged not to know the rule she was using. An inability to apply the rule in all conceivable situations proved neither that the rule was not complete nor that its applier did not know how to use it; it proved nothing more than there was vagueness in the rule.[119] The rule was not vague; it just could not settle disagreements over all its applications. This is what it meant to say that the rule has "open texture."[120] Friedrich Waismann used open texture to describe the phenomenon that no proposition can anticipate all circumstances upon which it is to apply; although a term like gold was not vague, it was "of an open texture in that we can never fill up all the possible gaps through which doubt may seep in."[121] In other words, some set of events may come to pass in

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human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life.").

116. *See* WITTGENSTEIN, *supra* note 96, § 84 ("But that is not to say that we are in doubt because it is possible for us to *imagine* a doubt.").

117. *Id.* § 87; *see also* MARMOR, *supra* note 96, at 152.

118. *See* MARMOR, *supra* note 96, at 153.

119. *Compare* WITTGENSTEIN, *supra* note 96, § 100 ("'But still, it isn't a game if there is some vagueness *in the rules*."—But *does* this prevent its being a game? . . . I want to say: we misunderstand the role of the ideal in our language. That is to say: we too should call it a game, only we are dazzled by the ideal and therefore fail to see the actual use of the word 'game' clearly."), *with* HART, *supra* note 3, at 152 ("[T]hough every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points.").

120. HART, *supra* note 3, at 128, (citing Friedrich Waismann, *Verifiability*, *in* ESSAYS ON LOGIC AND LANGUAGE 117-30 (Anthony Flew ed., 1963)).

121. Waismann, *supra* note 120, at 123; *see also* BIX, *supra* note 105, at 10-14 (discussing Waismann's concept of open texture).

which what we call gold simply behaves differently than we heretofore experienced. Although there are specific ways in which Waismann's idea that rules were necessarily "incomplete" may have been inconsistent with Wittgenstein,[122] Waismann clearly adopted the view that the standard instances of an open-textured concept "provide the *criteria* for correct understanding of expressions."[123]

Hart used the idea of open texture to point out that while all rules are "theoretically ambiguous" or "possibly vague," only some subset of their applications are "actually ambiguous" or actually vague.[124]

This was a result of the fact that law occurs in a "natural language."[125] Nonetheless, open texture had a very specific application to law. According to Hart, because of open texture, every legal rule is characterized by "indeterminacy of aim" and "indeterminacy of fact."[126] The former was especially important in understanding why Fuller's purposive analysis was seen by Hart to be a nonstarter. Given the Wittgensteinian view of a rule, no single purpose could ever be constructed across all of its applications. To Hart, a common law precedent and the general language in a statute were both illustrations of how standard instances marked out the limits of vagueness.[127] The hypothetical author of Rule P, for example, was presumed to have been a competent user of legal sentences when they constructed Rule P. Therefore, it can be presumed that the author knew that the rule could only have meaning to the extent that it could be applied to its standard instances. Remember that according to Wittgenstein, a rule cannot have a nonlinguistic form.[128] While there are other sentences in which the standard instance would be what might be ambiguous in Rule P (e.g., "No bicycles in the park") those sentences are not Rule P. Regardless of whether the author chose to leave this point ambiguous, or did so out of oversight, Rule P does not settle the

122. G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: UNDERSTANDING AND MEANING 432-33 (1980). Baker and Hacker argued that since it made no sense to speak of a rule being *complete*, it made no sense to speak of a rule being *incomplete*. *See id.*

123. MARMOR, *supra* note 96, at 134; *see also* BIX, *supra* note 105, at 16 ("Waismann agreed with Wittgenstein that our concepts are not completely defined/fully delimited/completely verifiable, that this 'ideal' could not be reached, and that this 'deficiency' had no negative consequences for our use of language under normal circumstances.") (citations omitted).

124. *See* Smith, *supra* note 99, at 171 (distinguishing between theoretical and actual ambiguity); *see also* MARMOR, *supra* note 96, at 132-33 ("That Wittgenstein would subscribe to the view that most of the words in our language are at least possibly vague is quite [indisputable] yet one would be on safe ground in presuming that he would not have attached great significance to this fact.").

125. *See* HART, *supra* note 3, at 128.

126. *Id.*

127. *See id.* Although Hart was emphatic that this was a feature of both legislation and common law, he developed his theory most clearly in THE CONCEPT OF LAW through reference to legislation.

128. *See* WITTGENSTEIN, *supra* note 96, § 38 ("Can I say 'bububu' and mean 'If it doesn't rain I shall go for a walk'?—It is only in a language that I can mean something by something. This shews clearly that the grammar of 'to mean' is not like that of the expression 'to imagine' and the like.").

"unenvisaged case" of bicycles.[129] The same can be said of a law-applier encountering an ambiguous precedent: the hypothetical author of "Holding P" is presumed to have been a competent user of legal sentences. Holding P cannot apply outside of its set of standard instances. It is at this point that the law-applier must "interpret" Holding P; interpretation is required when a statement contains "[o]bscurities, ambiguities, or complexities."[130] Once the penumbral case is settled, the rule is extended: in the case of statutory interpretation, by rendering more "determinate" the law's initial aim and in the case of common law interpretation, by producing a precedent that may be as "determinate as any statutory rule."[131] In this way, the set of standard instances of the rule is increased and the penumbra is reduced, although the "indeterminacy of fact" could cause it to increase again.

IV.

The most important objection that Fuller could have made to Hart's argument against purposive interpretation is that the Wittgensteinian concept of rules may be right about language games, grammar, and mathematics, but it is inapplicable to law. As Brian Bix has argued, there is a risk of "overreading" Wittgenstein's lessons for law, and Hart may have fallen into that trap.[132] The phenomenology of rule-following in arithmetic or in speaking one's native language describes a "core" that has no analog in law. When discussing arithmetic, "Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example."[133] Wittgenstein thought that we could learn from very simple cases how we could do much more complicated rule-driven activities. He certainly did not think that the way one learned what "two" meant was only different in degree from how one learned calculus. Knowing a grammar is basic to knowing how to do everything else.[134] But that does not mean that everything that depends upon the existence of a grammar is itself grammatical: "a phrase's grammar is constituted in part by the rules which

129. *See* HART, *supra* note 3, at 129. It would be a mistake to conclude that Hart's statement that the penumbral case was "unenvisaged" implies that the standard instances of Rule P were specifically envisaged when Rule P was promulgated. I take Hart merely to be giving a causal explanation for how an alternative to Rule P might have come about; not how Rule P necessarily came about.

130. P.M.S. Hacker, *Language, Rules, and Pseudo-Rules*, 8 LANGUAGE AND COMMUNICATION 159, 168 (1988); *see also* MARMOR, *supra* note 96, at 154 ("Interpretation is required only when the formulation of the rule leaves doubts as to its applicability in a given set of circumstances").

131. HART, *supra* note 3, at 129, 135.

132. *See* BIX, *supra* note 105, at 45-53 (citing Brian Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law*, 33 MCGILL L.J. 451 (1988)); *see also* Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990).

133. WITTGENSTEIN, *supra* note 96, § 240.

134. *See* Smith, *supra* note 99, at 183 ("The ability to abstract—to use a verbal formula, to follow a rule, is *secondary* to our knowledge and facility with linguistic usage.").

determine how that phrase can be used, such that if those rules are violated the resulting sentence will have no sense."[135] Certainly disputes do break out between mathematicians over advanced theorems (even if they do not come to blows), as well as scientists and literary critics, and in each discipline there is lively debate over the "rules" of the discipline which are sensible and profitable.[136] Are we to say that except in their use of arithmetic and basic vocabulary, mathematicians, scientists, and critics spend all their time in the penumbra, not the core? If we say that (and it might be the case that in most advanced fields, almost all argument takes place in the penumbra) then the same should be true of law as well. It would seem to be as much of a category mistake to talk about the "grammar" of law as it would be to talk about the "grammar" of organic chemistry. As Bix argued, "Contrary to Wittgenstein's descriptions of mathematicians and mathematical series, disputes do break out in law over the question of whether a rule has been obeyed or not. Legal practice, locally and generally, is subject to criticism and is in need of further justification."[137]

Furthermore, Wittgenstein said very little about what Hart called the penumbra. For Wittgenstein, the examples he cared about (involving simple rules) had two possible outcomes: successful applications of the rule, and unsuccessful applications of the rule.[138] Vagueness, which Wittgenstein accepted as a possibility, was not something which confronted someone following a rule; vagueness was something that was encountered when the rule was applied to a non-standard instance. Hart's solution in *Positivism and the Separation of Law and Morals* was to describe judgment in the penumbra as "judicial legislation or even fiat."[139] But this description of what the law-applier does in the penumbra was too quick. For Wittgenstein, a sentence that does not follow the rules of its grammar is nonsense, not an invitation to make up a new rule.[140] There must be more to the penumbral case than the fact that it is an instance that is non-standard: in other words, there must be some way to know that it is a penumbral case and not merely nonsense. But Hart's account seemed to assume that the law-applier already recognized the relationship between the penumbral case and the rule. Hart did not explicitly state the basis of the relationship. On the one hand, by saying that judgment in the penumbra was judicial legislation, Hart seemed to have suggested that the law-applier was creating a new rule, not extending the old one. On the other hand, the expression "judicial legisla-

135. BIX, *supra* note 105, at 46.
136. *See* Radin, *supra* note 5, at 803.
137. BIX, *supra* note 105, at 48-49. *But see* Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 398-401 (1992); McDowell, *supra* note 101, at 151-60 (applying Wittgensteinian analysis to the deliberation of complex or contested questions).
138. *See* WITTGENSTEIN, *supra* note 96, § 219; *see also* Bix, *supra* note 105, at 53.
139. Hart, *supra* note 1, at 629.
140. *See* WITTGENSTEIN, *supra* note 96, § 199-200.

tion" seemed to contradict the conventional view that statutory and common law interpretation is a matter of extending or adding to an existing rule. This is why Fuller accused Hart's core/penumbra distinction of being "unfaithful" to the law.[141]

By taking a Wittgensteinian approach to the theory of legal rules, Hart solved some problems (it explained the core/penumbra distinction) but raised some further difficulties (first, legal rules do not seem to behave like Wittgensteinian rules, and second, Hart's theory seemed to suggest that every interpretation in the penumbra created a new rule). Hart dealt with these new problems in *The Concept of Law*; in fact, I will argue that we cannot truly appreciate the Wittgensteinian foundations of Hart's theory until we look carefully at Hart's distinction between primary and secondary rules. To see this, however, we will have to look first at how Hart dealt with decisionmaking in the penumbra before he published *The Concept of Law*.

Decisionmaking in the penumbra is decisionmaking that is not guided by rules. It would seem, therefore, that when a law-applier made a decision in the penumbra, he or she was exercising discretion. Yet Hart used the word "discretion" somewhat irregularly: although he incorporated it fully in his chapter on the core/penumbra distinction in *The Concept of Law*,[142] he used the word "discretion" only once in *Positivism and the Separation of Law and Morality*, and then only in reference to Fuller's argument.[143] Instead of "discretion," in *Positivism and the Separation of Law and Morals* Hart referred to "judicial legislation."[144] I think that the meaning of discretion changed in Hart's mind during the late 1950s. I will argue that until the theory of secondary rules had been fully developed, Hart's concept of discretion raised problems for him, and these problems reflected the difficulties raised by his use of a Wittgensteinian picture of rules.

Despite the strange absence of the word "discretion" in *Positivism and the Separation of Law and Morals*, Hart had written and discussed discretion a great deal during his visit to Harvard in 1956-57. Hart participated in Harvard's Legal Philosophy Discussion Group and presented a paper entitled "Discretion" in which he presented many of the ideas that would find their way into his Holmes lecture the following April.[145] In the paper for the discussion group, Hart defined discretion as a concept that possessed its own set of "central cases."[146] The central cases Hart identified fell into two groups. The first group he called "Express or Avowed

141. Hence the title of Fuller's response: *Positivism and Fidelity to Law*.

142. HART, *supra* note 3, at 110-23.

143. Hart, *supra* note 1, at 613.

144. *Id.* at 593.

145. H.L.A. Hart, Discretion (November 19, 1956) (unpublished manuscript) (on file with author).

146. *See id.* at 2.

> After the characteristics of the central or clear cases of the exercise of discretion have been distinguished we can then see that there will be many other cases where only some of the cardinal features present in the clear case are

Use of Discretion," which included rate-fixing by administrative agencies and the application of standards of law (such as "reasonable care") in torts suits.[147] The second group Hart called "Tacit or Concealed Discretion," which included the "interpretation of statutes" and the "use of precedent" by judges and juries.[148] In both its "express" and "tacit" forms, discretion occupied a middle ground between whim and compulsion.[149] Thus, argued Hart, the key feature of discretion was that it involved a choice between equally reasonable alternatives: "[W]e have in discretion the sphere where arguments in favour of one decision or another may be rational without being conclusive."[150] At the root of discretion, according to Hart, was the fact that application of a law was always the result of one norm or value trumping another. Hart thought that every individual law contained competing norms. Hart termed this problem the "Indeterminacy of Aim" and argued that it characterized both statutes and common law. For example, he argued that Rule P contains both (or at least) the norm of "peace in the park" and "the pleasure to use [certain] objects."[151] Similarly, Hart argued that the negligence standard contained both the norm of the reduction of "substantial harm" and the norm of "precautions . . . such that the burden . . . does not involve too great a sacrifice of other respectable interests."[152] In core cases, one norm was clearly selected over another, but in penumbral cases, the conflict between the norms remained open, and a choice had to be made between the two. The only difference between "avowed" and "tacit" discretion was a matter of degree; the former made no pretense at setting out standard instances of a rule that occupied the core, while the latter offered a set of standard instances either through the language of the statute or the holdings of a precedent.[153] But ultimately the demand that the rule-applier choose between competing norms would be the same in both sets of cases.

It is clear that Hart's Harvard paper paralleled *Positivism and the Separation of Law and Morals*. The paper helps us see what it was about Hart's theory of discretion that so offended Fuller. The key assumption upon which Hart's view of discretion relied was that in every law there were competing norms which, although settled in the core, had to be settled by the law-applier in the penumbra. Hart ended *Positivism and the Separation of Law and Morals* by stressing his rejection of the idea that a

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present and where we would hesitate or disagree as to the classification of them as cases of discretion.

Id.

147. *Id.* at 4.

148. *Id.*

149. *Id.* at 8. ("Discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious.").

150. *Id.* at 15.

151. *Id.* at 12-13.

152. *Id.* at 13.

153. *See id.* at 5.

law instantiated a single, coherent norm: "Within the framework of relatively well-settled law there jostle too many alternatives too nearly equal in attraction between which judge and lawyer must uncertainly pick their way. . . ."[154] This is, of course, the opposite of monism.

The problem with Hart's analysis was that it did not explain how a choice between two norms was connected to the standard instances of a given rule. For example, Hart was sure that there was a difference between the exercise of discretion by an administrative agency determining a "fair" rate and a judge determining whether a bicycle was a vehicle. But given what he argued in his Harvard talk, the difference was ad hoc: in the former case, no standard instances had been set out "ab initio," while in the latter case, there were some standard instances.[155] This difference would matter only if the standard instances played some role in the law-applier's judgment in the penumbra. But what role could that be? If discretion is the act of choosing between two norms that are both within the law, how others had performed when faced with a similar choice in the past would seem at best to have practical, not legal, significance.

The problem with Hart's picture of discretion was that the standard instance of a rule not only seemed to establish how the rule was to be applied in that instance, but also how the rule-applier should approach the penumbra. Neither Hart's Harvard paper nor *Positivism and the Separation of Law and Morals* gave any reason to believe that the choices made in the penumbra were controlled by the standard instance of the rule. Henry Hart, who gave a paper *entitled The Place of Discretion in the Legal System* shortly after Hart's paper, criticized Hart's concept of discretion for its failure to explain how judgment was controlled in the penumbra.[156] In his outline for the talk, Henry Hart wrote, "*The alternative to discretion*: An obligation of reasoned elaboration of the grounds of decision."[157] "Reasoned elaboration," of course, was a term of art developed by Henry Hart and Albert Sacks in their book, *The Legal Process*, which, although unofficially completed in 1958, existed in draft form in 1956.[158] The phrase "reasoned elaboration" described how a legal rule was supposed to be applied in the penumbra. It had to meet a "double test": first, the application had to be consistent with every other application of the same rule, and second, it had to "best serve" the principles and

154. Hart, *supra* note 1, at 629.

155. *See* Hart, *supra* note 145, at 4, 12-13.

156. Henry Hart, The Place of Discretion in the Legal System 2 (November 20, 1956) (unpublished manuscript, on file with author).

157. *Id.* On the outline someone (Henry Hart?) had crossed out "elaboration" and written in its place "explanation."

158. THE LEGAL PROCESS is known to have gone through four versions between 1955 and 1958 and was never completed. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* THE LEGAL PROCESS, 107 HARV. L. REV. 2031, 2040-41 (1994). THE LEGAL PROCESS was "officially" published in 1994. *See* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

policies expressed by the rule.[159] Although Hart and Sacks agreed with Hart's definition of discretion,[160] they did not think that reasoned elaboration was discretion.[161] Apparently, Hart and Sacks thought that if reasoned elaboration required a rule-applier to pick the norm that "best served" the legal rule, then one could not say that "two or more courses of action" were available to the rule-applier. Contrary to what Hart had argued, the standard instance of the rule could affect what was chosen in the penumbra. It is interesting to note, however, that while Hart and Sacks disagreed with Hart over the question of whether law-appliers exercised discretion during the interpretation of statutes or common law, they agreed with Hart that law-appliers exercised discretion in administrative law—the area Hart had called "avowed discretion." According to Hart and Sacks, in administrative law, "it is not feasible . . . to reduce [the law] to the form of rules, perfected and inchoate, and standards which are sufficiently definite to eliminate the need for discretion in filling in their meaning."[162] Hart and Sacks argued that lawmakers reverted to administrative law when they wanted to delegate to others the formation of the very norms that would otherwise form the basis of reasoned elaboration.[163] But this agreement between Hart and Sacks on the ineliminable presence of discretion in administrative law suggests to me that the problem with Hart's Harvard paper and *Positivism and the Separation of Law and Morals* was not his insistence that discretion occurs in the penumbra in the application of any type of law, but that his distinction between "avowed" and "tacit" discretion was ill-conceived.

V.

As we saw above, the distinction Hart drew between avowed and tacit discretion seemed ad hoc: it was based on nothing more than whether the law-applier was given standard instances of the application of the law or not. As Hart and Sacks pointed out in *The Legal Process*, the difference between the guidance a law-applier received in the case of what Hart

159. HART & SACKS, *supra* note 158, at 147.

160. *See id.* at 144 ("For purposes of these materials, *discretion* means the power to choose between two or more courses of action each of which is thought as permissible.").

161. In these circumstances there may be thought to be a justification for describing the act of interpretation as one of discretion, even within the definition which has been given. But this would be to obscure what seems to be the vital point—namely, the effort, and the importance of the effort, of each individual deciding officer to reach what *he* thinks is *the* right answer.

Id. at 149-50. Hart and Sack's concept of discretion was very similar to the concept deployed by Ronald Dworkin in *Judicial Discretion*, 60 J. PHIL. 624 (1963). Dworkin argued that a decisionmaker does not have discretion if in implementing a policy, he/she cannot choose the standard upon which the choice is based. *See id.* at 630-31. Dworkin later argued that the fact that a decisionmaker has a wide range of choice in the application of a standard, or that the decisionmaker's application of the standard cannot be reviewed, are not instances of *real* discretion, but merely features of "weak" discretion. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 32 (1977). Dworkin's "weak discretion" is simply the equivalent, I think, of Hart and Sacks's concept of reasoned elaboration.

162. HART & SACKS, *supra* note 158, at 150.

163. *See id.* at 151-52.

called tacit discretion (what Hart and Sacks called reasoned elaboration) and a case of avowed discretion (what Hart and Sacks called noncontinuing discretion) had to do with the kind of reasons a law-applier could use to make a decision.[164] I think that Hart and Sacks were just as wrong as Hart to draw an ad hoc distinction between reasoned elaboration and noncontinuing discretion: there is some degree of discretion in the application of all forms of law, regardless of whether it is statutory, decisional or administrative. But Hart and Sacks were correct to see that the form of law could determine (a) the degree of discretion used and (b) the types of norms among which the law-applier would be required to choose.[165] Hart and Sacks's great insight was that different types of legal rules permit different degrees of discretion, and that a complex legal system needs rules that can distinguish between varying degrees of discretion:

> [L]egal words are vehicles for a delegation of power from user to some addressee. The delegation is not an unlimited one. How the addressee should use his power is a question to which it will be necessary to give much attention. For the present three points are important: first, that the delegation again and again is there; second, that it is in part a matter of necessity; and third, that it may be a matter also of deliberate choice.[166]

I believe that Hart tried to deal with the criticisms raised by Hart and Sacks in *The Concept of Law*.[167] In chapter seven, he combined the argument about discretion from his Harvard paper with the core/penumbra argument from *Positivism and the Separation of Law and Morals* and added a new twist by framing both arguments against a discussion of the different types of law found in a complex legal system. Hart began the chapter by discussing the problem of a judge in applying a rule like Rule P under conditions of indeterminacy: "The discretion thus left to him 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."[168] Then he discussed legislation, which is indeterminate by design, where "the sphere to be legally controlled is recognized from the start as one in which the features of individual cases will vary so much . . . that uniform rules . . . cannot usefully be framed by the legislature in advance."[169] In these sorts of cases, administrative agencies "must exercise a discretion."[170] The third sort of rule he discussed is the common law; in torts for

164. *See id.* at 143.
165. *See id.* at 145-58.
166. *Id.* at 139 (footnote omitted).
167. Although Hart and Sacks were critical of H.L.A. Hart's theory of discretion, they were not hostile to the fundamental principles of legal positivism. *See* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 113-178 (1998). Hart's inability to defend his theory of discretion may have contributed to Hart and Sacks's failure to discuss their deep differences with Fuller in THE LEGAL PROCESS, although there were other factors at work as well. *See id.* at 160-68 (discussing the influence of contemporary political science on the reception of Fuller's coherence theory by the legal process movement).
168. HART, *supra* note 3 , at 127.
169. *Id.* at 131.
170. *Id.* at 132.

example, "our aim of securing people against harm is indeterminate till we put it in conjunction with, or test it against, possibilities which only experience will bring."[171] Next, Hart contrasted common law with a criminal statute having "the area of open texture," such as a murder statute or a traffic ordinance.[172] Next, he noted that the rules of precedent allow a court to treat holdings the way they treat statutes, as rules with open texture.[173] He concluded by drawing the following picture of the relationship between the core and the penumbra:

> The open texture of the law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case. This salient fact of social life remains true, even though uncertainties may break out as to the applicability of any rule (whether written or communicated by precedent) to a concrete case.[174]

This passage reversed the core and penumbra metaphor in *Positivism and the Separation of Law and Morals*: uncertainty is now at the center, bounded by legal rules. In setting out the list above, Hart described how different sorts of laws were appropriate to provide different degrees of open texture: administrative law was marked by a great deal of discretion which was appropriate to the ends it served, whereas criminal law was marked by a very small degree of discretion.

By focusing on the different types of law in a legal system, Hart was not interested in merely describing the specific amount of open texture in these different types of law. He wanted to confront the fact that a legal system could be designed so that rule-appliers could know in advance what sort of law they were dealing with and respond accordingly. The question that I think Hart was trying to answer was the question I raised earlier: How could a law-applier know that a case was in the penumbra? What rule told them that? The answer: the secondary rules of the legal system. The distinction between primary and secondary rules is at the heart of *The Concept of Law*. Hart argued that if modern legal systems are built out of rules, not commands, then legal positivism must explain how different rules are created, changed, and identified. Hart built on the insight that law both limits and expands liberty, and argued that rules that limit liberty are "primary" rules, while rules that confer powers are "secondary" rules.[175] There are three types of secondary rules. There are rules that confer the power to change primary rules. Hart included in this

171. *Id.* at 133.
172. *Id.* at 134.
173. *See id.* at 134-35.
174. *Id.* at 135.
175. *See id.* at 94.

category the rules of legislation and the powers of private law making ("the making of wills, contracts, transfers of property").[176] There are rules that confer the power to adjudicate primary rules. These rules determine whether "a [primary] rule has been broken."[177] But the most important type of secondary rule is the "rule of recognition." This rule sets out the conditions that must be satisfied by a norm if it is to count as a primary rule.[178]

Under normal conditions, the secondary rules operate very much like a grammar.[179] Hart described the rule of recognition as an "ultimate" rule; it "provides criteria for the assessment of the validity of other rules; but it is also unlike [the other rules] in that there is no rule providing criteria for the assessment of its own legal validity."[180] Hart was very careful to insist that he did not mean that the rule of recognition could not be judged according to non-legal standards; his point was, however, that the rule of recognition serves as the measure of legal validity and therefore cannot be judged by a legal standard. This is because

> [w]e only need the word 'validity', and commonly only use it, to answer questions which arise *within* a system of rules . . . . No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.[181]

This sounds very similar to Wittgenstein's argument that the applica-

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176. *Id.* at 96.

177. *Id.* at 97.

178. *See id.* at 94-95. As Coleman and Leiter note, unlike the other two secondary rules, the rule of recognition is not a power-conferring rule. *See* Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 245 (Dennis Patterson ed., 1996).

179. I want to be very careful to set aside Hart's discussion of the rule of recognition under circumstances of total revolution or foreign occupation. Where the legal officials of a legal system accept the secondary rules as common public standards of official behavior, but "there is no longer general obedience to the rules" then at some point, Hart acknowledges, the legal system ceases to exist. HART, *supra* note 3, at 118. These sorts of cases are not important for the comparison of the rule of recognition with Wittgenstein's theory of rules in this Article, since the analogy would be to two languages at war with each other, not a language in which the rules of grammar are in dispute. *See, e.g.*, LUDWIG WITTGENSTEIN, ON CERTAINTY 80 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) ("Supposing we met people who . . . consult[ed] an oracle [to make important decisions] . . . If we call this 'wrong' aren't we using our language-game as a base from which to *combat* theirs?"). On the other hand, a more apt parallel is the circumstance where there is a breakdown over the identification of the rule of recognition among the legal officials: "It may be that, over certain constitutional issues *and only over those*, there is a division within the official world ultimately leading to a division among the judiciary." HART, *supra* note 3, at 122 (emphasis added). This would be analogous to members of a linguistic community openly arguing over the basic grammar of their language. While such disputes can occur within members of the same language-game, they are, as Hart noted, abnormal episodes which must be seen as a failure of the rule of recognition, not an application of it. *See id.* Hart gave as an example the attempt by the South African parliament to severely restrict the power of judicial review. *See id.* at 122-23 (citing Harris v. Dönges, 1 TLR 1245 (1954) (describing *Harris* as a "substandard, abnormal case")).

180. HART, *supra* note 3, at 107.

181. *Id.* at 108-09.

tion of a rule is "fixed" by the forms of life, not by further rules.[182] Hart noted that some critics thought the rule of recognition must be incoherent, since it was a legal rule that could not be validated through legal analysis.[183] Hart responded that to say the validity of the rule of recognition cannot be demonstrated through legal reasons is simply like saying "that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct."[184] The rule of recognition, like the word "metre" cannot be demonstrated; it is part of the language game that makes argument possible. We should note that Wittgenstein first used the example of the "metre bar in Paris" to make the point that the fundamental rules of a system are not susceptible to validation:

> There is *one* thing of which one can say neither that it is one metre long, nor that it is not one metre long, and that is the standard metre in Paris. But this is, of course, not to ascribe any extraordinary property to it, but only to mark its peculiar role in the language-game of measuring with a metre-rule.[185]

The rule of recognition (and the rules of adjudication, which for purposes of this argument should be seen as part of the rule of recognition) is directed towards legal officials, not citizens.[186]

As Jules Coleman has noted, the rule of recognition can have an epistemic function.[187] Hart distinguished between two types of epistemic functions: validation and identification. The rule of recognition serves a validation function when it "enable[s] relevant officials to judge the validity of official actions."[188] The rule of recognition serves an identifying function when it helps ordinary citizens determine "which of the community's norms [are] binding on them."[189]

However, the rule of recognition is "fundamentally" a validation rule.[190] It is directed towards legal officials, not citizens. Therefore, the rule of recognition does not identify primary rules; it is not used to iden-

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182. *See supra* text accompanying note 109; *see also* WITTGENSTEIN, *supra* note 96, § 224 ("The word 'agreement' and the word 'rule' are *related* to one another, they are cousins"). Frederick Schauer argued that the rule of recognition, being a practice, should not be called a rule at all. *See* Frederick Schauer, *Amending the Presuppositions of a Constitution, in* RESPONDING TO IMPERFECTION 145, 150 (Sanford Levinson ed., 1995) (citing A.W.B. Simpson, *The Common Law and Legal Theory, in* OXFORD ESSAYS IN JURISPRUDENCE, 2ND SERIES 77-99 (A.W.B. Simpson ed., 1973)). Once we see that by "rule" Hart could have meant a "form of life," Schauer's objection is probably cured.

183. *See* HART, *supra* note 3, at 111.

184. *Id.* at 109.

185. WITTGENSTEIN, *supra* note 96, § 50.

186. *See* HART, *supra* note 3, at 116 (stating that the "rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of *official behavior by its officials,*" emphasis added)).

187. *See* Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139, 141 (1982).

188. Jules L. Coleman, *Authority and Reason in* THE AUTHORITY OF LAW: ESSAYS ON LEGAL POSITIVISM 291 (Robert George ed., 1996).

189. *Id.*

190. *See id.* at 292.

tify when a citizen ought to act or forbear from some action. The rule of recognition validates the actions of other legal officials—for example, it tells when an act of Parliament or a lower court decision is law.[191] The legal officials must agree, of course, on the identification of the rule of recognition, but that is not the same thing as saying that the rule of recognition has an identifying function.[192]

In its validation function, the rule of recognition behaves like a Wittgensteinian rule. While the legal officials may disagree over some of the applications of the primary rules in the legal system (hence the disagreement over the interpretation of the primary rules) they generally do not disagree over the application of the rule of recognition. That is to say, in general, disputes do not break out among legal officials over "whether" to apply the rule of recognition in a given case.[193] Furthermore, given a complex rule of recognition, the rules of adjudication and change (the other secondary rules) are not often in dispute; although the rules concerning precedent and parliamentary supremacy do change over time, they change in the same way that rules of a language game change: gradually, imperceptibly, and rarely through the application of legal rules.[194] The rule of recognition, argued Hart, has a "peculiar role" in the language game of law. Unlike all the other rules of the legal system,

191. *See* Coleman, *supra* note 188, at 293. Coleman, in his essay with Brian Leiter on legal positivism, argues that Hart's original dichotomy between primary and secondary rules really is a trichotomy. The secondary rules that create the power to legislate and adjudicate are not like the secondary rule of recognition, since the former are power-conferring rules but the latter is not: "Hart really believes that there are three kinds of legal rules: those that obligate, those that enable and the rule of recognition that sets out validity conditions." Coleman & Leiter, *supra* note 178, at 245.

192. *See* HART, *supra* note 3, at 258-59; *see also* Coleman & Leiter, *supra* note 178, at 252 ("That a rule of recognition may be controversial in its instantiations, however, does not entail that judges disagree about what the rule is. They disagree, perhaps, only about what it requires. In that case, they do not disagree about what the validation standard is, only about what it validates.").

193. Hart recognized that the rule of recognition itself had a penumbra. *See* HART, *supra* note 3, at 148. But Hart stressed that there were two important differences between rule-application in the penumbra of the secondary rules and rule-application in the penumbra of the primary rules. The first difference was simply one of degree: disputes over the application of the rule of recognition are infrequent and occur at the "fringe." *See id.* at 148, 154. Second, Hart noted that unlike primary rules, in which (as I have argued in this article) the exercise of discretion is controlled by law through the secondary rules, the exercise of discretion in the penumbra of secondary rules is not controlled by law at all. *See id.* at 153. Although sometimes disputes over the application of the rule of recognition are settled by courts, the judiciary's success at settling a dispute of constitutional dimensions is an exercise of political, not legal, judgment: "[W]hen courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success." *Id.*

194. The transformation of the doctrine of precedent in English law illustrates this. As Hart noted, in *Rex v. Taylor*, 2 K.B. 368 [1950], the court said that it had "always" had the power to review its own precedents concerning the liberty of a subject, even though it had gradually accumulated this power and used the decision as an opportunity to promote the fiction that it had no such thing: "[H[ere power acquire[d] authority *ex post facto* from success." *Id.* at 154. In 1966, after THE CONCEPT OF LAW was published, the House of Lords "announced" that it had determined that it could depart from its own precedents as a matter of law, something which they had arguably been doing in practice for many years.

whose "existence" depends on the satisfaction of the criteria of validity in the legal system, the rule of recognition "exists only as a complex, but normally concordant, practice of the courts . . . [i]ts existence is a matter of fact."[195]

This is important because it helps Hart explain how a law-applier can treat disagreement over the validation of the application of primary rules as more than just nonsense. The secondary rules do not identify the primary rules, but they do tell a judge how to approach the task of validation in a dispute over the application of primary rules. As Hart put it, for judges to perform their validating function they must be able to identify "settled law" (read: the core), and "for that to be possible a rule of recognition specifying the sources of law and the relationships of superiority and subordination holding between them is necessary."[196] In other words, the secondary rules may tell a judge, for example, how to identify whether a precedent has already been established by another court, or how to identify a legislative act or an administrative ruling relevant to the question. In doing so, the core is identified by the judge without the fresh application of the primary rule. The rule of recognition identifies the standard instances of the primary rule by their form: precedent, statutory language, or regulatory standards. In doing so, the secondary rules set out the point at which interpretation begins, and illustrate the breadth of the law-applier's scope of interpretation. The scope depends, to borrow Hart's opaque expression, on the "relationships of superiority and subordination holding between" the application in question and the standard instance.[197]

I have argued that Hart's adoption of a Wittgensteinian picture of rules, which, as some observers have pointed out, seems ill-suited to the vast majority of primary rules in a legal system, makes sense if the secondary rules are seen as part of the "grammar of law" that sets out the beginning point and scope of discretion in the application of the primary rules. According to my argument, Hart's concept of discretion is intelligible only within the framework of primary and secondary rules. Whereas Hart in his Harvard talk was incapable of explaining to Hart and Sacks how standard instances of different types of law could direct the exercise of discretion by a law applier in the penumbra, Hart was able to provide an answer in *The Concept of Law*. The secondary rules, especially the rule of recognition, establish the scope of discretion by identifying for the law applier not only the standard instances of the legal rule at issue, but also what type of legal rule is at issue, and, therefore, the range of norms

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See LORD DENNING, THE DISCIPLINE OF LAW 296-97 (1979) (citing The Lord Chancellor's Statement in the House of Lords, July 26, 1966).

195. HART, *supra* note 3, at 110. Compare with Wittgenstein: "'If humans were not in general agreed about the colours of things, if undetermined cases were not exceptional, then our concept of colour could not exist.' No—our concept *would* not exist." LUDWIG WITTGENSTEIN, ZETTEL § 351 (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe, trans., 1970).

196. HART, *supra* note 3, at 266.

197. *Id.*

that are available to the law applier when exercising discretion. Hart would no longer need to appeal to the fiction that what distinguishes common law from administrative law is that the former simply has more standard instances available than the latter, but could say instead that the former is characterized by one set of rules for identifying standard instances (rules of precedent, for example) and the latter by another set of rules (rules about the practice of administrative agencies). This is compatible with Hart's claim that the secondary rules do not identify primary rules but instead establish the conditions under which primary rules are validated by law-appliers; those "conditions" are the standard instances of the various types of law discussed in *The Legal Process* and *The Concept of Law*.