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Three Concepts of Law: The Ambiguous Legacy of H.L.A. Hart

*Brian Slattery**

The law presents itself as a body of meaning, open to discovery, interpretation, application, criticism, development and change. But what sort of meaning does the law possess? Legal theory provides three sorts of answers. The first portrays the law as a mode of communication through which law-makers convey certain standards or norms to the larger community. The law's meaning is that imparted by its authors. On this view, law is a *vehicle*, conveying a message from a speaker to an intended audience. The second theory portrays the law as a mode of interpretation, whereby judges, officials, and ordinary citizens make decisions about how the law applies in various practical contexts. The law's meaning is that furnished by its interpreters. According to this theory, law is a *receptacle* into which decision-makers pour meaning. The third viewpoint argues that these theories, while not altogether wrong, are incomplete because they downplay or ignore the autonomous meaning that the law itself possesses. This theory suggests that the law is basically a mode of participation, whereby legislators, judges, officials, and ordinary people attune themselves to an autonomous field of legal meaning. The law's meaning is grounded in a body of social practice which is independent of both the law's authors and its interpreters and which is infused with basic values and principles that transcend the practice. On this view, law is the *emblem* of meaning that lies beyond it.

Elements of all three theories are present in H.L.A. Hart's influential work, *The Concept of Law*,[1] which attempts to fuse them into a single, all-encompassing theory. Nevertheless, as we will argue here, the attempt is not successful. Any true reconciliation of the communication and interpretation theories can only take place within the framework of a fully-developed participation theory. In the early stages of his work, Hart lays the foundation

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1 (Oxford: Oxford University Press, 1961).

for such a theory. However, his failure to elaborate it in a thoroughgoing way renders the work incomplete and ultimately unbalanced. As we will see, there is something to be learned from this failure.

We will begin with a discussion of Hart's concept of the internal aspect of law, which provides the basis for a broadly participatory approach. We will then consider his view that law is fundamentally a mode of communication whereby general standards of conduct are conveyed to the public. Finally, we will assess his argument that legal interpretation is a mode of creative decision-making necessitated by the limitations of language and the inscrutability of the future.

I. LAW AS PARTICIPATION

Hart argues that there is a significant difference between social *rules* and social *habits*. Rules have an "internal aspect" that habits lack. For example, the people living in a certain village may be in the habit of going to the local tavern on Saturday nights. Their behaviour is quite consistent on this point. Virtually all the adult members of the community manage to drop by the tavern, even if only briefly. However, this pattern of behaviour is not a social *rule* because the villagers do not think that they "ought" to go to the tavern or criticize others if they fail to attend. By contrast, virtually all the people in the village go to the local church on Sunday mornings. Again, there is the same regular pattern of behaviour. But this time there is a difference: most members of the community believe that they "should" attend church. Not only do they hold themselves individually to that standard, but they think that the other villagers are likewise bound and they criticize people who fail to attend without good reason. Here, we have not only a social habit but a social *rule*.

A social rule, says Hart, exists only where at least some members of the group look upon the activity in question as a general standard to be followed by the group as a whole. It entails a "critical reflective" attitude to certain standards of behaviour as a common standard. This attitude manifests itself in criticism of others and also in self-criticism—hence its critical reflective character. It gives rise to demands for conformity and elicits acknowledgements that such criticism and demands are justified. These criticisms, demands, and acknowledgements are expressed in normative language, featuring such expressions as "ought", "must", "should", "right", and "wrong". This normative language flows from what Hart terms the "internal viewpoint" of members of the community.[2]

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2 *Ibid.* at 55-56.

Hart contrasts the internal viewpoint with an "external" one. Suppose an anthropologist who is unfamiliar with the ways of our imaginary village decides to carry out a purely behavioural study in the locality. She limits herself to recording the observable regularities of behaviour in the village, without taking account of the internal attitudes of group members. On the basis of sustained observation, the anthropologist may discover strong correlations between certain social deviations and hostile reactions and so may be able to predict with tolerable success when departures from habitual modes of behaviour will meet with social disapproval and when they will not. She may discover, for example, that failure to show up at the tavern on Saturday night does not cause adverse reactions, but failure to attend church on Sunday does. After some time, the anthropologist might be able to predict how group members will behave in most circumstances, enough to let her live in the group without experiencing unpleasant consequences. However, so long as the anthropologist sticks strictly to this "external" viewpoint and does not take account of how the group members view their own conduct, she will fail to render an account in terms of *rules* and the attendant notions of obligation or duty. She will miss the rules' internal aspect.[3]

Hart gives the example of a rigorously empirical observer who stations himself at an intersection with a traffic light and scrutinizes the behaviour of drivers. After some time, he is able to predict that when the traffic light turns red, the cars will almost always stop. This external viewpoint treats the red light as a *sign* that cars will stop, in somewhat the same way that thunder is a sign of impending rain. By contrast, from the internal perspective of drivers, the red light is a *signal* to stop; it embodies a rule that drivers use to regulate their own conduct and to assess that of others. This internal viewpoint is characteristic of rules and rule-following.[4] In a word, people adopting an external viewpoint limit themselves to merely recording and predicting behaviour according to rules, while those who embrace an internal viewpoint actually use the rules as standards for appraising their own and others' conduct.[5] Let us call the first group "observers" and the second group "participants".

The law, as a body of social rules, must be understood from the internal perspective of a participant rather than from the standpoint of an external observer. Except insofar as observers imaginatively put themselves in the position of participants in the legal order (or actually become participants),

3 *Ibid.* at 86-87.
4 *Ibid.* at 87-88.
5 *Ibid.* at 96.

they cannot appreciate the nature of laws and other social rules. To this extent, then, Hart's theory of law is *participatory* in its orientation.

One feature of Hart's analysis needs to be highlighted. He suggests that, although the internal viewpoint is necessary for understanding the *normative character* of rules, it is not indispensable for grasping their *content*. The anthropologist, by carefully correlating social deviations with hostile reactions, may be able to predict successfully when departures from habitual conduct will call down sanctions. The patient observer seated at the intersection will soon be able to anticipate when cars will stop at the traffic lights. In other words, the content of the rules is accessible to the external observer, even if their distinctively normative dimension is not. An internal "normative" viewpoint is not necessary in order to grasp what the rules actually require.

But this point seems dubious. Perhaps in the case of very elementary rules, such as that governing the conduct of drivers at traffic lights, it is possible for an external observer to grasp the basic content of the rule without adopting a participant's viewpoint. Even then, to move beyond a simple correlation between "red light" and "stopping" would require some understanding of the social institution represented by the "traffic light", as embedded in the complex normative matrix of our highway traffic rules and practices.

In any case, most rules are not nearly this simple or straightforward, and most social interactions are difficult to construe from a purely external point of view. Could an observer make sense of even the most common social interactions in the village's tavern without some internal grasp of their normative underpinnings? When Marc offers Jeanette a drink and she declines, what is the significance of that simple exchange? Does Jeanette's rejection of Marc's offer represent a tacit reproof for the "gauche" manner in which he approached her (and how could we tell unless we had some internal grasp of what villagers consider good and bad manners)? Or does it flow from Jeanette's newfound conviction that drinking alcohol is "wrong" (and how could we judge without knowing the range of religious and moral norms in the society)? Or does it reflect the fact that Jeanette actually likes Marc a lot and rejects his offer as a playful "ploy" (and could we even imagine that possibility without some familiarity with the intricacies of mating norms and rituals)? Or is it just that Jeanette thinks she has already drunk "enough" (and how could we judge without knowing the social norms governing drinking)?

It seems unlikely that our anthropologist could ever make much sense of villagers' behaviour in the tavern without adopting an internal point of view, if only tacitly. It would not, of course, be necessary for the anthropologist to accept the village's social rules as binding on *her*. However, she would have

to enter imaginatively into the normative world of the villagers in order to make sense of their goings-on. That is, she would have to put herself into the shoes of Jeanette and Marc and consider what their interaction means to them. Only by sympathetic identification with the internal viewpoint of participants in the society could she hope to discover the content of its governing standards. In other words, then, the *content* of most social rules cannot be severed from their *normative character*; they are linked indissolubly.

The problematic nature of Hart's views on this point becomes apparent at a later stage in his discussion.[6] He points out that most citizens in a modern state ordinarily exhibit the internal point of view. They do not confine themselves to recording and predicting the actions of courts or other state officials and the probable incidence of sanctions, as an external observer might. They accept the law as a shared standard of behaviour. Not only do they comply with the law with tolerable regularity, but they look upon it as a common standard for the entire community and use it as a basis for making criticisms and demands and for acknowledging the criticisms and demands of others. However, Hart suggests, at a certain point this internal point of view necessarily gives way to an external perspective. This shift in attitude stems from the fact that the meaning of a legal rule is necessarily uncertain at its fringes, due to what Hart calls the "open texture" of the law. In that area of uncertainty, argues Hart, "*individuals can only predict how courts will decide and adjust their behaviour accordingly.*"[7] So, in contexts where the law is unclear, the best that law-abiding citizens can do is to take the predictive attitude characteristic of the external point of view. The internal aspect of rules gives out at the point that they become uncertain. We can take an internal attitude to legal rules only when we know what they require.

The latter point may be clarified by an example. Suppose we encounter a sign that states: "By municipal by-law, it is forbidden to fenester in the park". We puzzle over the sign but in the end have no real idea what it means. Under Hart's account, we cannot be said to accept the by-law as a common standard of conduct (except in the most formal and superficial sense), because we do not know what that standard consists of. A minimal knowledge of what it is that we are accepting is an essential prerequisite of true acceptance. The best that we can do is to fall back on an external viewpoint and guess how a court might rule.

However, this last point seems contestable. Our failure to understand the sign not only affects our capacity to *accept* the by-law, it also precludes us

6 See *ibid.* at 134-35.

7 *Ibid.* at 135 [emphasis added].

from *predicting* how courts might interpret it—and to the same extent. If we have no idea what "fenester" means from an internal viewpoint, we have no basis for forecasting how a court might rule from an external viewpoint. And to the extent that we suspect what "fenester" means (perhaps it is some kind of unruly behaviour), that conjecture provides a minimal basis not only for predicting court rulings but also for accepting the rule as binding.

The point is sharpened if we consider the position of a judge called on to apply the by-law. Which viewpoint—internal or external—should he adopt? According to Hart, if the judge is mystified by the by-law's strange wording, he is precluded from adopting an *internal* point of view because the rule's internal aspect gives out precisely at the point that the rule ceases to be reasonably clear. On the other hand, it is difficult to see how the judge can adopt an *external* viewpoint, unless he tries to predict his own probable behaviour, which is circular. Perhaps the judge should attempt to foresee the behaviour of a higher court sitting on appeal. However, this solution just shunts the problem farther up the line. In the end, the highest court in the appeal structure will have to ask itself how to approach the case.

We suggest that the only appropriate way that a judge (or for that matter a private individual) can even conjecture, much less determine, what the by-law might mean in this context is *to consider it from an internal viewpoint.* We can have no proper basis for determining what the rule might require unless we view it as a rule rather than as a mere *description* or *prediction* of possible conduct. In effect, the external "predictive" point of view is parasitic on the internal perspective. Of course, we might, in the end, decide that the by-law does not mean anything—that it is mere nonsense. But that conclusion is one that flows from a struggle to discern the law's internal meaning.

To appreciate this point more fully, we need to explore the other main tenets of Hart's approach: his theories of communication and interpretation. Although the two are closely related, it will be convenient to discuss them separately.

II. LAW AS COMMUNICATION

A theory of communication plays a central role in Hart's analysis.[8] He argues that law should be understood in part as a method of social control that consists of the communication of general standards of conduct to classes of persons, who are expected to understand and conform to these standards without further official direction. This communication is often effected by

8 The main elements of Hart's communication theory are set out in *ibid.* at 121-32 and are reiterated at 202.

means of explicit general language, as in the case of a statute or other legislative act, but it may also be effected by concrete example, as in the case of a judicial precedent. In a striking passage, Hart remarks:

> In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist.[9]

We may observe that a communication has four essential elements: (1) an *author* that formulates the communication; (2) a *medium* that carries it; (3) a *message* that comprises its content; and (4) an *audience* that receives it. However, if this analysis is applied to the law, it can be seen that the first and the third elements are both problematic: rules of law frequently lack a definite author, and in many cases their message is unclear. Let us consider first the problem of an author and then the question of a message.

The author of a communication is the person or body that consciously formulates the message to be delivered. However, some forms of law have no identifiable author in this sense. The most obvious example is furnished by customary law, which is generated by the immemorial practice of a community. While there is perhaps an identifiable "law-maker" in the collective person of the community, this law-maker obviously has no single mind capable of consciously framing a "message" to be delivered. The innumerable individual actions that give rise to a custom are accompanied by a great variety of psychological states and animated by a great variety of purposes. It would be straining the point to say that the myriad performers of these actions collectively constitute an "author" speaking to future generations, except in a metaphorical sense.[10]

Nevertheless, it could be argued that there is no need for an author who consciously formulates the message to be communicated. So long as there is some person or body that actually generates the message, the requirement of an author is satisfied. However, this argument confuses communication with

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9 *Ibid.* at 121.

10 Curiously, Hart discusses the difficulties that customary law poses for the theory that law consists of coercive orders *(ibid.* at 43-48); however, he does not address the similar problems that customary law presents for a communication theory.

transmission. Of course it is possible for a traditional pattern of conduct to be passed down through the generations without conscious effort or design, just as it is possible for a mother unconsciously to transmit a certain way of speaking to her children, who imitate the characteristic lilt of their mother's speech. However, it would be wrong to say that the woman communicates her speech patterns to her children, except in an extended, analogical sense. Nevertheless, if the woman takes it upon herself to correct her children's manner of speech in a deliberate manner, then the process shifts from mere transmission to conscious communication.

The problem of an author is not confined to customary law; it also arises with statutes passed by legislatures. As Anglo-Canadian courts have often remarked, a legislative assembly has no "mind" as such, and it is fruitless to search for an empirical "legislative intent" in a collection of disparate people with varying goals, conceptions and levels of awareness, such as compose the ordinary legislature. If the message communicated by a statute consisted of the actual psychological states of those responsible for drafting and passing the law, the content of the statute would be diffuse, scattered, and likely incoherent. Given that both statutes and customary laws lack an "author" capable of formulating a conscious intent, it seems inappropriate to characterize the law as a mode of communication.

Let us turn now to the question of law's "message". Here, Hart is well aware of the difficulties in a pure communication theory. He concedes that the message delivered by a statute or a judicial precedent can never be completely clear and unequivocal. While the message will normally have a core of unproblematic meaning, it will also necessarily have a penumbra of uncertainty, where the meaning becomes vague or obscure. Hart explains that this uncertainty results in part from the open texture of language but just as importantly from our inability to predict all future situations and our consequent indeterminacy of aim. The inherent uncertainty of the law gives rise to the need for creative interpretation. We will postpone our detailed examination of Hart's theory of interpretation until the next section and focus here on the question of how far the law can be viewed as a message.

In some contexts, the communication theory seems intuitively right. Consider the example of a municipal by-law posted at the entrance to a park stating "No vehicles in the park".[11] Here the law addresses a matter that is not governed by uniform or settled social standards. Some parks allow vehicles, while others do not. It is for the municipal authorities to decide *whether* a

11 Hart uses this example on a number of occasions; see, *e.g.*, *ibid.* at 123-26.

particular park will be open to vehicles. This decision has to be *communicated* to the general public, for otherwise they cannot know how to conduct themselves. Moreover, the content of the law (the *message*) is arguably fairly specific. The by-law forbids people to bring a fairly well-defined range of mechanical devices ("vehicles") into a fairly well-defined area (the "park"). While we may debate whether a child's toy car is a vehicle within the provision's meaning, by and large the rule has an unproblematic operation over a large range of common situations, sufficient for ordinary people to know how they should behave in most cases.

Nevertheless, the matter is not as simple as it first appears. We may observe that the by-law only makes sense in a certain cultural and social context. Although both vehicles and parks are material objects, they are also cultural artefacts defined by their social significance and functions. The term "vehicles", as used in the by-law, does not refer to objects of a specific size, shape, or material properties. It is a purposive concept encompassing a wide variety of objects that serve certain ends. An effort to define "vehicles" in terms of specific material attributes would surely misfire and include objects that clearly are not vehicles for the rule's purposes and exclude others that just as clearly are. By the same token, a "park" is not just a tract of land consisting of lawns, trees, paths, ponds, and so on; it is a sophisticated social institution whereby a certain area is dedicated to a range of specific public uses (such as picnics, baseball, sun-tanning, or simply strolling about), which in turn serve certain abstract values and principles (such as "health", "recreation", "sociability", and "the equal access of all members of the community"). Our understanding of the by-law is informed by the larger cultural realities represented by the terms "vehicles" and "parks" and, more importantly, by *our grasp of the normative dimensions of those realities when juxtaposed in the manner suggested in the by-law.*

Consider a slightly different case, where the sign states "No laughing in the park". While at one level the language of the sign is clear, we would still be puzzled as to what it actually *means*. Why? Because it seems to lack an appropriate normative context. Why should laughing be forbidden in the park (of all places) when one can laugh to one's heart's content on the sidewalk just outside? What connection is there between the behaviour prohibited and the purposes ordinarily served by a park? If a court had to interpret the by-law, it would probably search for some appropriate normative context in which the prohibition makes sense. It might decide, for example, that the law should be read as aimed only at laughter that is so excessively loud, offensive, or malicious that it prevents others from enjoying the park. Or perhaps it might conclude that this particular park (unlike most others) is

wholly dedicated to the quiet contemplation and enjoyment of nature and that the prohibition of laughing is a specific manifestation of a broader norm forbidding any form of noisy activity.

In effect, then, when we come across a sign that takes the form "No [*specified activity*] in the park", we normally read it as a particular instance of the underlying norm "No *inappropriate activity* in the park", where "inappropriate" is understood in light of the well-understood purposes of the park and the basic principles that support and further these purposes. If the activity specified by the sign does not seem to affect any of these purposes and principles, we will have difficulty understanding and applying the sign.

So, even in the relatively straightforward case of a park by-law, the theory that the law communicates a certain "message" turns out to be simplistic. As we have seen, the by-law functions in part by calling attention to norms that exist apart from the by-law and that are embodied in overlapping strata of social practice, which in turn are saturated with basic values and principles. To portray the law as a message conveying the ideas of its authors obscures the fact that the law ordinarily functions by calling attention to larger *normative realities* and by eliciting in citizens, judges, and officials *reasonable decisions* in light of those realities. This point brings us to the final element of Hart's theory: his account of the decision-making process.

III. LAW AS INTERPRETATION

As noted, Hart acknowledges that the two main modes of legal communication (precedent and legislation) both leave room for doubt on the part of the intended audience. Where the legal standard is embodied in a judicial decision, there is inevitably some uncertainty as to the range of cases that the precedent governs. However, even when explicit general language is used, as is the case with legislation, there is still an element of uncertainty. In part, this uncertainty is due to the irreducibly open-ended character of any natural language. However, it also results from the fact that we are human beings—not all-knowing gods. We have to cope with two interconnected handicaps: relative ignorance of fact and relative indeterminacy of aim. We cannot foresee all the possible combinations of circumstances that may arise in the future. As a result, we are not in a position to decide in advance how unanticipated cases should be resolved. So it would be misguided to entertain the ideal of laws so comprehensive and detailed that they resolve in advance every possible case and never need to be supplemented by fresh decisions. For our inability to anticipate the limitless range of concrete situations that the future holds in store necessarily limits our capacity to decide those situations in advance.[12]

12 *Ibid.* at 124-26.

All legal systems, observes Hart, represent a compromise between two social needs. The first is the need for clear rules that individuals can apply for themselves in most common situations, without having to resort to official guidance. The second, however, is just as important: the need to leave open a range of concrete issues that can be properly appreciated and settled by official decision only when they arise. As a result, the law cannot be viewed, even at the ideal level, simply as a mode of communication whereby an omniscient law-maker provides clear directions to citizens as to how they should conduct themselves in all possible circumstances. There is also the need for contextual decision-making as situations come up.[13]

So, the communication theory of law needs to be supplemented by a theory of decision-making. What form should that theory take? Hart explains:

> Faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate, all that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case 'sufficiently' in 'relevant' respects. 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. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule. To characterize these would be to characterize whatever is specific or peculiar in...legal reasoning.[14]

In effect, once we move beyond the unproblematic core of a legal rule into the penumbra of uncertainty, legal decision-making necessarily entails a form of creative choice—a choice that is not necessarily arbitrary or irrational but nonetheless one that does not consist of syllogistic reasoning or the simple subsumption of the particular under the general.[15] In Hart's view, such

13 *Ibid.* at 127.
14 *Ibid.* at 124.
15 *Ibid.*

decision-making involves a distinctive form of legal reasoning that entails choosing between alternatives on the basis of "whether the present case resembles the plain case 'sufficiently' in 'relevant' respects", which depends on the rule's presumed "aims and purposes" as well as "many complex factors running through the legal system". But what, more specifically, does that mode of legal reasoning entail and how far does it represent simple "choices" as opposed to something else? Indeed, what does Hart mean by "choice" in this context? After all, even when applying a legal rule to a plain case, a court still makes the choice to apply it, for it could conceivably decide to do otherwise.

On this point, Hart attempts to strike a middle path. On the one hand, he argues that in the penumbra of uncertainty surrounding legal rules, legal decision-makers are not governed by the general standards communicated in the law but are free to make choices that the law leaves open. To this extent, Hart distances himself from the legal formalists. However, he also maintains that in making these choices legal decision-makers do not necessarily act in an arbitrary or irrational manner but engage in a distinctive mode of legal reasoning. So doing, he distinguishes his approach from that of the legal sceptics. However, what warrants the claim that the process involves *reasoning*, as opposed to mere choice, and in what sense is this reasoning distinctively *legal*?

Hart's eventual answer comes in a brief discussion toward the end of his work where he concedes that the interpretive process often shows the influence of morality and broad notions of justice.[16] In making the choices that the open texture of the law permits, judges are guided by the assumption that the purposes of legal rules are reasonable—that they do not lead to injustice or violate moral principles. However, these moral considerations do not eliminate the need for choice, since "it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer."[17] Still, these choices are not necessarily arbitrary but display characteristic judicial virtues, three of which merit mention: impartiality and neutrality in weighing the available alternatives, consideration of the interests of all those affected by the decision, and a concern to display the decision as rationally grounded in some acceptable general principle. While these moral principles and factors are clearly important to the interpretive process, argues Hart, they do not demonstrate any necessary connection between law and morals. For they have been honoured almost as much in the breach as in the observance. Indeed critics have often censured judicial law-making for its blindness to social values, its mechanical nature, and its inadequate reasoning.

16 *Ibid.* at 199-201.

17 *Ibid.* at 200.

This is the gist of Hart's theory of interpretation. How adequate is it? We wish to argue that it has two related deficiencies. First, despite the belated concession to moral values and principles, Hart's analysis betrays the imprint of the view that the interpretation of legal rules is basically akin to the application of descriptive statements. As such, the analysis downplays the distinctive normative character of social rules, their *internal aspect*—the very thing that (as Hart has argued) serves to distinguish rules from mere descriptions or predictions of social habits. Second, as a result of this tacit bias, Hart tends to treat legal interpretation as comprising two alternative processes: (1) the relatively unproblematic application of general descriptive terms to particular cases that fall within the core meaning of those terms; and (2) the exercise of creative choice when those terms are applied to cases that fall within the penumbra of doubt. In neither instance does Hart give full credit to the normative character of the interpretive process; once again, in effect, he forgets his own best lesson, that the law must be seen from the *internal viewpoint.*

Hart's descriptive bias emerges when he suggests that the process of statutory interpretation basically involves the classification of particular cases under general terms. As he writes:

> All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture'....[18]

It seems significant that Hart borrows the concept of "open texture" from Friedrich Waismann, who argues that most of our *empirical concepts* have an open texture, in contrast to the "closed texture" of mathematical concepts.[19] Waismann suggests that this feature explains, in part, why an experiential statement can never be verified in a conclusive way. He explains:

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18 *Ibid.* at 119-20.

19 Waismann's discussion is found in an essay entitled "Verifiability", reproduced in A. Flew, ed., *Logic and Language (First Series)* (Oxford: Basil Blackwell, 1952) 117; see especially his analysis at 118-24. Hart acknowledges his debt to Waismann in a note in *The Concept of Law, supra* note 1 at 249.

> Try as we may, no concept is limited in such a way that there is no room for any doubt. We introduce a concept and limit it in *some* directions; for instance, we define gold in contrast to some other metals such as alloys. This suffices for our present needs, and we do not probe any farther. We tend to *overlook* the fact that there are always other directions in which the concept has not been defined. And if we did, we could easily imagine conditions which would necessitate new limitations. In short, it is not possible to define a concept like gold with absolute precision, i.e. in such a way that every nook and cranny is blocked against entry of doubt. That is what is meant by the open texture of a concept.[20]

However, this analysis cannot be transferred to the law without significant amendment. Legal rules are quite different from empirical propositions: they are normative "ought" statements rather than experiential "is" statements. Not only that, but the concepts employed in such rules gain their meaning in part from the normative context in which they function. In effect, *legal concepts are fragments of normative statements rather than simple descriptive terms*. Once a term is drawn into a normative field, its centre of gravity may shift and its descriptive core shrink or expand. As a result, the meaning of a term may differ depending on whether it occurs in a normative or descriptive context. It is one thing to determine whether a particular object is a "vehicle" as a matter of empirical classification and another to apply the norm "No vehicles in the park" to a concrete situation. Applying the law is not an exercise in empirical classification; even in the plainest of cases, it is a matter of *normative judgment.*

Consider, for example, the descriptive statement "There are no vehicles in the park today". To verify the statement we would have to survey all the objects in the park and determine in each case whether the object qualifies as a "vehicle" in the term's ordinary sense of "a means of conveyance or transport". While most objects would pose no real problems in classification, a few might prove troubling. Automobiles, trucks, bicycles, baby carriages, wheelchairs, and wagons are all means of conveyance and so would clearly qualify as "vehicles". However, rollerblades might raise a more difficult issue. As Hart points out, resolving that issue would involve making a choice in light of the similarities and differences between rollerblades and the devices that clearly count as vehicles in everyday language.

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20 Waismann, *ibid.* at 120.

Predictive statements are basically similar to descriptive statements in this respect. Take, for example, the proposition "There will be no vehicles in the park tomorrow". To verify the accuracy of this prediction, we would have to visit the park on the following day and examine the range of objects encountered there. Once again, the word "vehicles" would be applied in its everyday sense and once again we would have to make choices in order to determine whether certain marginal devices should count as "vehicles" or not.

Consider now the normative statement "No vehicles in the park". One obvious difference between this statement and its descriptive and predictive counterparts is the fact that it cannot be verified by an empirical survey. The park might in fact contain a number of cars and yet the statement could still hold true. More important for our immediate purposes, however, is the fact that the statement's *coverage* would differ from that of its descriptive and predictive cousins.

For example, while "No vehicles in the park" would clearly include cars, trucks, and buses, it would likely *not* include baby carriages, even though these are clearly means of conveyance and match the dictionary meaning of the term. The normative field in which the term "vehicles" is suspended transforms the term's meaning. It does not make much sense to ban baby carriages from the park, given the values and principles that parks serve. If we change the normative field, the term's meaning will change accordingly. Consider a sign on a golf course that reads "No vehicles on the greens". Here, by contrast, we would have little difficulty concluding that the sign covers baby carriages, along with cars, golf carts, bicycles, and so on. We make this practical judgment in light of the normative reality to which the sign draws our attention. The "greens" are part of a complex social institution (the game of "golf"), which in turn embodies certain basic values and principles ("recreation", "the cultivation of certain skills and virtues", "health", "mental tranquillity", "companionship and mutual regard", and the like). In light of this normative reality, we make reasonable judgments about the kinds of vehicles likely to harm greens in ways that significantly detract from the game of golf and the basic values and principles it serves.

In the case of the park sign, the main effect of the normative context is to narrow somewhat the scope of the term "vehicles", so that the ordinary descriptive reach of the word is curtailed. However, in some contexts, the normative field might also broaden the word's scope. For example, in verifying the descriptive statement "There are no vehicles in the park", we might decide not to treat remote control model cars as vehicles, on the ground that these devices are not actually used to convey anything. Nevertheless, we

might possibly reach a different conclusion in applying the sign "No vehicles in the park", on the ground that the model cars are noisy and possibly hazardous to others and generally detract from the park's tranquil ambiance.

As these simple examples show, even statements about relatively concrete objects (such as vehicles and parks) may have a somewhat different meaning depending on whether they are descriptive or normative and, in the latter case, on their specific character. Of course, the effect of a normative field is amplified once we move to more abstract statements, such as "Every individual is equal before and under the law" or "Everyone has the right to be secure against unreasonable search or seizure". The legal term "equal" will clearly differ substantially in meaning from its purely descriptive counterpart: the fact that two individuals are unequal in height obviously does not make them unequal before the law. Moreover, the legal term "unreasonable" has *no definite descriptive content at all* but points to an autonomous normative reality and enjoins practical judgments in light of that reality.

So, legal interpretation cannot be characterized as either the application of general descriptive terms to particular cases (on Hart's empiricist account of "unproblematic" cases) or as the exercise of creative decision-making (on his account of "hard" cases). In all cases, legal interpretation involves the exercise of normative judgment. Indeed, it is only the normative context that allows us to identify the "unproblematic" cases and to distinguish them from the "hard" cases. In short, the import of legal rules cannot be understood by someone who takes a purely external viewpoint. Law does not merely wear an "internal aspect"; it is internal to the core.

IV. CONCLUSION

We have argued that the content of legal rules cannot be severed from their normative character; the two are inextricably intertwined. The only appropriate way for a judge, official or private individual to determine what the law means is to consider it from an internal viewpoint. We can have no proper basis for determining what a legal rule requires unless we view it as a *rule* rather than as a mere *description* or *prediction* of possible conduct. In effect, the external attitude to rules is parasitic on the internal perspective.

Considered from an internal point of view, the law cannot be characterized principally as a mode of communication. Neither statute nor custom has a definite "author" capable of formulating a conscious intent. Moreover, the view that the law conveys a certain "message" oversimplifies the matter. As we have seen, a legal rule functions in part by calling attention to norms embodied in a finely-spun web of social practice, which displays certain basic values and principles. To portray the law as a message conveying the intentions

of its authors obscures the fact that the law operates by summoning up these larger normative realities and eliciting in citizens, judges, and officials reasonable decisions in light of those realities.

Legal rules are significantly different from empirical propositions: they are normative "ought" statements rather than experiential "is" statements. The concepts deployed in such rules derive their meaning in part from the normative matrix in which they occur. Legal concepts are fragments of normative propositions rather than simple descriptive terms. So the import of a legal term may vary depending on its setting. Applying the law is never simply a matter of empirical classification; even in the most obvious of cases, it involves the exercise of *normative judgment.*

These, then, are the lessons to be drawn from our analysis of Hart's theory. In the end they boil down to one basic point: the only satisfactory theory of law is one that illuminates the internal structure of law from a genuinely participatory point of view. If this brief paper does not present such a theory in any detail, hopefully it gestures in the right direction.[21]

21 For a fuller account of a participatory theory, see B. Slattery, "Law's Meaning" (1996) 34 Osgoode Hall L.J. 553.