

A CRITICAL GUIDE TO VEHICLES IN THE PARK

FREDERICK SCHAUER*

The 1958 debate between Lon Fuller and H.L.A. Hart in the pages of the Harvard Law Review is one of the landmarks of modern jurisprudence. Much of the debate was about the relative merits of Hart's version of legal positivism and Fuller's brand of natural law theory, but the debate also contained the memorable controversy over the fictional rule prohibiting vehicles from the park. Hart used the example to maintain that rules have a core of clear applications surrounded by a penumbra of uncertainty, but Fuller offered a counterexample to insist that the language of a rule, by itself, could never determine any legal outcome. At one level, therefore, the debate was about the relative importance of language and purpose in applying a general rule to a particular issue. At a deeper level, however, the debate was about the formality of law and about the possibility of varying commitments to formality in different legal systems. By examining this debate, and by largely removing it from the surrounding controversy over positivism and natural law, we can gain valuable insights about legal rules, legal interpretation, and the nature of legal language.

INTRODUCTION

It is the most famous hypothetical in the common law world. And it is part of one of the more memorable debates in the history of jurisprudence. Stunning in its simplicity, H.L.A. Hart's example of a rule prohibiting vehicles from a public park was intended primarily as a response to the claims of the legal realists about the indeterminacy of legal rules.¹ Hart believed that many of the realists were obsessed with difficult appellate cases at the fragile edges of the law and, as a result, overestimated law's epiphenomenal indeterminacy and vastly underestimated its everyday determinacy. Through the example of the rule excluding vehicles from the park, Hart hoped to differentiate the straightforward applications of a rule at what Hart called the rule's

* Copyright © 2008 by Frederick Schauer, David and Mary Harrison Distinguished Professor of Law, University of Virginia; Visiting Professor of Law, Harvard Law School; George Eastman Visiting Professor and Fellow of Balliol College, University of Oxford. This Article was prepared for the Symposium on the Hart-Fuller Debate at Fifty, held at the New York University School of Law on February 1–2, 2008. The audience comments on that occasion were especially helpful, as was research support from the Harvard Law School.

¹ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958) [hereinafter Hart, *Positivism and the Separation of Law and Morals*]. The example is reprised in modified form in H.L.A. HART, *THE CONCEPT OF LAW* 125–27 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) [hereinafter HART, *THE CONCEPT OF LAW*].

“core” from the hard cases at a rule’s edge, the area that he labeled the “penumbra.”² For Hart, the fundamental flaw of the realist perspective was in taking the often-litigated problems of the penumbra as representative of the operation of law itself.³ And insofar as judicial decisions in the penumbra necessarily involve determinations of what the law ought to be, it was important for Hart the positivist to stress that the interconnection between what the law is and what the law ought to be in the penumbra was not an accurate characterization of how law operated at the core, where the separation between the “is” and the “ought,” between law and morality, could still obtain.

Although Hart’s target was legal realism, the response came from a different direction. Lon Fuller was no legal realist himself,⁴ but Hart’s almost offhand observations about the clear cases at the rule’s core—ordinary automobiles, for example—spurred Fuller to respond.⁵ Believing Hart to be claiming that the core of a rule’s application was determined by the ordinary meaning of individual words in a rule’s formulation⁶—if something like an automobile was straightforwardly a vehicle in ordinary language, then an automobile would plainly fall within the scope of the rule—Fuller offered a gripping counterexample. What if a group of patriots, Fuller asked, sought to “mount on a pedestal” in the park, as a war memorial, a military truck

² Hart, *Positivism and the Separation of Law and Morals*, *supra* note 1, at 607.

³ Although Hart’s charge rings true with respect to some of the realists, others, especially Karl Llewellyn, explicitly acknowledged that their observations about legal indeterminacy were restricted to the skewed sample consisting of only those cases that were worth litigating. See K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 58 (1930) (observing that litigated cases bear same relationship to underlying pool of disputes “as does homicidal mania or sleeping sickness, to our normal life”); see also KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 6, 64–68 (1960) (noting that “demonstrations will be undertaken not on cases carefully selected to convenience” but “on stuff from the daily grist”); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 245–69 (1973). In this respect, Llewellyn anticipated by many years the phenomenon now known as the selection effect. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.4, at 567–71, § 21.15, at 600 (6th ed. 2003); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988). An excellent analytical overview of the literature is in Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictions of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999).

⁴ See L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 430–31 (1934); see also Myres S. McDougal, *Fuller v. the American Legal Realists: An Intervention*, 50 YALE L.J. 827, 828 (1941).

⁵ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958) [hereinafter Fuller, *Positivism and Fidelity to Law*]. Fuller addresses similar themes in a broader way in LON L. FULLER, *THE MORALITY OF LAW* 81–91 (rev. ed. 1969) [hereinafter FULLER, *THE MORALITY OF LAW*].

⁶ Fuller, *Positivism and Fidelity to Law*, *supra* note 5, at 662.

“in perfect working order”?⁷ Although the truck would plainly count as a vehicle in ordinary talk, it was hardly plain to Fuller that the truck ought to be excluded. Indeed, for Fuller it was not even clear whether the truck qualified as a vehicle at all in the particular context of this rule. We could not know whether the truck was within the scope of the rule, Fuller argued, without consulting the rule’s deeper purpose. His challenge was thus not to Hart’s conception of the penumbra, with which Fuller presumably would have had little quarrel.⁸ Rather, the hypothetical truck/memorial was a challenge to the idea of a language-determined core. In offering this example, Fuller meant to insist that it was *never* possible to determine whether a rule applied without understanding the purpose that the rule was supposed to serve.⁹

The debate over this simple example has spawned numerous interpretations, applications, variations, and not a few misunderstandings.¹⁰ The fiftieth anniversary of the debate, therefore, seems the

⁷ *Id.* at 663.

⁸ But not no quarrel: When making decisions in the penumbra, Hart argued, judges would exercise “discretion” to make decisions in more or less legislative (or administrative agency) style. HART, *THE CONCEPT OF LAW*, *supra* note 1, at 135–36. By contrast, Fuller’s belief that judges should look to “purpose,” FULLER, *THE MORALITY OF LAW*, *supra* note 5, at 145–51, 189–90, was, in theory if not in practice, more focused and more constraining than Hart’s open-ended approach.

⁹ In using the phrase “supposed to,” I attempt, with only limited success, to avoid terms having a meaning similar to that of “intended to.” Throughout his life, Fuller remained committed to law’s overall purpose, *see supra* note 8, and also to the particular purpose behind particular laws. The purpose that a reasonable person might see a presumably reasonable law as serving (which is how Fuller might well have put it), however, is very different from the intentions or mental states of the people who actually drafted or enacted the law. *See* *Richards v. United States*, 369 U.S. 1, 9 (1962) (“[W]e are faced with . . . a problem which Congress apparently did not explicitly consider . . .”); AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 265–68 (2005); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

¹⁰ Among the more extended discussions, some of which qualify as misunderstandings, are FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 212–15 (1991) [hereinafter SCHAUER, *PLAYING BY THE RULES*]; STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 200–06 (2001); Larry Alexander, *All or Nothing at All: The Intentions of Authorities and the Authority of Intention*, in *LAW AND INTERPRETATION* 357 (Andrei Marmor ed., 1995); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1333–41 (2000); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–13 (1980); Anthony D’Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 595–602 (1989); Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1460, 1463, 1474 (1997); Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 984, 989–99 (1990); Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 MD. L. REV. 1192 (1993); Andrei Marmor, *No Easy Cases?*, CANADIAN J.L. &

appropriate occasion on which to offer a guide to understanding a seemingly simple example that has mushroomed into something far larger. The hypothetical rule prohibiting vehicles in the park, and Fuller's response to what Hart likely initially believed to be its least controversial dimension, has become a lens through which many commentators have viewed more recent debates, including those about statutory interpretation, law's determinacy, the role of rules in law, and the nature of legal language, among others. If we can get clear about the issues involved in Hart and Fuller's disagreement over this one example, and if we can understand the strongest arguments on either side (only some of which were actually offered by either Fuller or Hart), we will have learned something important about numerous questions of legal theory and legal practice, questions that transcend what initially may appear to be a rather limited debate.

I

A DEBATE WITHIN A DEBATE

The Hart-Fuller debate was focused principally neither on Hart's example nor on Fuller's counterexample. Nor was this larger debate significantly one about legal rules, or about rules in general, or even about the interpretation of rules. Rather, the bulk of the debate consisted of a comprehensive and eventually defining controversy about legal positivism and its opponents, with Hart championing the former against Fuller's procedural variation on traditional natural law theory.¹¹ Conducted when Nazi atrocities committed in the name of the law were a recent memory,¹² the debate over the question whether a broadly positivist or instead a broadly natural law vision of law would be more conducive to morally right action figured prominently

JURISPRUDENCE, July 1990, at 61, 65–68; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 338–46 (1985); Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 SAN DIEGO L. REV. 519, 520–23 (2005); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514, 524–26, 533–34 (1988) [hereinafter Schauer, *Formalism*]; Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381 (1999); Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 76–77, 89, 96–101 (1999); Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 441, 456–57, 462–64, 473–77 (2001); William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 563–71 (2000) (reviewing JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999)); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2041–43 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)).

¹¹ In addition to the works cited in notes 1 and 5, *supra*, the debate also includes H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing FULLER, *THE MORALITY OF LAW*, *supra* note 5).

¹² See David Dyzenhaus, *The Grudge Informer Revisited*, 83 N.Y.U. L. REV. 1000, 1003–08 (2008).

in the articles of both men,¹³ as did an even deeper disagreement about the fundamental nature of law itself.

In discussing legal interpretation, and in using the rule prohibiting vehicles from the park to further that discussion, Hart does not appear to have taken very seriously the connection between the issue of interpretation and these larger moral and conceptual themes. Hart had something he wanted to say to the legal realists, and, like the chapter of *The Concept of Law*¹⁴ that the discussion of the no-vehicles-in-the-park example spawned, the debate about interpretation, with the example as its focal point, seems oddly removed from much of the surrounding debate about legal positivism and natural law.

This is not to say there was no connection at all. The question of how to understand and interpret a rule such as one prohibiting vehicles from the park does link to Hart's larger jurisprudential position, and he strains—albeit with less than complete success—to demonstrate this. If law is to be understood as not necessarily incorporating moral criteria for legal validity,¹⁵ then there must exist some possible rules in some possible legal systems that can be identified as legal without resort to moral criteria. And what better example could there be than a rule whose principal operative terms appear morally neutral, and whose application, at least at the core, would seem to avoid any recourse to morality? If the clear applications of the no-vehicles-in-the-park rule were plainly law, Hart appears to be arguing, then the inevitable use of morality (or justice, equity, policy, efficiency, or

¹³ Although Hart retreated slightly from such an overtly instrumentalist position in *THE CONCEPT OF LAW*, *supra* note 1, in 1958, he and Fuller shared the view that the worth of a theory of law lay partly in its tendency to foster the correct attitude towards morally iniquitous official action. See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005). See also Liam Murphy, *The Political Question of the Concept of Law*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 371 (Jules Coleman ed., 2001), a position subsequently modified in Liam Murphy, *Better To See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008).

¹⁴ HART, *THE CONCEPT OF LAW*, *supra* note 1, at 124–27.

¹⁵ The characterization of positivism in the text owes less to what Hart wrote in either 1958 or 1961 than to subsequent debates and interpretations about the character and forms of legal positivism. The flavor of these debates—ones that tend to treat *The Concept of Law* as the canonical legal positivist text—can be seen in the various contributions in, for example, *ANALYZING LAW: NEW ESSAYS ON LEGAL THEORY* (Brian Bix ed., 1998), *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* (Robert P. George ed., 1996), and *HART'S POSTSCRIPT*, *supra* note 13. Useful overviews of existing conceptions of legal positivism can be found in John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199 (2001), Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CANADIAN J.L. & JURISPRUDENCE 361 (1996), and Leslie Green, *Legal Positivism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2003), <http://plato.stanford.edu/entries/legal-positivism/>.

something else he would have considered nonlegal) in the interpretation of unclear rules (or largely clear rules in the region of their murkiness) would not undercut the basic positivist claim. No sensible positivist, even in Hart's time (or in Austin's for that matter, as Hart himself makes clear¹⁶), would claim that morality is never relevant or necessary for legal interpretation.¹⁷ But in order to support his case that morality is not always or necessarily relevant, Hart needs an example in which recourse to morality is unnecessary (or impermissible) to the performance of an act that is plainly—at least to Hart—deserving of the name “law.” The rule excluding vehicles from the park was just that example, and the application of that rule to clear cases in the core was for Hart just that morality-free legal act.

Making the link between the no-vehicles-in-the-park example and Hart's side of the debate about legal positivism is something of a reach, not least because of Hart's dual agenda of challenging the realists and challenging Blackstone.¹⁸ Much the same can be said about Fuller's side of the debate. Fuller's lifelong focus on the purpose of a law and the purpose of law provides an obvious connection between the interpretive debate and the debate about the nature of law,¹⁹ especially from Fuller's more or less natural law perspective. If law itself is by (Fuller's) definition just, then the demands of law would require

¹⁶ Hart, *Positivism and the Separation of Law and Morals*, *supra* note 1, at 609 n.34.

¹⁷ Some so-called “exclusive” positivists might say that even if recourse to morality is often part of what judges and other legal actors in legal systems do, they are not actually “doing law” or engaging in legal reasoning when they do it. See Joseph Raz, *Postema on Law's Autonomy and Public Practical Reason: A Critical Comment*, 4 LEGAL THEORY 1, 4–7 (1998). For a discussion of this aspect of exclusive positivism, see JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 105–07 (2001), and Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 CANADIAN J.L. & JURISPRUDENCE 17, 27–28 (1999).

¹⁸ I take Blackstone, along with Cicero and Fuller, but not Aquinas, as exemplary proponents of the “unjust law is not law” position often taken to be a central tenet of a prominent version of natural law theory. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *41, *70; CICERO, *THE LAWS*, at bk. 2, para. 13, *translated in* THE REPUBLIC AND THE LAWS 95, 126 (Jonathan Powell & Niall Rudd eds., Niall Rudd trans., 1998) (arguing that “unjust” law should not “be given the status or even the name of law”); see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 25–29, 364 (1980) (maintaining that Aquinas recognizes status and value of positive law as well as natural law); see also Frederick Schauer, *Positivism as Pariah*, in *THE AUTONOMY OF LAW*, *supra* note 15, at 31 (describing common caricatures of positivism and natural law). For a recent defense of the position taken by Blackstone and Cicero, see generally Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 CANADIAN J.L. & JURISPRUDENCE 201 (2007).

¹⁹ Fuller's preoccupation with purpose is evident in, for example, FULLER, *THE MORALITY OF LAW*, *supra* note 5, at 145–51, 189–90, LON L. FULLER, *ANATOMY OF THE LAW* 26–40 (1968), LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 55–59 (1940), and Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697 (1956).

that it understand particular legal acts in just or sensible or otherwise morally desirable ways. A legal outcome excluding the truck/memorial from the park would thus for Fuller not only be a silly one, but also one inconsistent with the deeper nature of law itself. This aspect of the connection between the interpretive debate and the debate about the nature of law is closer for Fuller than its counterpart is for Hart. Still, the connection is neither obvious nor necessary, and it seems fair to conclude that the no-vehicles-in-the-park example and its surrounding debate were largely, even if not completely, detached on both sides from many of the loftier moral and conceptual issues that were an important part of the larger debate.

The lack of a close connection between the interpretive debate and the conceptual one, however, is better seen as a strength than as a weakness. The value of Hart's example transcends his own use of it, and so too for Fuller's counterexample. For not only would one be hard-pressed to find a question about legal reasoning that is unconnected with one or the other position in the interpretive debate, but the questions of interpretation over which Hart and Fuller tussled are also serious and enduring ones, even when the issue of the nature of the concept of law is far in the distance.

II

AN UNFORTUNATE EXAMPLE

Fuller was of course compelled to take Hart's example as Hart presented it. But in terms of how we can best understand Fuller's larger point, an example using the word "vehicle" may have presented an unfortunate distraction.²⁰ In order to see why this is so, we must take the debate to a higher level of generality. That is, we have to understand that the question was not only the familiar one about the potential conflict between the text of a rule and its purpose²¹—between the letter of the law and its spirit—but about legal formality

²⁰ Hart almost certainly drew the example from *McBoyle v. United States*, 283 U.S. 25 (1931), a case in which the question was whether an airplane was a vehicle for purposes of a federal statute prohibiting transporting a stolen vehicle across state lines. *See id.* at 26. I suspect that Hart learned of the case while at the Harvard Law School in 1956–1957, and in particular that he learned of it from Henry Hart, Albert Sacks, or possibly even from Fuller himself. On Hart's sojourn at Harvard and the circumstances in which the article was written, see NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 179–208 (2004) [hereinafter LACEY, *A LIFE OF H.L.A. HART*], and Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1060–63 (2008).

²¹ *See* AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 77–80, 143–44 (Sari Bashi trans., 2005).

in all of its (defensible) guises.²² The question that the debate about vehicles in the park raises is the question of the ever-present potential for conflict between the letter of the law (about which much more will be said in the following Part) and what would otherwise be the best (fairest, wisest, most just, most optimal, etc.) resolution of a legal question. If the straightforward reading of the law produces a ridiculous or even merely suboptimal outcome, are legal actors required or even permitted to reach the right outcome instead of the outcome seemingly mandated by the plain meaning of the words on the page?

In order to frame this recurring conflict in the crispest possible way, it is important that following the letter of the law really does produce a poor outcome. And for this purpose the word “vehicle” might not do the trick. It is a colorable understanding of the word “vehicle” that something is not a vehicle unless, at the time we are applying the label, the thing we are describing has the capacity for self-propulsion, or at least for movement. If it cannot move, it might be said, it is not a vehicle.²³ It might be a former vehicle, or a quasi-vehicle, or even a vehicle-in-progress, but to be a real vehicle it must be able to move.

If this understanding of at least one meaning of the word “vehicle” is plausible, then it is no longer clear that the truck which has been “mount[ed] on a pedestal” as a military memorial is even a vehicle at all. We have all seen bronzed cannons, immobilized tanks, and flightless airplanes used as war memorials, and a tank—or a truck, for that matter—with all of its moving parts removed or welded fixed might not strike everyone as being a vehicle at all. That conclusion might not be much different if the truck used as a war memorial consisted of an otherwise fully functioning vehicle—Fuller did use the description “in perfect working order”—that was placed in a locked

²² See Schauer, *Formalism*, *supra* note 10, at 520–38 (defending possibility of constraint by literal meaning of rules); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 643–44, 669 (1999) (defending formalism when it produces fewer errors). Legal formalism is defensible not when it is the instrument for denying the extent to which a judge is exercising a genuine choice—when it treats choice as compulsion, as in Justice Peckham’s opinion in *Lochner v. New York*, 198 U.S. 45, 53 (1905)—but when it recognizes that guidance and constraint by precise language is often possible and sometimes desirable. In this latter sense, what some call “formalism” others would label “objectivity.” See KENT GREENAWALT, *LAW AND OBJECTIVITY* 14–15, 48–49, 71–73, 207–31 (1992) (connecting objectivity in interpretation with shared understandings of meaning); Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1 *passim* (1990) (same).

²³ Not only might it be said, it has been said. *The Shorter Oxford English Dictionary* includes within its definition of “vehicle” that the thing must be a “means of conveyance” and must be used “for transporting people, goods, etc.” 2 THE SHORTER OXFORD ENGLISH DICTIONARY 3512 (5th ed. 2002).

enclosure, or bolted to a base, or even simply had its battery or keys removed. At some point on a continuum these former vehicles move from nonvehicles (the bronzed and welded tank) to vehicles (the fully operational truck with the keys removed), but the point is that the issue might be seen as debatable.²⁴ Some degree of functionality may, and only may, be one of the necessary conditions for something being a vehicle at all and, insofar as this is so, then the example becomes a bit murky on the conflict between what the rule clearly requires and what the best result would be. If the truck/memorial is possibly not a vehicle at all, then the conflict dissolves, and the point of the example is lost.

Not so, however, with various other examples. Indeed, Fuller himself, perhaps recognizing the potential complications of the word “vehicle,” provides a different example. A page after talking about trucks being used as war memorials, he asks us to imagine a tired passenger who nods off in the station late at night while waiting for a delayed train.²⁵ In doing so, the passenger runs afoul of a “no sleeping in the station” rule, a rule plainly designed, says Fuller, as a restriction on the homeless (this being 1958, Fuller calls them “tramps”), who might seek to use the station as their residence.²⁶

This turns out to be a better example. Sleep is a physiological state, and as a matter of physiology Fuller’s businessman was sleeping. Period. It is true that there are uses of the word “sleep” that do not require physiological sleep, as when sleep is a euphemism for “have sex” or when it is used to describe a computer that has gone into low-power mode, but there are few instances of the reverse. If you are physiologically sleeping you are almost always sleeping in ordinary language, even if sometimes when you are sleeping in ordinary language you are not always physiologically sleeping. The no-sleeping-in-the-station example thus turns out to be a better one than the prohibition on vehicles in the park, because now the conflict between what the rule on its face requires and what a good outcome would be becomes much crisper and substantially less open to challenge on definitional grounds.

The same crispness of conflict is equally apparent in the now-prominent example of *Riggs v. Palmer*.²⁷ The force of using *Riggs* as

²⁴ But only barely. The familiar phrase “disabled vehicle” makes sense only because vehicles that do not work are still vehicles. In an imaginary debate between Fuller and the person who objects that the truck is no longer a vehicle, Fuller has the better of it, but not by so much as to render the example perfect for his purposes.

²⁵ Fuller, *Positivism and Fidelity to Law*, *supra* note 5, at 664.

²⁶ *Id.*

²⁷ 22 N.E. 188 (N.Y. 1889).

an example of one dilemma of legal reasoning is that the case also presents a well-defined opposition between what a rule says and what the morally right or sensibly right or all-things-considered right answer should be. Insofar as New York's Statute of Wills, as it existed in 1889, said plainly that anyone named in a will would inherit except in cases of fraud, duress, or incapacity at the time the will was made,²⁸ Elmer Palmer should clearly inherit according to the language of the statute,²⁹ even though his killing of the testator, his grandfather, makes this a morally abhorrent result. We now associate the case with Ronald Dworkin,³⁰ and with the Hart and Sacks materials on the Legal Process,³¹ but both *Riggs* and the sleeping businessman would have been clearer examples for Fuller than one using the word "vehicle," a word that is linguistically problematic for Fuller in just the wrong way.

So although some might therefore quibble over whether the military truck ceased being a vehicle at the moment it was mounted on a pedestal to become a war memorial, this is a peculiarity only of the example. The literature on statutory interpretation is replete with instances in which the conflict between the plain meaning of the most immediately applicable legal item and simple good sense is far less escapable, whether they be real cases like *United States v. Kirby*³² and *Church of the Holy Trinity v. United States*,³³ or hypothetical ones like Pufendorf's surgeon, who, in performing an emergency operation, runs afoul of the prohibition on drawing blood in the streets.³⁴ Conse-

²⁸ It is noteworthy that both the majority and the dissent in *Riggs* share this understanding of what the plain meaning of the statute required. Judge Earl for the majority said that "[i]t is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." *Id.* at 189. And in dissent Judge Gray insisted that "the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way." *Id.* at 192. For both the majority and the dissent, therefore, the facts of *Riggs* presented an inescapable conflict between the plain meaning of the statute and the best, fairest, or most just result.

²⁹ This is decidedly not the same as saying "should clearly inherit according to the law," for that is precisely the matter at issue.

³⁰ See RONALD DWORKIN, *LAW'S EMPIRE* 15–20 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 23–31 (1978).

³¹ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 68–102 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

³² 74 U.S. (7 Wall.) 482, 487 (1868) (finding that statute prohibiting obstruction of mail did not extend to law enforcement officer arresting mail carrier).

³³ 143 U.S. 457, 472 (1892) (finding that statute prohibiting paying passage of foreign labor was not violated when church hired new pastor from abroad).

³⁴ SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRO OCTO* (1672), as described in 1 WILLIAM BLACKSTONE, *COMMENTARIES* *60.

quently, we should not get hung up on the word “vehicle,” for the point of Fuller’s counterexample of the vehicle that has become a war memorial is a point that far transcends the peculiarities of the particular word.

The example of the no-vehicles-in-the-park rule turns out to be doubly unfortunate because it also allows Fuller mistakenly to suppose that Hart’s argument turns on the meaning of individual words taken in isolation. Fuller stresses that Hart’s mistake is in thinking that a single word by itself can tell us what a rule means, but Hart makes no such claim. Indeed, had Hart anticipated that Fuller would challenge him on this point, he might have used a better example, such as the language in *Riggs*, or, better yet, *Kirby*. For although it is pretty clear what the language in the statute at issue in *Kirby*—“willfully obstruct or retard the passage of the mail, or of any driver or carrier”³⁵—means, very few questions of meaning, and certainly not the question at issue in *Kirby* itself, would focus on any one of those words in isolation. So while Hart used an example that turned out to be susceptible to Fuller’s misaimed charge, nothing in Hart’s larger point is inconsistent with the (correct) view that it is sentences, not individual words, that are the principal carriers of meaning.³⁶ Hart’s claim, at least in 1958, was that the statutory language, as language, would generate some number of clear or core applications, and this is a claim that does not at all depend on whether it is this or that particular word in a rule or statute that is expected to carry most of the load.

III

THE MEANING OF MEANING³⁷

Fuller’s challenge to Hart’s theory of meaning is broader than just the question whether it is the word or the sentence that is the principal transmitter of meaning. For Fuller, Hart’s mistake in believing that words can have meanings in isolation is the mistake of ignoring the importance of context, of ignoring the maxim that meaning is use, and, in essence, of not having read his Wittgenstein.³⁸ Once we recognize that meaning is use, Fuller appears to argue, we cannot avoid the fact that it is the use in the particular context that is

³⁵ 4 Stat. 104 (1825), quoted in *Kirby*, 74 U.S. at 483.

³⁶ See W.V. Quine, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 69, 72 (1969) (understanding “contextual definition” as “recognition of the sentence as the primary vehicle of meaning”).

³⁷ With apologies to Ogden and Richards. Cf. C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING* (1923).

³⁸ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 2d ed. 1958).

the appropriate unit of understanding. If we appreciate this understanding of contextual definition, he seems to be saying, then we must realize that, in the *particular* context of applying a rule prohibiting vehicles from the park to a *particular* military truck used as a war memorial, the alleged vehicle may simply not be a vehicle at all.

But even if Fuller were right (which he was not) about Hart being committed to a so-called pointer theory of meaning and about Hart believing that the chief unit of meaning was the word, it does not follow that meaning resides solely or even principally in the full immediate context in which words and sentences are used. This is a common view,³⁹ but its ubiquity, like the ubiquity of belief in the explanatory validity of astrology, is no indicator of its soundness. For if meaning only existed in the particular context in which words and sentences are used, it is hard to see how we could talk to each other. It is true that the compositional nature of language—the ability to understand sentences we have never heard before—is one of the hardest and most complex of questions concerning the nature of language. But anything even residing in the neighborhood of the “meaning is use on a particular occasion” view of language fails even to address the compositional problem: Without knowing something about words and sentences and grammar and syntax as general or acontextual rules (or, even better, conventions), we could never hope to understand each other. The full particular context may indeed add something or even a great deal to our understanding, but we will understand virtually nothing at all about “the cat is on the mat” unless we understand that this sentence carries meaning by drawing on shared acontextual understandings of the facts that the word “cat” refers to cats, that the word “mat” refers to mats, and that the words “is on” refer to a certain kind of relationship that differs from the relationship described by phrases such as “is under,” “is near,” or “is a.”⁴⁰

³⁹ See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 709–13, 759–60 (1985) (insisting that linguistic meaning depends on subjective intention); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1456 (1990) (“No act of reading can stop at the plain meaning of a document . . .”); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1332 (1984) (claiming that all interpretation is inside context and that external constraint by rules is impossible).

⁴⁰ See JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 117–26 (1979); P.F. Strawson, *On Referring*, in *ESSAYS IN CONCEPTUAL ANALYSIS* 21, 30–31 (Antony Flew ed., 1956); see also MICHAEL DUMMETT, *THE INTERPRETATION OF FREGE'S PHILOSOPHY* 364 (1981); Paul Ziff, *On H.P. Grice's Account of Meaning*, 28 *ANALYSIS* 1, 7 (1967).

When Wittgenstein, J.L. Austin,⁴¹ and all of their fellow travelers in Cambridge and Oxford, respectively, talked about meaning being use, they were talking not about particulars but about rules or conventions. And they were talking about the rules or conventions that constitute any language. The way the word “cat” is used in a particular linguistic community is what determines the meaning of the word “cat,” but it is the *community* that is the key. That linguistic community could decide (in a nonconscious sense of that word) over time that the word “cat” would refer instead to dogs or sheep or sealing wax, and in just that sense the meaning of a word or, better, a sentence is a function of how that sentence is now used by the relevant linguistic community.

Still, nothing in the view that linguistic communities determine meaning by how they in fact use language entails the view that meaning is entirely or even largely a function of how particular individuals use language on particular occasions. In baseball there used to be, prior to the modern era of interleague play, a difference between a strike in the American League and a strike in the National League, even though the umpires in the respective leagues both purported to be interpreting the same words in the same written book of rules.⁴² Yet no one suggested that an American League umpire was free to call balls and strikes according to National League criteria. If he did, he would have been criticized or sanctioned for violating a rule that reflected a continuously changing practice, but which possessed sufficient short-term fixity in the face of longer-term flexibility that we could usually understand at any point of time who was following the rules and who was breaking them. The fact that the Constitution adopted in 1787 referred to a “*Republican* Form of Government”⁴³ does not mean that we cannot now distinguish the party affiliation of Barack Obama from that of John McCain. And it is hardly nonsense to speak of standing still while on a moving train. Although the conventions of language change over time or in different contexts, they still have the capacity to carry meaning at any given time, and this conclusion applies no less to the language of the law than it does to language in general.

⁴¹ See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

⁴² See Murray Chass, *In the Early Returns, American League Hitters Have the Upper Hand*, N.Y. TIMES, Apr. 13, 1997, § 8, at 8; Tim Sullivan, *High Time for “New” Strike Zone*, CINCINNATI ENQUIRER, Feb. 25, 2001, at 1C.

⁴³ U.S. CONST. art. IV, § 4 (emphasis added).

In misunderstanding the lessons of “use” and “context” that dominated the philosophy of language of his times,⁴⁴ Fuller failed to understand the basic problem of language—our ability to understand sentences we have never heard, people we have never met, and propositions we have never previously encountered. And thus Fuller failed to understand why as an American English-speaking lawyer I can understand far more on a first reading of a New Zealand statute about corporate insolvency, a topic about which I am completely ignorant, than I can on a first reading of a French code provision about freedom of expression, a subject about which I have considerably more knowledge.

Fuller’s misguided foray into the philosophy of language is ironic, because it damaged his own case. Insofar as he wished to employ the military truck/war memorial example to demonstrate how legal language may not always produce the correct all-things-considered result or to show that language may not always accurately reflect a rule’s purpose, Fuller needed to rely on the fact that legal language transmitted meaning apart from its particular application. The vividness of Fuller’s counterexample stems precisely from the fact that the truck *is* a vehicle.⁴⁵ If Fuller had instead offered the counterexample of a veterans group that wished to plant a bed of poppies as a war memorial, we would have thought him daft, because it is implausible that a bed of poppies would be prohibited by a “no vehicles in the park” rule. Only because a truck is a vehicle in the way that a bed of poppies is not does the example have its sting. Like pitchers trying to explain the physics of the curveball or artists venturing into philosophical aesthetics, Fuller’s examples demonstrated an intuitive and correct understanding of the problem which his explanations served only to undercut.

A related problem arises with respect to the distinction between plain and ordinary meaning. Putting aside any question about words as opposed to sentences, Hart’s point was basically one about plain meaning, although he did not explicitly take up the question of the linguistic community or subcommunity within which the meaning would be plain. An automobile is plainly a vehicle, Hart argues, but the fact that what counts as a vehicle in ordinary language is (usually) the same as what counts as a vehicle in legal language does not mean that law is committed to the ordinary meaning of ordinary terms.

⁴⁴ See Fuller, *Positivism and Fidelity to Law*, *supra* note 5, at 669.

⁴⁵ Subject to the qualifications in Part II, *supra*.

There are times when law uses language of its own making, often in Latin—replevin, assumpsit, quantum meruit, habeas corpus, res judicata—and sometimes even in English—bailment, demurrer, due process, joinder, interpleader, easement. Such terms have little if any meaning for the layperson, but they can still have plain meanings in law and for lawyers and judges. So as long as one believes in anything close to plain or literal meaning at all,⁴⁶ such terms, when used inside the legal world, do not present special problems. Like the words of ordinary language, the meaning here is determined by the rules of use of the relevant linguistic community, but here that community is the community of legal actors rather than the men on the Clapham omnibus.

Things become somewhat more problematic, however, when terms have both ordinary and technical legal meanings. We know that “due process” in the Fifth and Fourteenth Amendments has a legal/constitutional meaning with no ordinary counterpart. The women on the D train are no more likely ever to use the term than are the men on the Clapham omnibus. But the same does not hold true for “speech” and “religion” in the First Amendment⁴⁷ or “arms” in the Second⁴⁸ or “searches” in the Fourth.⁴⁹ Here there are both ordinary and legal meanings, and the question is about the relation between them. So too outside of constitutional law, where words such as “trespass,” “complaint,” and even “contract” have legal meanings that diverge from their nonlegal ones.

This is not the place to engage in an in-depth analysis of the relationship between ordinary language and legal language.⁵⁰ My point here is only that there is nothing about the existence of law itself as a relevant linguistic community that entails that every person is his or her own linguistic community. Just as there can be plain (legal) meanings of terms like replevin and bailment, so too can there be plain (legal) meanings of terms like speech and contract. That Hart and Fuller were debating, in part, about the extent to which plain meaning is dispositive in the interpretation or application of a formulated rule says nothing about whether that meaning need be ordinary or technical—whether the terms be everyday ones or terms of art. And although Fuller does not exactly say this, one senses in his challenge a

⁴⁶ For my own longer discussion of plain or literal meaning in the context of rules, see SCHAUER, *PLAYING BY THE RULES*, *supra* note 10, at 53–64.

⁴⁷ U.S. CONST. amend. I.

⁴⁸ U.S. CONST. amend. II.

⁴⁹ U.S. CONST. amend. IV.

⁵⁰ A good exploration of the issues is Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271 (1989).

flavor of the belief that if law can be a relevant linguistic community and a relevant linguistic context, then there is no limit to the smallness of the context that should concern us. This is a mistake about the relationships between language and community and between language and rules, but it is not a mistake that detracts from the basic problem: Sometimes language will simply give the wrong answer, and the problem for law is the problem of what, if anything, to do about it.

IV

CORES, PENUMBRAS, AND OPEN TEXTURE

Hart employs the “no vehicles in the park” rule as a way of explaining the problem of the penumbra, but it is important to distinguish two very different types of penumbral problems, problems signaled in Hart’s 1958 contribution but not developed fully until *The Concept of Law* three years later.

One type of penumbral problem, if we can even call it that, is the problem of pervasive vagueness.⁵¹ Although Hart focused on statutes with a clear core and a vague penumbra, some legal rules resemble penumbra all the way through. It is true that there exist intentionalist theories of interpretation that would find in the drafters’ mental states a clear set of intended applications even when the language of a legal text is unclear,⁵² and in that way “cure” the vagueness of a vague text. But if we put aside such an approach and focus just on the language, we find that on occasion legal language is so vague by itself that there is nothing clear at all. Without recourse to the original intentions of the drafters (or possibly, as Justice Scalia would have it, to potentially narrower contemporaneous meanings⁵³), there may be *no* clear instances of which searches and seizures are “unreasonable” under the

⁵¹ Vagueness in law is a far larger issue than I can hope to deal with in this Article. For comprehensive analytic discussions of the topic, see TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* (2000), Timothy A.O. Endicott, *Vagueness and Legal Theory*, 3 *LEGAL THEORY* 37 (1997), and Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 *CAL. L. REV.* 509 (1994). And for a collection of valuable attempts to link legal with philosophical thinking about vagueness, see Symposium, *Vagueness and Law*, 7 *LEGAL THEORY* 369 (2001).

⁵² See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 4, 9, 404–05, 410–27 (2d ed. 1997) (insisting that original intentions are “binding” and can clear up meaning of otherwise indeterminate language); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. U. L. REV.* 226, 228–35 (1988) (distinguishing use of original intentions from interpretive approach that looks only to words of legal text); Earl M. Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, 42 *OHIO ST. L.J.* 209, 210 (1981) (explaining that recourse to original intentions can limit judicial authority when constitutional text is indeterminate).

⁵³ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). For a careful and balanced exploration of the “original meaning” position

Fourth Amendment; which forms of inequality are the focus of the Fourteenth Amendment's prohibition on the denial of the "equal protection of the laws"; when a "contract, combination, . . . or conspiracy" is "in restraint of trade or commerce" for purposes of the Sherman Antitrust Act;⁵⁴ which custody decisions are in the "best interests" of the child;⁵⁵ and just how fast one may drive when the only relevant rule says simply that one's driving must be "reasonable" and "prudent."⁵⁶ With respect to examples like these, there is no reason to believe that Hart would not have taken the position that *all* applications (questions of precedent and *stare decisis* aside) of such rules require an exercise of judicial discretion, and that judicial discretion necessarily requires recourse to extralegal factors. And there is no reason to believe that Fuller would have disagreed, except of course with the designation of such factors as "extralegal." So although this kind of pervasive vagueness is widespread, and although it requires the type of judicial behavior that Hart saw in the penumbras around clearer cores, this is not an issue about which Hart and Fuller, except perhaps for terminology, would have had much disagreement.

So what, then, *is* a penumbra, whether in the context of language generally or of legal language specifically? In explaining the idea of penumbral language, Hart borrows in part from Bertrand Russell, who in his enduring article on "vagueness" drew a distinction between the core and the fringe.⁵⁷ He borrows even more, however, from Friedrich Waismann, whose elaboration of Wittgensteinian themes brought us the idea of "open texture."⁵⁸ Russell was concerned principally with line-drawing and boundaries, and he relied on the example of baldness as a way of showing that the inability to draw a sharp demarcation between two words or concepts does not mean that there was no distinction to be had. So in this companion to the classic paradox of *sorites*,⁵⁹ Russell asked us to recognize that although there

and the differences between it and an "original intentions" approach, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 553-78 (2003).

⁵⁴ 15 U.S.C. § 1 (2000).

⁵⁵ E.g., ARIZ. REV. STAT. ANN. § 25-403 (2007); MASS. GEN. LAWS ch. 119, § 23 (2003); MICH. COMP. LAWS ANN. § 722.23 (West 2002); accord CAL. FAM. CODE § 3011 (West 2004) (using phrase "the best interest of the child").

⁵⁶ MONT. CODE ANN. § 61-8-303(1) (1995), *invalidated* by State v. Stanko, 974 P.2d 1132 (Mont. 1998). The history of Montana's experience with and without numerical speed limits is recounted in great detail in Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999).

⁵⁷ Bertrand Russell, *Vagueness*, 1 AUSTRALASIAN J. PHIL. 84 (1923).

⁵⁸ Friedrich Waismann, *Verifiability*, in LOGIC AND LANGUAGE: FIRST AND SECOND SERIES 122, 125 (Antony Flew ed., Anchor Books 1965) (1951).

⁵⁹ General discussions of linguistic vagueness and the *sorites* paradox can be found in, for example, LINDA CLAIRE BURNS, VAGUENESS: AN INVESTIGATION INTO NATURAL

might be some cases in which we would be unsure about whether a man was bald or not,⁶⁰ this does not mean that there are not men who are clearly bald and men who are clearly not. And so too with vehicles: The line between a vehicle and a nonvehicle is fuzzy—and this is presumably what Hart had in mind in offering bicycles, roller skates, and toy automobiles as examples—but this does not mean, Hart argued, that standard ordinary automobiles are not clearly vehicles, nor, he might have said, that lovers quietly strolling hand-in-hand in the park are not nonvehicles. In this respect, the penumbra consists of those anticipated applications of a term that we know now will present uncertainties or indeterminacies, just as we know now that a rule requiring drivers to have their lights on after dark will be vague with respect to dusk and that the mostly clear distinction between frogs and tadpoles will become vague at some point on a tadpole's journey towards becoming a frog. In offering the example of the no-vehicles-in-the-park rule, and in speaking of the core and the penumbra, Hart was presumably asking us to see that for many or even most rules we can, even at the time of drafting, imagine that there will be hard cases as well as easy ones,⁶¹ but that the existence of the hard ones—the indeterminacy claims of the legal realists notwithstanding—does not mean that there are not easy ones as well, just as there are clear examples of frogs, tadpoles, night, day, and, of course, vehicles.

Waismann's valuable addition to what was in his time well known about vagueness was the conclusion that it is impossible to eliminate the *potential* for vagueness in even nonvague terms, and this is the phenomenon he called "open texture."⁶² Even the most precise term has the potential for becoming vague upon confronting the unex-

LANGUAGES AND THE SORITES PARADOX (1991), TIMOTHY WILLIAMSON, VAGUENESS (1994), and Dominic Hyde, *Sorites Paradox*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2005), <http://plato.stanford.edu/entries/sorites-paradox/>. The paradox of baldness, *falakros*, in fact has the same origin—Eubulides of Miletus—as the paradox of *sorites*, the heaper. *Id.*

⁶⁰ Ten or so years ago, I used to see an example of this when I looked in the mirror.

⁶¹ Which is not to say that there will be clear lines between the hard cases and the easy ones. The boundary between the core and the penumbra is itself a fuzzy one, and it is towards precisely this issue that the longstanding debates about the *sorites* paradox are directed.

⁶² A generation of law professors (who shall remain unnamed here), perhaps attempting to look sophisticated, has used "open texture" as a synonym for "vagueness." As Waismann made very clear, the two are not the same, and he used the term "open texture" to refer to the ineliminable potential for vagueness surrounding even the clearest of terms. Waismann, *supra* note 58, at 126–27. Hart unfortunately fostered some of the problem, for in *The Concept of Law* we see the phrase "vagueness or 'open texture,'" which in context was ambiguous as to whether Hart was describing two different phenomena or whether he was merely providing two terms for the same idea. HART, *THE CONCEPT OF LAW*, *supra* note 1, at 123.

pected, Waismann argued, and so no amount of precision can wall off every possibility of future but now unforeseen and even unforeseeable vagueness. When Hart's friend and Waismann's contemporary J.L. Austin talked of the exploding goldfinch,⁶³ he vividly captured the same idea, for his point was that even if we could now describe with total precision the necessary and sufficient conditions for "goldfinchness," "we [would not] know what to say"—"words [would] literally fail us"—when confronting a creature that was a goldfinch according to all of the existing criteria, but which proceeded to explode before our eyes.⁶⁴ In other words, the unexpectedly exploding goldfinch would render vague what we had previously thought clear, just as the unexpectedly vehicle-like war memorial would render vague what might have been thought to be the clear part of the no-vehicles-in-the-park rule.

Fuller's example of the truck/memorial thus presents an interesting question with respect to the idea of open texture. Fuller presented the example as a case involving legal uncertainty arising from linguistic certainty—or at least should have—and it raises an important question with respect to the relationship between linguistic open texture and what we might think of as legal open texture.⁶⁵ It is certainly possible to imagine legal uncertainty arising out of unexpected linguistic uncertainty: If we had a statute that protected goldfinches as, say, endangered species or national symbols,⁶⁶ a sudden awareness of the existence of an exploding goldfinch would have made the law uncertain—it would have produced an indeterminate application—just because that event would have made the language in which the law was written uncertain as well.

More commonly, however, and this is the point of Fuller's example, as well as Pufendorf's, as well as of real cases like *Riggs*,⁶⁷ *Kirby*,⁶⁸ and *Church of the Holy Trinity*,⁶⁹ our language does not fail

⁶³ J.L. AUSTIN, *Other Minds*, in *PHILOSOPHICAL PAPERS* 76, 88 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

⁶⁴ *Id.*

⁶⁵ See Frederick Schauer, *On the Supposed Defeasibility of Legal Rules*, in *CURRENT LEGAL PROBLEMS* 1998 (M.D.A. Freeman ed., 1998); see also Neil MacCormick, *Defeasibility in Law and Logic*, in *INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING* 99 (Zenon Bankowski, Ian White & Ulrike Hahn eds., 1995); Richard H.S. Tur, *Defeasibility*, 21 *OXFORD J. LEGAL STUD.* 355 (2001).

⁶⁶ Imagine, if you will, the case of the exploding bald eagle.

⁶⁷ *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); see *supra* notes 27–29 and accompanying text.

⁶⁸ *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868); see *supra* note 32.

⁶⁹ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); see *supra* note 33. An important and interesting disagreement about the actual facts and legislative history can be found in Adrian Vermeule, *Legislative History and the Limits of Judicial Compe-*

us but our law does. The language is clear, and the application is linguistically clear, but following the clear language will lead to what appears to be a wrong or unjust or unwise or inequitable or silly result. In such cases we do not have linguistic open texture, but we might have legal open texture, and it is in such cases that legal decisionmakers must decide what to do. For Fuller, the law should always in such cases seek to come up with the reasonable result, and from this premise Fuller derives the conclusion that there are no purpose-independent, clear, easy, or core cases.

Interestingly, Hart may not have completely disagreed with Fuller about the proper outcome of the truck/memorial case, although he might have disagreed with the route that Fuller took to get there. When Hart says in *The Concept of Law* that legal rules are necessarily always subject to exceptions, and that the grounds for creating such exceptions cannot be specified in advance,⁷⁰ we see in Hart the through-and-through mentality of the common law lawyer. Common law rules are always subject to modification at the moment of application, and it is characteristic of the common law that it treats a ridiculous or even somewhat suboptimal outcome generated by an existing common law rule as the occasion for changing the rule. If “no vehicles in the park” were a common law rule, there is little doubt that Hart would have expected the common law judge to change the rule into “no vehicles in the park except for war memorials,” or something of that sort. Indeed, Hart verges on suggesting in his discussion of the always open “unless” clause that this is not only a characteristic of the common law, but a necessary feature of law and a necessary feature of rules.

In this Hart was mistaken. As most civil lawyers would understand, and as Jeremy Bentham would have applauded,⁷¹ sometimes

tence: The Untold Story of Holy Trinity Church, 50 STAN. L. REV. 1833, 1885–96 (1998) (challenging Supreme Court’s understanding of pertinent legislative history), and Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (supporting Court’s historical understanding and *Church of the Holy Trinity* outcome).

⁷⁰ Hart had made a seemingly similar claim earlier when he said that legal concepts could not be defined except “with the aid of a list of exceptions or negative examples.” H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC’Y (NEW SERIES) 171, 174 (1948–49). But by itself this is a mild and almost certainly sound claim. It was not until Hart added in *The Concept of Law* that the list of exceptions could never be specified in advance—that law was necessarily continuously open to new exceptions—that the claim became more debatable. A claim similar to Hart’s can be found in Neil MacCormick, *Law as Institutional Fact*, 90 LAW Q. REV. 102, 125 (1974).

⁷¹ Bentham would have preferred a code so precise and prescient that such a thing would almost never occur. See, e.g., Letter from Jeremy Bentham to Pres. James Madison (Oct. 1811), in THE COLLECTED WORKS OF JEREMY BENTHAM 5, 7–15 (Philip Schofield & Jonathan Harris eds., 1998) (stressing importance in legal code of correctness, complete-

the language of a rule generates a bad result, and sometimes we have to live with that bad result as the price to be paid for refusing to empower judges or bureaucrats or police officers with the authority to modify the language of a rule in the service of what they think, perhaps mistakenly, is the best outcome.⁷² This is the argument for a plausible formalism, and in this respect Hart's commitment to the continuous flexibility of the common law may have made him no more of a formalist than Fuller.

V

THE NATURE OF THE DEBATE

So what, precisely, were Hart and Fuller fighting about? What really were their differences regarding the no-vehicles-in-the-park rule? These questions are even more relevant in light of what might appear to some to be Hart's "concession" in the Preface to *Essays in Jurisprudence and Philosophy*.⁷³ Here, Hart acknowledged that the distinction between the core and the penumbra was not necessarily, at least in law, located in the language in which a rule is written. The law could, Hart concedes, distinguish the core from the penumbra on the basis of purpose or of intent, and were the law to do so, it might very well exclude the truck/vehicle from the reach of the rule, thus allowing it to be erected in the park.

At this point, it appears that the debate has become, in part, an empirical one. Fuller can be best understood as claiming that the reasonable and purpose-based interpretation of the no-vehicles-in-the-park rule is a *necessary* feature of law properly so called.⁷⁴ And, if we forgive Hart for what he said about "unless" in *The Concept of Law*, Hart might now be understood, postconcession, as saying that the recourse to purpose or common sense is a possible and even arguably

ness, and ability to impart clear knowledge of what law requires). Moreover, Bentham's skepticism about judges, judicial power, and the common law was so pervasive that he would hardly have approved of allowing to judges the updating function that is well-recognized in common law countries. Compare JEREMY BENTHAM, TRUTH VERSUS ASHHURST (1823), reprinted in 5 THE WORKS OF JEREMY BENTHAM 231, 235–37 (photo. reprint, Russell & Russell, Inc. 1962) (John Bowring ed., 1843) (castigating almost all aspects of common law and common law judges), with GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 170–74 (1982) (sympathetically describing updating function).

⁷² See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); cf. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000) (applying same theme to judicial interpretation of contracts).

⁷³ H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 8 (1983).

⁷⁴ For a similar argument that an equitable override of inequitable statutory or common law outcomes is a necessary feature of law itself, see Tur, *supra* note 65.

desirable feature of a legal system, but that it is not a necessary component of the concept of law.

This is a real disagreement about the concept of law, but there is also an empirical disagreement between Hart and Fuller. Fuller is arguing not only that his purpose-focused approach is a necessary feature of law properly so called, but also that it is an accurate description of what most judges and other legal actors would actually do in most common law jurisdictions. On this point Hart might well be read as being agnostic, but there is still a tone in Hart of believing that Fuller not only overestimates the role of purpose in understanding the concept of law, but may well also be overestimating the role of purpose and underestimating the role of plain language in explaining the behavior of lawyers and judges. And if this is not what Hart would have said, and it may not have been, then it may well be what he should have said.⁷⁵

Thus, although much of the debate appears to be a nonempirical one, it also has an empirical side, a side in which Fuller and Hart hint at opposing descriptions of the role of language-determined cores in producing actual legal outcomes in actual legal systems. Moreover, even as Hart conceded that the core of a rule might be determined by something other than the plain meaning of the rule's language, he did not go so far as conceding that anything other than first-level purpose—the purpose of a particular rule—might take the place of language in distinguishing the core from the penumbra. In this respect, Hart would almost certainly have bridled at the prospect of a judge setting aside both the purpose and the language of a rule when the two together produced a poor outcome from the perspective of broader conceptions of justice, fairness, efficiency, or wise policy. And here we suspect that Fuller may well have been more sympathetic to such an outcome because of his commitment to purpose, not only to the particular purpose behind particular rules, but also to the idea that law as a whole had a purpose—the reasonable regulation and organization of human conduct—the frustration of which was always to be avoided.⁷⁶

Seen in this way, the example of the no-vehicles-in-the-park rule also suggests a real debate about the role of the judge. One way of

⁷⁵ On the extent to which Hart can be understood as making empirical claims, admittedly sub silentio, about the operation of the legal systems he knew best, see Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1912 (2004) [hereinafter Schauer, *The Limited Domain of the Law*], and Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 860–61 (2006) (reviewing LACEY, *A LIFE OF H.L.A. HART*, *supra* note 20).

⁷⁶ See sources cited *supra* note 19.

understanding Fuller, and possibly theorists such as Ronald Dworkin⁷⁷ and Michael Moore⁷⁸ as well, is as believing that the good judge is one who sets aside the plain language of the most directly applicable legal rule in the service of purpose, or of reasonableness, or of making law the best it can be, or of integrity, or simply of doing the right thing. Dworkin's sympathy with the outcome in *Riggs* makes this clear for him,⁷⁹ and Fuller's only slightly less overt sympathy for his mythical Justice Foster in *The Case of the Speluncean Explorers*⁸⁰ is in the same vein.

So then the question is a slightly different one. If the plain meaning of a rule, or of "the law" positivistically understood,⁸¹ generates a wrong, silly, absurd, unjust, inequitable, unwise, or suboptimal outcome (and these are not all the same thing), then is it the job of the judge to do something about it? This is a question of role morality, and just as some would argue that justice is best done if lawyers fight for their clients and not justice,⁸² that truth may emerge from the clash of often false ideas,⁸³ and that economic progress for all comes from the invisible hand of the market while individual economic actors pursue only their own well-being,⁸⁴ it might be the case that the best legal system is one in which individual judges do not seek—or at least do not always seek—to obtain the all-things-considered best outcome.⁸⁵ Neither Hart nor Fuller addresses this issue directly, but one cannot help believing that on this question it is Fuller who far more likely prefers the justice-seeking judge and Hart who might under-

⁷⁷ DWORKIN, *LAW'S EMPIRE*, *supra* note 30, at 37–43; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 30, at 23–39.

⁷⁸ Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 381–96 (1985) (arguing that judge has responsibility to pursue morally correct outcome even if ordinary meaning of legal language indicates otherwise); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 178–202 (1981) (discussing necessary role of moral considerations in legal interpretation).

⁷⁹ *E.g.*, DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 30, at 23.

⁸⁰ Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 620–26 (1949).

⁸¹ For the conception of positivism that informs this statement, a conception that finds its roots in Bentham, Austin, and, more controversially, Hart, but a conception that is decidedly nonstandard in some of the current debates, see Schauer, *The Limited Domain of the Law*, *supra* note 75.

⁸² *See, e.g.*, MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958); Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. ASS'N B. CITY N.Y. 534, 535–45 (1975).

⁸³ *See, e.g.*, JOHN STUART MILL, *ON LIBERTY* ch. II (Prometheus Books 1986) (1859).

⁸⁴ *E.g.*, ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS IV–V* 32–33 (Andrew Skinner ed., Penguin Books 1999) (1776).

⁸⁵ And something like this claim is implicit in any serious defense of legal formalism. *See supra* note 22.

stand that in law, seeking justice is not always or necessarily part of the job description of either the lawyer or the judge.⁸⁶

VI WHO WON?

There are, to be sure, people who cannot see a debate without insisting that we pick a winner and a loser. Many of those same people cannot see a list or collection of two or more items without ranking the items on the list. But we are not choosing between Hart and Fuller for a single position on a law faculty. They are, after all, both dead, and that appears to make them unlikely candidates for faculty appointments.⁸⁷ Thus, it may not really matter whether anyone won or lost the debate. Much more important is what the debate as a whole illuminated and what the particular example of the no-vehicles-in-the-park rule revealed about one of the central dilemmas of law. Most of what we have learned comes not from Hart's original example itself, nor solely from Fuller's counterexample, but from the conjunction of the two. Looking at the conjunction, we might say that Hart's basic point about the core and the penumbra was properly influential, and demonstrated not only his firsthand knowledge of how law worked,⁸⁸ but also the sophistication, for the times, of his philosophical knowledge.

Although Fuller's philosophical forays were far clumsier, it may be important to remember that Fuller offered a highly resonant picture of modern common law legal systems, especially (though not exclusively) in the United States. In an environment in which law professors who urge judges to rewrite statutes to make them less obsolete can go on to become judges themselves,⁸⁹ in which the instrumentalist, anti-literal, and anti-formal approach exemplified by cases like

⁸⁶ This difference of opinion between Fuller and Hart may have been partly a function of the fact that Fuller seems more focused on an audience of lawyers and law students, while Hart is interested more in an external description of the operation of the law, albeit one that includes an external description of a judge's internal point of view. Frederick Schauer, *Fuller's Internal Point of View*, 13 *LAW & PHIL.* 285, 298-308 (1994).

⁸⁷ Which is not to say that we might not prefer to have them, even dead, over some of our colleagues.

⁸⁸ Hart spent almost nine years as a barrister, specializing in equity. See LACEY, *A LIFE OF H.L.A. HART*, *supra* note 20, at 45-46, 84. And although as a barrister he presumably spent some time in court, he was likely, given the nature of his practice, to have spent a considerable amount of time writing opinions about the core meanings of complex trusts and related documents. *Id.* at 46.

⁸⁹ See CALABRESI, *supra* note 71, at 163-66. For similar arguments supporting a statute-revising function for the courts, see Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 *MICH. L. REV.* 672 (1987), and Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 *HARV. L. REV.* 892, 912-15 (1982).

Riggs, *Kirby*, and *Church of the Holy Trinity* is a major component of the legal and judicial arsenal; and in which judges may without fear of impeachment set aside the plain language of even the Constitution in the service of something larger or deeper,⁹⁰ Fuller may have correctly captured something important about the legal system he knew best. Even with respect to Great Britain, a legal environment more formal than that of the United States but in which judges still sometimes use broad conceptions of equity to defeat an otherwise unfortunate application of a legal rule,⁹¹ Fuller's description may capture an element of actual adjudication and legal practice that Hart had neglected or slighted.

Riggs, *Kirby*, and *Church of the Holy Trinity* are of course not all or even most of American law, to say nothing of law in jurisdictions more formal and less instrumentalist than the United States.⁹² Even in America, cases like *United States v. Locke*⁹³ and *Tennessee Valley Authority v. Hill*⁹⁴ represent part of the fabric of the law, and although *Riggs* has become famous, there are in fact numerous decisions in which unworthy beneficiaries who were in some way responsible for the testator's death have been permitted to

⁹⁰ See *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)) (holding that literal meaning of Contract Clause is not conclusive); see also *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (holding that state cannot be sued by own citizens despite Eleventh Amendment's literal meaning); *Hans v. Louisiana*, 134 U.S. 1, 10–11, 15 (1890) (same).

⁹¹ See, e.g., *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, 339 (1974) (U.K.) (holding that standard contract law will not be enforced where there is "inequality of bargaining power" and terms are "very unfair"); *In re Vandervell's Trust (No.2)*, [1974] Ch. 269, 322 (U.K.) ("If the law should be in danger of doing injustice, then equity should be called in to remedy it."); *Central London Prop. Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, 134–35 (1946) (U.K.) (concluding that "fusion of law and equity" allows enforcement of promise even where there is no consideration); see also PATRICK DEVLIN, *THE JUDGE* 90–93 (1979) (discussing more examples of such cases in English law). For an analysis of the even more common American equivalent, see Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 68, 72–80 (2007).

⁹² See generally P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* (1987) (concluding that formal approaches to law are more common in English than in American law); *INTERPRETING STATUTES: A COMPARATIVE STUDY* (D. Neil MacCormick & Robert S. Summers eds., 1991) (surveying approaches to statutory interpretation throughout world).

⁹³ 471 U.S. 84, 93–96 (1985) (enforcing literal meaning of "prior to December 31" statutory filing deadline despite argument that Congress obviously intended to say "on or prior to December 31").

⁹⁴ 437 U.S. 153 (1978) (enforcing plain meaning of Endangered Species Act to protect habitat of three-inch-long brown fish called snail darter, even at what majority conceded was sacrifice of great public benefit and millions of dollars), *superseded by statute*, Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3753.

inherit.⁹⁵ Moreover, the United States is also a legal environment in which the formal constitutional separation of powers as specified in the document often is outcome-determinative,⁹⁶ in which a court can believe that a statute that produces an obsolete and morally problematic result can nevertheless be changed only by the legislature,⁹⁷ and in which prominent political figures who might otherwise have had presidential aspirations⁹⁸ never consider the possibility solely because they would run afoul of the Constitution's "natural born" requirement to be President.⁹⁹ So although the example of the truck/memorial that falls within the literal language of a statute tells us something important about modern common law legal systems, so too does the automobile that is plainly a vehicle. Indeed, if we seek to understand law and not just judging—and that was what Hart wanted us to understand by using the example in the first place—it is important that we not forget about the driver of a pickup truck, with family and picnic preparations in tow, who sees the "No Vehicles in the Park" sign at the entrance to the park and simply turns around.

Once we see how often law is formal, and once we see how often (especially in the United States) it is not, we can appreciate that the best understanding of rule interpretation in particular, and an important part of law in general, may come neither exclusively from Hart's example of the automobile, nor from Fuller's counterexample of the military truck. Rather, we learn a great deal from the conjunction of both examples and both sides, and from an appreciation that each of the two examples captures an important feature of the legal systems we know best. To the extent that this is so, the real winner of the debate is not Hart, nor is it Fuller, for both neglected something important. Instead, insofar as the two perspectives complemented each other and remedied the too-narrow descriptive account of the other, the real winner turns out to be all of us.

⁹⁵ The cases are described in Schauer, *The Limited Domain of the Law*, *supra* note 75, at 1937–38.

⁹⁶ See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

⁹⁷ See *In re Blanchflower*, 834 A.2d 1010 (N.H. 2003) (construing statutory definition of adultery as limited to opposite-sex partners because term had been limited to opposite-sex partners in other statutory contexts); see also *Ga. Forestry Comm'n v. Taylor*, 526 S.E.2d 373, 374–75 (Ga. Ct. App. 1999) (correcting even a "weakness" in statute is for legislature and not court); *Hauser v. Reilly*, 536 N.W.2d 865, 869 (Mich. Ct. App. 1995) (admittedly "unfortunate" consequences for divorced parent must be remedied by legislature and not court); *Todd v. Bigham*, 395 P.2d 163, 165 (Or. 1964) (court may not depart from statute even to accomplish "desirable result"); *N. Marianas Hous. Corp. v. Flores*, 2006 MP 23, ¶ 5 (N. Mar. I. 2006) ("[E]mpathy does not trump legislation.").

⁹⁸ Including, for example, Jennifer Granholm, Christian Herter, Henry Kissinger, Madeleine Albright, and Arnold Schwarzenegger. And maybe Bob Hope.

⁹⁹ U.S. CONST. art. II, § 1, cl. 4.