

# PRACTICAL POSITIVISM VERSUS PRACTICAL PERFECTIONISM: THE HART-FULLER DEBATE AT FIFTY

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*This Article offers a new reading of Hart's classic Positivism and the Separation of Law and Morals by rethinking the form of positivism Hart was putting forward. Hart's separationism was not principally intended as a speculative proposition about the conceptual distinctness of law and morality but as a practical maxim about the need to distinguish what the law is from what the law ought to be. Hart believed that legal interpreters must display truthfulness or veracity about the law, being candid about what it actually says and how far it goes, rather than gilding the content of the law by ascribing to it what one wishes it said. "Practical positivism," as Professor Zipursky calls it, was Hart's antidote to the approaches of legal realism and natural law theory gaining ascendancy in American legal theory in the 1950s. Despite all of their differences, both realists and natural law theorists like Fuller treated the task of saying what the law is as inviting decision makers to make the law what it ought to be—"practical perfectionism," in Zipursky's terminology. Hart's great lecture asserted, above all, that practical positivism was superior to practical perfectionism. Drawing upon a variety of contemporary examples, the Article suggests that the practical perfectionism that concerned Hart in 1958 is alive and well today among both conservatives and progressives—on the bench, at the bar, and in the legal academy. Conversely, originalists, textualists, and pragmatic conceptualists are among today's descendants of practical positivists. The last half of the Article sketches a contemporary defense of practical positivism, adapting a Legal Coherentist framework to bolster Hart's work against Ronald Dworkin's criticisms.*

## INTRODUCTION

H.L.A. Hart's justly famous Holmes Lecture, *Positivism and the Separation of Law and Morals*,<sup>1</sup> contains an important social criticism that continues to go unheeded, now fifty years later. Hart protested that judges and jurists too frequently try to pass off imposition of their own individual political and moral views as legal interpretation. He believed there ought to be clarity and candor in legal interpretation,

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\* Copyright © 2008 by Benjamin C. Zipursky, Professor & James H. Quinn Chair, Fordham Law School; Visiting Professor, Columbia Law School. I am grateful to comments provided by participants at the Symposium on the Hart-Fuller Debate at Fifty, held at the New York University School of Law on February 1–2, 2008, as well as to audiences at Fordham Law School and Vanderbilt Law School. Special thanks to Matthew Diller, William Eskridge, John Goldberg, Abner Greene, Liam Murphy, Antonia New, Dennis Patterson, Anthony Sebok, Scott Shapiro, Jeremy Waldron, and the *New York University Law Review* editors.

<sup>1</sup> 71 HARV. L. REV. 593 (1958).

not moralizing or pursuit of individual political goals masquerading as law. Hart's American contemporaries supposedly rejected positivism because they regarded it as being a kind of formalism, and they regarded formalism as simpleminded and disingenuous. But the nearly automatic rejection of positivism was a prelude to all kinds of interpretive shenanigans that in effect obscured or misrepresented the law. Hart argued that this lack of clarity and candor was regrettable, both intrinsically and because it hindered effective evaluation of the law, thereby obscuring questions as to whether the law should be respected or reviled, renewed, revised, or rejected.

Today there continues to be a great deal of the sort of mischief in legal interpretation that Hart was criticizing. Ironically, the interpretive approaches advocated by Hart are disfavored by the descendants of both Hart's legal realist and natural law opponents. Be they self-styled pragmatists or constitutional justice seekers, many of today's legal theorists, lawyers, and judges treat interpretation as a domain in which first-order normative reasoning is the best approach—once a fairly thin constraint of fit has been satisfied. I shall call this approach “practical perfectionism”—“perfectionism” because it is teleological, aiming to make the law what it ought to be, and “practical” both because it recognizes the pragmatic need to be constrained by extant legal materials and, more importantly, because it is not so much a speculative theory of what the law is as a practical or action-oriented methodology directing a certain approach to the task of interpretation.

If positivism has a tendency to lead to constricted thinking, practical perfectionism in lawyers leads to mischievous and promiscuous thought. It has the potential to lead to what the public and many or most lawyers regard as conduct that flouts expectations, common sense, and boundaries of power and authority in a striking manner. By taking frequent refuge in the idea that meaning cannot be formally demonstrated but requires interpretation, practical perfectionism permits judges to do things that are bad for society, like deciding presidential elections or undertaking to commence federal emissions regulation; it permits lawyers to do things that are bad for their clients, like advising them that torture is not really torture or that grand jury subpoenas need not be obeyed; and it permits legal theorists to do things that are bad for their students and beside the point for their audience of lawyers and judges (who want to know what the law actually says, not what it might say if it were remade by an economist or a philosopher).

The view I elicit from Hart's 1958 article, which I call “practical positivism,” advocates recognition of the value of candor, clarity,

truthfulness, and transparency in legal interpretation: a cluster of values in legal interpretation that I shall gather together under the label “veracity.” Hart’s rejection of practical perfectionism in legal interpretation has turned out, in many respects, to be deeper, more plausible, more enduring, and more practically important than his embrace of the separation thesis. Moreover, to come to grips with the Hart-Fuller debate today is to see a debate between a practical positivist and a practical perfectionist—a debate that has continued in the hands of subsequent thinkers.

Part I begins with Fuller’s curious claim that Hart defined fidelity to law as one of the chief issues in the debate between positivists and their opponents.<sup>2</sup> While this claim is shown to reflect a misunderstanding of Hart, it helps to focus attention on aspects of Hart’s position that have not been adequately noticed before. Part I then suggests that Fuller’s interpretation can be understood by reading Hart as advocating for another virtue, one related to but distinct from fidelity—that of veracity.

Part II contends that there is as great a need for the virtue of veracity in those who interpret the law today as there was when Hart gave his Holmes Lecture fifty years ago. As Part II shows, the tendency to engage in less than candid legal interpretation—in a skewing of the law in accordance with what the legal interpreter believes it ought to say—is not a failing of one particular ideology but rather is widespread in American legal culture.

Part III looks at Hart’s project in *The Concept of Law*<sup>3</sup> through the lens of the veracity-based interpretation of *Positivism and the Separation of Law and Morals*. *The Concept of Law* contends that even if an Austinian command theory fails, there is nevertheless a way to understand the phenomena of law and legal systems such that there is a fact of the matter about what the law is, how far it goes, and where the law runs out and judicial invention steps in. Unfortunately for Hart, Part III suggests, Dworkin’s “argument from disagreement” undercuts central pillars of Hart’s account, raising the question of whether it is even possible to talk about the truth of legal statements without ultimately relying on an account of why the law merits our fidelity. In this respect, Dworkin’s work presents an extraordinarily powerful revitalization of the central theme of Fuller’s fidelity critique and thereby poses a challenge to the viability of practical positivism. Part III argues that the challenge of rendering practical positivism

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<sup>2</sup> Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958).

<sup>3</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

cogent can be met using a framework that adopts a coherentist theory of truth in law.

Finally, Part III pushes Hart on the normative front, just as Fuller did in his famous reply and as Dworkin did in *Law's Empire*. While *Positivism and the Separation of Law and Morals* defended practical positivism normatively, asserting both its intrinsic and its instrumental value, those defenses were quite incomplete. However, a wide array of important legal theorists today have, in a manner not always connected with positivism, presented important defenses of veracity in legal interpretation. The Article concludes by depicting originalists, popular sovereignty theorists, textualists, and neo-formalists as modern descendants of Hart's practical positivism.

## I

### FIDELITY, VERACITY, AND PRACTICAL POSITIVISM

#### A. *Fuller and Fidelity in Positivism*

A core message of Hart's 1958 lecture was that even though legal positivism does not tell anyone what they ought to do once they know what the law says, it does tell them that they should not purport to ascertain what the law says by reverse engineering from what they believe the law ought to be or from what they wish the law to say. Conversely, Fuller responded with the following: Knowing what the law says requires identifying those principles and ideas in it that merit allegiance. On Fuller's view, what the law would say if it were justifiable plays a key role—in at least many instances—in ascertaining what the law says.

In the introduction to his article, Fuller lays out the structure of his critique:

It is now explicitly acknowledged on both sides that *one of the chief issues is how we can best define and serve the ideal of fidelity to law*. Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation. If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark. If, as I believe, it is a cardinal virtue of Professor Hart's argument that it brings into the dispute the issue of fidelity to law, its chief defect, if I may say so, lies in a failure to

perceive and accept the implications that this enlargement of the frame of argument necessarily entails.<sup>4</sup>

What is peculiar is that Fuller's setup is based upon a false premise; Hart does not recognize—implicitly or explicitly—that how best to define and serve the ideal of fidelity is a chief issue.<sup>5</sup> It is not surprising, then, that Hart “failed to perceive” the implications of having raised the fidelity issue: Far from raising the fidelity issue, he did not even acknowledge it. It seems surprising, then, that Fuller confidently and centrally asserts this mischaracterization of Hart.

A qualification is in order. Hart certainly criticized the Austinian characterization of law as mere fiat of power,<sup>6</sup> and he certainly cast doubt on efforts to see law as merely a pattern of behavior.<sup>7</sup> At many points in his lecture—including the discussion of the Grudge Informer Case<sup>8</sup>—Hart drove a wedge between the statement that something is a piece of positive law and the statement that it ought to be followed or that it is entitled to respect.<sup>9</sup> Indeed, the preservation of this conceptual distinction is critical to the entire separationist depiction of positivism he offers. But this qualification does not bring us within a stone's throw of saying that a central issue is “how we can best define and serve the ideal of fidelity to law.” Indeed, one might question whether Hart even thought there was such an ideal.

One finds a slightly more promising way to rescue Fuller's claim by turning to the famous antiformalist portions of Hart's article. In discussing judges who allegedly suffer from the vice of formalism, Hart strains to imagine such a judge dealing with a case that is not neatly covered by the settled meaning of a statute:

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<sup>4</sup> Fuller, *supra* note 2, at 632 (emphasis added).

<sup>5</sup> See MICHAEL MARTIN, *THE LEGAL PHILOSOPHY OF H.L.A. HART* 221 (1987) (“Fuller makes a great deal of Hart's alleged advocacy of the ideal of fidelity to the law, but it is doubtful that Hart does advocate such an ideal.”); see also Liam Murphy, *Better To See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008).

<sup>6</sup> Hart, *supra* note 1, at 602–05; HART, *supra* note 3, at 50–61.

<sup>7</sup> HART, *supra* note 3, at 85.

<sup>8</sup> Hart's account of the Grudge Informer Case is a central example in his Holmes Lecture. See Hart, *supra* note 1, at 618–21. The post-war German case involved a woman in Nazi Germany who had, apparently respecting laws that forbade making statements detrimental to the government, reported her husband to the authorities for criticizing the Nazis so that he would be arrested and punished, and she would be able to continue her extramarital affair. A trial court had rejected her prosecution on the ground that the Nazi law privileged her report to the authorities; the Court of Appeal reversed, rejecting her reliance on Nazi laws. While the German legal theorist Radbruch praised the Court of Appeal's decision (as did Fuller), Hart criticized it. *Id.* at 619–20. For a critique of Hart's interpretation of the case, see David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000 (2008).

<sup>9</sup> Hart, *supra* note 1, at 594, 596–97, 618.

[A formalist judge] either does not see or pretends not to see that the general terms [of the rule in question] are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. . . . Instead of choosing in the light of social aims, the judge . . . either takes the meaning that the word most obviously suggests in its ordinary nonlegal context to ordinary men, or one which the word has been given in some other legal context, or, still worse, he thinks of a standard case and then arbitrarily identifies certain features in it . . . .<sup>10</sup>

Hart remarks that while “[d]ecisions made in a fashion as blind as this would scarcely deserve the name of decisions,”<sup>11</sup> the irrationality of such a procedure does not undercut the value of distinguishing the law as it is from the law as it ought to be. Further steps are needed. Struggling to articulate his adversary’s position, Hart imagines the following reply:

The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of “law” which is held to be more illuminating than that used by the Utilitarians [Bentham and Austin, principally]. This restatement of the point would have the following consequence: instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges’ choice are in a sense there for them to discover; the judges are only “drawing out” of the rule what, if it is properly understood, is “latent” within it. To call this judicial legislation is to obscure some essential continuity between the clear cases of the rule’s application and the penumbral decisions. I shall question later whether this way of talking is salutary . . . .<sup>12</sup>

Perhaps Fuller understood these passages as follows: Hart is conceding that formalistic decisions do not merit being called “law” and suggesting that—to the extent that decisions in the penumbra intelligently could count as law—judges will have to strive to be true to the animating goals of the law in question. The continuity and presence of law between the core and the penumbra depend on good faith judicial efforts to be faithful to the goals of the law. In this sense, perhaps, Hart might be thought to have said that anything deserving the name

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<sup>10</sup> *Id.* at 610–11.

<sup>11</sup> *Id.* at 611.

<sup>12</sup> *Id.* at 612.

of law requires a commitment to fidelity, to some ideal of why the law deserves our loyalty.

This would be an odd way to read Hart, given how fervently and carefully he rejects this precise view. When Hart imagines the procedures of a formalistic judge and writes that “[d]ecisions made in a fashion as blind as this would scarcely deserve the name of decisions,”<sup>13</sup> he is not saying such judicial resolutions would not deserve to be called “law,” but simply that they would not really be “decisions.” The judges would essentially be replacing a process of “decision-making” with a resolution device as nondeliberative as a professor’s throwing examinations down a staircase and grading by step. For Hart, the utilization of a more intelligent process would not render a decision the application of law either; rather it would render it judicial legislation that deserved the name of “decision.”

More importantly, while Hart tentatively examines the proposal that penumbral resolution guided by the aims animating a statute should be called “law,” contra Bentham and Austin, he expressly cautions the reader that he will “question later whether this way of talking is salutary.”<sup>14</sup> When he does ask that question, he offers a resoundingly negative answer:

If it is true that the intelligent decision of penumbral questions is one made not mechanically but in the light of aims, purposes, and policies, though not necessarily in the light of anything we would call moral principles, is it wise to express this important fact by saying that the firm utilitarian distinction between what the law is and what it ought to be should be dropped? [This claim] is, in effect, an *invitation* to revise our conception of what a legal rule is. . . . But though an invitation cannot be refuted, it may be refused . . .<sup>15</sup>

Finally, and most importantly, Hart’s principal point in this entire discussion is one that cuts against Fuller’s attribution of fidelity to him: Even if nonformalistic judges appropriately choose to guide their penumbral interpretations by the goals of the law, embracing values or principles because one takes those values to be morally deserving of allegiance is quite different from guiding one’s interpretations by what the goals of the law happen to be. The latter, not the former, is what the nonformalistic judge must do. “So the contrast between the mechanical decision and the intelligent one can be repro-

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<sup>13</sup> *Id.* at 611.

<sup>14</sup> *Id.* at 612.

<sup>15</sup> *Id.* at 614.

duced inside a system dedicated to the pursuit of the most evil aims.”<sup>16</sup>

### B. Hart's Virtue of Veracity

Why, then, did Fuller say that Hart really cared about fidelity? There are at least three intersecting reasons. First, Hart regarded the Grudge Informer Case and certain other examples as instances in which there are moral reasons that conflict with the duty to comply with or to apply the law. In so doing, Hart recognized that there is some normative demand that law makes. Judges and laypersons must sometimes strive to gauge the force of that demand in order to resolve the ultimate question of what to do. The second reason is that Hart contemplated that judges dealing with interstitial questions of legal interpretation should ask themselves what the aims and purposes of a statute are and should seek to extend the application (or nonapplication) of the statute in a manner that is faithful to those aims. Hart says remarkably little in *Positivism and the Separation of Law and Morals*, or even in *The Concept of Law*, about why judges should do that.

The third reason, of greatest relevance for this Article, is that while Hart did not concern himself with fidelity, he did, in some sense, concern himself with a related value, which I term “veracity.” It was the virtue of veracity, so conceived, that Fuller mistook for fidelity. Fidelity serves a double role for Fuller: It refers to a virtue, which judges and other legal officials, as well as citizens, aspire to exercise, and it also denotes a relationship between the interpretation offered and the actual content of the law. A judge can be faithful to the law, and a judge’s interpretation of some piece of law can be faithful to what the law was intended to do. Fidelity names both, and not coincidentally. A judge with fidelity supplies an interpretation with fidelity. A central antipositivistic point of Fuller’s is that the telos of the law cannot be defined in a manner that preserves the separation of law and morality. But as noted above, Fuller’s effort to do a sort of *reductio ad absurdum* of Hart does not have any purchase; Hart does not adhere to the value of either virtue or excellence of interpretation.

Hart does, however, endorse a pair of values closely related to Fuller’s fidelity: a virtue of clarity or candor about what the law says, and an excellence in accurate interpretation. There are a number of

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<sup>16</sup> *Id.* at 613. Fuller, of course, contests the suggestion that a coherent legal system can be generated out of evil aims as easily as out of good aims. But that complaint does not approach Hart’s larger objection: Referring to what goals motivate a law being applied is quite different from referring to what is morally correct.

passages adverting to the virtues of clarity, candor, forthrightness, and steadiness of view in jurisprudence as well as to the vices of confusion and obfuscation: "Like our own Austin, with whom Holmes shared many ideals and thoughts, Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong *clearly*. This surely is a *sovereign virtue in jurisprudence*."<sup>17</sup>

After quoting extensively from Austin, Hart writes of "Austin's protest against *blurring* the distinction between what law is and what it ought to be"<sup>18</sup> and writes of Bentham and Austin's shared prime objective of enabling people "*to see steadily* the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order."<sup>19</sup> The opposites of clarity and candor, for Hart, were confusion and obfuscation. "Bentham was especially aware," Hart wrote, that

the time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured. Yet, this was precisely what the confusion between law and morals had done . . . .<sup>20</sup>

While Hart praised clarity as a great virtue, he faulted forms of jurisprudence that led to clouded discussions.

It is tempting to read Hart's invocations of the virtue of clarity/candor as insubstantial, as fairly limp attempts by a highly analytic thinker and an admirer of Bentham to inject something that sounded morally vigorous into his Holmes Lecture, or perhaps as an effort to find something commendatory about Holmes (who was surely candid and clear), given that he was unimpressed with Holmes's actual jurisprudential work. Although I have sometimes read it that way, I now think that doing so risks missing what may be Hart's most important message in *Positivism and the Separation of Law and Morals*. "Clarity" and "candor" are really words that refer to a virtue in the family of honesty, sincerity, devotion to accuracy, and trustworthiness. Veracity, forthrightness, truthfulness, or the quality of being straight in how one sees things and how one reports upon them are the virtues Hart really had in mind; their opposite vices are not so much dishonesty, but obscurity, wishful thinking, carelessness, inattentiveness, or promiscuity in characterizing facts to oneself or to others.

Hart's advocacy of the separation between law and morality can be seen in the first instance as a practical principle rather than a theo-

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<sup>17</sup> *Id.* at 593 (emphasis added).

<sup>18</sup> *Id.* at 597 (emphasis added).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.*

retical one. He writes, “I shall present the subject as part of the history of an idea. . . . Bentham and Austin[ ] constantly insisted on *the need to distinguish, firmly and with the maximum of clarity*, law as it is from law as it ought to be.”<sup>21</sup> This passage does not express a conceptual truth about the relationship between the legal and the moral. It expresses a maxim for thought and speech: One needs to distinguish the law as it is from the law as it ought to be. It is not so much about what is the case as it is about how one should think. Hart is explaining Austin and Bentham’s insistence on a maxim of how to regard law, not their insistence on a conceptual truth.

At some level, of course, Austin and Bentham offered not only motivations for thinking it mattered whether this maxim was accepted, but also grounds for thinking the maxim was theoretically sound. Austin’s famous passage offers the conceptual grounding that backs up the maxim of thought: “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”<sup>22</sup> There is no doubt that Hart, like Austin and Bentham, accepted this ground for his practical positivism, and it was arguably part of Hart’s enterprise in *The Concept of Law* to justify and explain the truth of the Austinian claim, having demolished the foundation upon which Austin himself placed it.<sup>23</sup> And yet it is important to see that this conceptual grounding for positivism as a theoretical proposition is not the central idea Hart was attributing to Austin and Bentham.

Instead, Hart was emphasizing the practical need to distinguish what is the law from what ought to be the law. Deviations from practical positivism reflect a lack of being forthright—a gilded, romantic, or rosy-eyed perception and reporting of the law. Hart identifies Bentham and Austin as advocates of the view that straight-thinking and straight-speaking about the law ought to be prized, hand-in-hand with being able to say what the law is. To the degree that this veracity about the law and accuracy about the law, as forms of being truthful about the law, are similar to being true-to-the-law, it is understandable that Fuller might have taken Hart to be praising fidelity. Yet

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<sup>21</sup> *Id.* at 594 (emphasis added). There is practical language throughout the article stressing the importance of veracity. For example: “Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it.” *Id.* at 619–20.

<sup>22</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (1954).

<sup>23</sup> See *infra* note 84 and accompanying text (discussing Hart’s efforts to provide account of what it was for legal system to exist after he had undercut Austin’s command theory).

there is a great difference between truthfulness as to what the law means and faithfulness to its dictates.

Like Bentham, Austin, and Holmes, Hart was advocating a practice of legal interpretation in which a lawyer or judge reports on the content of the law in a particular way: He or she provides a description of what the law says, what it does not say, and what it could be interpreted to say at various levels of plausibility. Such a description should be ungilded by what the interpreter wishes the law would say or believes the law ought to say—if not washed in cynical acid, as Holmes said,<sup>24</sup> then washed in the skeptical acid of analytical rigor. The practical positivist advocates engaging in the practice of characterizing and describing the law in this deromanticized fashion both for its intrinsic value and for instrumental reasons. Hart advocates veracity because it identifies and accepts the truth, and doing so is intrinsically valuable. It is good to be faithful to reality. And it is good for instrumental reasons, too: We cannot know whether to obey, disobey, revise, reject, celebrate, or overturn the law unless we know what it actually says. As both Jeremy Waldron and Liam Murphy have said in their respective essays on Hart's *Postscript*,<sup>25</sup> Hart was concerned about the tendency of natural law theory to foster quietism about the law: Too closely associating what the law is and ought to be could and did mislead lawyers and citizens to assume that if something is the law then it is morally right.<sup>26</sup> Conversely, he recognized the risk of anarchy in a system in which putative law was dismissed as not really law by those who disapproved of it and failed to credit the genuine existence of laws that they regarded as immoral.

Hart's practical positivism is meant to be the antithesis of the sort of wishful jurisprudence that Bentham somewhat contemptuously took Blackstone to have had.<sup>27</sup> When Hart urges that the lawyerly enterprise of reporting what the law is should be recognized as distinct from the moral and political enterprise of saying what the law ought to be, it is not put forward just as an implication of the conceptual

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<sup>24</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461–62 (1897).

<sup>25</sup> Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 429–30 (Jules Coleman ed., 2001); Liam Murphy, *The Political Question of the Concept of Law*, in HART'S POSTSCRIPT, *supra*, at 371, 387–88, 391. To the extent that I am depicting in the positivism of Hart's *Positivism and the Separation of Law and Morals* a broad normative strand, this Article shares an important theme with both Waldron and Murphy. However, the practical positivism I attribute to Hart in his Holmes Lecture is quite different from both Waldron's normative positivism (which, he suggests, comes near to a position prescribing exclusive positivism) and Murphy's suggestion of a normative approach to answering questions about the concept of law.

<sup>26</sup> Hart, *supra* note 1, at 598.

<sup>27</sup> *Id.* (describing approvingly Bentham's critique of Blackstone).

truth that law and morality are separate. On the contrary, the drive to clarify and establish a separation thesis is in part motivated by the philosophical belief that it is a mistake to permit one's apprehension of what the law is to be distorted by one's convictions about what the law ought to be. Because Hart is concerned not simply about how a legal thinker represents the law to others—not simply about misrepresentation or concealment—but also about how she perceives or apprehends the law, my selection of the term “veracity” is meant to convey more than honesty and forthrightness in speech, but also a clear-sightedness or accuracy in understanding the law—what Hart calls “candor” and “clarity.”

Hart's concern with candor and clarity reflects a belief that there is a certain way that legal interpretation can go wrong in adjudication. A judge may produce an interpretation of the law that conforms to what she believes the law should be, transforming, embellishing, or distorting the content of the law without indicating that this transformation is occurring. This might occur even if the judge is not doing so dishonestly or disingenuously. On the other hand, it would not be quite correct simply to say that the interpretation was mistaken or poorly done. It would be more accurate to say that the judge is permitting her views of what the law ought to be determine her views of what the law is. There need not be either dishonesty or incompetence in this scenario. There could be wishful thinking or even a form of self-deception.<sup>28</sup>

Courts do things; the act of adjudication is not only verbal but legal. It is, of course, trivially true that the will of the adjudicator is exercised in adjudication. It is also quite clear that what judges frequently do in interpreting the law is, at least in part, articulating or pronouncing the law. It is therefore not at all surprising that judges end up, in the act of announcing what the law is, announcing the law to be as they believe it ought to be. Hart is not necessarily critical of the judge who does so. But he is critical of the judge who, in announcing the law as she believes it ought to be, simultaneously characterizes herself as interpreting what the law is—unless, of course, it is true to say that this is what the law is. However, in the context of a set of adjudicative and interpretive norms—i.e., in a legal system—that sometimes enjoins judges from announcing the law to be something unless the law already has that content, a judge may find herself tacitly reverse engineering. She may find herself interpreting the law

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<sup>28</sup> Thanks to Thomas Nagel for suggesting (at the symposium) that the set of shortcomings in the interpreter, with which Hart's “candor” was being contrasted, might include, or be related to, self-deception.

to be the way she wishes it were, so that she can unproblematically announce the law to be as she thinks it ought to be. In this sense, there can be self-deception or wishful thinking in legal interpretation. Hart's virtue of candor and clarity—veracity—is the disposition not to overstate or misstate what the law says or how far it goes in legal interpretation, in order that its content conform to what one believes it ought to be or wishes it were.

Hart's veracity is in some ways like and in other ways unlike Fuller's fidelity, which may explain Fuller's otherwise puzzling claim that Hart accepted the importance of fidelity.<sup>29</sup> Veracity and fidelity are similar insofar as each is aptly described as a virtue of being true to the law. However, Fuller is interested in the adjudicator's virtue of being faithful—in her interpretation of the law *and* her application of the law—to the values embedded in the law insofar as she judges those values to merit faithfulness. Hart's veracity is a virtue displayed in interpretation of law, not application of it. The virtue lies in candor and accuracy as to the law's content. It is a virtue in adjudication regardless of whether the adjudicator actually undertakes to evaluate the merit of the law, as so interpreted, and regardless of whether she applies the law so interpreted. Indeed, one of the reasons it is a virtue is that it enables both the judge and others to engage in such an evaluation secure in the assumption that what is being evaluated is really the law, not some skewed representation of it.

Finally, it is worth noting that Hart's famous separation thesis was put in two forms, one concerning the need to distinguish "law as it is from law as it ought to be" and the other concerning the "separation between law and morals."<sup>30</sup> Repeatedly in *Positivism and the Separation of Law and Morals*, Hart's casual flip from one version to the other indicates that he treated them as equivalent. Most strikingly, in distinguishing five meanings of "positivism," Hart lists within one of those five: "(2) the contention that there is no necessary connection between law and morals or law as it is and ought to be."<sup>31</sup> The title of Hart's Holmes Lecture of course selects one of these—the separation between law and morality. Most scholarly responses to Hart's article, including, for example, Leslie Green's contribution to this symposium,<sup>32</sup> make the same selection.

The account I have offered focuses on the is/ought version of Hart's positivism, and it is not at all obvious that this version is easily

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<sup>29</sup> See *supra* Part I.A.

<sup>30</sup> Hart, *supra* note 1, at 594.

<sup>31</sup> *Id.* at 601 n.25.

<sup>32</sup> Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035 (2008).

reproduced in terms of the more commonly invoked law/morality version. The difference is easily illustrated. Consider the overworked example of the businessman walking to his bus stop who notices a small child drowning in a pond. Notoriously, American law in nearly all jurisdictions says that there is neither criminal liability nor civil liability for the man who declines to reach in and save the child; in tort law, in particular, there is no legal duty to save the child. To push a separationist line in such a case is to insist that the question of whether the man has a *moral* duty to rescue the child does not answer the question of whether there is a *legal* duty to rescue the child. To push a practical positivist line is to say that the question of whether there *ought to be* a duty to rescue the child under the law does not answer the question of whether there *is* a duty to rescue the child under the law. One could believe that there is a moral duty to rescue the child and there is no legal duty to rescue the child, and therefore instantiate at least a simple version of the separationism, without necessarily signing onto practical positivism. For one could believe there is a moral duty to rescue the child without believing that there ought to be a legal duty to rescue the child. Conversely, one could believe there is no moral duty to rescue the child but still believe that there ought to be such a legal duty. And one's views on whether to say, in legal interpretation, that there is such a legal duty may or may not be linked to one's views as to whether there ought to be such a duty. In short, it is one thing to interpret a legal norm L concerning whether A is legally required as saying "Do A!" because, as to the importance of doing A, a moral norm says "Do A!" It is quite another thing to interpret a legal norm, L, concerning whether to do A, as saying "Do A!" because one believes that L ought to say "Do A!" Overwhelmingly, *Positivism and the Separation of Law and Morals* has been read as a critique of the first sort of inference. By emphasizing the importance of veracity to Hart, I aim to illuminate Hart's position as a rejection of the second sort of inference.

Although I shall ultimately be indicating some strong points of disagreement with Hart, I will be siding with Hart's practical positivism at a number of junctures. Given that the separation thesis, as articulated in terms of law and morality, seems fairly widely accepted in at least a very basic form that distinguishes a putative law's status as positive law from its status as a morally sound norm, it might seem odd that I am treating the switch to practical positivism as an advantage in defending Hart. The reason is that scholars who find this incontrovertible version of the separation thesis too bland have reacted by attributing to Hart more ambitious versions of the separation thesis, such as the thesis that there are no necessary connections

between law and morality.<sup>33</sup> This broader thesis has the opposite problem, however. A large number of scholars—including many positivists—reject the thesis as either unintelligible or false. My own view is that an interesting version of the thesis at the core of Hart's article is neither the simple version nor the "no necessary connection" version: It is practical positivism, an insistence on not answering the question of what the law is by supplying one's views of what the law ought to be. A further advantage of seeing Hart's article in this way is that it more readily permits one to understand him as offering a critique that simultaneously aims at Fuller and natural law theorists on the one hand, and Holmes and Legal Realists on the other.

## II

### PRACTICAL PERFECTIONISM IN PRACTICE

While Hart famously and candidly acknowledged that words have a "penumbra" of meaning, not just a core,<sup>34</sup> Fuller rightly criticized him for failing to appreciate how deep problems in interpretation run—for, in effect, oversimplifying the vagaries of interpretation by floating the idea that the core/penumbra distinction could capture those difficulties.<sup>35</sup> Perhaps in part in response to Fuller, Hart expanded his account of the penumbra in *The Concept of Law*, systematically describing "the open texture of law."<sup>36</sup> However, since at least the 1970s, legal theorists (paralleling literary theorists and those in other fields of philosophy, social sciences, and the arts) have been enchanted by the extraordinary range of possibilities in interpretation. If Hart's concept of a core and a penumbra was intended to impose some limits on what he saw as the exaggerated liberty of interpretation felt by legal realists, it did not succeed. To the contrary, a legal realism in which there was no semantic core at all became almost a dogma in the leading law schools by the late 1970s and early 1980s. And critical legal studies—as the new left—rejected standard norms of legal reasoning as methods of filling in the open texture of the law.<sup>37</sup>

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<sup>33</sup> See, e.g., *id.* at 1041–44. John Gardner argues that the "no necessary connection" thesis is absurd and that it is a myth of legal positivism that any notable legal philosopher, including Hart, has ever endorsed it. John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 222–23 (2001).

<sup>34</sup> Hart, *supra* note 1, at 607.

<sup>35</sup> Fuller, *supra* note 2, at 662–69.

<sup>36</sup> HART, *supra* note 3, at 124–36.

<sup>37</sup> See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 559 (1986) (rejecting argument "that the only permissible course of action for a judge confronting a conflict between the law and how he wants to come out is *always* to follow the law").

By the late 1980s, although there were a number of subject-specific approaches to legal interpretation (such as originalism in constitutional interpretation), two more general approaches attracted a great deal of attention: Ronald Dworkin's morally-grounded approach to interpretation and Richard Posner's pragmatism. Despite all of their differences, these two eminent legal theorists—both, incidentally, students of the Harvard Law School during the 1950s—are alike in embracing an interpretive method that is really a form of practical perfectionism, not practical positivism. Both argue that, so long as the moral and political views that a judge believes are best can be made to cohere adequately with the extant legal materials that are applicable, a judge may resolve the ambiguity in interpretation in a manner best suited to realizing what the judge believes to be best justified from a moral and political view. A judge may, under these circumstances, make the law the best that it can be. Dworkin and justice seekers believe judges ought to do so, because they believe that saying what would make the law the best it can be (given extant legal materials) *is* what it means to say what the law is. Posner and realists seem skeptical about this ought claim, but tend to believe that judges may do so and will do so. As a practical matter, both moralists and pragmatists do engage in this sort of interpretation and openly advocate the legitimacy of doing so. Antipositivists of a Dworkinian stripe believe that this is an approach designed to get at what the law says, and that one need not disclaim moral or legal objectivity here. In this way, the unearthing of what is latent in the law goes hand in hand with a sort of moral perfectionism. By contrast, most legal pragmatists do not contend that there is discovery or truth here. But as a practical matter regarding what approach is recommended they are very similar: Both believe a legal interpreter ought to shoot for what he or she takes to be the morally, politically, and pragmatically best way to read the law, constrained by a loose fit requirement. Both believe that a judge who is saying what the law is should be saying what—given the constraints that exist and with which the articulation of the law must cohere—the law ought to be. In this respect, both fall within the domain of the practical perfectionists, albeit in entirely different ways.

And yet within both the philosophy of language and legal theory, leading voices have rejected the idea that there are not better and worse answers to many interpretive questions, both inside law and more broadly.<sup>38</sup> The upshot is a fairly widely acknowledged view that

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<sup>38</sup> For a more detailed account of the developments in the philosophy of language and epistemology that paved the way to an open-minded and down-to-earth form of coherentism both in and outside law, see Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1695–1705 (1997). See also John C.P. Goldberg & Benjamin C. Zipursky, *The*

there is meaning in law, that there are easy cases (which are core-like, though not necessarily in the way Hart thought), hard cases (which, perhaps, have equally good and opposing interpretive answers), and a wide array of cases in between. A judge, lawyer, or legal scholar aiming to answer a legal question—including, for example, a law clerk writing a memorandum to a judge—is capable of characterizing what is interpretively fairly well settled, clearly not at all well settled, and what lies in between. A good report would indicate how strong or weak the in-between positions are and might even illuminate plenty of disagreement. We shall later address the question of whether—as a legal positivist would maintain—there is really a basis for thinking such a “good report” would reflect truth about the law. But it remains the stuff of treatises, Restatements, practitioner guides, law review notes (at least in their opening Parts), and the daily memoranda of associates, law clerks, and in-house lawyers.

Nevertheless, despite the recognized availability of a path that is consonant with the *modus operandi* of a practical positivist, the opposite approach—practical perfectionism—can also be found wherever legal interpretation is being done and often at its most important junctures. Veracity is not nearly where Hart would have hoped. Let us consider examples in three areas: judges adjudicating a case in which a legal claim for relief is being pursued; lawyers counseling clients about what the law says in order to guide their client’s conduct; and law professors offering a comprehensive or searching account of what some important legal term means or how some important legal concept works. These examples are just that—examples. While not meant to be conclusive, of course, this survey is intended to illustrate

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*Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1802–06 (1998) (explaining how aforementioned developments in metaphysics, epistemology, and philosophy of language bolstered development of rights-based theorizing in jurisprudence, and support more flexible approach to reasoning about duty-based thinking); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 470–74 (2000) (explaining how developments in semantics and epistemology support pragmatic form of conceptualism in jurisprudence). Donald Davidson and Hilary Putnam paved the way toward coherentist theories. See, e.g., Donald Davidson, *A Coherence Theory of Truth and Knowledge*, in TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 307 (Ernest LePore ed., 1986); HILARY PUTNAM, REASON, TRUTH AND HISTORY (1981). The holistic core of coherentism is that justification is fundamentally a concept that requires statements to cohere *with one another* and permits bundles of statements to be tested against experience as a whole, rather than supposing that individual statements purport to represent pieces of reality one by one. Once philosophical theorists in basic areas outside of law had begun to reject the idea of statements representing pieces of reality in a one-to-one way, many philosophers working in more controversial areas—such as ethics or jurisprudence—no longer thought that establishing the possibility of truth and knowledge for statements about their field (e.g., ethics or jurisprudence) required (or even permitted) reducing those statements to facts in some other, less problematic domain of knowledge (e.g., social facts).

the breadth, range, and significance of practical perfectionism in contemporary legal interpretation.

One of the most striking American examples of practical perfectionism in the past several decades is the United States Supreme Court's decision in *Bush v. Gore*.<sup>39</sup> Few constitutional provisions are as open textured as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and there is, therefore, plenty of space for judicial improvisation in the interpretation of this clause. On the other hand, the very openness of the Equal Protection Clause is part of the reason that judges are circumspect in applying it, cautious in applying it vigorously, and candid about the institutional, political, and historical reasons for choosing to apply it aggressively when they do so. Not so in *Bush v. Gore*. Five members of the U.S. Supreme Court found that Florida's method of recounting ballots, county by county, violated the Equal Protection Clause and that no remand would be possible, thereby deciding that the initial count in favor of George W. Bush could not be subjected to a statewide recount.<sup>40</sup> In so doing, the U.S. Supreme Court effectively decided the American presidential election. Concerns regarding the political question doctrine, standing, the procedural propriety of a remand, voter empowerment, and the state's prerogative to untangle its own election law simply fell by the wayside. Five justices reasoned that the imperative of equal protection simply demanded that the recount not be permitted under these circumstances.<sup>41</sup> Virtually no precedent like this had been decided; nothing noticeable in text or history supported it, and it ran head-on into federalism claims. Acting as practical perfectionists, the Court saw a way to make it seem that legal sources and texts supported its conclusion and then simply said what it wished was true—that there was a violation of the Constitution in the Florida Supreme Court's decision to interpret Florida law to require a recount.<sup>42</sup> I address this argument below. But even assuming argu-

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<sup>39</sup> *Bush v. Gore (Bush II)*, 531 U.S. 98 (2000).

<sup>40</sup> While Justice Breyer and Justice Souter agreed that there was an equal protection problem, they disagreed with the majority's decision to stop the recount; they would have remanded. There were, therefore, seven Justices who concurred in the view that there was an equal protection violation, but only five who voted to stop the recount. As Posner pointed out, however, it is plausible that Justices Rehnquist, Scalia, and Thomas signed onto the equal protection argument to secure the appearance of agreement in rationale by a majority of the Court willing to stop the election. See Richard A. Posner, *Bush v. Gore as Pragmatic Adjudication*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 187, 209 (Ronald Dworkin ed., 2002). They likely had a far greater attraction to the Article II argument. *Id.* at 210–12.

<sup>41</sup> *Bush II*, 531 U.S. 98, 110 (2000).

<sup>42</sup> My colleague Abner Greene has offered an interesting argument that a line of First Amendment cases supports the Court's constitutional argument, even if their actual equal

endo that the equal protection argument was sound, that is a far cry from reaching the result the Court reached. Two of the most powerful arguments against *Bush v. Gore* are prior and posterior to the substantive equal protection argument. A prior question is whether, according to the political question doctrine, the Supreme Court should have even reached this issue.<sup>43</sup> A posterior question is whether the appropriate remedy for the equal protection violation was reversal or remand. As Justice Souter explained, the arguments on the remedy are straightforward and overwhelming.<sup>44</sup>

With regard to whether the equal protection argument itself had merit, the answer depends on what level of creativity is required or even permitted of the Court in this context. Our question is not whether Justices like Rehnquist, Scalia, and Thomas—who deride flexible interpretations of broad rights clauses—displayed hypocrisy in *Bush v. Gore* (or, for that matter, whether Justice Stevens’s rejection of such interpretations in this case also displayed hypocrisy). Our question is whether this is a legitimate or appropriate interpretive approach for the Court in 2000 to have taken. On this question, two observations are pertinent. The first is that the question of what interpretive approach should have been taken is not independent of the arguments behind the political question doctrine. Surely the reasons for not even deciding the case at all cut heavily against a broadly creative approach to equal protection; the political question argument against taking the case embodies a concern that what seems like a legal ruling may surreptitiously be an injection of politics from an

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protection argument, as put forth, was quite weak. See Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643 (2005); see also ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 132–33 (2001). Even if I were to accept this position, and to overlook the Court’s having chosen a completely different clause, other issues would remain dispositive, as discussed above.

<sup>43</sup> Justice Stevens’s dissent (with which Justices Souter, Ginsburg, and Breyer concurred) from the Court’s December 9 stay decision is particularly apt on the imperative of restraint in this context. *Bush v. Gore* (*Bush I*), 531 U.S. 1046, 1047–48 (2000) (Stevens, J., dissenting). As to the political question doctrine itself, the Court did not speak to the issue. See Steven G. Calabresi, *A Political Question*, in *BUSH V. GORE: The Question of Legitimacy* 129, 137–38 (Bruce Ackerman ed., 2002).

<sup>44</sup> *Bush II*, 531 U.S. at 133–35 (Souter, J., dissenting). The academic writing on *Bush v. Gore* is legion, and, unsurprisingly, reflects an array of different views on the justifiability of different pieces of the decision and on the decision as a whole. See generally, e.g., *BUSH V. GORE: The Question of Legitimacy*, *supra* note 43; *A BADLY FLAWED ELECTION*, *supra* note 40. Because they are featured in other respects in this Article, Dworkin’s and Posner’s positions are particularly noteworthy. See Ronald Dworkin, *Introduction*, in *A BADLY FLAWED ELECTION*, *supra* note 40, at 1; Posner, *supra* note 40, at 187. Posner has also written an entire book on the events leading up to *Bush v. Gore* and the case itself. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION AND THE COURT* (2001).

institution plainly designed not to exercise political power in this type of situation. To put it simply, there were special reasons in this case to shy away from a particularly inventive interpretive approach, even assuming such an approach is generally permissible or appropriate.<sup>45</sup> The second observation regards what it means for our top courts to be engaging in practical perfectionism as an interpretive methodology. If the growing pervasiveness of that methodology led to a 5–4 majority of the U.S. Supreme Court erecting a novel and one-time-only constitutional theory to enable them to secure their preferred candidate for President, that should surely count as a reason to be concerned about practical perfectionism.

I do not mean to suggest, by selecting *Bush v. Gore*, that it is one side of the Court that has been particularly mischievous. On the contrary, I believe there are spectacular displays of judicial improvisation on all sides of the Court every term. Justice Stevens’s opinion in *Massachusetts v. Environmental Protection Agency*<sup>46</sup> presents an excellent example.

*Massachusetts v. EPA* addressed the issue of federal regulation of greenhouse gas emissions. The EPA during earlier years of the Bush Administration decided not to regulate carbon emissions from new motor vehicles under the Clean Air Act. When a group of private parties petitioned the EPA to regulate greenhouse gas emissions, the EPA denied the petition on two grounds: first, that the EPA lacks the power to issue mandatory regulations to address global climate change, and second, that even if the agency had the power to regulate greenhouse gas emissions it would be unwise for it to do so at this time.<sup>47</sup> The Commonwealth of Massachusetts challenged the EPA’s denial of the petition in federal court, eventually appealing to the Supreme Court. In an unsurprising and plausible argument, Justice Stevens ruled for a 5–4 majority that the Congressional authorization to regulate pollutants under the Clean Air Act was broad enough to give the EPA power to regulate greenhouse gas emissions.<sup>48</sup> Notwithstanding Justice Scalia’s dissent (which was uncharacteristically mild),<sup>49</sup> there is nothing particularly contentious about this conclu-

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<sup>45</sup> A similar point is nicely made by Jeffrey Rosen. See Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, in BUSH v. GORE: The Question of Legitimacy, *supra* note 43, at 161 (describing political question doctrine as “argument for deference in the face of contestability”).

<sup>46</sup> 127 S. Ct. 1438 (2007).

<sup>47</sup> *Id.* at 1450.

<sup>48</sup> *Id.* at 1462.

<sup>49</sup> *Id.* at 1471 (Scalia, J., dissenting).

sion; one wonders how the EPA could really have taken the opposite view of its limited empowerment seriously.

However, the EPA had three other arguments that were much less fragile: the need for deference to the agency's decision not to regulate, the nonreviewability of agency decisions not to make a rule, and Massachusetts's lack of standing. As to the first, the EPA argued that the agency deemed it unwise to regulate greenhouse gas emissions of new automobiles at this time. Several reasons were offered for this position: a number of other executive branch programs already responded to global warming, the President thought regulating emissions in the United States would reduce his negotiating effectiveness with other nations on trade and global warming issues, and regulating carbon emissions for automobiles would be a piecemeal solution.<sup>50</sup> The legal question identified by Justice Stevens was, therefore, whether any of these reasons amounted to a reasoned explanation for the decision that it would be unwise to regulate greenhouse gas emissions. Justice Stevens, writing for a five-Justice majority, held that they did not—that the EPA's decision not to regulate was *arbitrary and capricious*.<sup>51</sup>

In doing so, Justice Stevens made new law in the area of standing—for the first time recognizing a “special solicitude” for state standing<sup>52</sup>—and made new law on the issue of agency decisions not to regulate. Justice Stevens, like the majority in *Bush v. Gore*, was taking the law to be what he believed it ought to be. The EPA's decision not to regulate greenhouse gas emissions may have been a poor one, but it did in fact come with an explanation that is hard to call unreasoned. The issue of whether the EPA's decision was a political one that did not even take the statutory mandate seriously is a closer one (and perhaps one where the arbitrary and capricious review question could get a foothold). But realistically, it is hard to believe that Justice Stevens was doing anything other than supplanting what he believed was a poor decision by a government body understood to have the prerogative to make that decision. The fact that Stevens needed to make the great stretch of recognizing Massachusetts as a party with standing and needed to make new law on the reviewability of agency decisions not to rulemake<sup>53</sup>—like the fact that the Rehnquist Court needed to leapfrog the political question doctrine in *Bush v. Gore*—only highlights the picture of the Court rushing to interpret the law as it wishes it to be.

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<sup>50</sup> See Brief for the Federal Respondent, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

<sup>51</sup> *Massachusetts*, 127 S. Ct. at 1463.

<sup>52</sup> *Id.* at 1454–58 & n.17.

<sup>53</sup> See *id.* at 1459, 1462.

It is not only judges who engage in loose interpretations that look more like wishful thinking than an accurate depiction of where the law stands. For instance, the virtue of veracity was sorely lacking in the notorious Bybee Torture Memo, in which the Office of Legal Counsel provided legal advice to its client, the Executive Branch of the U.S. Government.<sup>54</sup> No doubt there are subtle issues regarding what counts as “torture” and what does not for the purposes of the statutory and treaty language in question. Waterboarding is not one of those subtle issues, according to scholars and lawyers of all stripes.<sup>55</sup> The authors of the memorandum simply assumed that, because the contours of meaning are indefinite, and because their aims were commendable, they could produce and be guided by their particular conception of what the law *should be*.

Again, no one side of these issues has a monopoly on dressing up the law to suit their purposes; private parties and their lawyers are at least as large a part of the problem as the government and its lawyers. Thus, lawyers who counsel clients on tax shelters, reporting of assets, drug risks, and reporters’ duties to divulge sources unquestionably engage in a kind of interpretation that leads them to the position that their client would want to hear, rather than the position that an even-handed veracity about the law would demand.<sup>56</sup>

Finally, legal scholars make mischief when putting forward edifying new theories of substantive areas of the law. My own personal favorite example is Richard Posner’s theory of negligence, the most celebrated interpretive theory of tort law in the last half century.<sup>57</sup> Unlike Coase, whose famous work was put forward as an analytical

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<sup>54</sup> See generally Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_20020801\\_JD\\_%20Gonz\\_.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf).

<sup>55</sup> See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1704–09 (2005) (criticizing analysis of torture in Bybee memorandum); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 n.2 (2005) (reviewing breadth of commentators and sources criticizing legal analysis in memorandum).

<sup>56</sup> This theme has been developed, with examples, in several articles by W. Bradley Wendel. See, e.g., W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1492–93 (2006) (tension between lawyer’s duty to clients and objectivity of law seen in controversy over interpretation); Wendel, *supra* note 55 (constraints on lawyers come from obligation to law rather than general morals); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 396–401, 418–19 (2004) (same, in context of tax shelters); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1211–18, 1224–28 (2005) (same, in context of tax shelters and torture).

<sup>57</sup> Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (“[T]he dominant function of the fault system is to generate rules of liability that . . . will bring about . . . the efficient . . . level of accidents and safety.”).

tool,<sup>58</sup> or Calabresi, whose work was put forward as a guide to evaluation and revision of accident law,<sup>59</sup> Posner put forward his as a positive theory of tort law.<sup>60</sup> At the heart of his theory is his contention that an economic version of the Hand formula provides the meaning of the common law tort of negligence.<sup>61</sup> To be sure, the concept of negligence is a cloudy one, whose core is hard to find and whose penumbra is wispy. This provides a great opportunity for any theorist to jump in and offer a theory about how we ought to understand, clarify, and refine it, and so on. And that is what Posner's theory ought to have been, and perhaps, what he was aiming to do. But that is not what he said or did; rather, he offered a positive theory.<sup>62</sup> As many have demonstrated, the positive theory is demonstrably false;<sup>63</sup> though, of course, the insights are rich and helpful on a variety of evaluative and revisionary fronts.

In scholarship on constitutional law, as in statutory interpretation and the common law, we find both subtle and striking examples of wishful thinking where candid depictions of the state of the law would be more valuable. In his beautifully crafted book *Life's Dominion*, Ronald Dworkin asserts that the religion clauses of the First Amendment provide a broad enough conception of religion to protect an individual's conscientious beliefs about what makes life sacred, regardless of whether those beliefs are connected to any sort of theistic conception.<sup>64</sup> He suggests this in the context of arguing that, because prohibitions on abortion and physician-assisted suicide impose particular views of what makes life sacred on the entire political community, they are violations of the religion clauses of the First Amendment.<sup>65</sup> This is a powerful and interesting argument about how one might interpret these clauses. It is also an example of reading the religion clauses as one believes they ought to be, rather

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<sup>58</sup> R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (suggesting alternative economic analysis for harmful action by business).

<sup>59</sup> GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 14–15 (1970) (analyzing mutuality of various goals and systems of accident law).

<sup>60</sup> See Posner, *supra* note 57, at 33 (suggesting new analysis of dominant goal of negligence system).

<sup>61</sup> *Id.* at 56.

<sup>62</sup> See *supra* note 57 and accompanying text.

<sup>63</sup> See generally, e.g., Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES LAW 145 (2003) (observing that aggregate risk-utility test is rarely actually used by courts); Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007) (rejecting Hand formula as uniform explanation for negligence law and suggesting civil competency theory instead). For further references, see *id.* at 2002–03 & nn.16–22.

<sup>64</sup> RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 155–56 (1993).

<sup>65</sup> *Id.* at 154–56.

than as they are. This is not to say that the religion clauses as they are categorically rule out this interpretation. It is to say that to read them in this way is to be creative, and perhaps revisionary. I am not suggesting that an advocate before a court must put the point this way. I am suggesting that if one presents oneself as reporting on what the law is, candor requires an accurate depiction of the distance between where the text, precedent, history, and plausible conceptual analysis conducted thus far brings us, and where the jurist thinks courts applying the law ought to go.<sup>66</sup>

I refer to these pieces of legal interpretation as cases of “mischief” not to judge the results or character of those who have produced them, but to suggest that there is something objectionable about these interpretations which cuts across them. To be sure, they do seem to include the values of the interpreters, but to complain about this is to beg the question. Do legal theorists, more broadly, express dismay when legal interpreters choose to apply the law as they wish under the rubric of “interpretations”?

The answer is unclear if we look at those analytic legal philosophers today who are most obviously identifiable as the descendents of Hart’s jurisprudence—Joseph Raz,<sup>67</sup> Jules Coleman,<sup>68</sup> Leslie Green,<sup>69</sup> Scott Shapiro,<sup>70</sup> and Wilfred Waluchow,<sup>71</sup> for example. At one level, debates over the nature of interpretation seem either passé or the domain of another range of law-and-humanities scholars. On the other hand, the debate between inclusive and exclusive legal positivism rages on, and one wonders whether this is, in part, a debate over the proper role of values in legal interpretation.

It is worth observing, however, what answer we would get if we were to expand our range of vision beyond analytic jurisprudence to legal theory more generally, and ask the same question: Is the exercise of individual moral and political judgment under the rubric of

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<sup>66</sup> See Abner S. Greene, *Uncommon Ground: A Review of Political Liberalism by John Rawls and Life’s Dominion by Ronald Dworkin*, 62 GEO. WASH. L. REV. 646, 660–65 (1994) (arguing that Dworkin’s broad conception of religion is not supported by precedent or settled law).

<sup>67</sup> See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979) (arguing that authority of law is consistent with legal positivism and that all legal systems have gaps requiring discretion of interpretation).

<sup>68</sup> See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001) (rejecting interpretation of law driven by economic analysis, interpretivism, and “exclusive” legal positivism in favor of “inclusive” legal positivism).

<sup>69</sup> See, e.g., Green, *supra* note 32.

<sup>70</sup> See, e.g., Scott J. Shapiro, *On Hart’s Way Out*, 4 LEGAL THEORY 469 (1998).

<sup>71</sup> See, e.g., W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994) (defending inclusive positivism).

interpretation controversial among today's legal theorists? The answer is "of course" or "and how!" The subjects of constitutional interpretation, legislative interpretation, and common law reasoning remain very controversial in legal theory, and the core of the controversy is exactly this question: What methodologies of interpretation are available that do not devolve into the judge or legal interpreter simply doing what she or he thinks best, or wants to do, once a constraint of fit has been met?

Virtually all of the great new "isms" of legal theory can be understood as efforts to meet this challenge. Originalism in constitutional theory is among the most virulent strands of methodological theory.<sup>72</sup> Textualism is also a powerful movement in constitutional theory, and beyond that, in the normative methodological theory of statutory interpretation.<sup>73</sup> In tort theory, and in common law theory generally, Posner's unabashed reductive instrumentalism has come under attack from neo-formalists and pragmatic conceptualists.<sup>74</sup> Each of these

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<sup>72</sup> See generally, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Scalia describes what is essentially a practical perfectionistic mindset learned in the first year of law school. See *id.* at 7 ("[The] first-year [of] law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."). He proposes textualism in statutory interpretation and originalism in constitutional interpretation as methods necessary to hold judges back from simply doing what they think best. *Id.* at 23, 46. Scalia's concern is that permitting them to do so is antithetical to democracy. See *id.* at 9 ("All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy."). For more background on originalism, see ORIGINALISM: A QUARTER CENTURY OF DEBATE (Steven Calabresi ed., 2007) (collecting major speeches from early phase of originalism as a movement), and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (emphasizing discretion-constraining justification of originalism).

<sup>73</sup> SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 72 (defending originalism and textualism in constitutional interpretation and textualism in statutory interpretation); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552–53 (1994) (setting forth influential interpretive procedure for textualist originalists); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 538–44 (1988) (setting forth jurisprudential considerations in favor of more rule-oriented and text-oriented method of interpretation).

<sup>74</sup> See generally Zipursky, *Pragmatic Conceptualism*, *supra* note 38 (arguing that economic theory of tort law is purely functional and therefore insufficient). That article builds upon work by Coleman and Weinrib. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 374–85 (1992) (noting limitations of economic theory of tort law as self-fulfilling prophecy); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 46–48 (1995) (criticizing economic theory of tort law for ignoring basic relationships and structure of tort jurisprudence); Ernest J. Weinrib, *The Monsanto Lectures: Understanding Private Law*, 23 VAL. U. L. REV. 485 (1989) (rejecting instrumentalist economic theories of tort law as incomplete). I anticipate the connection between pragmatic conceptualism and neo-formalism, on the one hand, and Hart's positivism on the other, in Zipursky, *Pragmatic Conceptualism*, *supra* note 38, at 458–59, 478.

schools—originalism, textualism, and pragmatic conceptualism—arises from a sense that veracity is a virtue in legal reasoning and interpretation. Each expresses a concern that those who are charged with the job of interpreting the law too easily merge their views of what the law ought to be with the reality of what the law actually is. Each recognizes that any account of what should guide adjudication and interpretation will need to focus on an account of what the law actually is. And each selects a methodology that works for a large domain of law, but not necessarily across the board.

Originalism in constitutional theory is certainly the most widely discussed example of an interpretive theory putatively aimed at cabining judges' tendencies to make some part of the law say what they believe it ought to say. Central to the textualist form of originalism that has become dominant is the idea that the binding nature of the Constitution as law comes from its status as a written text that underwent a legitimizing process of ratification. The content of constitutional law is, on this view, no more and no less than the content of the text that was ratified. It is thus inferred that it would be wrong to permit one's views of how best to realize laudable constitutional values to govern one's interpretation of the Constitution. Rather, the interpretation must flesh out the content of constitutional law only by ascertaining the everyday meaning of the words in the text of the constitutional clause at issue.

To some extent, each of these movements aims to produce a foundation for thinking about which values, principles, and goals are embedded in the law and, in so doing, to assist those engaged in legal interpretation in their efforts to identify normative content that may then be used to flesh out the meaning of the law on occasions (perhaps most, or even nearly all) where some clarification is needed. Critically, all of these approaches aim to guide legal interpreters so that they can find a core of normative content to be drawn upon in interpretation *without asking whether the values and principles expressed in the law merit fidelity from a first-order moral point of view*. In this regard, these movements share something with the *Legal Process* approach of Harvard's Henry Hart and Albert Sacks,<sup>75</sup> to which H.L.A. Hart implicitly averted in his Holmes Lecture,<sup>76</sup> and which influenced him during the period leading up to the Hart-Fuller

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<sup>75</sup> HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994).

<sup>76</sup> See *supra* text accompanying note 12 (quoting Hart, *supra* note 1, at 612).

debate.<sup>77</sup> To the extent that these content-seeking methodological theories of legal interpretation defend the view that the question of whether the law merits fidelity should be bracketed when trying to ascertain the content of the law, practical positivism and the embrace of veracity as a virtue in legal interpretation remain very much alive.<sup>78</sup>

### III

#### VERACITY, SOCIAL FACTS, AND TRUTH IN LAW

On my reading of *Positivism and the Separation of Law and Morals*, then, Hart was arguing that legal interpreters ought to be careful not to confuse what the law is with what they think it ought to be. Although Hart did not use the term “veracity” and did not speak of the “virtues” of legal interpreters, I have taken the liberty of doing so here in order to accentuate the superficial resemblance between the approach Hart was defending and the “fidelity”-based approach that Fuller puzzlingly misattributed to Hart. The principal point of selecting the term “veracity” is, of course, to highlight that Hart advocated *being truthful in representing the law’s content, not being true (i.e., committed) to the law’s morally worthy goals*, as Fuller’s “fidelity” suggested.

Where Fuller was closer to the mark, however, was in his perception that Hart, in his Holmes Lecture, was commending positivism as a justifiable jurisprudential theory *in action*, not simply as a matter of the speculative philosophical theory of the nature of law. And here, then, is the second coupling of contrasting phrases I have been deploying: “practical positivism” versus “practical perfectionism” as a normative approach to the activity of legal interpretation. The practical positivist contends that one must strive, in interpreting the law, to distinguish what the law is from what it ought to be. The practical perfectionist, by contrast, urges that in interpreting what the law is, one will find oneself at various junctures in which one will need to reason about which justification will render the law more deserving of

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<sup>77</sup> See Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 99–102 (1999) (describing 1956 Harvard Law School seminar on discretion attended by H.L.A. Hart during his visit to Harvard, and discussing disagreement during seminar between H.L.A. Hart and Henry Hart).

<sup>78</sup> I do not mean to embrace any of these views here (and, indeed, I would not be inclined to embrace any version of originalism). However, today, each has its own foils that are similar in the aspiration to find a core in political and jurisprudential theory of what gives the law its content. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (advancing popular sovereignty theory in constitutional law); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (critiquing various theories of statutory interpretation, including textualism).

allegiance, from a moral point of view, and one ought to select the interpretation that is more deserving of allegiance. The practical positivist commends veracity as a judicial virtue; the practical perfectionist commends fidelity. The overarching theme of this commentary on the Hart-Fuller Debate at Fifty is that it is illuminating to depict the dialogue as one between a practical positivist (Hart) and a practical perfectionist (Fuller).

In his reply to Hart, Fuller effectively raises three very substantial challenges to what I have called practical positivism. Liberally interpreted, they are:

- (1) What entitles you to say that there is such a thing as truth about law, or such a thing as the correct interpretation of law, if not simply by your own stipulation?<sup>79</sup>
- (2) What reason is there to believe that epistemic access to truth about law is available independently of access to beliefs and convictions about what the law ought to be and about the proper purposes of the law?<sup>80</sup>
- (3) Even assuming there is a ground for thinking there is truth in law and that it is, at least in principle, epistemically accessible in a way that permits it to be distinguished from convictions about what the law ought to be, what reason is there to think that it is important to identify the truth about law, in that sense?<sup>81</sup>

Hart published *The Concept of Law* only three years after his Holmes Lecture, and it clearly and openly developed themes that were begun there.<sup>82</sup> Indeed, a central aim was to construct a new and workable commonsense model to support legal positivism after Hart demonstrated the shortcomings of the Austinian model. Fuller had asserted that Hart needed to offer far greater substance with regard to what law is if he was to expect anyone to accept his view as anything but stipulation.<sup>83</sup> And Fuller realized that by undercutting Austin's

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<sup>79</sup> See Fuller, *supra* note 2, at 633–35. Here, Fuller does not refer to “truth” but to the question of what “the law is.” His complaint is that Hart needs to give a more substantive account, otherwise Hart appears to be arguing by stipulation. *Id.*

<sup>80</sup> See *id.* at 666–67. “Can it be possible that the positivistic philosophy demands that we abandon a view of interpretation which sees as its central concern, not words, but purpose and structure?” *Id.* at 667.

<sup>81</sup> *Id.* at 656. More specifically, Fuller argues plausibly that Hart cannot make good on the claim that there is a dilemma between what the law requires and what being right and decent requires, because he does not tell us anything about the nature of the duty to obey the law, i.e., the moral significance of law. *Id.*

<sup>82</sup> Among the many illuminating features of Nicola Lacey's work, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004), is her depiction of the immensely productive segment of Hart's life during which he was working on *Positivism and the Separation of Law and Morals* (1958), *The Concept of Law* (1961), and *Causation in the Law* (1959).

<sup>83</sup> Fuller, *supra* note 2, at 633–35.

command theory—in which binding law issues from a sovereign to his subjects—Hart had left a void on a critical question: What constitutes a law *existing* in a legal community? More broadly, Hart needed an account of what it was for a legal system to exist.

Looked at backwards, through the lens of the *Postscript*, Hart's effort to construct a model of a legal system in *The Concept of Law* appears to have been an enterprise in descriptive jurisprudence—a kind of armchair a priori sociology. That is certainly what Hart came to say in his later life.<sup>84</sup> But *The Concept of Law* does not look like that from the perspective of *Positivism and the Separation of Law and Morals*. On the contrary, it looks like an account of how it is that there is something for there to be truthful about in legal thought, legal speech, and legal interpretation. Like Austin's command theory, Hart's theory of a legal system as a system of rules is an effort to tell us what it is we are speaking about, describing, and trying to be accurate about when we are purporting to describe the law. It is not a semantic theory of the truth conditions of statements about "law," as Dworkin might be taken to suggest in *Law's Empire*;<sup>85</sup> it is a philosophical theory of the subject matter of legal statements—what we talk about when we talk about law, as Raymond Carver might put it.<sup>86</sup> It is a nontranscendentalist, nonmoralistic theory of what it is for there to be such a thing as "getting it right" (or not getting it right) when one describes the law.

The interpretation of *Positivism and the Separation of Law and Morals* as being about veracity offers one particular perspective, then, on why the project of *The Concept of Law* was important to Hart. If Austin's command theory was unacceptable, and yet the effort was to distinguish what the law is from what the law ought to be, we need a philosophical explanation of why there is such a thing as what the law is. If that philosophical explanation is good enough to support the emphasis on veracity, then it must also include an explanation of why the ascertainment of law can, in principle, proceed in a manner that pushes to one side questions about what the law ought to be. Hart's theory of legal systems in *The Concept of Law* purports to do exactly that.

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<sup>84</sup> H.L.A. HART, *Postscript to THE CONCEPT OF LAW*, *supra* note 3, at 239–44.

<sup>85</sup> RONALD DWORKIN, *LAW'S EMPIRE* 4 (1986).

<sup>86</sup> Cf. RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE* (1989).

A. *Social Facts in Hart's The Concept of Law and  
Dworkin's Argument from Disagreement*

*The Concept of Law* asserts that in a modern legal system (such as the American and U.K. systems) the extant laws are rules that satisfy certain conditions. What those conditions must be will depend on what a set of legal officials in that system—typically the judges—accept as the master rule of the legal system. This “rule of recognition” is two things at once: (i) a propositional entity (which is concededly difficult to formulate) that sets out various conditions for what counts as law, and (ii) a social practice.<sup>87</sup> As I have explained elsewhere, one can distinguish the sort of thing a rule of recognition *is*—a proposition, like that described above—from whether a rule of recognition conceived as a proposition stands in a certain dyadic relation to a particular legal community. The kind of relation to the community is being-embedded-in-that-community (by a certain kind of conventional social practice), a relation in which the legal officials of that community use that proposition as the guide to which putative legal rules are deemed valid and which are not. Notably, the practice is one in which part of the reason that participants conform to it is that they are aware that others conform to it, and they too are expected to conform to it. Unfortunately, Hart's label for this kind of practice was a “social rule”; this phrase turned out to be quite counterproductive, because it includes the word “rule,” thereby inviting confusion regarding whether rules of recognition are basically propositions or basically practices.<sup>88</sup>

A central contention of *The Concept of Law* is that it is a social fact, in any given legal community, which rule of recognition proposition is accepted as a social rule. And now we add to this that the rule

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<sup>87</sup> See Timothy A.O. Endicott, *Herbert Hart and the Semantic Sting*, 4 LEGAL THEORY 288–89 (1998). Endicott may well be right that Hart's account was not criterial, but the account Endicott offers in its place preserves the place of social facts within Hart's account of law. To this extent, I believe it equally vulnerable to the version of the argument from contestability presented here, but greater care would be needed to establish this.

<sup>88</sup> As I have argued elsewhere, this overuse of the term “rule” makes it easy to misinterpret what is meant when one says that a rule of recognition is a social rule. That is not the kind of thing a rule of recognition is; a rule of recognition is a proposition. However, if a rule of recognition is an operative rule of recognition in an actual legal system, then it will have the attribute of being a social rule. The analysis put forward here is a very condensed version of that developed in some of my other work. See generally Benjamin C. Zipursky, *The Model of Social Facts*, in HART'S POSTSCRIPT, *supra* note 25, at 219, 247–55 [hereinafter Zipursky, *Social Facts*]; Benjamin C. Zipursky, *Pragmatism, Positivism, and the Conventionalistic Fallacy*, in LAW AND SOCIAL JUSTICE 285 (Joseph Keim Campbell et al. eds., 2005) [hereinafter Zipursky, *Pragmatism*]. Analytic philosophers have in recent decades called this sort of social practice a “convention,” following David K. Lewis's classic, CONVENTION: A PHILOSOPHIC STUDY (1969).

of recognition determines the boundaries of what is valid law. And we imagine a rule of recognition that conditions validity upon historical and social matters. If all of these assumptions hold, then the question of whether something is or is not valid law has a factual answer.<sup>89</sup> To this extent, there is truth about law.

Hart struggled, first in *Positivism and the Separation of Law and Morals*, and then in *The Concept of Law*, to deal with the uncertainties of meaning that he initially called “the penumbra” of the meaning of legal terms and went on to describe in terms of “the open texture of law.”<sup>90</sup> When we see the elegance of his account in *The Concept of Law* of why there are facts about law, we should be able to see why the vagaries of interpretation seemed like such a spoiler. For one could say as a fact that certain putative legal norms were law. But on the other hand, knowing the law in a useful sense will always mean being able to apply it, and so long as there are open questions about how the law is to be interpreted at various junctures, there will then be huge gaps in what is the truth about law. Moreover, as Fuller’s powerful critique of Hart’s core/penumbra analysis foreshadowed, the vagaries of interpretation became only more evident in the decades following *Positivism and the Separation of Law and Morals*.

The apparatus to articulate this problem was in front of Hart in *The Concept of Law*, but he made little use of it, at least explicitly. So long as there are secondary legal rules that have the status of social rules and are conventionally accepted by legal officials, it is plausible that norms of interpretation are social rules too. Perhaps Hart would have understood these as implicit in the rule of recognition; perhaps they would have been a form of rule of adjudication; perhaps a separate category of secondary legal rule. It does not really matter. The point is not that such rules would eliminate uncertainty; Hart of course believed there was uncertainty and would have had no reason to wish a theoretical device that would suppress that truth. It would, rather, help us to articulate the possibility of law existing with respect to a matter that was prima facie ambiguous (on language alone), but that competent legal officials would all regard as having the same meaning. To the extent that there are accepted rules of interpretation,

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<sup>89</sup> Interestingly, Hart is particularly open about the inclusiveness of his positivism in his Holmes Lecture and concludes with a discussion bracketing cognitivism vs. noncognitivism for moral propositions. See Hart, *supra* note 1, at 624–29. The upshot is that there is a doubly disjunctive account; if, as a matter of contingent fact, there are no moral predicates in the rule of recognition, then an account in terms of social facts will work and there will be truth. If there are moral predicates, then one’s treatment of truth will depend on whether one is a cognitivist or a noncognitivist, and the noncognitivist will end up with a sort of fractured account of truth in law.

<sup>90</sup> HART, *supra* note 3, at 124–36.

those rules also determine what the underlying legal rules mean in that legal system. Hence, there could also be truth about the correct interpretation of a legal rule. Correspondingly, of course, such rules could leave the ambiguity intact, or could even generate unclarity where there was prima facie clarity. In this way, I believe, Hart's apparatus could be extended to generate an account of truth about law that could, at least in principle, accommodate much of what Hart understatedly referred to as "the open texture of law." We would still have answers to legal questions that were true by virtue of social facts determining certain secondary legal rules as extant, and by virtue of the application of those secondary legal rules. This might be labeled a "penumbra-extending version" of what I have elsewhere called "the model of social facts."<sup>91</sup>

Ronald Dworkin addresses the social facts thesis with an important argument first made in *The Model of Rules II*<sup>92</sup> and developed in *Law's Empire*<sup>93</sup>—what I shall refer to as "the argument from disagreement." It runs as follows:<sup>94</sup> Judges do not in fact agree about the criteria for what counts as law. Therefore there is no social rule that determines what the law is. In response to Hart's (and others') observation that sometimes it is the *application* of an agreed upon rule that is disputed, Dworkin has three replies: (a) Any putatively valid law as to which there is no agreement regarding whether it satisfies the operative rule of recognition neither qualifies nor fails to qualify as valid law, thereby diminishing the reach of the theory since, on the Hartian theory, it is only the rule of recognition insofar as it is agreed upon in practice that fixes what is law; (b) disagreements about rules in fact keep pushing back to more and more basic levels, threatening to trivialize the rule of recognition; (c) regardless of whether articulations of a rule of recognition are in fact agreed upon, every articulation of a rule governing what is valid law is in principle open to being contested.<sup>95</sup>

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<sup>91</sup> See Zipursky, *Social Facts*, *supra* note 88.

<sup>92</sup> See RONALD DWORKIN, *The Model of Rules II*, in TAKING RIGHTS SERIOUSLY 46, 54–64 (2d ed. 1978).

<sup>93</sup> See DWORKIN, *supra* note 85, at 3–44.

<sup>94</sup> An excellent account of the argument is found in Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 35–40 (Arthur Ripstein ed., 2007).

<sup>95</sup> See DWORKIN, *supra* note 92, at 66–68 (discussing the need for normative argumentation regarding the acceptance of any putative rule of recognition). To be more precise, Dworkin's claim is not so much the global and affirmative claim that every legal statement is contestable, but the negative, holistic claim that the positivists' assertion that there is always a fundamental legal statement that is incontestable—a rule of recognition that is beyond contest—is false.

I have argued in two prior papers that Dworkin's argument from disagreement is sound, and that its strongest component is the argument from contestability, (c), sketched above.<sup>96</sup> Indeed, I have argued that Dworkin's argument from contestability is structurally parallel to Quine's famous refutation of the analytic/synthetic distinction in *Two Dogmas of Empiricism*.<sup>97</sup> In both cases, if the statement in question is to have content, it must be considered together with other statements in conjunction with which its truth is to be evaluated. But if that is so, then it is in principle possible that there will be junctures at which an open-minded inquirer will consider absorbing some new evidence or consideration by rejecting or altering this particular statement. This seems to be impossible because there are certain statements that, in addition to being part of the language that users employ substantively and (more typically) for a variety of convention-keeping purposes in a community (e.g., education, clarification), are also employed by theorists engaging in the enterprise of characterizing the whole system for the purposes of individuating it within a broader domain of possible systems.

Like meaning statements or definitions in language, rule-of-recognition statements in law play this double role. Particularly because of their role in individuating legal systems, there is a sense in which it is true that a legal official may have switched legal systems when she rejects a particular rule-of-recognition statement. But to infer from the fact that a given rule of recognition is accepted at a given point in time in a given legal community that anything not complying with that rule is not law in that community is to commit what I call "the conventionalistic fallacy."<sup>98</sup> It has the effect of wrongly converting a social fact that is significant in light of the boundary-defining role of rules of recognition in the metatheory into a rigid and epistemically privileged substantive statement within first-order discourse. The sort of statement rendered true by such a social fact is simply a statement of social fact about legal officials in community X regarding what proposition they conventionally accept to govern their determinations of validity. However, the rule-of-recognition statement within first-order legal discourse is a legal statement, not a social fact statement. That is, such a statement says something about the legal properties of a course of conduct, dispute, governmental or private entity, putative statute or decision, etc.; it does not merely say some-

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<sup>96</sup> See Zipursky, *Social Facts*, *supra* note 88; Zipursky, *Pragmatism*, *supra* note 88.

<sup>97</sup> WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (1961).

<sup>98</sup> Zipursky, *Pragmatism*, *supra* note 88.

thing about how individual actors in a given community behave or what attitudes they have.

Consider the following oversimplified example. A social fact statement would be:

In the legal community of the United States, legal officials conventionally accept that no federal statutory law is valid that the Senate has not passed by majority vote.

A rule-of-recognition statement would be:

No federal statutory law is valid that the Senate has not passed by majority vote.

The truth of the former is purely a matter of social fact; the truth of the latter is a legal issue. There are sentences that, in some respects, express both simultaneously, such as:

In the American legal system, no federal statutory law is valid that the Senate has not passed by majority vote.

These sentences are convenient, play important educative roles, and can easily serve both to describe social facts and to ground inferences about law. But they tempt us to engage in the conventionalistic fallacy of supposing that the legal truth of the underlying rule-of-recognition statement (and, therefore, of particular statements about primary rules of law being valid) is simply a matter of social fact. This is the mistake at the root of what Dworkin identifies in his argument from disagreement.

### *B. Coherentism and Hart*

It is important to see, however, what Dworkin's argument from disagreement shows and what it does not show. What it shows is that the truth of a rule-of-recognition statement—as a legal statement—is not simply a matter of social fact about individual behaviors and attitudes. This, in turn, undercuts the idea that the truth of legal statements depends on a combination of facts about whether certain criteria of the rule of recognition are satisfied and a set of social facts. Thus, to the extent that Hart was seeking to reduce the subject matter of legal statements to social facts plus the facts-types indicated in rules of recognition, Hart's model of social facts fails.<sup>99</sup>

Yet Dworkin infers—at least in the *Model of Rules II*<sup>100</sup> and in “The Semantic Sting” argument in *Law's Empire*<sup>101</sup>—that this defeats Hart's picture of legal systems in *The Concept of Law*, and, in turn,

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<sup>99</sup> This holds whether the version of positivism be exclusive or inclusive. *Id.* at 308.

<sup>100</sup> See DWORKIN, *The Model of Rules II*, *supra* note 92.

<sup>101</sup> See DWORKIN, *supra* note 85, at 45–46.

defeats legal positivism as a whole.<sup>102</sup> But, as I and many others have pointed out, this is too quick an inference.<sup>103</sup> It remains a possibility that, in some sense, the possibility of truth for rule-of-recognition statements depends upon patterns of social practice, but that their truth is not reducible to social facts about members of the legal community. Their truth is contestable, and their truth is not accessible from a form of discourse that purports to be strictly extralegal. That is exactly the role that many philosophers of language take toward meaning claims.<sup>104</sup>

More broadly, philosophers such as Jules Coleman,<sup>105</sup> Hilary Putnam,<sup>106</sup> and Dworkin himself<sup>107</sup> have taken a holistic, nontranscendentalist view toward legal statements, and it is not at all clear why a Hartian could not take such a view. I have elsewhere called such a view Legal Coherentism.<sup>108</sup> Philosophers of language following Donald Davidson<sup>109</sup> typically contend that a domain of assertions that purport to be about a range of practices, goods, actions, and entities connected with our everyday world, and spoken about and argued about coherently, are capable of truth and falsity. To put the point succinctly, if somewhat frustratingly, a thin coherence-based theory of legal truth seems possible at the level of semantics, so long as a Hartian theory of conventions is available to explain how there is a subject matter for legal statements at all.

### C. *Veracity and Coherentism*

Let us return now to the second of the three Fuller-inspired challenges to practical positivism that I laid out at the beginning of Part III:<sup>110</sup> What reason is there to believe, within a legal coherentist framework, that it is possible to ascertain what the law is without relying upon one's beliefs regarding what the law ought to be? There is at least one good reason to think this is not possible. Ronald Dworkin's theory of law in *Hard Cases* and *Law's Empire* is fruitfully

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<sup>102</sup> Except as reconstrued as a form of normative jurisprudence resting on values of predictability and notice. See *id.* at 117–20.

<sup>103</sup> See, e.g., Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139 (1982).

<sup>104</sup> Although he later took a different view, Quine's position on meaning claims was holistic in this sense. See QUINE, *supra* note 97.

<sup>105</sup> See, e.g., COLEMAN, *supra* note 68.

<sup>106</sup> Hilary Putnam, *Are Moral and Legal Values Made or Discovered?*, 1 LEGAL THEORY 5 (1995).

<sup>107</sup> See DWORKIN, *supra* note 85, at 78–83 (distinguishing internal and external skepticism); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 167–77 (1985).

<sup>108</sup> Zipursky, *Legal Coherentism*, *supra* note 38.

<sup>109</sup> See, e.g., Davidson, *supra* note 38.

<sup>110</sup> See *supra* text accompanying note 80.

understood as a form of coherentism,<sup>111</sup> and Dworkin has obviously developed the view that what the law actually is cannot be abstracted away from the question of which interpretation, among those versions that are possible on loose grounds of fit, would place the law in the best light, or would render the law as interpreted to be best justified, which is very close to what the law “ought to be.”<sup>112</sup> To this extent, Dworkin’s corpus could be understood to provide a unified account of fidelity and truthfulness.

While Hart slid too quickly from social facts about rule-of-recognition acceptance to social facts about law, Dworkin slid too quickly from the failure of a social facts model, on the one hand, to the pervasive appropriateness of a “best light” attitude in legal interpretation. As Stephen Perry has pointed out in an excellent article, Dworkin’s demonstration of the pervasiveness of moral principle within law, suggested in *The Model of Rules*, falls far short of the view suggested in *Hard Cases* and carried through in *Law’s Empire*, in which the truth about what the law is is identified with the legal materials understood as an embodiment of the most justifiable set of moral principles that fits the legal materials adequately, as a whole.<sup>113</sup> That is, when a judge produces the most morally attractive interpretation of the law that actually fits it, that judge has accurately stated what the law actually is, in Dworkin’s view. Of course, Dworkin recognized the need for much more argument and produced it;<sup>114</sup> whether the further argument succeeds is beyond the reach of this Article. The point here is simply that a coherentism that rejects a rigid boundary and accepts moral principles in law does not, in and of itself, entail a pervasive dependency of the truth about law upon the acceptance of a general justificatory framework within moral and political theory. Similarly, the rejection of the sources thesis in an account of law—whether right or wrong—does not mean that it is

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<sup>111</sup> RONALD DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY, *supra* note 92, at 81, 115–18 (using Quinean metaphor of “seamless web” in legal interpretation and explaining judge’s need to find coherent set of principles); DWORKIN, *supra* note 85, at 176 (developing interpretive approach that prizes integrity, political virtue that builds in importance of coherence in evaluating which set of legal statements interpreter should accept).

<sup>112</sup> DWORKIN, *supra* note 85, at 410–13.

<sup>113</sup> Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 809–10 (1997). Compare DWORKIN, *The Model of Rules II*, *supra* note 92, at 52–53, with DWORKIN, *Hard Cases*, *supra* note 111, at 116.

<sup>114</sup> *Law’s Empire* is in many ways an expansion of Dworkin’s theory put forward in his essay *Hard Cases*. The laudability of the coherence-based normative methodology of adjudication in *Hard Cases* is transformed into the integrity-based defense of an entire conception of law in *Law’s Empire*; the continuity of the mythical Judge Hercules from the article to the book is one of many signals that the book can be understood as a development of the essay.

always or even generally legitimate in the act of ascertaining what the law is to go to the question of whether some putative piece of law or interpretation of the law is moral or merits fidelity.

The obvious question to ask now is whether the Dworkinian argument from disagreement applies to the penumbra-covering version of Hart's model in *The Concept of Law* developed above. The answer to this question is as double-edged as it was for the more basic version of the argument from disagreement regarding rules of recognition. The need for conventional rules of interpretation in order for there to be law (under the penumbra) might seem to suggest that what the law is (interpreted) turns on the social fact about whether such rule is in fact accepted and the considerations that the rule of interpretation requires adjudicators to select. Again, the point would be that first-order legal statements of the sort at issue in adjudication or the giving of legal advice are of a different order than social-fact statements and that therefore, it would be fallacious to infer that social facts limit the domain of reasons in legal arguments to just those considerations laid out in the accepted rules of interpretation. In other words, it would be fallacious to suppose that the sheer fact of acceptance of a set of principles of interpretation could somehow cut off the legal relevance of normative considerations in legal interpretation. However, of at least equal importance, it would be fallacious to suppose, from this critique of the expanded Hartian model, that considerations of what the law ought to be should always be present in determining what the law is. The lack of social fact-based reasons sufficient to exclude normative considerations in interpretation does not entail the pervasiveness of questions concerning why fidelity is merited or what makes the law most justifiable.

#### *D. Coherentism and the Value of Veracity: Intrinsic Value*

The thinness of a coherentist account of legal truth certainly has its advantages. But it has its disadvantages too. One of these disadvantages is that a coherentist does not have any easy answer to the question: Why is it good to speak the truth about law? Of course, one could easily give a moral defense of the claim that one ought not intentionally misrepresent the law; doing so involves manipulation. But the ethic of veracity in jurisprudence goes beyond that. It suggests that one ought to aspire to ask a certain sort of question about the law, and one ought to aspire to a certain level of answer to that question. To return to our global warming example, why should Justice Stevens aspire to arrive at a measured answer to the question of whether the EPA's decision not to regulate was arbitrary and capri-

cious, rather than an answer that builds in what he believes the EPA ought to do?<sup>115</sup> Assuming that it is a judgment call, in some sense of the term, whether the EPA's decision was arbitrary and capricious, why not ask which decision would merit our fidelity, rather than seeking a less normatively ambitious answer? In effect, we have now arrived at the third of the three Fuller-inspired challenges set forth at the beginning of Part III:<sup>116</sup> Even assuming there is such a thing as the truth about what the law is, and assuming that it is accessible independent of beliefs about what the law ought to be, why is identifying that truth a valuable enterprise?

The obvious direction in answering this question is the direction of legal theorists who, in their own way, have been trying to squelch practical perfectionism: broad and narrow originalists<sup>117</sup> and textualists,<sup>118</sup> theorists in constitutional interpretation; textualists and rule-oriented theorists in statutory interpretation;<sup>119</sup> and neo-formalists and pragmatic conceptualists<sup>120</sup> in common law theory. Each of these schools of legal theory believes that accurately capturing the truth about what the law says is critically important because the law lays out norms both recognizing and constraining power, and these norms only go a certain distance—although just how far they go is often unclear. Beyond this distance—which may be measured by text, by intent (at various different levels), or by structure—what a legal interpretation offers may be commendable and may even be one that should be adopted, but it is no longer precisely a characterization of what the law says. Conversely, to give up before this level is reached is to give insufficient attention to what should be conceived of as part of the law. For example, the broad originalism contained in Dworkin's famous essay, *Constitutional Cases*,<sup>121</sup> indicates that the Equal Protection Clause of the Fourteenth Amendment not only could but should be read as supportive of *Brown v. Board of Education*.<sup>122</sup> This is because the content of the Equal Protection Clause is appropriately

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<sup>115</sup> See *supra* notes 46–53 and accompanying text.

<sup>116</sup> See *supra* text accompanying note 81.

<sup>117</sup> See, e.g., ORIGINALISM: A QUARTER CENTURY OF DEBATE, *supra* note 72.

<sup>118</sup> See, e.g., SCALIA, A MATTER OF INTERPRETATION, *supra* note 72; Calabresi & Prakash, *supra* note 73.

<sup>119</sup> See, e.g., FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

<sup>120</sup> See COLEMAN, *supra* note 68, at 16–24; Zipursky, *Pragmatic Conceptualism*, *supra* note 38.

<sup>121</sup> RONALD DWORKIN, *Constitutional Cases*, in TAKING RIGHTS SERIOUSLY, *supra* note 92, at 131 (2d ed. 1978).

<sup>122</sup> 347 U.S. 483 (1954).

understood at the level of the abstract principle of equality that was placed there by the framers.<sup>123</sup>

When, however, a court misdescribes the law as authorizing a certain result, and then acts to secure that result, it is depicting its own conduct as an exercise of the power that it has (or as an application of the power that the other lawmaking body has). Similarly, when a lawyer or law professor interprets a piece of law in the context of advising his or her client or surveying to the world of lawyers for the benefit of evaluation or revision, the lawyer or law professor is depicting the space of conduct carved out as permissible (or mandatory) by an organ of political power that our legal system understands as vested with that power. The practical perfectionist permits what the lawyer or judge regards as unclarity in the contours of the power to count as permission to act in a way that the court or the client wishes to, or permits an exercise of power to create a nonpermission (as in *Bush v. Gore* or *Massachusetts v. EPA*). This is particularly striking where (as in the torture memo) the lawyer uses unclarity (or alleged unclarity) to reduce the reach of the law and create a permission. Lawyers effectively cut into the efficacy of law and into the power of the lawmaking body, such as the legislature, that our system supposedly empowers to make the law. Conversely, when a court forbids another body from acting a certain way by grafting a prohibition onto a supposed unclarity, it is cutting into the power of another body (for instance, the State of Florida in *Bush v. Gore*, or the EPA in *Massachusetts v. EPA*). It is not that the United States Supreme Court lacks power over those bodies, but that the legitimacy of the exercise of that power hinges on what the law says.

The conventional approach of deciding how to interpret these rights by drawing out what is latent in the law essentially treats our society and legal system as having a certain shared, implicit understanding of how power is allocated. Moreover, it treats our legal system as relying upon judges and lawyers to fashion adjustments to this allocation of power in particular settings by engaging in a pattern of reasoning that incrementally draws out different aspects of this allocation of power implicit in the system. The question is not whether the substantive law merits fidelity; it is how one way or another of pushing the alleged legal category fits with a plausible understanding of who exercised the power that the law represents, how much power they had to exercise, and how they exercised it. The point is not that every interpretation by a judge must strive to adhere to the answers such questions would yield. Rather, it is that judicial

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<sup>123</sup> DWORKIN, *supra* note 121, at 133–34.

action that does something different from this is judicial action that exercises a power different than that exercised when the law is applied. The reasons in support of such an exercise must suffice to support it in this now different sort of setting.

Practical perfectionists in the judicial examples we have considered simply exercise power that is incompatible with our conventional understanding of the reasons underlying the allocation of power, while not permitting the public (or perhaps even themselves) to see that they are doing so. In the counseling examples, they are effectively negating the reach of the law and misinforming their clients.

Legal academic theories like broad originalism or narrow originalism in constitutional interpretation are, in effect, efforts to depict a set of meta-conventions of interpretation, analogous to the meta-conventions dubbed “rules of recognition.” They regard meta-conventions of legal interpretation as critical because they help delineate what is plausibly understood as a fleshing out of what is latent in the law as opposed to what is simply constructing the law a certain way to make the law what the judge believes it ought to be. Dworkin’s point in a great deal of writing, consistent with the point of holists in a wide range of subject areas, is that this theoretical enterprise is itself part of what judges and lawyers do.<sup>124</sup> To apply our earlier lesson on the argument from disagreement, even assuming there is some fact of the matter about what picture of the meta-rules of interpretation is accepted, this fact would not dictate the necessity of acceptance of the corresponding rule of interpretation. The social fact of acceptance is modally different from the norm of interpretation itself. It is therefore understandable that Dworkin believes that it is interpretation all the way down. But it hardly follows that, at the bottom of all of the elephants, is the question: Yes, but does this law or this interpretive approach *deserve* our fidelity?

#### *E. Coherentism and the Value of Veracity: Consequentialist Considerations*

Recall that a principal rationale for practical positivism—for separating what the law is from what the interpreter thinks it ought to be—was the passion for reform of law; the sense that a blurring of the distinction between what law is and what law ought to be tends to undercut the possibility of legal change by inviting people to become complacent and to assume that what is the law must be good. In this view, veracity enhances the possibility of legal change.

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<sup>124</sup> DWORKIN, *supra* note 85, at 15–30.

Regrettably, I am not at all sure that this is true. The idea that the best way for a judge to fix the law is to say that it is bad, and to hope that there will be a legislative change of it (or work for such a change) seems quite naïve, at least in American law. Our federalist system makes it very difficult for a person living in Washington, D.C., to change the law of Texas or Arizona. Our Constitution is overwhelmingly difficult to amend. Perhaps the best way to change unjust law, if one is a Justice on the United States Supreme Court, is simply to strike down the law as unconstitutional. That will make the law unenforceable, and will itself be nearly unreviewable. This is a quick and powerful change. The Supreme Court did it in the leading cases of the Warren era; does that not demolish the quietism argument?

I think the spirit of candor valued by Hart requires us to take this feature of the jurisprudential landscape in the United States very seriously. Left and right wing advocates for legal change are not dense. They see in broad perfectionistic strategies—be they realist or Fullerian—opportunities to make a difference, to change laws they think are unjust. The most promising interpretive strategy for them, in many cases, is creativity in interpreting the law and finding new legal arguments, not cautious and tightly cropped distinctions between what the law is and what the law should be. Bentham wrote about a different system than the one we have in the United States—he and Hart worked in a parliamentary system without a written constitution. It is not surprising that interpretive approaches will be of different instrumental value in different legal and political systems. This is one of the reasons for both the initial success of practical perfectionism prior to 1958 and its enduring importance today.

The foregoing discussion might seem to suggest that the normative arguments in favor of treasuring the value of veracity are largely ones relating to its value as a virtue of a legal system and that, contra Hart, veracity in legal interpretation is an obstacle to improving the law. Therefore, it might appear that there is a trade-off in the decisions of how strongly to adhere to such an interpretive approach and whether to turn to constrained perfectionism.

There is truth in the observation that the goal of revision and improvement in the law can sometimes compete with the value of veracity, but this observation is overstated and incomplete. To see why, we need only look at our examples of mischief under the rubric of performing interpretation under penumbra where meanings are not settled. Practical perfectionism cuts both ways. Many of the cases discussed above<sup>125</sup>—*Bush v. Gore* being the most obvious example—are

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<sup>125</sup> See *supra* Part II.

cases of fighting fire with fire. The Rehnquist majority saw a largely Democratic Florida Supreme Court making up the rules to reach its own desired result. On this view, they may well have been correct. But they were not about to stand by and watch it happen, and they were not about to worry too much about larding up the Equal Protection Clause, since they believed this had been occurring for decades. Similarly, the Stevens majority saw the EPA playing with words, and was not about to hold back in the exercise of raw power to correct this mischief. My point is not that the majorities were justified in doing so, or that others need to be blamed for precipitating this result. It is that the conclusion that more just results can be reached, in the long run, by practical perfectionism suffers from an artificial limitation of vision; an advocate of practical perfectionism must be willing to take what he or she regards as the bad results along with what he or she regards as the good ones, and must be willing to accept the corresponding alterations in judicial and nonjudicial power. When a court reaches for a result that requires a stretch of the power that our political system understands it to have, there are questions about how enduring and firm its results will be. This is not to say that practical perfectionism in the courts is ineffective at producing change, but to indicate that the issue is far more complex than a first cut suggests.

The larger problem of mischief under the penumbra does not pertain to the legal interpretation done by courts. It pertains to the legal interpretation done by practicing lawyers: witness the torture memo, scandals in pharmaceutical companies, banks, law firms, and across the heavily lawyered domains of American society.<sup>126</sup> If we not only tolerate but also prize practical perfectionism at the highest level of our legal system and in our law schools, it is difficult to see how we can expect veracity about the law in the many tiers of lawyers and citizens beneath. And if we cannot even get a grip on what the law is, we cannot expect conscientious objection to or criticism of the law or anything in this vicinity—certainly not fidelity to the law.

#### CONCLUSION

To the extent that Fuller's great reply to Hart in 1958 was predicated upon the idea that Hart acknowledged the importance of fidelity to the law as a theme of jurisprudence, that reply was misdirected. If Hart was engaged by any question concerning how one ought to be performing interpretations of the law, it was the complex question of what it meant to be candid about the law's content—how to avoid embroidering what the law actually says with one's aspira-

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<sup>126</sup> See Wendel, *Professionalism as Interpretation*, *supra* note 56.

tions about what it should say or, as I have put it, how to achieve veracity about law. In retrospect, it seems that Hart, having spent some time among American legal academics caught in the grip of a knee-jerk antipositivism, was struck by how much wishful thinking could be found in American adjudication, lawyering, and academic writing. Like Holmes before him, he thought it a worthwhile task to point this out. It continues to be worth it to point this out today, whether or not I have succeeded in doing so.

Although Hart's lack of an actual acknowledgement regarding the importance of fidelity meant that Fuller's argument failed as an internal critique, this is not to deny the force of Fuller's basic point. What Fuller showed—and Dworkin has unflaggingly emphasized—is that it is often hard to grasp what it means to be looking for the content of the law without a conception of what the law's ethical significance might be if we were to find it. I hope to have suggested that positivists like Hart are quite right to emphasize the opposite problem, which is quotidian but of fundamental importance: It is often hard to carry through on the important enterprise of finding and candidly representing the content of the law if we are too sure of what it is we are going to “find” before we even start to look.