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A CRITICAL GUIDE TO VEHICLES IN THE PARK

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It is the most famous hypothetical in the common law world. And it is part of one of the more memorable debates in the history of jurisprudence. Stunning in its simplicity, H.L.A. Hart's example of a rule prohibiting vehicles from a public park was intended, primarily, as a response to the Legal Realists.² Hart believed that the Realists were obsessed with difficult appellate cases at the fragile edges of the law, and as a result vastly underestimated law's everyday determinacy. Through the example of the rule excluding vehicles from the park, Hart hoped to be able to differentiate the straightforward applications of a rule at what Hart called the rule's "core" from the hard

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²H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 608-15 (1958).

cases at a rule's edge, the area that Hart labeled the "penumbra." For Hart, the fundamental flaw of the Realist perspective was in taking the often-litigated problems of the penumbra as representative of the operation of law itself.³ And insofar as judicial decisions in the penumbra necessarily involve determinations of what the law ought to be, it was important for Hart the positivist to stress that the interconnection between what the law is and what the law ought to be in the penumbra did not carry over to the core, where the separation between the is and the ought, between law and morality, could still obtain.

Although Hart's target was Legal Realism, the response came from a different direction. Lon Fuller was no Legal Realist himself,⁴ but Hart's almost offhand observations about the clear cases at the rule's core – ordinary automobiles, for example – spurred Fuller to respond.⁵ Believing Hart to be claiming that the core of a rule's application was determined by the ordinary meaning of individual words in a rule's formulation – if something like an automobile was straightforwardly a vehicle in ordinary language, then an automobile would plainly fall within the scope of the rule – Fuller

³ Although Hart's charge rings true with respect to some of the Realists, others, and especially Karl Llewellyn, explicitly acknowledged that their observations about legal indeterminacy were restricted to the skewed sample consisting of only those cases that are worth litigating. See Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930).

⁴ See Lon L. Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429 (1934). See also Myres McDougal, *Fuller v. the American Legal Realists: An Intervention*, 50 Yale L.J. 828 (1940).

⁵ Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 661-69 (1958).

offered a gripping counter-example. What if a group of patriots, Fuller asked, sought to place in the park as a war memorial a functioning military truck? Although the truck would plainly count as a vehicle in ordinary talk, it was hardly plain to Fuller that the truck ought to be excluded. Indeed, for Fuller it was not even clear whether the truck qualified as a vehicle at all in the context of this application of this rule. We could not know whether the truck was within the scope of the rule, Fuller argued, without consultation of the rule's deeper purpose. Fuller's challenge was thus not to Hart's conception of the penumbra, as to which Fuller presumably would have had little quarrel. Rather, Fuller's hypothetical truck/memorial was a challenge to the idea of a language-determined core, and by offering this example Fuller meant to insist that it was *never* possible to determine whether a rule applied without understanding the purpose that the rule was supposed to⁶ serve.

The debate over this simple example has spawned numerous interpretations, applications, variations, and not a few misunderstandings.⁷ The fiftieth anniversary of

⁶ In using a phrase such as "supposed to," I try, with only limited success, to avoid terms having a meaning similar to that of "intended to." Throughout his life Fuller remained committed to law's overall purpose, and also to the particular purpose behind particular laws. The purpose that a reasonable person might see a presumably reasonable law as serving (which is how Fuller might well have put it), however, is very different from the intentions or mental states of the people who actually drafted or enacted the law. See *Richards v. United States*, 369 U.S. 1, 9 (1962); Aharon Barak, *Purposive Interpretation in Law* 265-68 (2005); Felix Frankfurter, *Some Remarks on the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947); Max Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863 (1930).

⁷ Among the more extended discussions, some of which qualify as misunderstandings, are Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991); Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* 200-06 (2001); Larry Alexander, *All or Nothing at All: The*

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

I. *A Debate Within a Debate*

Intentions of Authorities and the Authority of Intention, in *Law and Interpretation* 360 (Andrei Marmor, ed., 1995); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C.L. Rev. 1254, 1333-41 (2000); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 209-11 (1980); William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 Colum. L. Rev. 558 (2000); Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 Notre Dame L. Rev. 1449, 1460, 1463, 1474 (1997); Heidi M. Hurd, *Sovereignty in Silence*, 99 Yale L.J. 984, 989-99 (1990); Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 Md. L. Rev. 1192 (1993); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 279, 338-46 (1985); Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 San Diego L. Rev. 519, 520-23 (2005); Frederick Schauer, *Formalism*, 97 Yale L.J. 509 (1988); Pierre Schlag, *No Vehicles in the Park*, 3 Seattle U.L. Rev. 381 (1999); Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 Tulane L. Rev. 431, 441, 456-57, 462-64, 473-77 (2001); William N. Eskridge, Jr., *No Frills Textualism*, 119 Harv. L. Rev. 2041 (2006) (Book Review).

The larger Hart-Fuller debate was focused neither on Hart's example nor Fuller's counterexample. Nor was this larger debate, principally, a debate about legal rules, or rules in general, or even about the interpretation of rules. Rather, the bulk of the debate consisted of a larger and defining controversy about legal positivism and its opponents, with Hart championing the former against Fuller's procedural variation on traditional natural theory. Conducted when Nazi atrocities committed in the name of the law were a recent memory, the debate over the question whether a broadly positivist or instead a broadly natural law vision of law would be more conducive to morally right action figured prominently in the articles of both men,⁸ as did an even deeper disagreement about the fundamental nature of law itself.

Hart does not appear to take very seriously the connection between the vehicles in the park example, or even the full discussion of interpretation within which is embedded, and these larger moral and conceptual themes. Hart had something he wanted to say to the Legal Realists, and, like the chapter of *The Concept of Law*⁹ that the discussion of the no-vehicles-in-the-park example spawned, the debate about interpretation of which the example was a focal point seems oddly removed from much of the surrounding debate about legal positivism and natural law.

⁸ Although Hart backed away from such an instrumentalist position in *The Concept of Law* (H.L.A. Hart, *The Concept of Law* (Penelope A. Bulloch & Joseph Raz, eds., 2d ed., 1994)), in 1958 he and Fuller shared the view that the worth of a theory of law lay partly in its tendency to foster the correct attitude about morally iniquitous official action. See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 *Oxford J. Legal Stud.* 493 (2005).

⁹ H.L.A. Hart, *The Concept of Law*, *supra* note 8, at 125-27.

This is not to say that there was no connection at all. The rule prohibiting vehicles in the park does have a link to Hart's larger jurisprudential position, and he makes a strained effort to demonstrate it. If law itself is to be understood as not necessarily incorporating moral criteria for legal validity,¹⁰ then there must exist some possible rules in some possible legal systems that can be identified as legal without resort to moral criteria. And what better example could there be than a rule whose principal operative terms were morally pure, and whose application, at least at the core, could avoid any recourse to morality at all? If the clear applications of the no-vehicles-in-the-park rule were plainly law, Hart appears to be arguing, than the inevitable use of morality (or justice, or equity, or policy, or efficiency, or something else non-legal) in the interpretation of unclear rules (or largely clear rules in the region of their murkiness) would not undercut the basic positivist claim. No sensible positivist, even in Hart's time (or in Austin's for that matter, as Hart himself makes clear¹¹), would claim that morality is never relevant or necessary for legal interpretation. But in order to support his case that morality is not always or necessarily relevant, Hart needs an example in which recourse to morality is unnecessary (or impermissible) to the performance of an act plainly – at least to Hart – deserving of the name “law.” The rule excluding vehicles

¹⁰ The characterization of positivism in the text comes less from what Hart wrote in either 1958 or 1961 than from subsequent debates and interpretations about the character and forms of legal positivism. *See, e.g.*, *Analyzing Law: New Essays on Legal Theory* (Brian Bix, ed., 1998); *The Autonomy of Law: Essays on Legal Positivism* (Robert George ed., 1996); *Hart's Postscript* (Jules Coleman, ed., 2001).

¹¹ Hart, *Positivism*, *supra* note 2, at 609 n.34.

from the park was just that example, and the application of that rule to clear cases in the core was just that morality-free legal act.

Making the link between the no-vehicles-in-the-park example and the debate about legal positivism is for Hart something of a reach, not least because of his dual agenda of challenging the Realists and challenging Blackstone.¹² And much the same can be said about Fuller's side of the debate. Fuller's focus on the purpose of *a* law and the purpose *of* law is an obvious connection between the interpretive debate and the debate about the nature of law, especially from Fuller's more or less natural law perspective. If law itself is by (Fuller's) definition just, then the demands of law would require that it understand particular legal acts in just or sensible or otherwise morally desirable, ways. A legal outcome such as excluding the truck/memorial from the park would thus for Fuller not only be silly, but would also be inconsistent with the deeper nature of law itself. Yet although this connection between the interpretive debate over vehicles in the park and Fuller's larger themes does exist, the connection is, as it is for Hart, somewhat of a loose one.

The lack of a close connection between the interpretive debate and the conceptual one is better thought of as a strength, however, and not as a weakness. The value of

¹² I take Blackstone, along with Cicero and Fuller but not Aquinas, to be exemplary proponents of the "unjust law is not law" position often taken as a central tenet of a prominent version of natural law theory. See Frederick Schauer, *Positivism as Pariah*, in *The Autonomy of Law*, *supra* note 10, at 31. For a recent defense, see Philip Soper, *In Defense of Classical Natural Law Theory: Why Unjust Law is No Law at All*, 20 *Can. J.L. & Jurisp.* 201 (2007).

Hart's example transcends his own use of it, and so too for Fuller's counter-example. Not only would one would be hard-pressed to find a question about legal reasoning that is unconnected with one or the other position in the interpretive debate, but it is also the case that the questions of interpretation over which Hart and Fuller tussled are serious and enduring ones even when the issue of the nature of the concept of law is far in the distance.

II. *An Unfortunate Example*

Fuller of course was compelled to take Hart's example as Hart presented it. But in terms of what we can understand as Fuller's larger point, an example using the word "vehicle" might turn out to be distracting.¹³ In order to see why this is so, we have to move the debate to a higher level of generality. That is, we have to see that the question was not only the familiar one about the potential conflict between the text of a rule and its purpose – between the letter and the spirit of the law – but about legal formality in all of its (defensible) guises.¹⁴ The question the debate about vehicles in the park raises is the question of the ever-present potential for conflict between the letter of the law (about which much more will be said in the following section) and what would otherwise be the

¹³ Hart almost certainly drew his example from *McBoyle v. United States*, 283 U.S. 25 (1931), a case in which the question was whether an airplane was a vehicle for purposes of a federal statute prohibiting the taking of a stolen vehicle across state lines. I suspect that Hart learned of the case while at the Harvard Law School in 1957-58, and that Hart learned of it from Henry Hart, or Albert Sacks, or possibly even from Fuller himself. On Hart's sojourn at Harvard and the circumstances in which the article was written, see Nicola Lacey: *A Life of H.L.A. Hart, The Nightmare and the Noble Dream* (2005).

¹⁴ See Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509 (1988); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 *U. Chi. L. Rev.* 636 (1999).

best, fairest, wisest, or most just resolution of some legal dispute or the best answer to some legal question. If the straightforward reading of the law produces an absurd or even merely suboptimal outcome, are legal actors required or even permitted to reach the right outcome instead of the outcome seemingly mandated by the plain meaning of the words on the page?

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

If this understanding of at least one meaning of the word “vehicle” is plausible, then it is no longer clear that the truck which has become a memorial is even a vehicle at all. We have all seen bronzed cannons, immobilized tanks, and flightless airplanes used as war memorials, and a tank – or a truck, for that matter – with all of its moving parts removed or welded fixed might not strike everyone as being a vehicle at all. And that conclusion might not be much different if the truck used as a war memorial consisted of an otherwise fully functioning vehicle that was placed in a locked enclosure, or bolted to a base, or perhaps even simply had its battery or keys removed. At some point on a continuum these former vehicles move from non-vehicles – the bronzed and welded tank

– to vehicles – the fully operational truck with the keys removed – but the point is that the issue might be seen as debatable. Some degree of functionality may, and only may, be one of the necessary conditions for something being a vehicle at all, and insofar as this is so then the example becomes a bit murky on the conflict between what the rule clearly requires and what the best result would clearly be. If the truck/memorial is possibly not a vehicle at all, then the conflict dissolves, and the point of the example is lost.

Not so, however, with some number of other examples. Indeed, Fuller, perhaps recognizing the problems with the word “vehicle,” gives us a different example himself. A page after talking about trucks being used as war memorials, he asks us to imagine a tired businessman who has missed his train, and nods off in the station while waiting for the next one. In doing so, however, he runs afoul of the “no sleeping in the station” rule, a rule plainly designed, says Fuller, as a restriction on the homeless (this being 1958, Fuller calls them “tramps”), who might seek to use the station as their residence.

This turns out to be a better example. Sleep is a physiological state, and from the perspective of physiology Fuller’s businessman was sleeping. Period. It is true that there are uses of the word “sleep” that do not require physiological sleep, as when sleep is a synonym or euphemism for “have sex,” but there are few instances of the reverse. If you are physiologically sleeping you are almost always sleeping in ordinary language, even if sometimes when you are sleeping in ordinary language you are not always physiologically sleeping. And if this is so, then the “no sleeping in the station” example is a better one than the prohibition on vehicles in the park, because now the conflict

between what the rule on its face requires and what a good outcome would be becomes much crisper and substantially less open to challenge on definitional grounds.

The same crispness of conflict is also apparent in the now-prominent example of *Riggs v. Palmer*.¹⁵ The force of using *Riggs* as an example of one dilemma of legal reasoning is that the case also presents a well-defined opposition between what a rule says and what the morally right or sensibly right or all-things-considered right answer should be. Insofar as the Statute of Wills as it existed in 1889 said plainly that anyone named in a will would inherit except in cases of fraud, duress, or incapacity at the time the will was made,¹⁶ then Elmer Palmer should clearly inherit according to the statute even though his killing of his grandfather, the testator, makes this a morally abhorrent result. We now associate the case with Ronald Dworkin,¹⁷ and with the Hart and Sacks materials on the Legal Process,¹⁸ but *Riggs* as well as the sleeping businessman would

¹⁵ 22 N.E. 188 (N.Y. 1889).

¹⁶ It is noteworthy that both the majority and the dissent in *Riggs* share this understanding of what the plain meaning of the statute required. Judge Earl for the majority, Judge Earl said that “[i]t is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled, or modified, give this property to the murderer. 22 N.E. at 189. And in dissent, Judge Gray insisted that “the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way.” 22 N.E. at 192. For both the majority and the dissent, therefore, the facts of *Riggs* presented an inescapable conflict between the plain meaning of the statute and the best, fairest, or most just result.

¹⁷ Ronald Dworkin, *Law’s Empire* 15-20 (1986); Ronald Dworkin, *Taking Rights Seriously* 23 (1978).

¹⁸ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frckey, eds., 1994).

have been clearer examples for Fuller than one using the word “vehicle,” a word that is linguistically problematic in just, for Fuller, the wrong way.

So although some might quibble over whether the military truck ceased being a vehicle at the moment it became a war memorial, this is a peculiarity only of the example. The literature on statutory interpretation is replete with instances in which the conflict between plain meaning and good sense is far less escapable, whether they be real cases like *United States v. Kirby*¹⁹ and *Church of the Holy Trinity v. United States*²⁰ or hypothetical ones like Pufendorf’s surgeon who in performing an emergency operation ran afoul of the prohibition on “letting blood in the streets.”²¹ We should not get hung up on the word “vehicle,” therefore, for the point of Fuller’s counter-example of the vehicle that has become a war memorial is a point that far transcends the peculiarities of the particular word.

The example of the no-vehicles-in-the-park rule turns out to be doubly unfortunate because it also allows Fuller mistakenly to suppose that Hart’s argument turns on the meaning of individual words taken in isolation. Fuller stresses that Hart’s mistake is in thinking that a single word by itself can tell us what a rule means, but Hart makes no such claim. Indeed, had Hart anticipated that Fuller would call him on this

¹⁹ 74 U.S. (7 Wall.) 482 (1868).

²⁰ 143 U.S. 457 (1892).

²¹ Samuel von Pufendorf, *De Jure Naturae et Gentium Libro Octo* (1672), as described in 1 William Blackstone, *Commentaries* *59-60.

point, he might have used a better example, and perhaps the statutory language in a case like *Riggs*, or, even better, *Kirby*, would have been preferable. For although it is pretty clear what “willfully obstruct or retard the passage of the mail, or [] any driver or carrier . . .” in the statute at issue in *Kirby* means, very few questions of meaning, and not the question at issue in *Kirby* itself, would focus on any one of those words in isolation. So although Hart used an example that turned out to be susceptible to Fuller’s mis-aimed charge, nothing in Hart’s larger point is inconsistent with the (correct) view that it is sentences and not individual words that are the principal carriers of meaning.²² Hart’s claim, at least in 1958, was that the statutory language as language would generate some number of clear or core applications, and this is a claim that does not at all depend on whether it is this or that particular word in a rule or statute that is expected to carry most of the load.

III. *The Meaning of Meaning*²³

Fuller’s challenge to Hart’s theory of meaning is broader than just the question whether it is the word or the sentence that is the principal transmitter of meaning. For Fuller, Hart’s mistake in thinking that words can have meanings in isolation is the mistake of ignoring the importance of context, ignoring the maxim that meaning is use,

²² See W.V. Quine, *Naturalized Epistemology*, in *Ontological Relativity and Other Essays* 69, 72 (1969) (understanding “contextual definition” as the “recognition of the sentence as the primary vehicle of meaning”).

²³ With apologies to Ogden and Richards. See C.K. Ogden & I.A. Richards, *The Meaning of Meaning* (1923).

and of, in essence, not having read his Wittgenstein.²⁴ Once we recognize that meaning is use, Fuller appears to argue, we cannot avoid the fact that it is the use in the particular context that is the appropriate unit of understanding. And once we see this, he seems to be saying, then we must realize that, in the particular context of a rule prohibiting vehicles from the park, the particular application of that rule to a military truck used as a war memorial tells us that in this particular context the military vehicle is simply not a vehicle.

But even if Fuller were right (which he was not) that Hart was committed to a so-called pointer theory of meaning and that Hart thought that the chief unit of meaning was the word, it does not follow that meaning resides solely or even principally in the full context in which words and sentences were used. This is a common view,²⁵ but its ubiquity, like the ubiquity of belief in the scientific validity of astrology, is no indicator of its soundness. For if meaning only existed in the particular context in which words and sentences are used, it is hard to see how we could talk to each other. It is true that the compositional nature of language – the ability to understand sentences we have never heard before -- is one of the hardest and most complex of questions about the nature of language, but anything even traveling in the vicinity of the “meaning is use on a particular occasion” view of language fails even to address the compositional problem.

²⁴ Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe, trans., 1956).

²⁵ See, e.g., Stanley Fish, *Is There a Text in This Class?* 269 (1980); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685(1985); Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. Chi. L. Rev. 1447, 1456 (1990); Stanley Fish, *Fish v. Fiss*, 36 Stan. L. Rev. 1325, 1332 (1984).

Without knowing something about words and sentences and grammar and syntax as general or acontextual rules (or, even better, conventions), we could not hope ever to understand each other. The full particular context may indeed add something or even a great deal to our understanding, but we will understand virtually nothing at all about “the cat is on the mat” unless we understand that this sentence carries meaning by drawing on shared acontextual understandings of the facts that the word “cat” refers to cats, that the word “mat” refers to mats, and that the words “is on” refer to a certain kind of relationship that differs from the relationship described by phrases such as “is under,” “is near,” or “is a.”²⁶

When Wittgenstein, J.L. Austin,²⁷ and all of their fellow travelers in Cambridge and Oxford, respectively, talked about meaning being use, they were talking not about particulars but about rules, or conventions. And they were talking about the rules or conventions that constitute any language. The way the word “cat” is used in a particular linguistic community is what determines the meaning of the word “cat,” but it is the linguistic *community* that is the key here. That community could decide (in a non-conscious sense of that word) over time that the word “cat” would refer instead to dogs or sheep or sealing wax, and in just that sense the meaning of a word or, better, a sentence, is a function of how that sentence is now used by the relevant linguistic community. Still, nothing in the view that linguistic communities determine meaning by how they in

²⁶ See Peter Strawson, *On Referring*, in *Essays on Conceptual Analysis* 30, 30 (Antony Flew, ed., 1956).

²⁷ J.L. Austin, *How to Do Things With Words* (J.O. Urmson & M. Sbisà, eds., 1962).

fact use language entails the view that meaning is entirely or even largely a function of how particular individuals use language on particular occasions. In baseball there is a difference between a strike in the American League and a strike in the National League, even though the umpires in the respective leagues both purport to be interpreting the same words in the same written book of rules, but nothing about the difference between National League strikes and American league strikes suggests that an American League umpire is free to call balls and strikes according to National League criteria. If he does so, he will be criticized or otherwise sanctioned, and that will be because he has violated a rule that admittedly reflects a continuously changing practice, but that has enough micro-fixity in the face of long term macro-flexibility that we can usually understand at a given point of time who is following the rules and who is breaking them. And the same conclusions apply to language in general, and to the language of the law in particular. In parroting the “meaning is use” slogan that was at the time even more common than it is now, Fuller failed to understand the basic problem of language – our ability to understand sentences we have never heard, people we have never met, and propositions we have never previously encountered. And thus Fuller failed to understand why as an American English-speaking lawyer I can understand far more on a first reading of a New Zealand statute about corporate insolvency, a subject about which I am completely ignorant, than I can on a first reading of a French code provision about freedom of expression, a subject about which I have considerably more knowledge.

Fuller’s misguided foray into the philosophy of language is ironic, because it damaged his own case. Insofar as he wished to employ the military truck/memorial

example to show that legal language would not always produce the right result, or not always accurately reflect a rule's purpose, he needed to rely on the fact that legal language had meaning apart from its particular application. The vividness of Fuller's counter-example stems precisely from the fact that the truck *is* a vehicle.²⁸ If Fuller had instead offered the counter-example of a veterans group that wished to plant a bed of poppies as a war memorial, we would have thought him daft, because it is implausible that a bed of poppies would be prohibited by a "no vehicles in the park" rule. Only because a truck is a vehicle in the way that a bed of poppies is not does the example have his sting, and it may be that, like pitchers trying to explain the physics of the curveball or artists venturing into philosophical aesthetics, Fuller's examples demonstrated an intuitive and correct understanding of the problem which his explanations served only to undercut.

* * *

A related problem arises with respect the distinction between plain and ordinary meaning. Putting aside any question about words as opposed to sentences, Hart's point was basically a point about plain meaning. An automobile is plainly a vehicle, Hart argues, but the fact that what counts as a vehicle in ordinary language is (usually) the same as what counts as a vehicle in legal language does not mean that law is committed to the ordinary meaning of ordinary terms.

²⁸ The statement in the text is subject to the qualifications in the previous section.

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

Things become somewhat more problematic, however, when terms have both ordinary and technical legal meanings. We know that “due process” in the Fifth and Fourteenth Amendments has a legal/constitutional meaning with no ordinary counterpart. The women on the D train are no more likely ever to use the term than are the men on the Clapham omnibus. But that is not the same with “speech” and “religion” in the First Amendment, or “arms” in the Second, or “search” in the Fourth. Here there are both ordinary and legal meanings, and the question is about the relation between them. And so too outside of constitutional law, with terms such as trespass, complaint, and even contract.

This is not the place to engage in an in-depth analysis of the relationship between ordinary language and legal language.²⁹ My point here is only that there is nothing about the existence of law itself as a relevant linguistic community that entails that every person is his or her own linguistic community. Just as there can be plain (legal) meanings of terms like replevin and bailment, so can there be plain (legal) meanings of terms like “speech” and “contract.” That Hart and Fuller were debating, in part, about the extent to which plain meaning is dispositive says nothing about whether that meaning need be ordinary or technical – whether the terms be everyday ones or terms of art. And although Fuller does not exactly say this, one senses a flavor in Fuller’s challenge of the belief that if law can be a relevant linguistic community and a relevant linguistic context, then there is no limit to the smallness of the context that should concern us. This is a mistake, and a mistake about the relationships between language and community and between language and rules, but it is not a mistake that detracts from the basic problem. Sometimes language will simply give the wrong answer, and the problem for law is the problem of what, if anything, to do about it.

IV. *Cores, Penumbras, and Open Texture*

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

²⁹ A good exploration of the issues is Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 *Cleve. St. L. Rev.* 271 (1989).

One kind of penumbral problem, if we can even call it that, is the problem of pervasive vagueness.³⁰ Although Hart focused on statutes with a clear core and a vague penumbra, some legal rules are penumbra all the way through. Putting aside for the moment those intentionalist theories of interpretation that would find in the drafters' mental states a clear set of intended applications,³¹ certain language is sufficiently vague that there is nothing clear at all. Without recourse to intentions (or possibly, as Justice Scalia would have it, to potentially narrower contemporaneous meanings³²), there may be *no* clear cases of which searches and seizures are “unreasonable” under the Fourth Amendment, which forms of inequality are the focus of the Fourteenth Amendment's prohibition on the denial of the “equal protection of the laws,” when a “contract, combination, or conspiracy” is in “restraint of trade or commerce” for purposes of the Sherman Act, which custody decisions are “in the best interests of the child,” and just how fast one may drive when the relevant rule says only that driving must be “reasonable

³⁰ For comprehensive analytic discussions of vagueness in law, see Timothy A.O. Endicott, *Vagueness in Law* (2000); Timothy A.O. Endicott, *Vagueness and Legal Theory*, 3 *Legal Theory* 37 (1997); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 *Cal. L. Rev.* 509 (1994).

³¹ *See, e.g.*, Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* (1977); Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U.L. Rev.* 226 (1988).

³² Antonin Scalia, *A Matter of Interpretation* 3, 38 (1997). For a careful and balanced exploration of the position, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519 (2003).

and prudent.”³³ With respect to such statutes, there is no reason to believe that Hart would not have taken the position that *all* applications (questions of precedent and stare decisis aside) of such rules would have required an exercise of judicial discretion, and that judicial discretion necessarily requires recourse to extra-legal factors. And there is no reason to believe that Fuller would have disagreed, except of course with the designation of such factors as “extra-legal.” So although this kind of pervasive vagueness is widespread, and although it requires the kind of judicial behavior that Hart saw in the penumbras around clearer cores, this is not an issue as to which Hart and Fuller, except perhaps for terminology, would have disagreed.

So what then is a penumbra? Here Hart borrows in part from Bertrand Russell, who in his enduring article on “Vagueness” in 1929 drew a distinction between the “core” and the “fringe,”³⁴ but even more on Friedrich Waismann, whose elaboration of Wittgensteinian themes brought us the idea of “open texture.”³⁵ Russell was concerned principally with boundaries, and it was he who gave us the example of baldness as a way of showing that the inability to draw a sharp line between two words or concepts did not mean that there was no distinction to be had. So in this variant on the classic paradox of

³³ See Mont. Code Ann. §61-8-303 (1996), *invalidated in State v. Stanko*, 974 P.2d 1132 (Mont. 1998). See Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U.L. Rev. 155 (1999).

³⁴ Bertrand Russell, *Vagueness*, 1 Australasian J. Phil. 84 (1923).

³⁵ Friedrich Waismann, *Verifiability*, in *Logic and language: First Series* 117 (A.G.N. Flew ed., 1951).

Sorites,³⁶ Russell asked us to recognize that although there might be some cases in which we would be unsure about whether a man was bald or not,³⁷ this did not mean that there were not men who were clearly bald and men who were clearly not. And so too, we can say, with vehicles. The line between a vehicle and a non-vehicle is fuzzy – and this is presumably what Hart had in mind with respect to bicycles, roller skates, and toy automobiles – but this does not mean, Hart argued, that regular automobiles are not clearly vehicles, nor, he might have said, that lovers quietly strolling hand-in-hand in the park are not non-vehicles. In this respect, the penumbra consists of those anticipated applications of a term that we now know will present uncertainties, just as we now know that a rule requiring drivers to have their lights on after dark will be vague with respect to dusk, and that the mostly clear distinctions between frogs and tadpoles and between arms and wrists (or between elbows and arms) will become vague on the borderlines between them. In offering the example of the “no vehicles in the park rule,” and in speaking of the core and the penumbra, Hart was presumably asking us to see that for many or even most rules, we can even at the time of drafting imagine that there will be hard cases as well as easy ones,³⁸ but that the existence of the hard ones, the claims of the Realists notwithstanding, did not mean that there were not easy ones as well, just as there are clear examples of frogs, tadpoles, arms, wrists, elbows, night, day, and, of course, vehicles.

³⁶ See Linda C. Burns, *An Investigation into Natural Languages and the Sorites Paradox* (1991).

³⁷ Ten or so years ago, I used to see an example of this when I looked in the mirror.

³⁸ Which is not to say that there will be clear lines between the hard cases and the easy ones. See Timothy A.O. Endicott, *Law is Necessarily Vague*, 7 *Legal Theory* 379 (2001).

Waismann's important addition was the conclusion that it is impossible to eliminate this *potential* for vagueness, and this is the phenomenon he called "open texture."³⁹ Even the most precise term has the potential for becoming vague upon confronting the unexpected, and so no amount of precision can wall off every possibility of future but no unforeseen and even unforeseeable vagueness. When Hart's friend and Waismann's contemporary J.L. Austin talked of the "exploding goldfinch,"⁴⁰ he vividly captured the same idea, for his point was that even if we could now describe with total precision the necessary and sufficient conditions for goldfinch-ness, we "would not know what to say" when confronting a creature that was a goldfinch according to the existing criteria, but which then proceeded to explode before our eyes.

Fuller's example of the truck/memorial presents an interesting question with respect to the idea of open texture. Fuller presented this example as a case involving legal uncertainty arising from linguistic certainty, or at least should have, and it raises an important question with respect to the relationship between linguistic open texture and what we might think of as legal open texture.⁴¹ It is certainly possible to imagine legal

³⁹A generation of law professors, perhaps attempting to look sophisticated, has understood "open texture" to be synonymous with "vagueness." See [Censored in the service of kindness]. As Waismann made very clear, the two are not the same, and he used the term "open texture" to refer to the ineliminable potential for vagueness surrounding even the clearest of terms. Hart unfortunately fostered some of the problem, because in *The Concept of Law* we see the phrase "vagueness or open texture," which in context was ambiguous as to whether Hart was describing two different phenomena or whether he was just providing two terms for the same one.

⁴⁰J.L. Austin, *Sense and Sensibilia* 91963).

⁴¹ See Frederick Schauer, *On the Supposed Defeasibility of Legal Rules*, in *Current Legal Problems*, 1998 (M.D.A. Freeman ed., 1998); Neil MacCormick, *Defeasibility in Law*

uncertainty arising out of unexpected linguistic uncertainty, and if we had a statute that protected goldfinches as, say, endangered species or national symbols,⁴² a sudden awareness of the existence of an exploding goldfinch would have made the law uncertain just because that event would have made the language in which the law was written uncertain as well.

More commonly, however, and this is the point of Fuller's example, as well as Pufendorf's, as well as that in real cases like *Riggs*, *Kirby*, and *Church of the Holy Trinity*,⁴³ our language does not fail us but our law does. The language is clear, and the application is linguistically clear, but following it will lead to what looks like a wrong or unjust or unwise or inequitable or silly result. In such cases we do not have linguistic open texture, but we might have legal open texture, and it is in such cases that the law must decide what to do. For Fuller the law should always in such cases seek to come up with the reasonable result, and from this premise Fuller derives the conclusion that there are no purpose-independent clear or easy or core cases. And, interestingly, Hart may not have completely disagreed with the outcome, although he might have disagreed with the route that Fuller took to get there. When Hart says in *The Concept of Law* that legal rules are necessarily always subject to exceptions, and that the grounds for creating such

and Logic, in *Informatics and the Foundations of Legal Reasoning* 99 (Zenon Bankowski, Ian White, & Ulrike Hahn, eds., 1995); Richard Tur, *Defeasibilism*, 21 *Oxford J. Legal Stud.* 355 (2001).

⁴²Imagine, if you will, the case of the exploding bald eagle.

⁴³*Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

exceptions cannot be specified in advance,⁴⁴ we see in Hart the through-and-through mentality of the common lawyer. Common law rules are always subject to modification at the moment of application, and it is characteristic of the common law that it treats a ridiculous or even somewhat suboptimal outcome generated by an existing common law rule as the occasion for changing the rule. If “no vehicles in the park” were a common law rule, there is little doubt that Hart would have expected the common law judge to change the rule into something like “no vehicles in the park except for war memorials,” or something of that sort. And indeed Hart verges on suggesting in his discussion of the always-open “unless” clause that this is not only a characteristic of the common law, but a necessary feature of law and a necessary feature of rules.

In this Hart was mistaken. As most civilian lawyers would understand, and as Bentham would have applauded, sometimes the language of a rule generates a bad result, and sometimes we have to live with it as the price to be paid for refusing to empower judges or bureaucrats or police officers with the authority to modify the language of a rule in the service of what they think is the best result. This is the argument for a

⁴⁴ Hart had made a seemingly similar claim earlier when he said that legal concepts could not be defined except with “the aid of a list of exceptions or negative examples.” H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 Proc. Arist. Soc. (New Series) 171, 176 (1948-49). But by itself this is a mild and almost certainly sound claim. It was not until Hart added in *The Concept of Law* that the list of exceptions could never be specified in advance – that law was necessarily continuously open to new exceptions – that the claim became more debatable. A claim similar to Hart’s can be found in Neil MacCormick, *Law as Institutional Fact*, 90 L. Q. Rev. 102, 125 (1974) (claiming that listing all of the known exceptions to a legal rule would be insufficient to know when a legal rule would apply).

plausible formalism, and in this respect Hart's commitment to the continuous flexibility of the common law may have made him no more of a formalist than Fuller.

V. *The Nature of the Debate*

So what were Hart and Fuller fighting about, we might now ask? That this is the right question to ask is even more apparent in light of what might appear to some to be Hart's "concession" in the Preface to *Essays in Jurisprudence and Philosophy*.⁴⁵ Here Hart acknowledges that the distinction between the core and the penumbra is not necessarily, at least in law, located in the language in which a rule is written. The law could, Hart concedes, distinguish the core from the penumbra on the basis of purpose, or intent, and were the law to do so, it might find ourselves excluding the truck/vehicle from the reach of the rule, and thus allowing it to be erected in the park.

At this point it appears that the debate has become, in part, an empirical one. Fuller is best understood as claiming that the reasonable and purpose-based interpretation of the "no vehicles in the park" rule is a *necessary* feature of law properly so called.⁴⁶ And, if we forgive Hart for what he said about "unless" in *The Concept of Law*, Hart might now be understood, post-concession, as saying that the recourse to purpose or common sense is a possible and arguable even desirable feature of a legal system, but that it is not a necessary component of the concept of law.

⁴⁵ H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 8 (1983).

⁴⁶ For a similar argument that an equitable override of inequitable statutory or common law outcomes is a necessary feature of law itself, see Tur, *supra* note 41.

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

Thus, although much of the debate appears to be a non-empirical one, it also has an empirical side, a side in which Fuller and Hart are suggesting opposing descriptions of the role of language-determined cores in producing legal outcomes. Moreover, even as Hart conceded that the core of a rule might be determined by something other than the plain meaning the rule's language, he did not go so far as conceding that anything other than first-level purpose – the purpose of a particular rule – might take the place of language in distinguishing the core from the penumbra. In this respect Hart may well have bridled at the possibility that when the purpose of a rule as well as its language still produced a poor outcome from the perspective of broader conceptions of justice, fairness, efficiency, or wise policy, it would be appropriate for a judge to set aside both the rule

and the policy behind it, and Fuller may well have, although we do not know, been more sympathetic.

Seen in this way, the example of the “no vehicles in the park” rule also suggests a real debate about the role of the judge. One way of understanding Fuller, and possibly theorists such as Ronald Dworkin and Michael Moore as well,⁴⁷ is as believing that the good judge is one who sets aside the plain language in the service of purpose, or of reasonableness, or of making law the best it can be, or of integrity, or of simply of doing the right thing. Dworkin’s sympathy with the outcome in *Riggs* makes this clear for him and Fuller’s only slightly less overt sympathy for his mythical Justice Foster in *The Speluncean Explorers*⁴⁸ is in the same vein. So then the question is a slightly different one. If the plain meaning of a rule, or if “the law,” positivistically understood,⁴⁹ generates a wrong, silly, absurd, unjust, inequitable, unwise, or suboptimal outcome (and these are not all the same thing), then is it the job of the judge to do something about it? This is a question of role morality, and just as some would argue that justice is best done if lawyers fight for their clients and not justice, that truth may emerge from the clash of often false ideas, and that economic progress for all comes from the invisible hand of the market while individual economic actors pursue only their own well-being, it might be

⁴⁷ Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. rev. 27 (1985); Michael Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151 (1981).

⁴⁸ Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).

⁴⁹ For the conception of positivism that informs this statement, a conception that finds its roots in Bentham, Austin, and, more controversially, Hart, but a conception that is decidedly non-standard in some of the current debates, see Frederick Schauer, *The Limited Domain of the Law*, 90 Va. L. Rev. 1909 (2004).

the case that the best legal system is one in which individual judges do not seek, or at least do not always seek, to obtain the all-things-considered best outcome. Neither Hart nor Fuller addresses this issue directly, but one cannot help believing that on this question it is Fuller who far more likely sees the justice-seeking judge and Hart who might understand that in law seeking justice is not always or necessarily part of the job description of either the lawyer or the judge.

VI. *Who Won?*

I am sure that there are people who cannot see a debate without insisting that we pick a winner and a loser. Many of those same people cannot see a list or collection of two or more items without ranking the items on the list. But we are not choosing between Hart and Fuller for a single position on a law faculty. They are, after all, both dead, and that appears to make them unlikely candidates for faculty appointments.⁵⁰ And thus it may not really matter whether anyone won or lost the debate. Much more important is what the debate as a whole illuminated, and what the particular example of the “no vehicles in the park” rule illuminated. That illumination came not from the example itself, and not just from Fuller’s counter-example, but from the conjunction of the two. Looking at the conjunction, we might say that Hart’s basic point about the core and the penumbra was properly influential, and demonstrated not only his experience-based knowledge of how law worked, but also the sophistication, for the times, of his philosophical knowledge.

⁵⁰ Which is not to say that we might not prefer to have them, even dead, over some of our colleagues.

But although Fuller's philosophical forays were far clumsier, it may be important to remember that Fuller offered a highly resonant picture of modern common law legal systems, especially in the United States. In an environment in which law professors who urge judges to rewrite statutes to make them less obsolete can go on to become judges themselves,⁵¹ in which cases like *Riggs*, *Kirby*, and *Church of the Holy Trinity* are major components of the legal and judicial arsenal, and in which judges may without fear of impeachment set aside the plain language of even the Constitution in the service of something larger or deeper,⁵² Fuller may have correctly captured something important about the legal system he knew best. And even in Great Britain, a legal environment in which judges sometimes use broad conceptions of equity to defeat an otherwise unfortunate application of a legal rule⁵³ is one that appears to come closer to Fuller's description than to Hart's.

⁵¹ Guido Calabresi, *A Common Law for the Age of Statutes* 163-66 (1982). For similar arguments supporting a statute-revising function for the courts, see Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich. L. Rev. 672 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982).

⁵² See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that the Contract Clause is not to be read literally); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (same). See also *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (holding that the word "another" in the Eleventh Amendment also included the same state); *Hans v. Louisiana*, 134 U.S. 1 (1890) (same).

⁵³ E.g., *Lloyd's Bank v. Bundy*, [1975] Q.B. 326; *Re Vandervell's Trust (No.2)*, [1974] 1 Ch. 269, 322; *London Property Trust v. High Trees House, Ltd.*, [1947] K.B. 130. See also Patrick Devlin, *The Judge* 90-93 (1979).

Riggs, *Kirby*, and *Church of the Holy Trinity* are of course not all or even most of American law, to say nothing of law in jurisdictions more formal and less instrumentalist than the United States.⁵⁴ Even in America, cases like *United States v. Locke*⁵⁵ and *TVA v. Hill*⁵⁶ are also part of the fabric of the law, and although *Riggs* has become famous, there are in fact numerous decisions in which unworthy beneficiaries who were in some way responsible for the testator's death have been permitted to inherit.⁵⁷ So although the example of the truck/memorial that falls within the literal language of a statute tells us something important about modern common law legal systems, so too does the automobile that is plainly a vehicle. Indeed, if we seek to understand law and not just judging, and that was what Hart wanted us to understand by using the example in the first place, it is important that we not forget about the driver of a pickup truck, with family and picnic preparations in tow, who sees the "No Vehicles Allowed" sign at the entrance to the park and simply turns around. Thus, the best understanding of rule interpretation in particular and an important part of law in general may come not exclusively from Hart's example of the automobile or from Fuller's counter-example of the military truck,

⁵⁴ See P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and legal Institutions* (1987); *Interpreting Statutes: A Comparative Study* (D. Neil MacCormick & Robert S. Summers, eds., 1991).

⁵⁵ 471 U.S. 84 (1985) (enforcing the literal meaning of a "prior to December 31" statutory filing deadline even in the face of an argument that Congress obviously intended to say "on or prior to December 31").

⁵⁶ 437 U.S. 153 (1978) (enforcing the plain meaning of the Endangered Species Act to protect the habitat of a 3-inch long brown fish called the snail darter, even at what the majority conceded was a sacrifice of great public benefit as well as millions of dollars).

⁵⁷ The cases are described in Schauer, *supra* note 49.

but from the conjunction of both examples and both sides, and from an appreciation that both examples capture important features of the legal systems we know best. And to the extent that this is so, then the real winner of the debate is all of us.