

MISCHIEF UNDER THE PENUMBRA

Benjamin C. Zipursky*

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Introduction

*Positivism and the Separation of Law and Morals*¹ contains an important social criticism that continues to go unheeded. Hart protested that judges and jurists too frequently try to pass off their own imposition of individual political and moral views as legal interpretation; there is too much of what I shall call “mischief under the penumbra.” We ought to have clarity and candor in legal interpretation, 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 really a prelude to all kinds of interpretive shenanigans that in effect obscured or misrepresented the law. This lack of clarity and candor was regrettable, Hart argued, 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.

To my mind, this message of Hart’s famous Holmes lecture is so clear, so powerful, and so obviously true that it hardly needs to be mentioned. Unfortunately, I think such a warmhearted approach is misguided. Fifty years later, there continues to be

* Professor & James H. Quinn Chair, Fordham Law School.

¹ 71 Harv. L. Rev. 593 (1958) [hereinafter “PSLM”].

a great deal of mischief under the penumbra and it tends to be a malignant force in law and politics which is only intermittently and inconsistently recognized as such. Ironically, the interpretive approaches advocated by Hart are disfavored by the descendants of both Hart's legal realist opponents and his natural law opponents. Whether it be 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: in this sense, they all might be called "constrained perfectionists." If breathtakingly fancy footwork in legal interpretation today is viewed as "mischief," it is usually because of a disagreement on the substance of the position reached; where there is agreement, the interpretation is celebrated as brilliant and powerful.

If positivism has a tendency to lead to constricted thinking, constrained perfectionism in lawyers leads to mysterious and promiscuous thought. It has the potential to lead to what the public – and what many or most lawyers – regard as conduct that flouts expectations, common sense, and power boundaries in a striking manner. By taking frequent refuge in the concept of a penumbra of meaning, constrained perfectionism permits judges to do things that are bad for society – like deciding presidential elections or undertaking to judicial emission 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 irrelevant for their audience – like saying that the positive law of negligence is really about economic efficiency or that the Religion Clauses of the First Amendment do not necessarily relate to theism *or* organized religion.

The view I elicit from Hart's 1958 essay, which I call "practical positivism," advocates a restoration of the virtue of candor, veracity, and truthfulness in legal interpretation.

The classic articles that we are studying in this symposium are remarkable not only in substance, but also in form. Given the improbability of nearing Hart in substance, I shall content myself today with mimicking his form. In one condense and elegant writing, Hart combined three different sorts of essays: a backward looking chronicle of intellectual history, paying homage to Hart's philosophical forbearers (Bentham and Austin); a timely critique engaging his contemporaries on legal and jurisprudential issues of the day; and a forward-looking philosophical reconstruction of the central ideas animating his predecessors' legal positivism. My effort to recapitulate this three-part form leads to an initial section reinterpreting a central theme of Hart's positivism, and its connection with the positivistic tradition; a second section applying this theme to current controversies in law and legal theory; and a third section preserving Hart's theme as against a central objection by separating out problematic features of his theory and pushing forward a repaired version of the central tenet. Part I – Fidelity, Veracity, and Practical Positivism -- is therefore a piece of intellectual history that places Hart's essay alongside Fuller's response², and, more broadly within Hart's corpus of work and within the broader stretch of positivism including Bentham, Austin, and contemporary figures. Its central point is to depict Hart as an advocate of candor and veracity in the law. He regarded it as critical to tame the inclination to distort the law as saying what one thought it should be, rather than it what it did say. Part II – Mischief Under the Penumbra – switches to several contemporary examples of legal interpretation

² Lon. L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1957).

in adjudication, counseling, and academic theory, including the United States Supreme Court's 2000 decision *Bush v. Gore* – and applies the insights of Hart's positivism in criticizing much of current legal practice. There is at least as great a problem today of obfuscation and concealment in the law today as there was fifty years ago. Part III – Veracity, Social Facts, and Truth in Law – articulates and accepts one of the most powerful criticisms that has been raised against Hart's positivism – Ronald Dworkin's argument from disagreement – and yet offers reasons to think we can retain important aspects of positivism – the insistence on veracity -- in a defensible form, moving forward.

I. Fidelity, Veracity, and Practical Positivism

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. (632)

What is peculiar in this set up by Fuller is that it 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.³ 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 is surprising, however, that Fuller confidently and centrally asserts this mischaracterization of Hart.

A few qualifications are in order. Hart certainly criticized the Austinian characterization of law as mere fiat of power, and he certainly cast doubt on efforts to see law as merely a pattern of behavior. At many points in his essay – including the discussion of the informer case – 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. Indeed, the preservation of this conceptual distinction is critical to the entire separationist depiction of positivism he offers. But none of these qualifications bring us within a stone’s throw of saying that it is a central issue “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. And it seems unlikely that Hart would have regarded as philosophically fruitful the quest for better defining and serving such an ideal.

We find a slightly more promising way to rescue Fuller’s claim by turning to the famous anti-formalist portions of Hart’s essay. In discussing judges who allegedly suffer from the vice of formalism, Hart strains to imagine a judge dealing with a case that is not neatly covered by the settled meaning of a statute. It is worth quoting Hart at some length.

³ See Michael Martin, *The Legal Philosophy of H.L.A. Hart* 221 (1987) (noting that “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”).

[Such a 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 convention. He ignores, is blind to, the fact that he is in the area of the penumbra and is not dealing with a standard case. Instead of choosing in the light of social aims, the judge fixes the meaning in a different way. He either takes the meaning that the word most obviously suggests in its ordinary non-legal context to ordinary men, or one which the word has been given in some other legal context, or one, still worse, he thinks of a standard case and then arbitrarily identifies certain features in it . . . and treats these [] always as necessary and always sufficient conditions for the use in all contexts of the word . . .

“Decisions made in a fashion as blind as this would scarcely deserve the name of decisions; we might as well toss a penny in applying a rule of law.” When he turns the critique of formalistic judging into a critique of separationism, Hart writes:

Clearly, if the demonstration of the errors of formalism is to show the utilitarian distinction to be wrong, the point must be drastically restated. 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). The 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 choices, 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 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. I shall question later whether this way of talking is salutary, . . . (612)

Perhaps Fuller understood these passages as follows: Hart is conceding that formalistic decisions do not merit being called “law” and suggesting that – so far as filling in the penumbra intelligently might count as law – judges will have to strive to be true to the

animating goals of the law in question. The continuity between the core and the penumbra – the continuity and presence of law – depends 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 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 “decisions made in a fashion as blind as this would scarcely deserve the name of decisions,” he was *not* saying such judicial resolutions would not deserve to be called “law”, but that they would not really be “decisions”; the judges would be virtually replacing a process of “decision-making” by employing a resolution device as non-deliberative as the professor’s throwing of the examinations down a staircase and grading by step. For Hart, the utilization of a more intelligent process would not render them the application of law, either: it would render them judicial legislation that deserved the name of “decisions.”

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 “later question whether this way of talking is salutary.” And then 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 can be refused . . . (614)

Finally, and most importantly, Hart's principal point in this entire discussion is one that cuts against Fuller's attribution to him of the issue: what makes law deserve our fidelity? His point is that even if non-formalistic 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 non-formalistic judge must do. "So the contrast between the mechanical decision and the intelligent one can be reproduced inside a system dedicated to the pursuit of the most evil aims." (613)⁴

Why, then, did Fuller say that Hart really cared about fidelity? I want to look at three intersecting reasons. First, Hart regarded the Nazi 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, and in so doing recognized that there is some kind of normative demand that law makes and that judges and jurists must sometimes strive to gauge the force of that demand in order to resolve the ultimate question of what to do. What it is striking is that he does not seem to regard this as a central question of jurisprudence, and does not even say, in PSLM, that it is a question of *jurisprudence* at all.

⁴ Fuller, of course, contests the suggestion that a coherent system 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 the goals behind the law being applied is quite different from referring to what is morally correct.

The second reason, indicated above, 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 non-application) of the state in a manner that is faithful to those aims. Hart says remarkably little in this essay, or even in *The Concept of Law*, about why judges should do that. It is as if he takes it for granted that such is part of the job. As already discussed, Hart thought this was not fidelity to the law, because he denied that this was part of the law. Moreover, he did not conceive of this as an effort to flesh out what the judge regarded as the justifiable or laudable purposes in the law, but what the judge regarded as the actual purposes of the law. Nevertheless, he does regard a sort of commitment to the carrying forth the actual purposes of the law as basic to the judicial role. We will return to the topic of purposiveness, fidelity, and the core/penumbra distinction.

The third reason is that while Hart did not concern himself with fidelity, Hart did in some sense concern himself with a related value, which I call “veracity.” Let us first look at fidelity. It 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. So 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. What it is for the judge to be faithful to the law is to provide an interpretation that adheres to that which the law was intended to do: a judge with fidelity supplies an interpretation with fidelity. A central anti-positivistic 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. Our

problem has been that Fuller's effort to do a sort of reduction of Hart does not have any purchase, because Hart does not sign on to either the virtue or the excellence of interpretation value, to begin with.

Hart does, however, sign onto a closely related pair of values: a virtue of clarity, candor, or forthrightness, about what the law says, and an excellence in interpretation that consists in accurately characterizing what the law says. Here are some early passages (with emphasis added) averting to the virtues of clarity, candor, steadiness of view in jurisprudence, and the vices of mysteriousness and blurriness :

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*. (593)

. . . jurisprudence trembles so uncertainly on the margin of many subjects that there will always be need for someone, in Bentham's phrase, 'to pluck the mask of *Mystery*' from its face.(594)

After quoting extensively from Austin, Hart writes of "Austin's protest against *blurring* the distinction between law is and what it ought to be" and writes of Bentham and Austin's shared prime reason 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." "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. . .*" (597) Referring to the omnibus surveys of jurisprudence, Hart wrote "in each of them the utilitarian separation of law and morals is treated as something that enables lawyers to attain a new *clarity*." (599)

The opposite of clarity and candor, for Hart, were confusion and obfuscation. While Hart praised clarity as a great virtue, he faulted forms of jurisprudence that led to mysterious discussions. Indeed, Hart recognized that under the penumbra, it was often appropriate to make choices by reference to how best to further the social goals of the law, but he ultimately rejected the idea that the interpretation of law in penumbral areas to support underlying aims of the law should count equally as law. This was for two reasons: first, that it was “mysterious” to count this sort of penumbral adjustment as “law,” and second, that it tended to support the idea that there was no core. These are, in essence, dependent upon the same point: there is something worth distinguishing about the applications of the rule at its core and the applications of the rationales underlying the rule in cases that are penumbral. For Hart, it was of immense value to remain clear and candid about which domain one is operating within: “*when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.*” (621)

It is tempting to read Hart’s invocations of virtues of clarity and candor as insubstantial, as fairly limp attempts by a highly analytic thinker and a fan of Bentham’s to inject something that sounded morally vigorous into speech, or perhaps an effort to find something commendatory about Holmes (who was surely candid and clear), given that he was unimpressed with his 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 PSLM. “Clarity” and “candor” are really words to refer to a virtue in the family of honesty, sincerity, and trustworthiness virtues: “Veracity,” “forthrightness,” “truthfulness,” or “the quality of being straight in how one sees things

and how one reports upon them” is the virtue Hart really had in mind; its opposite vices are not so much as dishonesty, but obscurity, secretiveness, wishful thinking, and carelessness, inattentiveness, or promiscuity in characterizing facts to oneself or to others. There is language throughout the article stressing the importance of this cluster of virtues:

“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.*” (619-20)

Hart’s advocacy of the separation between law and morality can be seen as a practical principle, in the first instance, rather than a theoretical one:

“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.” 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. What is being explained is their 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. This famous passage from Austin offers the conceptual grounding that backs up the maxim of thought: “The existence of the 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.” There is no doubt that

Hart, like Austin and Bentham, accepted this ground for his practical positivism, and, as we shall see, 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. And yet it is important to see that this conceptual grounding for positivism as a theoretical proposition is not the very idea Hart was attributing to Austin and Bentham, the very idea he was seeking to elevate.

The central idea is the practical one about the need to distinguish what is the law from what ought to be the law. The deviations from the practical positivism reflect a lack of being straight – gildedness or romanticism or rosy-eyed or romantic perception and reporting of the law. Hart identifies Bentham and Austin as advocates of the view that attributes of straight-thinking and straight-speaking about the law ought to be prized, hand-in-hand with the aspiration 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 there is a great difference between truthfulness as to what the law means, and faithfulness as 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, then washed in an the skeptical acid of analytical rigor. The practical positivist advocates engaging in the practice of

characterizing and describing the law in this de-romanticized fashion: he advocates a practice of veracity about the law. He advocates this practice for intrinsic reasons and for instrumental reasons. The practical positivist advocates this kind of description because it gets at – and accepts – the truth, and doing so is intrinsically valuable. It is good to be faithful to reality. But 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 papers on Hart’s Postscript,⁵ Hart was concerned about the tendency of natural law theory to foster quietism about the law: too close an association between 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.⁶ 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 he took Blackstone to have had. 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, this is not put forward simply as an implication of the conceptual truth that law and morality are separate. *On the*

⁵ Jeremy Waldron, *Normative (or Ethical) Positivism*, in Hart’s Postscript: Essays on the Postscript to *The Concept of Law* (Jules Coleman, ed. 2001) 411-33 [hereinafter “HP”]; Liam Murphy, *The Political Question of the Concept of Law*, HP 371-409. To the extent that I am depicting in the positivism of PSLM a broad normative strand, this paper shares an important theme with both Waldron and Murphy (whose essays have influenced me). However, the practical positivism I attribute to Hart in PSLM 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.

⁶ PSLM at 598.

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 the legal thinker 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 kind of clearheadedness or accuracy in understanding the law. In these ways, “veracity” is meant to cover what Hart calls “candor” and “clarity.” Finally, note that the modal distinction between what is and what ought to be is arguably more primary, and functions somewhat differently than, the domain-specific distinction between what is law and what is morality. Whether separationism as a thesis might have fared differently if conceptualized in these former terms is a topic I leave for another day.

II. Mischief Under the Penumbra

The contemporary equivalent of Hart's target is a certain approach toward legal interpretation and legal reasoning, which I have dubbed “constrained perfectionism.” In some ways, I shall be painting with a broad brush, for I aim to include both realists, pragmatists, and critics, on the one hand, and post-Fullerian anti-positivists, on the other. Or, to put the point in terms of its most illustrious exponents, I intend to include both Richard Posner⁷ and Ronald Dworkin⁸ within the range of constrained perfectionists.

⁷ See esp. Richard Posner, *Overcoming Law* (1995).

⁸ See esp. Ronald Dworkin, *Law's Empire* (1986).

Despite all of their differences, these two eminent legal theorists – both, incidentally, students of the Harvard Law School during the 1950s, a decade in which Fuller taught there, the decade in which the Hart/Fuller debate occurred, and the decade launching *Brown* and the Warren Court, and each, in some way, an acolyte of Justice William Brennan – are alike in their antagonism to the interpretive approach prized by Hart. Both believe that those interpreting the law must make sure that their interpretations fit extant legal materials to at least some extent. Both regard the test of fit as substantially underdeterminative, in at least a very great range of cases involving interesting questions of law. And both believe 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 realize the 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 it 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 do engage in this sort of view and openly advocate the legitimacy of doing so. Anti-positivists of a Dworkinian stripe believe that this is an argument over what the law says, and that one need not disclaim moral or legal objectivity here. In this way, the perfecting of articulated 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: shooting for what one takes to be the morally and politically and pragmatically best ways to read the law,

constrained by with a fit requirement, is what a legal interpreter ought to do. Of course, as to both Posner and Dworkin themselves, and as to both pragmatists and Dworkinians more generally, there are certainly grounds for depicting their views in a different, and more defensible manner (and I have done so as to each, elsewhere⁹). My goal in this section is, with Hart in PSLM, to resist the temptation to talk about the trees rather than the forest.

There are interesting questions of intellectual history about how we got to the point of dominance (or near dominance) by constrained perfectionism and the rejection of a positivistic mindset in thinking about the law; Tony Sebok has plausibly argued that the rejection of *Brown* by leading reasoned elaborationists in the late fifties – particularly Herbert Wechsler -- had the effect of turning a certain neutrality-embracing form of legal interpretation into a pariah in mainstream legal academia.¹⁰ Certainly the leading status of the Warren Court and the continued intellectual leadership of Justice William Brennan during the 1970's and 1980's, in the high culture of American law, must be part of the story of how what I call constrained perfectionism came to its high place of popularity.

Whatever the larger causes, I suggest that a central weakness of Hart's essay, identified by Fuller, ironically played into the ascent of constrained perfectionism. The attack on the core/penumbra distinction initiated by Fuller and carried further by many others, including Dworkin, was and is very powerful. This is not only because of the

⁹ As to Posner, see, e.g., my *Sleight of Hand* (depicting Posner's positive economic theory of negligence law as an effort to take more seriously than Calabresians the notion of fault that he, as a lawyer, so to be essential to negligence law). As to Dworkin, it remains unclear to me whether the minimal role he tends to give to "fit" is part of what he intends – in which case the depiction of him as a constrained perfectionist may be quiet accurate – or whether he intends a very serious engagement with fit, one that never fully releases the justification question on its own two feet, in which case the characterization of him as a constrained perfectionist is closer to the truth. In any case, I have written elsewhere offering an interpretation of Dworkin as a Legal Coherentist and not a perfectionist. Zipursky, *infra* note ___.

¹⁰ Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (1998).

peculiar semantic atomism (as opposed to holism) unfortunately suggested by Hart, not only because of the domain of principle (which Hart rightly concedes), not only because of the demonstrable lack of a clear boundary between core and penumbra, and not only because of the relevance of factual, historical, and legal context in interpreting text. It is also because the core/penumbra distinction – to the extent it was helpful at all – was helpful in a particularly legislative and statutory setting, and is remarkably unhelpful in common law and numerous other centrally important legal settings. Although the revitalization of his rule-scepticism critique in *The Concept of Law* in terms of “the open texture of law” is somewhat less vulnerable, many of these criticisms postdate *The Concept of Law*, and are equally applicable to it.

Hart’s underestimation of the problems with the core/penumbra distinction was exacerbated, in my view, by his blunt treatment of purposive interpretation under the penumbra. Recall that when he rejected the idea that such purposive interpretation justified treating judgments about what the law morally ought to be as grounds for statements about what the law is, this was for two reasons: (1) that such penumbral interpretations were creative of new law, not applications of the existing rules; (2) that, in any case, judicial reasoning about what would carry forth the purposes underlying the statutory rule were different from reasoning about what the law morally ought to be. Given that doing law is not an option in the penumbra, since purposive interpretation is not doing law anyway, it is simply not clear why a judge should choose purposive legislation rather than what he or she regards as just legislation. Given that very little of law falls into the core in the manner that Hart first envisioned – and that, indeed, it is hard to know whether there is a “core” in that sense, at all -- one ends up needing to admit that

there may be good reasons why one should generally take a perfectionistic attitude toward legal interpretation, and few fundamental jurisprudential reasons why one should not.

Philosophical difficulties in the core/penumbra distinction need to stand in the way of the value of veracity in law or the power of practical positivism. Again, somewhat counterintuitively, Dworkin's work arguably provides one of the best rescues for Hart against the line of thought leading to perfectionism. In *The Model of Rules* and a strand of thinking that runs through Dworkin's work to the present day, Dworkin insists that there must be, and is, a way of doing purposive interpretation that is different from legislation from the bench. Indeed, for a set of reasons he spells out in great detail, this kind of judicial interpretation even in hard cases does deserve to count as law. In other words, Dworkin not only invites us to see a continuity between penumbral applications and the core, he renews the invitation offering new reasons to come with him. In the context of a set of critiques on the core/penumbra distinction that diminishes the core to a thread, the invitation should seem irresistible.

Why do I call this a "rescue" of Hart, as a positivist, when Dworkin's route seems to lead straight to constrained perfectionism? The answer is that – as Hart argues persuasively, I believe, purposive interpretation is not the same as natural law or perfectionism or other forms of interpretation that give moral considerations an essential role; the key difference is that bringing out aspects of the law latent in the legal materials already, does not mean making the law as one believes it ought to be. Moreover, not all purposive interpretation is distinct from judicial legislation. The particular kinds of purposive interpretation carried out in statutory interpretation, common law,

constitutional law, and international law, for example, vary a great deal, because part of what is required of judges in these contexts is to understand the interpretive role our political structures expect of them.

Fuller and Dworkin each offer arguments about why the purposive interpretive enterprise cannot plausibly be viewed, at the end of the day, as one that could or should be operated by a judge abstracting away entirely from what he or she believes is morally right or best justified. It is just at this point, for each, that fidelity really comes into play. It is not the purposes or aims or values or principles of the law, simpliciter, that the interpreter is carrying forward in interpretation; it is those purposes and aims that merit fidelity. And here we see, finally, the deliberate violation of the maxim not to confuse what the law is from what one believes the law ought to be. Crafting an interpretation of the law that in fact realizes what the interpreter thinks the law *ought to be*, while appearing to capture principles and policies that are latent in the law in a manner that would entitle the interpretation to be treated as a fleshing out of the law – this is what I am calling “mischief under the penumbra.” Often the results are desirable. And sometimes, the results are ones that should in fact be reached by the legal interpreter. But the depiction of how one is getting there is veiled or misleading, and often is both. And the social costs of too much mischief are substantial, as I shall argue below.

Mischief under the penumbra can be found wherever legal interpretation is being done. Let us consider examples in three areas: judges adjudicating a case in which legal claim for relief is being sought; lawyers counseling clients about what the law says, in order to guide their client’s conduct; law professors offering a comprehensive of

searching account of what some important legal term means or how some important legal concept works.

Perhaps the most striking American example of judicial mischief in the past several decades is the United States Supreme Court's decision in *Bush v. Gore*.¹¹ Few constitutional provisions are as open textured as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. 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. In so doing, The U.S. Supreme Court actually decided the American Presidential election. Concerns regarding the political question doctrine, the procedural propriety of a remand, voter empowerment, and the state's prerogative to untangle its own election law simply fell by the wayside. The imperative of Equal protection, as these five members writing for the Court reasoned, simply demanded that the recount not be permitted under these circumstances. 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 constrained perfectionists, the Court saw a way to make it seem that legal sources and text supported its conclusion then simply said that what it wished was true – that there was something so fundamentally constitutionally unsound about Florida's State Supreme Court interpreting Florida law to require a recount.

My colleague Abner Greene has offered an interesting argument that a version of the Court's Equal Protection argument (actually, worked through First Amendment

¹¹ 531 U.S. 98 (2000).

precedents) had merit.¹² I shall respond to that argument below. But even assuming arguendo 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 political question doctrine should have kept the Supreme Court out of this issue. A posterior question is whether the appropriate remedy for the equal protection violation was reversal or remand. The arguments on the remedy are straightforward and overwhelming, as Justice Souter explained.¹³

With regard to whether the Equal Protection argument itself had merit, the answer to this question depends on what level of creativity is required or even permitted of the Court in this context. To his credit, Greene – a liberal democrat who generally favors fairly broad interpretations of clauses of the bill of rights, does not automatically assume a rigid, precedent-bound, hands off approach by the Court is required in *Bush v. Gore*. Our question here 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 dissent from such interpretations in this case also displays hypocrisy). Our question is whether this is a legitimate or appropriate interpretive approach for the Court in 2000 to have taken, not for individual members who have taken a stand on that issue. On that question, two observations are pertinent. The first is that the question of what interpretive approach should have been taken is not

¹² See esp. 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* (2001).

¹³ *Bush v. Gore*, 531 U.S. 98, ___ (2000) (Souter, J. dissenting). The law review articles and books on *Bush v. Gore* are legion, and, unsurprisingly, reflect an array of different views on the justifiability of different pieces of the decision, and on the decision as a whole. See, e.g., . . .

independent of the arguments behind the political question doctrine. Surely the reasons for considering not even deciding the case at all cut heavily against a broadly creative approach to equal protection if one is deciding the case, for the political question argument against taking the case depends on a concern that what seems like a legal ruling may surreptitiously be an injection of politics from an institution plainly designed not to have the political power to do this. 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. The second observation is that, of course, my whole point here is to step back and look at what it means for our top courts to be engaging in constrained perfectionism as an interpretive methodology. If the growing pervasiveness of that methodology is what led to a 5-4 majority of the U.S. Supreme Court deciding who would be president, that can surely count as a reason to be concerned about constrained 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 under the penumbra. On the contrary, I believe there are indeed several Warren Court decisions like *Miranda* that display a great deal of mischief under the penumbra. We see spectacular displays of judicial improvisation on all sides of the Court every Term. A Justice Stevens decision from last Term – *Massachusetts v. Environmental Protection Agency*¹⁴ presents an excellent example.

Under the Bush administration, the EPA 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

¹⁴ 127 S.Ct. 1438 (2007).

two grounds: (1) that the EPA lacks the power to issue mandatory regulations to address global climate change, and (2) that even if the agency had the power to regulate greenhouse emissions, it would be unwise for it to do so at this time. The State of Massachusetts challenged the EPA denial of the petition in federal court, and ended up before 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 emissions. Notwithstanding Justice Scalia's dissent (which was uncharacteristically mild on this issue), there is nothing particularly contentious about this conclusion; one wonders how the EPA could really have taken the opposite view of its limited empowerment seriously.

However, the EPA had a second defense which was much less fragile; it argued that the agency deemed it unwise to regulate greenhouse emissions of new automobiles at this time. Several reasons were offered for this position, including: a number of other executive branch programs respond to global warming; the President thought regulating emissions in the US would reduce his negotiating effectiveness with other nations, and the regulating carbon emissions for automobiles would be a piecemeal solution. The legal question identified by Justice Stevens were, therefore, whether there was any reasoned explanation of it decision that it would be unwise to regulate greenhouse emissions. More specifically, whether the decision that it would be unwise to regulate greenhouse gases made under the Bush administration was so lacking in supporting reasons that it was an "arbitrary and capricious" decision. Justice Stevens, deciding for a 5-judge majority, decided that the EPA's was *arbitrary and capricious*. Justice

Stevens, like the majority in *Bush v. Gore*, was making mischief under the penumbra. The EPA's decision not to regulate greenhouse emissions may be a poor one, but it is not a capricious or arbitrary one; it is made for a set of policy reasons that Stevens evidently did not share. The issue of whether the Administration's decision was a political one that did not even take the statute mandate seriously is a closer one (and perhaps one where the arbitrary and capricious review question could get a foothold), but at the end of the day, 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 the state of Massachusetts as a party with standing – like the fact that the Rehnquist needed to leap frog the political question doctrine on *Bush v. Gore* only highlights the picture of the Court rushing in to do its own thing.

Bush v. Gore and *Massachusetts v. EPA* are both lightning rod 5-4 decisions with an obvious political valence, but mischief under the penumbra reaches less magisterial heights, cuts across political spectra, and hits statutory issues as much as constitutional or administrative ones. A memorable example is *Smith v. United States*,¹⁵ in which Justice O'Connor wrote for a majority of the Court that a defendant convicted of a narcotics offense could be punished extra under a statutory provision enhancing the punishment for those transactions in which the defendant used a firearm, where the transaction was an exchange of narcotics for money and weapons. Although Justice Scalia protested in dissent that the word "use" could not plausibly be construed so broadly, a majority of the Court sided with Justice O'Connor.

¹⁵ *Smith v. United States*, 508 U.S. 223 (1993).

It is not only courts who make mischief. The role of lawyers counseling their clients is far more pervasive than courts deciding cases. The virtue of veracity was sorely lacking in the notorious Bybee Torture memo, in which the Office of Legal Counsel was providing legal advice to its client, the Executive Branch of the United States Government.¹⁶ No doubt there are subtle issues regarding what counts as “torture” and what does not. Waterboarding is not one of those subtle issues, according to scholars and lawyers from every different group.¹⁷ 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 peculiar “interpretation” of the law. Their client – President Bush – accepted their answer. This is more mischief under the penumbra, and less veracity.

Again, no one side of these issues has a monopoly on mischief – private parties and their lawyers are at least as large a part of the problem as the government and its lawyers itself. *The New York Times’* behavior with regard to its journalist, Judith Miller, is a fine example. Miller was subpoenaed by a grand jury regarding the outing of Valerie Plame, to divulge her source. Citing a First Amendment right to keep her source confidential, Miller refused to testify, and her employer, *The New York Times* supported her position. Indeed, Miller “heroically” went to jail. What was *The Times* thinking? Federal prosecutors have the legal power to subpoena reporters and to force them to divulge their sources, on at least a wide range of scenarios. Miller, the Times, and their

¹⁶ See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

¹⁷ 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).

lawyer (Floyd Abrams) may have thought there should be a right against such action, that the Courts should decide to recognize such a right. Perhaps that is true. But it is not true that there is such a right now (or was at the time of the paper); as the D.C. Circuit indicated, the Supreme Court had decided virtually the same issue in *Branzburg v. Hayes*¹⁸ and there were no particular reasons to believe that lower courts or any branch of the Court regarded that decision is vulnerable to overruling.¹⁹ To let one's client's conduct be guided by such views of the law is to suppress the strictures of veracity in favor of the pleasures of the penumbra. If Miller had declared her action to be civil disobedience, or the resolution of a cruel dilemma between a legal obligation and a moral obligation, that would have been quite different. But that is not what was said.²⁰

Finally, legal scholars make mischief in the penumbra in putting forward edifying new theories of substantive areas of the law. My own personal favorite example of this is Richard Posner's Theory of Negligence, the most celebrated interpretive theory of tort law in the last half century.²¹ Unlike Coase, whose famous work was put forward as an analytical tool, or Calabresi's, whose work was put forward as a guide to evaluation and revision of accident law, Posner's was put forward as a positive theory of tort law. At the heart of the positive theory is the contention that an economic version of the Hand formula provides the meaning of negligence within the common law tort of negligence. 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.

¹⁸ 408 U.S. 66 (1972).

¹⁹ In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

²⁰ Qualify; Miller herself adopted more than one position.

²¹ Richard A. Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972).

And that is what Posner's theory ought to have been, and, at some level, what he was aiming to do. But that is not what he said or what he did; he offered a positive theory. As many have demonstrated, the positive theory is demonstrably false,²² 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 in the common law, we find both subtle and striking examples of mischief under the penumbra. 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.²³ He writes 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 subject to the prohibition, they are violations of the religion clauses of the First Amendment.²⁴ 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 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 saying that an advocate before the Court must put the point this way. I am saying that if one presents oneself as reporting on what the law is, candor requires an accurate depiction of the distance

²² See, e.g., Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 *Theoretical Inq. L.* 145 (2003).

²³ Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (1993).

²⁴ *Id.* at 155.

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.²⁵

* * *

I refer to these pieces of legal interpretation as cases of “mischief under the penumbra,” of course, not to judge the results or character of those who have produced them, but to suggest that there is something objectionable about these interpretations that 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. Would legal theorists, more broadly, express dismay at these interpretations?

The answer is a categorical “yes”. Of course, a great deal of dismay is expressed with regard to each of these examples, because of its outcome. But we can go beyond that. With regard to *Bush v. Gore*, *Miranda*, reporter’s alleged immunity from subpoena and the issue of physician-assisted suicide, a complaint is made that there is a deviation from the original meaning or intent of the Constitution. Originalism in constitutional theory is among the most virulent strands of methodological theory. Textualism is also a powerful movement in constitutional theory, and beyond that, in the normative methodological theory of statutory interpretation. In tort theory, and in common law theory more generally, Posner’s unabashed reductive instrumentalism has come under attack from neo-formalists and pragmatic conceptualists. Each of these schools – originalism, textualism, and pragmatic conceptualism – arises from a sense that veracity is a virtue in legal reasoning and legal interpretation. Each expresses concern that those who are charged with the job of interpreting the law too easily merge their views of what

²⁵ See Abner Greene, *Uncommon Ground*, 62 *George Wash. L. Rev.* 646, 660-65 (1994).

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 bring home an account of what the law actually is. And each selected a methodology that works for a large domain of law, but not necessarily across the board.

Insofar as these intellectual movements aim to produce a foundation for thinking about what values, principles, and aims are embedded in the law, and in so doing, to assist in thinking about what the core of the law is without doing so in terms of why the values and principles expressed in the law *merit fidelity* from a first-order moral point of view, practical positivism and the embrace of veracity as a virtue in legal interpretation remains very much alive.²⁶

III. Veracity, Social Facts, and Truth in Law

A. Introduction

On my reading of PSLM, Hart was arguing for the importance of veracity in characterizing the law, under a conception of veracity that stresses the importance of not confusing what the law is from what one thinks it ought to be. Both Fuller, in his reply to Hart, and Dworkin in that portion of his corpus that responds to Hart, effectively raise three very substantial challenges to Hart's project. 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?

²⁶ I do not mean to embrace any of these views here (and, indeed, would not be inclined to embrace any version of originalism); each has its own foils, today, that are similar in the aspiration to find a core in political and jurisprudential theory of what gives the law its content (e.g., popular sovereignty theory in constitutional law; internationalism in statutory interpretation).

- (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?
- (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 distinction 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?

Hart published *The Concept of Law* only three years after his Holmes lecture, and it clearly and openly develops themes that were begun in PSLM.²⁷ Indeed, a central aim is to construct a new and workable commonsense model support legal positivism, after demonstrating the shortcomings of the Austinian model. Fuller had asserted that Hart needs to offer far greater substance with regard to what law is if he is to expect anyone to accept his view as anything but stipulation. Fuller realized that by undercutting Austin's command theory – in which binding law issues from a sovereign in a sovereign-subject relationship to his subjects – Hart has left a void on the critical question: what constitutes a law existing, or being extant, in a legal community. More broadly, Hart needed an account of what it was for a legal system to exist, given that he knocked out Austin's.

Looked at backwards, through the lens of the Postscript, Hart's efforts to construct a model of a legal system in *The Concept of Law* were efforts in descriptive jurisprudence – a kind of armchair apriori sociology. That is certainly what Hart came to say in his later life. But *The Concept of Law* does not look like that from the perspective of PSLM. On the contrary, it looks like an account of how it is that there is something

²⁷ Among the many illuminating features of Nicola Lacey's *The 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 PLSM, *The Concept of Law*, and *Causation in the Law*.

for there to be veracity 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*. 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.²⁸ It is a non-transcendentalist, non-moralistic theory of what it is for there to be facts about law.

The interpretation of PSLM as 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 needed 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 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.

B. Truth and Social Facts in Hart's *The Concept of Law*

The Concept of Law asserts that a modern legal system (like the American or UK 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

²⁸ Raymond Carver, *What we Talk About When We Talk About Love* (1989).

once: a propositional entity (which is concededly difficult to formulate) that sets out various criteria that are necessary and sufficient for counting as law, and a social practice.²⁹ 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, so conceived, stands in a certain dyadic relation to a particular legal community (is a social rule in that community).³⁰ It qualifies as the latter if the legal officials of that community have a certain kind of social rule of using that proposition as the guide to which putative legal rules are valid and which are not. The social rule is a conventional practice of using that rule, expecting others to use it, and using it in part because of mutual awareness that it is what is used in that legal community. It is a fact of that matter, in any given legal community, which rule of recognition type proposition is in fact accepted as a social rule. So long as the rule of recognition characterizes conditions of validity upon historical and social matters – and perhaps even on moral criteria – but not upon judgments of what ought to be – the question of whether something is or is not the law has a factual answer. To this extent, there is truth about law. To the extent that there are accepted rules of interpretation, 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.

C. The Argument From Disagreement

²⁹ See Timothy Endicott's contribution to HP. Endicott may well be right that Hart's account was not criterial, but the account Endicott offers in place of that remains one that is preserving 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.

³⁰ The analysis put forward here is a very condensed version of that developed in Benjamin C. Zipursky, *The Model of Social Facts*, in HP 219-70, esp. 247-55; Benjamin C. Zipursky, *Pragmatism, Positivism, and the Conventionalistic Fallacy*, in LAW AND SOCIAL JUSTICE, J. Campbell, M. O'Rourke, & D. Shier, eds. (MIT Press 2005).

Dworkin's argument from disagreement runs as follows.³¹ 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 dispute, Dworkin has three replies: (a) any case upon which there is not agreement is therefore neither law nor non-law, making the reach of the theory lesser, since it is only the rule of recognition insofar as it has agreed upon content that fixes the standards, on the Hartian theory; (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 legality is in principle open to contestation. The contestability of all legal statements is something Dworkin persuasively displays by example. But the very concept of legal contestability of a rule of recognition statement is incoherent, on the Hartian view.

I have argued in two prior papers that Dworkin's argument from disagreement is sound, and that its strongest prong is the argument from contestability.³² 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*.³³ In both cases, if the proposition in question is to have content, it must be connected to 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

³¹ An excellent account of the argument is found in Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, Ronald Dworkin (Arthur Ripstein ed. 2007).

³² See sources cited in note 30, supra.

³³ Cite.

altering this particular statement. This seems to be impossible because there are certain statements to which we attribute exceptional importance in two different meta-enterprises: the enterprise of characterizing the whole system for the purposes of individuating it within a broader domain of possible systems, and, relatedly, the enterprise of educating users of the system. Rules of recognition in law, like meaning statements or definitions in language, play this double role. Particularly because of their role in individuating legal systems, there is a sense in which it is true that one has switched legal systems when one alters the governing rule of recognition. But to infer from the fact that a given rule of recognition is accepted at a given point in time in a legal system, that anything not complying with that rule is not law in that system, is to commit what I call the conventionalistic fallacy. It wrongly converts a social fact that has significance in light of the boundary-defining role of rules of recognition in the meta-theory, into a rigid substantive rule within first-order discourse.

D. 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. 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 – and this holds whether the version of positivism be exclusive or inclusive.³⁴

Yet Dworkin infers – at least in the *Model of Rules II*³⁵ and in “The Semantic Sting” argument in *Law's Empire* – that this defeats Hart's picture of legal systems in *The Concept of Law*, and, in turn, defeats legal positivism (except reconstrued as a form of normative jurisprudence resting on values of predictability and stability). As I and many others have pointed out, this is too quick an inference. For it remains a possibility that rule of recognition statements are true by virtue of patterns of social practice in some sense, 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 extra-legal. That is exactly the role that many philosophers of language take toward meaning claims.

More broadly, philosophers such as Jules Coleman, Hilary Putnam, and Dworkin himself 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.³⁶ I have elsewhere called such a view Legal Coherentism.³⁷ Davidsonian philosophers of language, internal realists, soft realists, and anti-anti-realists like John McDowell typically contend that a domain of assertions that purports to be about a range of practices, goods, actions, entities, that are connected with our everyday world, and are spoken about and argued about coherently, are capable of truth and falsity. To put the point succinctly, if somewhat frustratingly, a

³⁴ Zipursky, *Pragmatism, Positivism, and the Conventionalistic Fallacy*, supra note ____.

³⁵ See Ronald Dworkin, *Taking Rights Seriously* (1977).

³⁶ See, e.g., Jules L. Coleman, *The Practice of Principle* (2001).

³⁷ *Legal Coherentism*, 50 SMU L. REV. 1679 (1997).

thin, coherence based theory of legal truth seems to possible at the level of semantics, so long as a Hartian theory of conventions is available at the level of subject matter.

E. Veracity and Coherentism

Let us return now to question (2): is it possible for a Hartian, within a coherentist framework, to embrace the value of veracity – to assert the importance of ascertaining what the law is without infecting one’s consideration by pervasive reference to 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 understood as a form of coherentism, as I and others have argued elsewhere, and Dworkin has obviously developed the view that what would be best justified (which is very close to “what ought to be”) cannot be abstracted away from the question of what the law is. To this extent, Dworkin’s corpus could be understood to provide, in integrity, a unified account of fidelity and truthfulness.

I believe that, 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 adequately.³⁸ Of course, Dworkin recognized the need for much more argument and produced it; whether the further argument succeeds is beyond the reach of

³⁸ Stephen R. Perry, *Two Models of Legal Principles*, 82 Iowa L. Rev. 787 (1997).

this paper. 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. Similarly, the rejection of the sources thesis in an account of law – whether right or wrong – does not entail that it is always or even generally legitimate to go to the question of whether some putative piece of law or interpretation of the law is moral or merits fidelity, in ascertaining what the law is.³⁹

F. Coherentism and the Value of Veracity: Intrinsic Value

The thinness of a coherentist account of legal truth certainly has its advantages, as we have seen. 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, for this 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 capricious, rather than an answer that builds in what he believes the EPA ought to do: regulate? Assuming that it is a judgment call, in some sense of the term, whether their decision was arbitrary and capricious, why not ask which decision would merit our fidelity, rather than seeking a less normatively ambitious answer?

³⁹ See Gardner in *American Journal of Jurisprudence*.

The obvious direction in answering this question is the direction of legal theorists who, in their own way, have been trying to squelch constrained perfectionism: broad and narrow originalists,⁴⁰ textualists, and popular sovereignty theorists in constitutional interpretation, textualists and rule-oriented theorists in statutory interpretation,⁴¹ and neo-formalists and pragmatic conceptualists⁴² 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 or by intent (at various different levels) or by structure – what a legal interpretation offers may be commendable – 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, perhaps, to give insufficient attention to what should be conceived of as part of the law. To take the broad originalism contained in Dworkin’s famous essay, *Constitutional Cases*, for example, is to see that the Equal Protection Clause of the Fourteenth Amendment not only could but should be read as supportive of *Brown*, because the content of the Equal Protection Clause is appropriately understood at the level of the principle of equality that was placed there by the framers.

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 (the court) has (or as an application of the power that the other lawmaking body

⁴⁰ See, e.g., *Originalism: A Quarter-Century of Debate* (Stephen Calabresi, ed., with foreword by Antonin Scalia) (2007).

⁴¹ Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-making in Law and in Life* (1991).

⁴² Coleman, *supra* note __; Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *Leg. Theory* 457 (2000).

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. What the constrained perfectionist does is to permit 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 wishes to or the client wishes to, or perhaps (as in *Bush v. Gore* or *Massachusetts v. EPA*) it permits an exercise of power to create a non-permission. Particularly where (as in the torture memo or in the alleged unconstitutionality of subpoenaing a reporter) the lawyer uses unclarity (or alleged unclarity) to reduce the reach of the law and create a permission, we are effectively seeing lawyers cut into the efficacy of law, and cut into the power of the body that our system supposedly empowers to make the law. Conversely, where 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 (the State of Florida, in *Bush v. Gore*, or the EPA, in *Mass. v. EPA*). It is not that the United States Supreme Court lacks power over those bodies; but the legitimacy of the exercise of that power hinges on what the law says, of course.

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 these allocations of power in particular settings by engaging in a pattern of reasoning that

incrementally draws out different aspects of this allocation of power that are implicit in it, as the interpretation is done. The question is not whether the substantive law merits fidelity. The question 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. It is rather that judicial action that does something different from this is judicial action that exercises a different power than the power that is exercised when the law is applied, and the reasons in support of such an exercise must suffice to support it in this now different sort of setting. Constrained perfectionists in the judicial examples we have considered simply exercise power that goes beyond 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, in effect, 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 these meta-conventions or meta-rules 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 because doing so would make the law what the judge believes it ought to be. Now 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. 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. And 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?

G. 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 and 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 was the law must be good. Veracity enhances the possibility of legal change, in this view.

Regrettably, I am not at all sure that this is true. Bentham and Hart worked in a parliamentary system without a written constitution. 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) – this idea seems quite naïve, at least in American law. Our federalist system makes it very difficult for a person living in Washington DC to change the law of Texas or Arizona. Our Constitution is overwhelmingly difficult to change. 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 quick and powerful change. The Supreme Court did it in *Brown*, *Miranda*, *Griswold*, *Roe v. Wade*, and *Bush v. Gore*.⁴³ Does not that 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 we have here. It is not surprising that interpretive approaches will be of different instrumental value in different legal and political systems. This is, of course, one of the reasons for both the initial success of constrained perfectionistic strategies prior to 1958 and its enduring importance today. As the cutting edge of legal rights switches to the international human rights domain, we are likely to see a great deal more of this style of legal reasoning.

The foregoing discussion might seem to suggest that the normative arguments in favor of treasuring the value of veracity are largely one's 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; it therefore might appear that there is a trade-off in the decision of how strongly to adhere to such an interpretive approach, and whether to turn to constrained perfectionism.

⁴³ In mentioning these cases, I do not mean to lump them together in terms of justifiability. Rather, each in its own way is a powerful display of the capacity of the Court to correct pieces of law it regards as unjust.

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 it is overstated and incomplete. We need only look at our examples of mischief under the penumbra to see why. Constrained perfectionism cuts both ways. Many of the cases cited above – *Bush v. Gore* being the most obvious example – is a case of fighting fire with fire. The Rehnquist majority saw a largely Democratic Florida Supreme Court making up the rules to reach their 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 they were not about to hold back in the exercise of the raw power to correct this mischief, either. My point is not that they 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 constrained perfectionism, suffers from an artificial limitation of vision. Popular sovereignty theorists in constitutional law – like Larry Kramer and Mark Tushnet – would perhaps not even cede this much ground. 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 constrained perfectionism in the courts is ineffective at change, but to indicate that the issue is far more complex than a first cut suggests.

The larger problem, in my view, 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.⁴⁴ If we not only tolerate, but prize constrained 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 the law 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's 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 doing interpretations of the law, it was the 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 aspirations about what it should say; how, as I have put it, 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 anti-positivism, 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 pointing 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 unflinchingly

⁴⁴ See Wendel, *supra* note ____.

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 its 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 our intended course of conduct when we engage in the search.