

Positivism and the Separation of Realists from Their Skepticism: Normative Guidance, the Rule of Law, and Legal Reasoning

As he opened section 3 of his Holmes lecture (1983a), Hart announced that his aim was to answer “a distinctively American” challenge to the positivist doctrine of the separation of law and morals. He mainly had in mind the Realists, who had made a significant impact on American law schools by mid-century, but he also included Lon Fuller amongst the challengers. However, although he addressed some of his comments to this challenge, the main line of argument in this section actually used the separation doctrine to answer a different challenge coming from the American camp, a challenge, as Hart saw it, rooted in a deep misunderstanding of the rule- or norm-guided character of legal reasoning. He did not seek to offer, even in schematic form, a theory of legal reasoning in this short section, or in his somewhat more elaborated discussion in chapter 7 of *Concept of Law*. He sought, rather, to draw resources from what he took to be absolutely fundamental, and widely recognized, features of the concept of law to correct the misunderstandings of the process of legal reasoning that had tempted some of the more “extreme” members of the American camp to a deep skepticism about the integrity and rationality of that process.

Lon Fuller (1958), in his response to the Holmes lecture, detected in Hart’s discussion, in this section and throughout the lecture, an undercurrent of concern for the ideal of the rule of law (“fidelity to law”) and what he took to be a characteristically positivist understanding of this ideal. Many commentators on the Hart-Fuller debate find Fuller’s attribution of such a concern to Hart incredible, but if one looks carefully at Hart’s arguments and tries to locate the sources of their plausibility, Fuller’s claim takes on more credibility. Assumptions, some them expressed, some implicit, about the fundamental task of law and about why we call on law to perform this task are essential to Hart’s argument. These assumptions are largely correct, I believe; however, when fully understood, they lead to a view of law and of legal reasoning that has more in common with the perspective of Hart’s more moderate challengers than with that of Hart’s positivists, both his intellectual ancestors and his descendents, and perhaps of Hart himself. This should not be entirely surprising, since Hart’s Holmes lecture was inspired by Bentham’s positivism, whose jurisprudence was shaped in reaction to Blackstone’s awkward version of classical common-law jurisprudence, while the views of Fuller and the (moderate) Realists reflected, again sometimes awkwardly and sometimes flamboyantly, their common-law

heritage,¹ and the view to which Hart's assumptions, properly understood, lead shares much with that common-law tradition.

Or so, at least, I shall argue here. I propose to explore Hart's attempt to counter the American challenge and to argue that Hart's fundamental jurisprudential assumptions lead us away from what I will call his "settled-meaning positivism" to a common-law inspired view of law as a disciplined practice of public practical reasoning. This story begins with Hart's attempt to characterize the "American challenge" in terms of his distinction between the core and penumbra of rules. Section II sets out Hart's critique of the "extreme" Realist flirtation with skepticism. In section III we explore Hart's reasons for refusing the Realists' invitation to extend to the domain of the core the account of reasoning they and Hart accept for the domain of the penumbra. It is here that the assumptions underlying Hart's arguments are exposed by looking briefly at two directions in which his incomplete statements of these arguments have been elaborated. Sections IV and V argue, first from some widely shared assumptions about the ideal of the rule of law, then from the assumption of law's essential normative-guidance technique, that not "settled-meaning positivism" and subsequent elaborations of it, but something closer to the common-law view of law as a disciplined practice of public practical reasoning is to be preferred.

I. Characterizing the Challenge: Rules, Judgment, and Indeterminacy

Hart's approach to the American challenge² was irenic. Acknowledging a core of good sense in the Realists' criticism of "formalist" judges and jurisprudence, he offered a more measured formulation of the criticism, identifying a plausible source of the concerns that motivated the criticism, in hopes of domesticating them and preventing the slide into the skepticism they invited. To this end he offered an articulation of certain features of practical reasoning in general and judicial reasoning in particular—taking conditions of linguistic communication as a point of departure—and a diagnosis of the concerns underlying the Realists' criticisms.

To begin, Hart observed that, like successful linguistic communication, successful regulation of human behavior by law depends on a generalized capacity of members of a linguistic or legal community to grasp rules and recognize instances in which they apply. Realists, he acknowledged, forcefully called to attention "one cardinal feature of human language and thought" and hence of this capacity to grasp and apply rules (1983a, 63). Around a *core* of settled meaning, there is a *penumbra* of uncertainty or "open texture". In their core, rules apply clearly to cases, but in their penumbra doubts and even disputes can arise, application is

¹ I defend this reading of the Realists in "Realism and Reaction" and Fuller in "Fuller's Interactional Theory of Law" (Postema, in draft).

² I will hereafter slip into talk of "Realists" rather than "the American camp" because Hart does. No harm is done if we keep in mind that Realism was a big tent and some in the tent (Fuller) were not even Realists.

not strictly dictated by the rule. The facts to which we fit the rule are dumb, Hart wrote (1983a, 63), and “logic is silent on how to classify particulars” (1983a, 67). When operating in the penumbra of rules, those charged with making decisions³ must take responsibility for *deciding* whether *to apply* the rules *to* situations facing them or not. Because the deciding is not dictated by logical deduction (1983a, 63), an ineliminable element of choice is involved—or, rather, “something in the nature of choice” (1994, 127). However, he hastened to add, this choice need not be bare or arbitrary choice. There is an important role for the exercise of practical reason in the penumbra, albeit not that of tracing the logical relations of premises to conclusions (1983a, 64). Thus, there is room for argument in the penumbra, and the arguments offered can be assessed as sound, even if not conclusive, and the decisions judged as correct insofar as they are based on sound arguments. If in some case this is not possible, at least we can say that some arguments offered are better or stronger than others and the decisions based on them more reasonable (1983a, 64). We judge the reasoned decision to be correct or at least better than alternatives according to some criterion or standard, and this standard typically involves some notion of what the rule ought to be (1983a, 64). In this way, Hart articulated the insight of Realist jurisprudence, an insight he fully embraced.

We can distinguish five moments in Hart’s analysis of the Realists’ insight. First, he offers an analytic frame for the problems to which the Realists called attention: The problems are traced to a feature intrinsic to rules or norms⁴, namely, the fact that the core of settled meaning is surrounded by a penumbra of open texture. The modes of application are taken to be sharply different: the element of choice and decision characteristic penumbral domain is entirely absent in the domain of the core. Second, Hart offers a diagnosis of the need for decision and choice in the penumbra: it lies in the logical gap between general propositions and particular instances. Third, he observes that the gap can (often) be closed by reasoned argument, which guides, but does not eliminate, choice in the penumbra. Fourth, he recognizes that this presupposes a criterion by which it is possible to assess reasoning as sound even if not conclusive. This criterion, presumably, guides proper reasoning in the penumbra. Finally, he associates this criterion with considerations regarding what the rule ought to be.

With this articulation of the Realists’ insight in hand, Hart sought to separate Realists from the skeptical conclusions about judicial reasoning they were tempted to draw. However, before we look at his efforts to this end, we should note one problematic feature of this analysis. Hart’s diagnosis of the problem of uncertainty in the penumbra relies on the fact that “logic is silent about how to classify particulars” (1983a, 67) which is supposed to explain the existence

³ Hart at this point shifts perspective from that of the general public to that of official, more specifically judicial decision-makers. The general public falls into the background.

⁴ The fact that Hart frames the discussion in linguistic terms, and even more specifically in terms of meaning of individual words (“vehicle”), should not mislead us, as it did Lon Fuller, into thinking that the problem is strictly linguistic or semantic. Hart focuses on rules (or more generally, norms), whether they be linguistic, conceptual, or practical. This is made abundantly clear in his parallel discussion in *Concept of Law*.

and profile of choice and discretion in judicial decision-making which the Realists called to attention. However, this is ill-suited to the categories of core and penumbra which framed Hart's analysis. The phenomenon Hart points to is the familiar Kantian problem of judgment, but that problem is entirely pervasive in thought; the gap between general and particular arises as much in the core as in the penumbra of rules, whether they are practical or theoretical. Logic cannot bridge this gap. It takes an act of judgment to take *any* empirical particular as an instance of a concept or *any* particular action as an instance of a rule. *Every* instance escapes in some respects the bounds of a concept or rule. Moreover, the gap is not bridged by making the rules more detailed and determinate, nor is it solved by appeal to other rules, policies, purposes, standards or the like.⁵ All these proposed solutions share the same problem-causing feature of generality relative to particular facts, situations, or actions. For every intermediary another intermediary is needed, for every interpretation another interpretation. Thus, the problem of judgment is as much a problem for application settled rules as application in their penumbra. Hart was right to insist that despite the element of "choice" (or, preferably, "judgment") it would be a mistake to conclude that application of rules, whether in core or penumbra, is arbitrary or unguided by reason. This conclusion removes reason from the domain of thought and practice entirely. But for the same reason Hart cannot explain the role of choice in judicial reasoning in the penumbra by appeal to the problem of judgment.⁶

In *The Concept of Law*, Hart offered an alternative diagnosis of the problems in the penumbra. He claimed that they arise from the inevitable and ineliminable vagueness or indeterminacy of rules and rule-like phenomena, including customs, precedents and examples of all kinds. The indeterminacy rules in law lies not so much in inherent deficiencies of language, but in "our relative ignorance of fact" and "our relative indeterminacy of aim" (1994, 128). Hart's response to this problem is exactly his response to the problems of the penumbra: (1) there cannot be indeterminacy of rules (borderlines) if there is not also, first of all, a zone of determinacy, a core of settled application (lines), and (2) choice in the zone of indeterminacy, when exercised responsibly, is often guided by a kind of reasoning that builds on the settled core and perhaps other things as well (1994, 127). This diagnosis provides Hart with a more plausible analysis of the Realists' insight and a more promising basis for his response to their challenge. We turn to the first phase of that response now.

⁵ Thus, the problem of judgment is not the familiar problem of the over- or under-inclusiveness of rules relative to their aims or purposes (Schauer 1991).

⁶ The *general philosophical* task is to explain the nature and authority of what Kant called "the faculty of judgment" and its partnership with theoretical and practical reason. The *jurisprudential* task (shared with moral and social philosophy) is to explain how the capacity of people, when leaping the gap between general and particular, to land on the same instance (as much as they seem to do). That is, the jurisprudential problem is not (simply) to explain how it is possible for there to be unproblematic instances of a rule, but rather to explain how this can be *publicly, manifestly* so within a group of rule-followers. Hart does not address this problem, although, as we shall see in Section V, his argument for "settled-meaning positivism" puts it close to the top of the agenda for legal philosophy. (For some hints at what such an explanation might look like, see Postema 2008.)

II. Containing the Challenge: Rules, Reasoning and Choice

To contain the Realists' challenge, Hart first sought to block the inference from recognition of problems in the penumbra to the broadly skeptical conclusion that that judicial reasoning is irremediably arbitrary, or at least within the control of judicial reason. Against this version Hart offered two objections. First, he insisted on the necessity of the core of settled application for law. If there is no core of settled meaning, he argued, legal regulation of human behavior impossible; for legal regulation of behavior in a community depends on the effective communication of rules to, and a general grasp the rules in, that community, and laws could not function as rules, if people could not count on some substantial range of settled application. To this the rule-skeptic might reply that legal regulation is possible, but just not regulation *by* or *with* rules *functioning as* rules. To this, Hart has several possible responses, but two are most important for our purposes. First, if regulation by means of rules functioning as rules is not possible, then *law* is not possible, for law is a *specific form* of social control or regulation of behavior, namely, social control through the instrumentality of rules or norms. This premise, which Hart shared with Fuller, is fundamental to his argument in the Holmes lecture (and *Concept*, chapter 7). From this premise it follows that to deny law the instrumentality of rules or norms is to usher law out of existence. Second, if guidance by rules is illusory, then not only is law not possible, but so too are most forms of human social interaction and activities, including rituals, customs, games and a large part of language, since most of these are governed by social rules of one kind or another.

Moreover, Hart argued that skepticism is unwarranted; for, even when an element of choice is involved, as in the penumbra, the choice is reason-guided. Reasoning is not absent from the penumbra, he argued, it just takes a different form from reasoning in the domain of the core. He noted with approval that Austin regarded legal reasoning in the penumbra to be in part a matter of tracing the influence of competing analogies drawn from past judicial decisions (1983a, 65). Moreover, when responsible judges choose "to add to a line of cases a new case" they often do so "because of resemblances which can be defended as both legally relevant and sufficiently close . . . [where] the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and the aims and purposes that may be attributed to the rule" (1994, 127). Because "cases do not arise in a vacuum but in the course of the operation of a working body of rules,' judges often have available to them "a multiplicity of diverse considerations" which are widely "recognized as good reasons for a decision" (1983b, 107). Thus, deciding to apply a rule to an instance outside its settled core is often a matter of reasoned elaboration of the rule, drawing on diverse considerations running through the law. At times decision-makers may even feel as if they have no choice at all (1983, 84-5). That feeling is illusory, Hart thought, but the process and its rationality are not.

Hart recognized that this brief description of what judges do when they conscientiously discharge their responsibilities must be elaborated in a full-scale theory of judicial reasoning (something which he left to others to fulfill), but he thought his remarks were enough to warn reasonable jurisprudence away from the skeptical brink. One wonders how Hart might have wished the theoretical elaboration to proceed. The passages quoted in the previous paragraph suggest that, at times, he might have been open to a view of judicial reasoning consonant with common-law jurisprudence,⁷ but he preferred the “clarity” offered by classical positivist’s approach, which, he thought, offered a more honest recognition of obvious facts of adjudication, in particular the large role that choice plays in judicial reasoning (1983a, 87). We will examine more carefully his reason for preferring the positivist approach to adjudication presently, but first I want to consider whether Hart conceded too much to his challengers regarding the role of choice in decision-making in the penumbra of uncertainty.

Hart found the language of “choice” helpful because it enabled him to mark clearly the fact that we are in a domain of judicial reasoning and practice characterized by a degree of uncertainty and contestation in which “there jostle too many alternatives too nearly equal in attraction between which judge and lawyer must uncertainly pick their way”. In this domain, language that disguises choice and presents the decision as a matter of “recognizing something awaiting recognition” (1983a, 87) is neither clear nor candid. This is understandable, even admirable, but not entirely convincing, because the language of “choice” can also obscure and mislead.

For one thing, the language of choice obscures the fact that there is always an element of choice even in the zone of settled application, although it may not be apparent. After all, a rule clear and settled for a given instance must still *be applied*; nothing about the rule *dictates* its application. The official (or law-subject) must still do the applying. What is dictated is a certain decision or action which, if it does not follow, can be judged to be in clear and uncontested violation of the rule. But even this is not, strictly speaking, dictated by the rule by deductive reasoning, as Hart sometimes suggests. Strictly speaking, there is no such thing as deductive reasoning, only deductive inference. No deductive inference dictates its conclusion; it only demonstrates the logical relationships between the premises and the conclusion. Those who make use of deductive argument draw the conclusions, but logic does not dictate their doing so, since they always have the logical option of challenging one or more of the premises. Whether the conclusion should be drawn, rather than challenging one or more of the premises is something to be settled by reasoning, but that reasoning is never “logically conclusive”. So, even regarding reasoning in the zone of settled application, and even if Hart is correct to model it on deductive reasoning (and there is good reason to think it is not), decision-makers still face “something in the nature of choice”. The kind or degree of choice in this context is different than

⁷ Think here of Fuller’s discussion of “adjudicative law” in *The Anatomy of Law* (Fuller 1968), 89-93, and adumbrated at various points in “Fidelity”. I have tried to capture this mode of thinking about law and judicial reasoning in Postema 2002a, (elaborated in Postema 2002b and 2003, 2004, 2007).

that involved in reasoning in the penumbra, but it does not seem to be clarity and candidness that warrant insisting on the language of choice in the latter case and resisting it in the former.

Second, the language of choice obscures the role of reason and argument in the penumbra. Hart wrote that reasons and arguments drawn from the body of law “impose...limits on [judicial] choice [but] not the choice itself” (1983a, 87). Hart might mean to say here that practical reason reflecting on the settled law *rules out* a number of otherwise possible lines of argument and decisions, but remains silent with respect to the options remaining. This leaves a substantial role for arbitrary choice, albeit in a circumscribed domain. Judicial opinions attempting publicly to justify decisions at law could only give reasons for *not* deciding in certain ways, which would not go far towards showing the decisions actually made to be warranted. Alternatively, Hart might mean to say that reasons and arguments rule out some options and positively support others—reason not only declares certain options *ineligible* it also selects and supports those that are *eligible*—although in this zone of uncertainty reasons run out and at that point choices must be made among the eligible, reasons-supported options. While this is more plausible it still obscures important features of legal reasoning. To explain this we need to look a little more closely at reasoning in the penumbra.

As Hart recognized, the reasons and arguments on which judgments in the penumbra are based held to presuppose standards of adequacy; likewise, assessments of these arguments are held to standards of adequacy. Two salient features of these assessments of judgments and the reasons and arguments that support them call for our attention. First, claims of correctness of the judgments and adequacy of the reasons and arguments for them can only be discharged by further argument. In the province of reasoning and judgment the only currency is argument: neither reports of conviction or certainty, nor Holmesian “can’t help”, nor sincerity, nor any other argument/reasons-independent property of the judgments can serve as legal tender. Second, the assessments are not and cannot be merely private or idiosyncratic; they must be public and thus open to public assessment and challenge (see Sections IV and V below). Now consider cases that arise in the penumbra.

Viewed from outside, these cases in the penumbra are occasions of doubt or uncertainty, but judges faced with such cases must engage in reasoned deliberation regarding them.⁸ It is possible that, at some point a judge feels compelled to conclude that all the reasons and arguments drawn from settled law balance out such that none of the eligible options is better supported than any of the others; but it is also possible that the judge concludes from consideration of the relevant arguments that one of the eligible options is better supported than any other and so must choose it, because the judgment must be made on the strength of the arguments and the arguments best support that judgment. Notice, however, that both conclusions are based on assessments of the strength of the arguments; neither follows from the fact that

⁸ I will follow Hart’s lead and consider the matter from the point of view of judges, but it is very important to keep in mind that this cannot be radically different from legal reasoning outside of the courts, whether by trained lawyers or lay people.

other competent judges came to different conclusions. Moreover, disagreement is possible not only with respect to the latter conclusion, but also with respect to the former. Disagreements of either kind are disagreements about the strength of arguments and judgments based on them, and these disagreements are resolved only by further argument.

In light of these considerations, we can see that the language of choice obscures the reasons-guided decision-making in the penumbra. In the area of penumbral uncertainty, as Hart characterized it, there is likely to be uncertainty going into consideration of an issue and disagreement about how the initial uncertainty is best to be resolved. However, in the face of the latter disagreement, where reasonable colleagues draw different conclusions from the arguments, the proper characterization is not “I chose option X but she chose option Y”, but rather “I decided or judged X and she judged Y”. The former characterization may not capture the phenomenology of judging accurately, but the more serious problem is that it fails to capture the logic or epistemology of the situation. From the fact of disagreement it draws the mistaken conclusion that disagreement is due to the balance of the argument. It misdescribes the normative status of the conflicting judgments and it obscures key implications of this conflict; for in the context of the reasoning of legal officials, it is not enough for officials to have or to act sincerely on reasons, or even to offer those reasons publicly. They are accountable for their judgments and reasoning to them. They can be challenged with respect to both and both can be redeemed only by further argument. Thus, at the point that different reasonable judges come to different conclusions after deliberation, it is always legitimate in principle (although possibly pragmatically difficult or inappropriate) to press for further reasons, to explore arguments not yet considered. The language of choice obscures these responsibilities of public justification. Of course, it is conceivable that we can reach a point at which *all* relevant reasons and arguments are exhausted and the disagreement remains, but, in view of the vast network of reasons and arguments that the settled law offers for responsible deliberation, this point will rarely be reached. Even if it were, it would be a mistake to characterize the situation facing the disputing parties as one of choice. The more accurate characterization is that after conscientious and exhaustive exploration, they have come to conflicting judgments based on the arguments. This characterization of the process and practice of legal reasoning in the penumbra does full justice to the uncertainty and openness that Hart was so keen to stress, but it also keeps fully in view the limits and demands of responsible judgment and decision-making. With this in mind Hart could have responded even more forcefully to the Realists’ challenge.

III Answering the Challenge: Avoiding Mischief in the Penumbra and Corruption of the Core

Hart was confident that moderate Realists would accept something along the lines of his characterization of judicial reasoning in the penumbra, but he worried that they were inclined to extend the view to all of judicial reasoning, thereby jeopardizing the integrity of the core. Realists, he observed, invite us to “include in the ‘rule’ the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled” (1983a, 71), but he insisted that we refuse the invitation. What exactly is the invitation and what evils did Hart seek avoid by refusing?

Understood in one way, (a) Hart sought to prevent lawyers and judges, urged on by Realist rhetoric, reasoning in the penumbra under color of law, pretending that their contestable claims and arguments, and even worse their personal ideological commitments, are sound conclusions and solid arguments of law.⁹ Understood in another way, (b) Hart sought to insulate reasoning in the core from the context-sensitive argumentation characteristic of reasoning in the penumbra, where the proper understanding of a rule can only be settled by putting it in the context of the whole body of law (or some substantial part of it) and tracing its content-determined relations with other rules, decisions, and the like.¹⁰ It is not clear which of these concerns was most prominent in his mind, but however we construe his concern, two things are clear about his critique of moderate Realists: (i) he insists that reasoning in the area of the core is sharply distinct from reasoning in the penumbra, and (ii) *law* is restricted to the hard core of settled meaning and so *legal* reasoning is restricted to reasoning within the domain of the core.

If we ask Hart why he thinks (i) and (ii) are true, he offers two reasons: clarity and the separation thesis. Clarity favors the classical positivist position which sharply distinguishes reasoning to and with legal rules alone and reasoning that appeals beyond them. This enables us to say everything true that the Realists’ sought to say in a less mysterious and misleading way. Second, the separation thesis, the positivists’ sharp distinction between law as it is and law as it ought to be, implies that “the hard core of settled meaning is law in some centrally important sense”, for without a settled core of meaning “the notion of rules controlling courts’ decisions would be senseless (1983a, 71). (I will call this “settled-meaning positivism”.)

These are singularly unpersuasive reasons. Clarity demands that we not confuse reasoning using the settled core of meaning with reasoning in the penumbra of legal rules, and

⁹ Zipursky (unpublished) calls this “mischief in the penumbra”.

¹⁰ This construes the relevant “context” more narrowly than many Realists would have done, although not more narrowly than Fuller did. Hart may have been worried about less disciplined Realists, but his arguments are meant to support a view that rejects even the more limited contextualism suggested here, so we are entitled at this point to adopt that as the foil to his account.

insists that the law is restricted to the settled meaning of rules, *only if* (i) and (ii) are true. Similarly, we must agree that it is a mistake to confuse law as it is with law as it ought to be, that would be a species of wishful thinking. However, until we have an account of what makes law what it is, we will not be able to determine whether considerations of value of any kind play a role in determining (metaphysically) whether something is law (a law, a legal system, a matter or law) and when he have such an account worth its salt, we will be able avoid confusion of the law with our proposals for its improvement. The separation thesis by itself cannot help us decide whether law is a matter of settled rules or disputed considerations and when the thesis is supplemented with an account of law, it is no longer needed. “Everything is what it is, and not another thing”,¹¹ Bishop Butler wisely remarked. The ring of truth comes from its status as a tautology. The separation thesis, deployed at this point in Hart’s argument, gives us nothing more substantial than such a tautology. Clarity with regard to legal reasoning and the separation of law from another thing becomes possible only after we have identified the kind of think law and legal reasoning are.

The larger framework of Hart’s critique of Realism suggests a rather different argument for settled-meaning positivism. This argument rests on premise we encountered before, namely, that the law’s basic task is to control of human behavior by general rules (1994, 124; 1983a, 63). We might express this premise more cautiously and perhaps more accurately in this way: law’s fundamental mode of operating is through guidance of self-directing agents by norms. Operating in this mode requires *inter alia* that the norms be clearly communicated and that activities of courts be limited to administering the norms meant to guide the behavior of those subject to the law. But, Hart argued, such norms or general rules cannot be communicated and cannot do their necessary guiding and controlling work unless there is a settled core of meaning that all can recognize, even if there is also some penumbra of uncertainty surrounding it. We cannot allow the uncertainty of the penumbra to penetrate the core of rules without crippling the law’s essential technique of social control. Thus, law must be clearly identified with that settled core of meaning and legal reasoning restricted to reasoning to and from the settled core of rules. This seems to be Hart’s argument, but it is clearly a non-sequitur. Settled meaning may well be necessary for law to do its essential norm-guiding work, but it does not follow that law embraces only that which is clearly included in the settled and undisputed core of law’s norms. Hart’s argument needs to be augmented or elaborated.

Since the publication of *Concept of Law*, Hart’s position and argument has been developed in basically two directions. First, appealing to law’s alleged claim to authority, elaborated to embrace law’s aim to offer normative guidance (Raz 1979, 1995; Shapiro 2000), it has been argued that law is limited to source-identified norms and that reasoning to establish the content and requirements of law is limited to reasoning with source-based legal norms. However,

¹¹ Butler, *Fifteen Sermons*, (Charlottesville, VA: Lincoln-Rembrandt Publishing, 1993) Preface, paragraph 39, p. xix.

on this view, proper judicial reasoning is not limited to such considerations. Judges are authorized and sometimes duty-bound to appeal to considerations not included in the set of source-based norms, for example, considerations of substantive political morality. The adjudicative power of judges is “directed” to resolve uncertainties by appeal to extra-legal considerations. This “exclusive positivism” is an extension or elaboration of Hart’s simpler “settled-meaning positivism”, but it is in the spirit of Hart’s view and is typically defended, especially in recent years, by appeal to arguments regarding law’s normative guidance function. On this view, while law is restricted to source-based rules (or settled meaning), judicial reasoning is not and in many cases must not be so restricted.

The second direction in which Hart’s argument has been developed is toward a more polished and sophisticated formalism. On this view, not only is *law* restricted to something like settled meaning, but so too must be judicial reasoning, and the restriction of judicial reasoning to the core is interpreted as a restriction to rule-bound reasoning (Schauer 1991, Alexander and Sherwin 2001). “Rule-bound reasoning” recognizes that there are strong reasons for judges to follow legal rules, even though the rules may be over- or under-inclusive relative to their underlying rationales and in consequence following the rule may “get it wrong” relative to those considerations. Reasons of decision-making efficiency, predictability, control of official exercise of power, coordination of social interaction, and other such familiar considerations counsel (a strong presumption in favor of) adherence to the rule in the face of deviation from their purposes and other compelling considerations. Rule-bound decision-making regards the rules as opaque to their underlying rationales and the balance of competing considerations bearing on the actions governed by the rules. In this way, the core of settled meaning of rules is insulated from the influence of purposes and competing considerations that stir uncertainty in the penumbra. The case for holding courts to this “plausible formalism” (Schauer (unpublished)) rests on considerations of effective guidance of behavior, effective control of the exercise of political power wielded by law-applying institutions, and related “rule of law values”.

These two ways of elaborating Hart’s suggestion stand in a curious relationship. Both appear to be unstable and reasons against one view incline one strongly to the other only to be upset by considerations that incline one back to the first. The circle does not appear to be virtuous. The first view faces the following problem. Since the exclusivist account accepts that judicial reasoning typically and properly (that is, as a matter of judicial duty or responsibility) involves appeal to considerations that are not encompassed within “settled meaning” or the range of approved sources, it is hard to see what is gained by restricting “law” and “legal reasoning” to the core of settled meaning or source-based rules. Perhaps the appearance of arbitrariness of this restriction can be dispelled if we take seriously law’s fundamental aim to guide the behavior of citizens and hold courts to decision-making that serves that task. However, this argument is puzzling. If norm guidance of law-subjects is materially affected by the activities of law-applying institutions, as this view assumes, will not the activity of the institution as a whole, i.e., judicial reasoning in general, and not merely the settled-meaning or source-based rules, be the

prudent focus of attention of law-subjects? If they seek guidance from the courts, why would they restrict their attention to law as narrowly construed? If effective guidance is the aim, then labeling certain parts of the practice “law” without binding the courts to those parts is unlikely to restrict the focus of guidance to those parts of the practice.

Something like this line of thought, I believe, moved Lon Fuller to attribute to Hart a conception of “fidelity to law” (or rule of law) despite the fact that Hart never mentioned the idea in his Holmes lecture. Since Hart had to have *some* reason for restricting “law” to settled meaning of legal rules, Fuller attributed to him the most plausible reason he could think of consistent with Hart’s general sympathy with the broad direction, if not the particular details, of classical positivist jurisprudence. And that reason, in Fuller’s view, arose from the classical positivist (thinking broadly now to include in this camp Hobbes and Bentham) answer to the question *why* do we want or find valuable law’s specific mode of exercising political power. That answer, he thought, was that we hold the exercise of power to *rules* that are public and largely undisputed. It is, he thought, a particular conception of the value and importance of law that underlay Hart’s commitment to settled-meaning positivism. That conception puts a premium on certainty, predictability, and control of the exercise of public power. This leads us to some version of sophisticated formalism, which holds judges to rule-bound reasoning.

Yet, Hart himself offered persuasive reasons for resisting formalism (1994, 128-30) which apply also to the more sophisticated version. Certainty, he argued, can be bought at a price too high. We must leave significant room in law and legal reasoning for adjustment to future circumstances which call for refined formulation of existing rules and standards and even more for refined grasp of the reasons, aims, and goals, and their relative importance, that inform the rules. We need some core of settled meaning, he insists, but we must not “freeze the meaning of the rule” thereby “settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified” (1994, 129, 130). Moreover, a degree of openness to the future is not only useful, it is essential to law’s doing its characteristic work. We look to law for predictability as a hedge against arbitrary exercise of power, but that predictability must itself avoid arbitrariness. As Bentham argued long ago, when we permit inflexibility to dominate, predictability and control of arbitrariness is typically undermined.¹² For the need to avoid arbitrariness of the instruments of control generates public pressure towards greater judicial flexibility which, however, the exercise of which is able to hide behind the appearance of adherence to rules, thereby loosening the reins of control. It is difficult to block judicial appeal to purposes and considerations behind the law, considerations actively in play in the penumbra, without undermining its ability guide action and control political decision making, because these are effective only if there is a significant degree of confidence in the non-arbitrary, reasons-intelligible character of the constraints. If this is, in broad strokes, correct, then we seem to be pushed back in the direction of the exclusivist understanding of settled-meaning positivism, a

¹² I called this Bentham’s “paradox of inflexibility” (Postema 1986/1989, ch. 8)

position which, we have seen, is unstable precisely in ways that push us back to the formalist understanding.

There is not time here or space to develop these arguments fully or to demonstrate these instabilities. I present this suggestion of antinomy to motivate a deeper exploration of the considerations on which Hart's initial argument, and these two competing elaborations of it, seem to rest. This exploration can proceed from two directions, one put on the agenda by Hart in his Holmes lecture, and the other put there by Fuller's response. The former looks more carefully at what is involved in law's distinctive technique of normative guidance; the latter looks at the implications for our understanding of law and legal reasoning of certain widely accepted features of the ideal of the rule of law.¹³ These explorations will lead us away Hart's settled-meaning positivism (and its elaborations) in the direction of a conception of law and of the rule of law with affinities to classical common law jurisprudence (Postema 2002a, 2002b, 2003).

IV Law, Reasons, and Accountability

The thesis of this section is that a very widely shared understanding of the rule of law favors a common-law conception of law and legal reasoning over Hart's settled-meaning positivism and its more sophisticated elaborations. We look to law to subject the exercise of political power to public accountability, and, I shall attempt to argue, such public accountability requires an institutionalized discipline of practical reason as conceived in common-law jurisprudence rather than conformity to public rules when and insofar as their meaning is settled, fixed, or source-based.

The notion of the rule of law builds on the core idea that law is a distinctive *mode* of exercising political power—or rather, more generally, a distinctive mode of social ordering, usually including the exercise of political power. We look to law for protection against the arbitrary exercise of power. Where rule of law is observed in a community, i.e., where law rules, it provides a substantial measure of protection in two dimensions: protection of the governed against the arbitrary power of those who govern (vertical) and protection of members of the society against the arbitrary exercise of power by their fellows (horizontal). We can highlight central features of this ideal of the rule of law by contrasting it with a mode of governance that stands just beyond the pale of (and masquerades as) the rule of law, which we might call *rule with law*.

Rule with law obtains where political power is exercised by means of public rules and institutions to administer them just to the extent that social control is efficiently maintained and

¹³ No great distance separates these points of departure, since it is widely agreed that we must defend the central components of a plausible conception of the rule of law by appeal to law's essential and distinctive mode of operation. This is not only the direction Fuller (1969) takes in his defense of the "inner morality of law", but it also is the starting point of Raz's (1979) classic analysis and defense of the ideal of the rule of law.

the goals of those in power are efficiently promoted. It is not anything about these goals that puts the exercise of power beyond the pale of the rule of law, but rather a particular feature of the attitude of those in power towards the law. For them law is a tool of governance only, not a constraint on their power; law does not rule, rather law submits to, those who govern. Thus, rule *with* law, lacks a key feature of the rule *of* law: reflexivity. Where political power can be more efficiently exercised without the law or outside its ordinary boundaries, those who govern recognize no reason to use it. Of course, the formalities of law prove most useful to those in power precisely because it is widely believed by those subject to their governance that law constrains the exercise of power and can put obstacles in the path of the realization of the goals of those who exercise it. That is, those inclined to rule with law realize that law is effective tool of governing just insofar as it is possible to mask its status as a mere tool. Rule with law is *parasitic* for its power on those subject to it confusing it with the more demanding ideal of the rule of law.

But what is it for law to rule? This idea of the rule of law seems to ignore the commonplace of political thought since before Plato that it is not laws that constrain or rule, but rather it is human beings exercising power who rule—or, rather, laws rule through human beings exercising power. Augusto Pinochet was reported to say to lawyers who threatened to prosecute some of his henchmen: “If someone touches one of my men, the rule of law is over.” [ref] When law rules, political power is constrained, but only, it appears, by the willing submission of those in power. Ironically, Pinochet’s arrogant assertion illustrates a deep truth about the ideal of the rule of law: the rule of law depends on a *commitment* to exercise power only within the limits of law and its governing ideals. Governing in the mode of law is a fundamental political choice, a commitment, of a political community, a commitment manifest in the vertical and the horizontal dimensions of the rule of law. Law can function as the fundamental mode of governance in a community only when there is wide commitment of the community and its government to this mode of governance, to *fidelity to law*, as Fuller liked to put it.

The commitment at the foundation of the ideal of the rule of law must be understood in public and normative, not personal and quasi-psychological, terms. It is not a matter of personal resolve or determination, of even of *holding oneself* to some course of action, but rather a matter of *being held* to some *standard* of behavior. Commitment is normative in two respects: (a) one can *mistake* what it is one is committed to, and (b) one can *fail* to act on the commitment. In both respects, commitments involve according authority to others to judge one’s performance (Brandom 1994, 2000). Thus, accountability to others lies at the center of the notion. This accountability can understood in two different ways. On the hierarchical model, one is held to a commitment by someone who in virtue of a position of superiority is able to assess one’s actions relative to the commitment and, where necessary, impose corrections. But since such assessments are also subject to assessment and correction, there must be someone superior to one’s superior to assess and correct the latter’s assessments. In contrast, on the reciprocal model, others hold one to a commitment on the condition that they acknowledge one’s standing to hold

them to their commitments as well. One is accountable to others on the condition that their assessments are subject to one's own assessment. This mode of holding to account describes a circle, of course, but it can be an entirely virtuous one.

The rule of law is seriously compromised if accountability is understood on the hierarchical model, because this model, familiar from political theory from Bodin and Hobbes to Austin, avoids a regress by putting one superior beyond the scope of accountability. However, accountability at the heart of the rule of law is given effective expression in the reciprocal model. Thus, the commitments on which the rule of law rests, commitments that make possible genuine *reflexivity* of law's rule in both of its dimensions, call for robust modes of reciprocal accountability. And where the commitments are public, i.e., commitments of members of a community and of those who exercise public power in that community, these modes of reciprocal accountability must be fully public.

We can approach this same conclusion from a slightly different quarter. We observed that the rule of law at its heart is concerned with protecting against arbitrariness, not merely the arbitrariness manifest in unpredictable exercises of power, but the arbitrariness of power that is not bound to act on principled reasons. At the core of this concern is subjection to the arbitrary will of others, their *libero arbitrio*. One who must act at the discretion or pleasure of another is subject to the other party's arbitrary will, even if that other party acts for good or sound reasons. As Kant [ref] made clear, power is arbitrary and without sound reason, from the point of view of one subjected to it, if the other party cannot be held accountable. Even sincere *claims* to act with right or warrant, if there are no means available assess those claims, leaves one no less subject to the arbitrary will of another. Effective protection against such arbitrariness, again, depends on the availability of robust public devices for reciprocal accountability.

Finally, if this accountability is to be robust, several things are necessary. First, there must be manifest and publicly accessible norms which can effectively guide behavior of officials and citizens and function as public warrants for that behavior. Second, there must be structures for reciprocal accountability of behavior. Consider accountability of official actions under law. The rule of law demands not only that officials act with sufficient warrant in the law for their actions, but demands also that an official's claim to act of to have acted with that warrant, be open to public challenge (MacCormick 1999). It requires a public forum in which claims can be assessed by marshaling arguments drawn from the body of law, arguments that proceed through "the labor of the negative" (as Hegel put it), that is, by way of drawing contrasting or conflicting claims and testing their adequacy in the context of the law (or the relevant part of it) as a whole. Accountability will be ineffectual and will fail to be reciprocal if one party is able to dictate the terms of the assessment. So, any claim to warrant must be assessable not only with respect to whether the actions actually conform to the norm alleged to justify it, but also with respect to the how the norm is to be understood and the force it has relative to other potentially competing norms and with respect to claims made on behalf of the place of the alleged warranting norm in the body of law as a whole. And reciprocal accountability requires forums in which inevitably

conflicting assessments can be tested and measured by the only appropriate measure of such assessments, namely, deliberative reasoning and discursive argument. Claims of warrant and justification can be discharged only through argument; public claims of warrant can only be discharged through public argument in public forums. *De legibus disputandum est*.

Thus, legal reasoning structured to reflect the demands of reciprocal accountability cannot be limited to matters already settled. The rule of law demands that law provide the focus, forums, and resources for robust reciprocal accountability through fully public argument from and with respect to public norms. This mode of public reasoning is subject to a discipline shaped, in the first instance, by the practice of those entrusted to maintain the community's public norms, but not just them, for their exercise of this practice is also subject to accountability in the wider community. The rule of law calls for a discipline of public reasoning, shaped by its practice in a public forum and tethered to an interconnected body of rules, decisions, norms and examples that are normative for the community because it represents its past and precedent for its future.

If this line of argument is correct, then we may conclude that core commitments of the idea of the rule of law call for law conceived more along lines of classical common-law jurisprudence, than those suggested by classical or contemporary positivist jurisprudence.

V Normative Guidance

According to common-law jurisprudence, law is best conceived not as a set of discrete rules, but as a discipline of public practical reasoning that provides a framework and forum for critical exploration as well as authoritative determination of public norms. This conception is favored not only by assumptions about the rule of law, but also by Hart's own orienting assumption regarding law's distinctive task or mode of operation. This basic and widely shared understanding of law's distinctive modus operandi locates at the center of the concept of law the notions of norm and authority. On this view, law-subjects typically take legal norms as guides for their action; as self-directing agents, they regard them as norms, as having authority for them, and they direct their own actions by their understanding of these norms. This is a good start, I believe, but Hart and many legal philosophers who have followed his lead work with a conception of the normative guidance offered by law that is too limited. They take guidance by authoritative directives as a model, but this model obscures important features of the way in which law typically provides normative guidance. At least three such features are worthy of mention here.

First, to do their distinctive work legal norms must be "communicated" and such communication is not a matter of issuing general directives to each law-subject individually, but

rather of addressing general norms to a general public.¹⁴ Law does its work only when it is *in force* in a community, when it is the law *of* the community and *used by* its members (Postema 2008a). The guidance it offers is addressed to individuals engaged in complex networks of social interaction. Among these agents it is common knowledge that they are rational, self-directing agents. So, effective guidance is possible only if their understanding of the norms and of the authority of the norms is common. Law's directives must be publicly recognizable and interpretable. The reasons they give must be reasons that law-subjects can generally appreciate and can readily understand that others appreciate. This need for public understanding and appreciation puts law-subjects and law-maintaining officials into a complex network of interdependence and, as Fuller often argued, imposes on them a discipline of reciprocity. Each law-subject and each official must engage in a kind of triangulation to arrive at his or her understanding of legal norms. Law-subjects must test their individual understandings against what they expect from other law-subjects with whom they are likely to interact and from officials in whose jurisdiction they find themselves. Officials, likewise, must approach their understanding of legal norms, and their fixing of them where they are empowered to do so, guided by the understanding held by other officials and by the public generally. For this reason, debate over and determination of the meaning of legal norms must be institutionalized and made public.

The second enrichment of our understanding of the way law offers normative guidance requires that we recognize that, in addition to the *directing* component, law's normative guidance has *constitutive* and *evaluative* or *vindicative* components. Unlike a regime of commands, law is fundamentally a mode of social ordering, *constituting* a network of relationships, normative conditions, and statuses which reinforces and underwrites the normative infrastructure of the community. No legal philosopher was more sensitive to this essential dimension of law than Bentham; indeed, it was his awareness of its importance which prevented him from publishing his initial thoughts about morals and legislation, shaped around a command model of law, until he could offer a consistent and plausible conceptualization of law in its constitutive dimension[ref]. The fact that his attempt failed does not diminish the importance of the task. The failure (as Hart helped us to see clearly) was due in part to the fact that such legal relationship-establishing norms are more like maps than directives, providing resources for successful navigation of social interaction rather than defining specific tasks to perform. The model of authoritative direction not only obscures this constitutive dimension of law, but it also obscures the law's evaluative or vindicative dimension. Law provides the standards by which individuals evaluate their own behavior, and evaluate the behavior of others, in its public dimension, and vindicate that behavior in response to its evaluation by others. Most importantly, it provides the framework within which we hold others accountable for their public behavior. As we have seen earlier, this calls for a framework and a forum for challenging official and non-official claims to

¹⁴ The idiom of norms *addressed to* a given public is dictated by taking authoritative directives as starting point of our reflections at this point. I do not mean to endorse this idiom beyond this usage.

act under color of law, for assessing arguments made in response to demands for warrant for their actions.

The constitutive and vindicative dimensions of law are essential to its form of normative guidance. The essential role of the constitutive dimension is clear if we consider what is necessary for public understanding of legal norms (Postema 2008a, 58f) If legal norms are to guide social interaction they must be practically intelligible to those whom they guide. For this purpose, an agent's determination of *what* a norm requires cannot be entirely divorced from her assessment of *why* she should follow it. It is too much, of course, to insist that the norm meet strict conditions of moral justification, but it is necessary for the agent to attribute some practical point to the norm. Moreover, because law seeks to guide action through public norms, those norms must be intelligible to law-subjects *in common*. What is practically intelligible in common is never merely a function of their promulgation in the common language of the community, but always also a function of the practices that structure their public life and relatively stable public relationships. Authoritative directives will be able to guide in the fashion distinctive of law (i.e., as norms, rather than as triggers for ritualized or fear-motivated behavior) only when they can draw on the infrastructure of social relations provided by such norms and practices. Law in its constitutive dimension underwrites, reinforces, and more or less subtly shapes these norms and practices. In political communities with mature legal systems there is likely to be a great deal of interdependency between informal social norms and the more formal constitutive norms of law, so much so that there is likely to be a gray area in which it is not possible sharply to distinguish them. Thus, law cannot authoritatively direct or regulate social behavior in the manner of law without the continued assistance of its constitutive norms.

Likewise, law depends on its vindicative dimension for effective normative guidance. Guidance of social behavior by public norms of law is possible only if the conditions of congruence and continuity are met. The requirement of *congruence* is familiar to readers of Fuller. Official promulgation and public profession of legal norms are not sufficient to secure their effectiveness as guides of public behavior if those whom law seeks to guide are not sufficiently confident that the law promulgated and professed is the law invoked and executed. Absent a sufficient degree of congruence between official profession and practice, law-subjects will, with good reason, ignore the professed norms (what the Realists liked to call "law on the books") and look to the actions of officials for their clues to legal requirements on their behavior. In that case, the game of social control changes from one in the mode of law to something in the mode of the arbitrary exercise of power. This, of course, is the lesson well-taught by Hart's vivid discussion of "scorer's discretion" (1994, 142-6). Similarly, *continuity* over time is essential to the normative guidance distinctively provided by law. I have argued elsewhere that historic continuity of present law-governed and law-guided actions with past such actions is essential to law (Postema 2004). Law provides the necessary bridge from the law-subjects' public past to their present legal-social constitution and commitments. Law can offer effective normative

guidance only if it is congruent with their lives as these lives are structured over time. Law gives them that structure.

Law's vindicative dimension is critical for both its congruence and its continuity. Only by making available a framework and forum for accountability can law-subjects hold official practice to its profession, thereby enhancing congruence by incorporating within law's ordinary practice institutional resources for law-subjects to demand such congruence. In the same way, public articulation of legal norms in the course of challenging and exploring alleged warrants of official action brings to public awareness the relationships between formal and informal constitutive norms, and between them and directive norms, and enables law-subjects and officials to shape the content of these norms and enhance their practical intelligibility.

Equally, by making available a framework and forum for accountability promotes law's continuity over time. Law's persistence over time and the demands of a community's past as reflected in its law are not empirically given facts, they are, rather, matters to be determined, publicly and by argument in a framework and forum dedicated to deliberative assessment in public of competing understandings of them (Postema 2004, 225). The forensic, discursive and argumentative dimensions of law are not merely a welcome but dispensable accessory of law; they play an essential role in law's distinctive mode of normative guidance.

Finally, the model of authoritative directives obscures the discursive and systemic character of law and its mode of normative guidance. Law offers those it governs not an aggregate of discrete rules or directives, but a system of interconnected norms related by content. The meaning of particular legal rules is typically conditioned by their interaction with many other rules and provisions. Moreover, these rules function in deliberation by providing reasons for action that implicate (commit their agents to) other actions or judgments and which themselves are grounded in further reasons and norms. Deliberation in law involves locating particular rules or reasons in a network of mutually conditioned norms. Reasons or norms offered by law at any point are grasped and understood not by intuition but by use, locating them in the network of reasons and norms, applying them to other situations, testing them by hypothetical situations, looking to other reasons or norms to ground them or illuminate their underlying rationales. The normative guidance offered by law is *systemic* and *discursive*.

On this richer understanding of normative guidance in the manner of law, it would appear to be a mistake to identify law merely with settled rules. In order to offer even minimally effective normative guidance, law must be public, systemic, discursive, and argumentative. It must not seek "to cut off all occasion of discord", as Hume thought, but rather to subject it to a disciplined practice of public reasoning. It is a practice of *public* practical reasoning because it focuses on public matters: matters of the political community, on the commitments of those in political power to its members, and of members to each other as members of the political community. It is also public in the sense that it is the practice of and by the political community as a whole, not just some elite segment of it. Because it is practiced in a distinctive

institutionalized (forensic) context, and because it is only part of the daily work of a political community, a segment of that community (the legal profession) is much more actively involved in it than the general public; indeed, the participation of the legal profession tends to exemplify the practice. Nevertheless, the practice is not, and if law is to be effective in normatively guiding behavior it cannot be, limited to this segment. Participation in the practice of a healthy legal system by members of the political community in general is typically mediated, but never supplanted, by the legal profession. It is a *disciplined* practice in the sense that it imposes structure, method, and articulated responsibilities on the practical reasoning of participants. The fact that the practice, in its most manifest form, takes place in a public forum, with its distinctive institutionalized procedures and rules decisively shapes the practice. As a discipline of practical reasoning, it involves skills and strategies that are learned over time and they may vary from one legal system to another. Common to them all, however, is the fact that public practical reasoning is anchored in a body of decisions, rules, codes and conventions widely acknowledged to be normative for deliberation because they represent commitments of the political community over time. This body of materials provides a rich context of relatively fixed points from which discursive argument on contested issues of law can proceed. This view of law has much more in common with common-law jurisprudence than with settled-meaning positivism or its more sophisticated contemporary elaborations.

If the arguments of this section and the previous section are sound, we may conclude that considerations that lie at the foundations of Hart's attempt to answer the challenge from the American camp actually lead to a view that many in that camp, Lon Fuller most prominent among them, might find entirely congenial.

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