

The Rise and Fall of Liberal Legal Positivism

Legal Positivism, Legal Process,
and H. L. A. Hart's America 1945-1960

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“A young hostess is giving her first dinner party and the question arises shall she use for this occasion the best knives: they are old silver, very beautiful and they will set off the snowy tablecloth and the glasses. On the other hand they are undoubtedly heavy and somewhat difficult to handle: they are not a bit sharp and also their splendour might be thought a little bit showy to some. The hostess ponders, she thinks out the possible disasters and some possible good consequences from the courses before her: she balances one consideration against another and perhaps wonders whom she can consult. She asks someone who has had a lot of experience in this field, an old lady, who says sagaciously that ‘on the whole I think the wisest thing to do would be to use the second-best set.’”

--H.L.A. Hart’s example of discretionary decision-making (see Hart, *Discretion*, 8).

“For us, surely, liberty is this: that there is a circle round each man, inside which he can do as he pleases, and it is no concern of others; this is the liberty the Englishman has inside his house and garden and behind its hedges. I think that this as an ideal makes little appeal to an enormous number of Americans; I believe you can find what the American means by liberty by looking at the constitution of an American state. In the State of Massachusetts the Constitution provides that any member of the public may introduce a measure into the Legislature and argue for it before committees. And it seems to me that this is what an American means by liberty; the right to take part in what he would call ‘the decision making process.’”

--H.L.A. Hart, recording his impressions of American democracy to an English audience in a B.B.C. radio broadcast (see Hart, *A View of America*.)

“‘What form can be taken by the concept of “decision according to law”, in the light of the new insights into the indeterminacy of legal doctrine and the consequent functioning of courts, in some sense, as organs of policy?’ I am just beginning to face up to this. It is the step one must take after ‘legal realism’ and linguistic criticism of law, unless one wants to give up on the notion of law altogether, or else to lead a double life of cynicism and cant.”

-- Charles Black, discussing how to understand *Brown v. Board of Education* in a letter to Herbert Wechsler. (April 22, 1959, On File in the Columbia University Library, Herbert Wechsler Papers).



"Hart and Sacks" -- Albert M. Sacks (left) and H.L.A. Hart (right) at Harvard, 1956-57. (Photo on file at the Library of New College, Oxford, H.L.A. Hart Papers.)

Table of Contents

Introduction

- A. The Puzzle of H.L.A. Hart's Lost Essay
- B. Contribution to the Literature
- C. The Argument in Brief
- D. The Plan of the Dissertation

Part I: Anglo-American Jurisprudence at Mid-Century

Chapter 1: A New Jurisprudence for a New World

- A. H.L.A. Hart and the Linguistic Revolution
- B. Jurisprudence in England 1776-1952
- C. Classical Legal Thought in America
- D. The Conservativization of Legal Formalism
- E. Progressivism
- F. Realism
- G. Taking the Chair

Chapter 2. H.L.A Hart and American Legal Thought 1945-1956

- A. The Process Ethos
 - 1. Purposive Law and the Fact Value Distinction
 - 2. Dynamic Institutionalism and Reasoned Elaboration
 - 3. The Golden Age
- B. The Americanization of H.L.A. Hart
 - 1. Hart's 1952 Visit
 - 2. Hart's Early Critique of Realism

- a. Rejecting the Prediction Theory of Law
 - b. Hart and Hohfeld
 - c. Embrace of the Realist Rejection of “Mechanical Jurisprudence”
 - d. The Separation of Legal Reasoning and Legal Theory
- 3. Bodenheimer’s Critique
 - 4. Hart’s Newfound Trajectory

Part II: H.L.A. Hart at Harvard 1956-57

Chapter 3. Hart’s Debut

- A. Hart’s Arrival in America
- B. The Legal Philosophy Discussion Group

Chapter 4: H.L.A. Hart’s *Discretion*

- A. Clarifying Fundamental Questions
- B. What is Discretion?
 - 1. The Analytical Approach to Definition
 - 2. Hart’s Taxonomy of Discretion in Law
 - 3. Looking Beyond the Law: Discretion as a Middle Position
 - a. Distinguishing Discretion from Arbitrary Choice
 - b. Distinguishing Discretion from the Determinate Application of Rules
 - c. A Middle Road Between Arbitrary Choice and Determinate Rules
- C. The Proper Place of Discretion in Law
 - 1. The Inevitability of Discretion in a Legal System
 - 2. The Responsibility of Discretion
 - a. Rationality
 - b. Choice of Factors
 - c. Justification
 - 3. Hart’s Solution to the Problem of Legal Indeterminacy

D. The Significance of *Discretion*

Chapter 5: The Aftermath of *Discretion*

- A. The Hart-Hart Debate?
- B. “My Rival” – Julius Stone on Discretion

Part III: The Pre-Hart-Fuller Debate Hart-Fuller Debate

Chapter 6. The Pre-Hart-Fuller Debate Hart Fuller Debate: Part I

- A. Hart’s Analysis of Purpose and the Fact-Value Distinction in *Discretion*
 - 1. Purpose in Legal Reasoning
 - 2. Purpose in Legal Theory
- B. Fuller’s First Responses
 - 1. Scientific Description of Human Behavior Requires Purposive Analysis
 - 2. The Importance of Purposive Analysis Requires a Fact-Value Merger
 - 3. How Does *Morality* Become Relevant? Fuller’s Magic Mountain Part I
 - 4. Anticipating Hart’s Poisoning Objection
 - 5. Fuller’s View of Law
- C. A Positive Agenda: The Collaborative Articulation of Shared Purposes and Interaction Between Means and Ends, Facts and Values
 - 1. The “Conversation” That Produces Purposive Law
 - 2. Direct Rebuttal to Hart’s Theory of Language and Definition in *Discretion*
 - 3. Collaborative Articulation and the Forms of Social Order: Fuller’s Agenda Part I
 - 4. The Revival of Natural Law Theory: Fuller’s Agenda Part II

Chapter 7: Answering Bodenheimer’s Challenge

- A. Hart’s Year of Wonders – Continued
- B. Hart’s Reply to Bodenheimer

C. Linguistic Philosophy and Liberalism

Chapter 8. The Pre-Hart-Fuller Debate Hart-Fuller Debate: Part 2

A. Fuller's "Reply to Critics"

1. Vicarious vs. Direct Evaluation
2. Internal vs. External Perspectives in Legal Theory: The Early Clash
3. Positivism Re-Rejected
4. Fuller's Magic Mountain: Part II
5. Fuller's Appeal to David Hume
6. Deciding *Oughts*: The Collaborative Articulation of Shared Purposes Revisited
7. Cultural Relativism
8. Natural Law and Moral Responsibility

B. The Significance of Fuller's "Reply to Critics"

Chapter 9: Reformulating Positivism

- A. Rule versus Discretion in Law
- B. Synthetic Faith in Reason: *Authority* as Reasoned Elaboration
- C. Hart's Holmes Lecture: *Positivism and the Separation of Law and Morals*
 1. An Intellectual History of "Legal Positivism"
 2. Positivism *as* the Separation of Law and Morals

Part IV: A Tale of Three Holmes Lectures: The Decline of Process Theory and the Reception of Hart's Positivism

Chapter 10: Hart and Hand

- A. *Brown* and Process Theory
- B. Learned Hand's Holmes Lecture: The Realists' Challenge Strikes Back
- C. Hart and Hand
- D. The Theoretical Dilemma of Legal Process: Legal Process 2.0

Chapter 11: Neutral Principles: Process Theory and Constitutional Law

- A. Herbert Wechsler to the Rescue?
- B. Wechsler's Holmes Lecture I: Saving Judicial Review
- C. Wechsler's Holmes Lecture II: Turning to *Brown*
- D. The Reception of *Neutral Principles*

Conclusion: H. L. A. Hart's America

- A. The America Hart Saw
- B. The America Hart Missed
- C. Hedge Rows and the Concepts of Liberty
- D. Paradoxes in Hart's America
- E. Bentham – and America --at Two-Hundred
- F. Between the Nightmare and the Noble Dream
- G. A Forgotten Form of Liberalism

Abstract

This dissertation uses new archival materials to analyze the intellectual journey of H.L.A. Hart and his ideas in the United States, focusing on Hart's year as a visiting professor at Harvard, 1956-57, and its immediate aftermath. The dissertation situates Hart's work in the United States in the historical and intellectual context of the Legal Process School, the jurisprudential movement that dominated legal thought at Harvard during Hart's visit.

When Hart arrived at Harvard in 1956, he found himself on a harmonious intellectual trajectory with the process theorists, seeking a middle road between legal formalism and legal realism, despite the deep suspicion with which American legal theorists viewed analytical jurisprudence and legal positivism. Over the course of the year, Hart and the process theorists collaborated and debated constantly – clarifying their methodological disagreements and also their shared jurisprudential mission. In close contact with the process theorists, Hart developed an account of legal decision-making and the relationship between legal indeterminacy and the rule of law that resonated deeply with process theory. He expressed these ideas in a lost essay, *Discretion*, written shortly after his arrival at Harvard. *Discretion* spurred a year of fruitful debate in the newly formed Legal Philosophy Discussion Group on topics ranging from the value of Hart's analytical methodology to the core problems of American democracy. Throughout the year, for example, Hart exchanged views with Lon Fuller about the applicability of the fact-value distinction to jurisprudence, constituting a “pre-Hart-Fuller debate Hart-Fuller debate,” largely unreconstructed until now, which informs what was really at stake in the published Hart-Fuller exchange. In the spring, Hart delivered his famous Holmes Lecture, *Positivism and the Separation of Law and Morals*. Understood in historical context, the lecture represented the culmination of a year of collaboration and debate with the Legal Process School, and Hart's attempt to defend a new, truly liberal formulation of legal positivism that responded specifically to the challenges his methodological outlook had encountered in the United States.

Ultimately, however, Hart's ideas were unable to transcend the broiling debate over the role of the judiciary in American democracy in the wake of *Brown vs. Board of Education*. As progressive politics in the United States came increasingly to depend on an activist judiciary enforcing moral rights, Hart's positivism seemed to resonate more with Learned Hand's criticism of judicial review (which came out the same month as Hart's Holmes Lecture) than with justice-oriented defenses of the Warren Court. Further, Hart's process theoretic account of judicial discretion came to conflict with the Warren Court's activist judicial stance, partly due to the "botched" reception of Herbert Wechsler's 1959 lecture, *Toward Neutral Principles of Constitutional Law*, which was heavily influenced by Hart's *Discretion* essay. But at the deepest level, Hart held a view about liberalism in which open, rational democratic deliberation, not judicial intervention, was the primary force for social change – a view the Process School largely shared, yet a view that was sidelined in the Warren Court era. For largely political reasons, Hart's liberal legal positivism failed to gain traction.

In telling this history, this dissertation makes an original contribution to the literature in several ways: by drawing on a wealth of new source material, by situating Hart's year at Harvard in the intellectual context of the Legal Process School, by providing a complete historical analysis of the Legal Philosophy Discussion Group, by analyzing Hart's lost essay *Discretion* and Fuller's forgotten "Reply to Critics," by reconstructing the interactions between Hart and Fuller before their published exchange, and by interpreting Hart's Holmes Lecture in the context of process theory's decline. Hart's extraordinary year in America and the legacy of analytical legal positivism and the Legal Process School remain topics of great importance to legal philosophy, and my goal is to contribute a new, I hope helpful, historical interpretation to the scholarly conversation.

Introduction

This dissertation grows out of frustration with the rhetorical modes that define contemporary American judicial politics. Frustration at the assumptions of a prevailing system of thought invites two distinguishable responses that I hope to show belong together. The first response is to ask a philosophical question; the second is to ask a historical one. How *should* we think about what law is and how it should function in our society? And what contingent historical processes produced and bequeathed to us the ideas and analogical connections that we take for granted today?

Intellectual history offers a way to pursue both projects at once. Quentin Skinner expressed the virtues of intellectual history this way:

“The history of philosophy, and perhaps especially of moral, social and political philosophy, is there to prevent us from becoming too readily bewitched. The intellectual historian can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds. This awareness can help to liberate us from the grip of any one hegemonal account of those values and how they should be interpreted and understood. Equipped with a broader sense of possibility, we can stand back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.”¹

This concept of intellectual history as a source of skepticism and a spur to better philosophy ought to be applied to the history of legal thought. Today’s way of thinking about the law is full of “hegemonal account[s]” that may seem bewitching, and the history of legal thought brings into focus the “different possible worlds” that could have been our own – the arguments that never caught on, the paths not taken, and the

¹ Quentin Skinner, *Liberty Before Liberalism* 117 (1988).

opportunities for the future. Our task, then, is this: reconstruct the world in which our most influential philosophical forefathers wrote and thought, and do our best to “see things their way.”² We must do our best to perceive for ourselves the philosophical problems they set out to solve and to evaluate their solutions to those problems, and at the same time understand how social and political events set their agenda, inspired their thinking, and blinded them to alternative possibilities. Who thought what and how and why? We must take seriously the social and political determinants of the “why” – without losing sight of the possibility that the great writers of the past might have been right.

In this middle ground between historicism and textualism – each nightmares *and* noble dreams in their own way – I offer this dissertation. I adopt a historical, but always philosophical, frame of mind and dive into the history of legal theory at a moment of unparalleled significance: the 1950s, at the moment when H.L.A. Hart, the most significant English legal philosopher of the twentieth century, found himself at Harvard in the company of the Legal Process School – a group of postwar American law professors on the vanguard of a jurisprudential movement of profound influence. In one sense, Hart’s arrival in America represented a meeting of two worlds, as the tradition of Hobbes and Hume collided with the tradition of Holmes and Hohfeld. Yet in a deeper sense, Hart’s interaction with American thinkers represented a key moment of reciprocal influence in the history of ideas. The story that follows reconstructs the narrative of H.L.A. Hart’s year as a visiting professor at Harvard – and also, I hope, opens a vista into a world that has much to teach us. H.L.A. Hart’s America shall be my subject, for in this subject history and philosophy join forces to illuminate legal thought as it could be. Hart’s lucid reflection and writing on American legal life and the modes of American legal thought reveal ways of thinking about American democracy and American law that can be directed to contemporary debates. And revisiting the history of Hart’s year in America opens our eyes to the growth of modern analytical jurisprudence and to the structure of process theory, a system of legal thought that rules us from the grave.

² Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *History and Theory* 3 (1969).

A. The Puzzle of H.L.A. Hart's Lost Essay

A few weeks before Thanksgiving, in 1956, H.L.A. Hart quietly gathered his thoughts as he watched “the most important public law thinkers”³ of the Legal Process School take their seats at a new Harvard faculty seminar, unsure of what to expect. Hart was nervous. The exacting Oxford philosopher, at ease in logic tutorials and language games, was a stranger to the confident world of “busy,... proud,.. vocational”⁴ American law professors. Though highly regarded as a brilliant legal theorist, he was far from uncontroversial. And that evening, just two months into his year as a visiting professor at Harvard, Hart was going to lecture his new colleagues on a topic they cared deeply about: discretion, its place in the legal system, and the relationship between legal indeterminacy and the rule of law.

For Hart, still getting his bearings at Harvard, giving a lecture on such a charged topic was a daunting prospect – especially given the “potentates”⁵ in his audience, which included Henry Hart,⁶ Albert Sacks, Herbert Wechsler, Paul Freund, and Lon Fuller -- but also an opportunity to demystify his approach to legal scholarship. The analytical jurisprudence Hart had developed at Oxford – which prized conceptual clarity, logical rigor, and the careful study of language in legal analysis -- aroused suspicion among his new colleagues, who wondered whether he was a “radical positivist,” as one American scholar had alleged just months before.⁷ What could Hart's new jurisprudence offer legal

³William N. Eskridge, Jr. and Phillip P. Frickey, *The Making of “The Legal Process”*, 107 Harv. Law Rev. 2031, 2047 (1994).

⁴Letter from H.L.A. Hart to Jennifer Hart, November 4, 1956 (on file in the library of New College, Oxford) (describing his talk on discretion).

⁵Letter from H.L.A. Hart to Jennifer Hart, November 4, 1956 (on file in the library of New College, Oxford) (describing his talk on discretion).

⁶Henry M. Hart, Jr. and H.L.A. Hart were two different people. Henry Hart was Dane Professor of Law at Harvard Law School; H.L.A. Hart was Professor of Jurisprudence at Oxford. The two were only three years apart in age, and part of the same generational cohort of legal philosophers who shared many concerns in the postwar era, discussed throughout this Dissertation.

⁷Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. Pa. Law Rev. 1080 (1956).

scholars in the United States, for whom the study of law often hinged not on precise formulations of abstract concepts, but on insights into judicial behavior, institutional design, and social reality?

Exceptionally well versed in the history of American legal thought, Hart understood the persistent significance of the issue he had been asked to address.⁸ In the nineteenth century, legal formalists had argued that legal questions had determinate answers that skilled lawyers could reach by reasoning from a finite set of legal sources.⁹ Most forms of discretion, especially judicial discretion, were excluded from the formalists' legal universe, inconsistent with their picture of law's basic nature. By contrast, the Realists of the early twentieth century had argued that judges and officials in fact exercise tremendous power of choice.¹⁰ While Realists hoped that this power of choice could be deployed progressively to improve social conditions, they never developed a theory to direct or constrain choice in law. Rule by choice is not rule by law, and thus the lasting legacy of legal Realism became a challenge: explain how legal indeterminacy can be reconciled with the rule of law.

The problem of discretion became more pressing after the New Deal. Increased complexity in law meant more gaps, more indeterminacy, and greater need for a theory of what to do when indeterminacy arose. As they tried to figure out "how to have a dynamic, problem-solving government that [was] also lawlike and legitimate,"¹¹ a group of post-New Deal professors – many of whom sat in Hart's audience -- developed a tentative solution to the Realist's challenge: discretion was acceptable in the legal system

⁸ This is certainly not intended as a comprehensive history of the idea of discretion, or of any school of thought in American jurisprudence; this is a simplified explanation by way of introduction.

⁹ See generally Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, 9-31 (1992); Thomas C. Gray, *Modern American Legal Thought*, 106 Yale L. J. 493, 495-97 (1996) (book review); Neil Duxbury, *Patterns of American Jurisprudence*, 9-65 (1995).

¹⁰ See generally Justin Zaremby, *Legal Realism in American Law* (2013, forthcoming), Neil Duxbury, *Patterns of American Jurisprudence*, 65-161 (1995); See also William Twining, *Karl Llewellyn and the Realist Movement* (1973); and Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010) for a particularly nuanced account arguing against a clear formalist-realist distinction.

¹¹ Eskridge and Frickey, 2047-48.

if it was sufficiently constrained and responsibly exercised. These “process theorists” accepted the Realist idea that law is sometimes indeterminate, but pushed beyond Realism, searching for a theory of how legal indeterminacy could be consistent with the rule of law. For process theorists, discretion and the rule of law could co-exist symbiotically if responsible judges decided cases rationally, respecting their institutional position with respect to the other branches of government, and explained their reasoning in writing, reflecting the judiciary’s professional craft, rationality, and wisdom – things in which the public could place its trust. Just two years before Hart’s arrival, the problem of discretion took on renewed, political urgency as *Brown v. Board of Education* posed the sharper “counter-majoritarian difficulty.”¹²

When his audience settled, Hart delivered a plainspoken analysis of discretion as a phenomenon in life and law – conversational yet uncompromising in philosophical precision. As Hart saw it, discretion was a special form of constrained, reasoned decision-making based on appeal to rational principles. For Hart, true discretion existed when decision-makers based their decisions on reason rather than on “whim” or “fancy.” Further, Hart argued that discretion was a necessary component of any legal system, because society’s ability to regulate the future was inherently limited by imperfect information and an imperfect understanding of aims. As such, positive law will inevitably be partly indeterminate; there will necessarily be cases that require judges to “make” rather than merely to “find” law. In these cases, Hart argued, decision-makers must exercise discretion – the special form of decision-making he had just described. Hart believed that indeterminacy was fully compatible with the rule of law as long as the method used to resolve indeterminate cases comported with the rational standards that distinguished discretion from arbitrary choice. For Hart, discretion was *part of law*, to be *perfected*, rather than an obstacle associated with the rule not of law but of men.

The talk set off a “storm” among the professors -- and Hart relished it. Predictably, the professors tore into his linguistic approach and questioned his analytic style, but when

¹² See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1961). See also Laura Kalman, *The Strange Career of Legal Liberalism*, 5 (1998) (commenting on how *Brown* changed the equation for law professors).

it came to the substantive analysis of discretion, their objections subsided. Hart was proud of his performance, and he thought he had impressed his new colleagues.¹³ A few weeks later, he consolidated his analysis and produced an essay, *Discretion*.¹⁴ Hart circulated his essay to the members of his audience, the newly formed “Legal Philosophy Discussion Group,”¹⁵ who read it, discussed it, and used it as a theoretical backdrop for subsequent discussions -- discussions that forged the ideas for some of the most famous “legal process classics.”¹⁶ “The lines of inquiry” pursued in the group, Henry Hart wrote to Lon Fuller the next autumn, “are of the greatest consequence to Al [Sacks] and me as we set out on the last lap of our effort to complete our materials on ‘*The Legal Process*.’”¹⁷ Hart’s essay has never been published, and, until now, it has been almost entirely unknown. It is not included in Hart’s archive, perhaps due to his “prodigious levels of disorganization.”¹⁸ Hart once “gestured to the piles of books and papers littering every surface of his room... and remarked to John Finnis: ‘This [i.e. the chaos] has consumed a huge amount of my life.’”¹⁹ Fate intervened, however, and Paul Freund and Henry Hart each kept their copies of *Discretion* in their files. In time, those files

¹³ Letter from H.L.A. Hart to Jenifer Hart, cited above.

¹⁴ See Memorandum from H.L.A. Hart to members of the Legal Philosophy Discussion Group (November 19, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7, also preserved in the Paul Freund Papers, Box 155, Folder 5); See also accompanying essay, H.L.A. Hart, “Discretion” (November 19, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7). Hereafter referred to as *Discretion*.

¹⁵ For information about the Legal Philosophy Discussion Group see Eskridge and Frickey, 2047-49; Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, 188 (2004); Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 38 (Virginia Public Law and Legal Theory Research Paper No. 2011-44) (2011).

¹⁶ Eskridge and Frickey, 2048. For example, Lon Fuller presented a draft version of his seminal article *The Forms and Limits of Adjudication*. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. Law Rev. 353 (1978). This essay remained unpublished at the time of Fuller’s death, although it was widely read and circulated in draft form. In a brief introduction to the essay, Kenneth I. Winston notes that it was first presented to the Legal Philosophy Discussion Group.

¹⁷ Letter from Henry Hart, Professor of Law, Harvard Law School, to Lon Fuller, Carter Professor of General Jurisprudence, Harvard Law School (November 5, 1957) (with copies to Albert Sacks and Jack Dawson). (On file with the Harvard Law School Library, Fuller Papers Box 4, Folder 2, also preserved in Henry Hart Papers Box 3, Folder 6).

¹⁸ Lacey, 185.

¹⁹ Lacey, 186.

became historical archives in the Harvard Law School Library, where I discovered H.L.A. Hart's lost essay more than half a century after it was written.²⁰

In my mind, Hart's lost essay raises a wealth of important questions. To start, H.L.A. Hart is a jurisprudential giant -- the central figure in the post-War revival of legal positivism in the English-speaking world.²¹ How has his essay on a subject as significant as discretion remained hidden for so long? How did H.L.A. Hart wind up writing an essay for a faculty group at Harvard in the first place, and how did Hart's interests relate to the concerns of his Harvard colleagues? How does his analysis of discretion fit into the rest of his work? Did it resonate with the views of his Harvard colleagues? Did it influence their intellectual trajectory? His?

Most importantly, what does *Discretion* reveal about the world in which it was written? Hart's lost essay opens up a vista to Hart's year at Harvard -- but also, more importantly, it demands a thorough investigation into the historical relationship between Hart's approach to law and the American perspectives he encountered. This dissertation, making use of many new archival materials, tells a new story of how H.L.A. Hart's analytical legal positivism interacted with American legal thought -- a story that lives on, in the shadows, in the way we think and talk about the law today.

B. Contribution to the Literature

The project of bringing the methods of intellectual history to bear on legal philosophy is a relatively new project and, I hope, ascendant. Still, several historical

²⁰ It is deceptively easy to miss, as it is signed only with Hart's initials, H.L.A.H., and located in the Henry Hart and Paul Freund collections -- places one would not normally expect to find material about H.L.A. Hart.

²¹ For Hart's biography see Lacey. For information on Hart's significance and legacy as a legal philosopher see generally P.M.S. Hacker and J Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (1977); Neil McCormack, *H.L.A. Hart* (1981); Michael Martin, *The Legal Philosophy of HLA Hart: A Critical Appraisal* (1987); Ruth Gavison ed., *Issues in Contemporary Legal Philosophy: Essays for H.L.A. Hart* (1987); Michael D. Bayles, *Hart's Legal Philosophy* (1992); Matthew Kramer, Claire Grant, Ben Colburn and Antony Hatzistavrou eds., *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (2008); Jules Coleman ed., *Hart's Postscript* (2001).

treatments of American legal thought and English jurisprudence have been written – and written well. Neil Duxbury’s majestic *Patterns of American Jurisprudence* chronicles legal thought in America from the nineteenth century to recent memory, emphasizing the similarities and continuities among different schools of thought, rejecting that American legal thought can be characterized as a “pendulum swing” between basically realist and basically formalist modes of thought. Brian Tamanaha took a similar stance in his book *Beyond the Formalist-Realist Divide* arguing against the claim that realism represented a defined departure from formalism, and emphasizing continuities between the two periods. To the charge that I have emphasized sharp breaks, rather than intellectual continuities, I plead guilty – but I made two points in my defense. First, my objective with this dissertation is not to problematize the “pendulum swing” narrative of American legal thought; that task has been admirably accomplished. Second, the subjects of my study *understood themselves* as part of a tradition that did have radical breaks and pendulum swings. The owl of Minerva rises only with the falling of the dusk, and in attempting to recreate the intellectual world of the 1950s, I have not drawn attention to the problems with a basically “pendulum swing” narrative. Laura Kalman has woven together exceptionally rich, contextualized accounts of American legal thinking in the realist and post-Realist periods, in must-read books like *The Strange Career of Legal Liberalism* and *Yale Law School and the Sixties*. William Eskridge and Philip Frickey provided the best historical and critical account of the Legal Process School yet written, as an introduction to the 1994 publication of (Henry) Hart and Sacks’s *The Legal Process*. These works provide much needed context in recreating the world H.L.A. Hart entered when he set foot on the Harvard campus in 1956.

Existing histories of jurisprudence have not, however, analyzed H.L.A. Hart and American legal thinkers as part of the same historical narrative – and that is a major gap I attempt to fill. Gerald Postema’s extraordinarily comprehensive history of Anglo-American legal philosophy, *Legal Philosophy in the Twentieth Century: The Common Law World*, explicitly divides the common law world in two. On one hand, Oliver Wendell Holmes’s lecture “The Path of the Law” launched a thousand American ships, inspiring the progressive and realist movements in American legal thought, the Legal

Process School, and the proliferation of post-Process legal theories in the United States: in short, the thinking one finds in law schools today. On the other hand, Postema argued, H.L.A. Hart's Holmes Lecture "Positivism and the Separation of Law and Morals," sparked the analytic jurisprudence movement that now largely occupies philosophy departments as a branch of analytic philosophy, and exists on the margins of law schools as "philosophy of law." Among my goals is to argue that these two stories in fact had a great deal to do with each other. Hart's Holmes Lecture took place in an intellectual context that Holmes himself had inspired, at the core of American legal thinking. *Discretion* and Hart's reply to Bodenheimer further illuminate the interconnection between English jurisprudence and American legal thought. Telling the histories separately has many advantages, but it is not the end of the analysis. Anthony Sebok's sweeping analysis in *Legal Positivism and American Jurisprudence* achieves a partial synthesis of American and English approaches to law, but the thrust of Sebok's argument was to analyze and identify elements of positivism within American legal movements and describe their waxing and waning. He did not set out to analyze the fate of Hart's ideas, Hart's context, or Hart's experiences in any significant way. His analysis is deeply relevant, but ultimately somewhat unrelated. Nicola Lacey's moving and widely acclaimed biography of H.L.A. Hart paints a break-taking portrait of H.L.A. Hart the man and the thinker, and I draw heavily on her chapter about Hart's year at Harvard. I hope to build upon her analysis by analyzing new archival materials that help to situate Hart's experience more firmly in the history of the Legal Process School, and his ideas more firmly in the history of American legal thought more broadly.

My analysis makes an original contribution to the literature on three different levels. First, I uncovered and have analyzed never before seen archival sources that shed fascinating light on our jurisprudential past. Hart's lost *Discretion* essay is the most significant contribution in this respect, but Fuller's lost "Reply to Critics" and the materials surrounding Wechsler's *Toward Neutral Principles of Constitutional Law* also represent important new discoveries. I draw extensively, too, on correspondence among law professors that has never before been analyzed. Among other things, I hope to convince the reader that archival sources are useful to the study of jurisprudence; because

these archives have been analyzed relatively lightly in existing literature, and have a great deal to offer, I do not think that should be too difficult a case to make.

My second contribution to the literature is interpretive. I interpret Hart's legal philosophy in the context of American legal thought, and defend the claim that fidelity to the historical circumstances of much of his philosophy demands such a contextual treatment. This is bound to provoke disagreement, which I can only answer by pointing once again to the historical circumstances, the archives, and the ideas themselves, and challenging detractors to explain why Hart's Harvard work ought not to be situated in the context of American legal philosophy. To be sure, other contexts and other treatments are deeply worthwhile as well; my only contention is that the American context is a significant one that deserves, as it were, its day in court.

Finally, I hope also to make a methodological contribution to the budding field of jurisprudence and intellectual history. As I see it, the history of jurisprudence is a successive story of intelligent people trying, collaboratively and philosophically, to work through difficult human problems in political context, informed by their own understanding of their intellectual history. *Legal* thought is unlike other forms of thought in that major legal thinkers have developed jurisprudential theories that simultaneously overthrow their intellectual forefathers *and* make or justify an intervention into the politics of their own day. The nerve that runs through jurisprudential history is the need to break new philosophical ground in defense (tacit or explicit) of a political agenda. As a result, jurisprudential historians must take ideas seriously *and* political and intellectual context seriously.

The methodological ground on which I hope to stand occupies a middle position between extreme historicism, according to which intellectual history is the history of intellectual networks, and a more theoretical "history of philosophy" approach, according to which intellectual history is the textual study of theories that happened to arise in the past. Further, in this dissertation, I have focused on *unstudied texts* that themselves draw attention to the immediate intellectual context in which they were created. Philosophy

begins in wonder, yet the texts we have today are artifacts of people using reason to confront the problems posed by politics against contingent intellectual traditions that guide, constrain, and sometimes blind their task. The ideas of great thinkers are worth understanding on their own terms – and if we are to rebehold their stars, we must first rebuild their world.

My goal is to be faithful to what I take to be three responsibilities of a jurisprudential historian: a responsibility to do justice to the ideas themselves, a responsibility to recreate faithfully the intellectual and political context, and, especially when it comes to Hart, a responsibility that comes from writing about real people, whom people loved. In my mind, these responsibilities add up to an obligation of *sympathetic reconstruction*. My goal is to present the ideas I discuss in their best possible light, and to reproduce, to the extent possible, the intellectual insight or spark that produced it. This is particularly necessary in understanding Hart's experience in America precisely because Hart's approach to philosophy was so much at odds with the approach of his American interlocutors. Lon Fuller, for example, often argued by allegory or drawn out example, illustrating ideas in a more freewheeling fashion. Hart, by contrast, remained committed to hyper-clarity in philosophical expression. A casual reader of the two writers would find them deeply incommensurate. Only by representing jurisprudential thinking in its best light can we truly revisit what was at stake in their debates.

Yet the task of representing the true insight that produced the texts we read today requires that we revisit the world in which the writers thought, lived, and wrote. As an old saying goes, one is fully acquainted with a culture when one "gets the joke." My goal is to recreate Hart's America so that we, from half a century away, can understand, for any thought or text, "what this was getting at," "why that was provocative," "what this really stood for," and so forth. In writing about great philosophers, we must retain our sense of wonder at their abilities and insights, remaining sympathetic to their intellectual goals *as they understood them* and charitable toward their philosophical shortcomings. If we stay true to form, we really can "see things their way." There are inevitably scores of roads I could have taken, other texts I could have emphasized, other contexts I could have

illustrated, and other interpretations – including conflicting interpretations -- still left to provide. But history written in good faith is about looking carefully at documents, reimagining the world in which they were created, and telling the story as fairly as possible.

C. The Argument in Brief

Hart's analytical positivism had a strange career in the United States that straddled two distinct paradigms in American constitutional and jurisprudential history. When Hart arrived at Harvard, the Legal Process School was at the height of its influence – in its “golden age,” as some have called it – carrying out the post-New Deal mission of understanding, coordinating, and justifying the power of different organs of the regulatory state. The Process School's project was fundamentally one of analyzing the structure of the legal system and making sense of government's powers – a project that resonated with Hart's own, though of course distinct in content and context.

Yet during Hart's visit, the Warren Court's “rights revolution” was gaining momentum, and well underway shortly after his departure, disrupting the constitutional equilibrium of the early 1950s and upending the academic priorities of professors of the legal process generation. Soon after Hart's departure, the most pressing problem in legal theory became understanding and legitimating the role of the United States Supreme Court in enforcing the fundamental rights of citizens – a project based, superficially at least, in the moral bases of legitimate government and fundamental rights as mediated by the American Constitution.

Hart's ideas were never popular in the United States -- his thinking could never shake its conservative overtones – yet in light of shifting American political context, the *source* of the unpopularity of Hart's ideas underwent a fundamental transformation that both inspired and undermined Hart's intellectual project.

At first, Hart's "analytical jurisprudence" was unpopular because it was taken (unfairly) as a restatement *both* of legal formalism and legal realism – two schools of thought that post-War American scholars were reacting against. As a result, Hart was tarred with allegations of conservatism, indefensible reductionism, and tacit complicity in both the laissez-faire anti-progressivism of the Gilded Age and the political evils of the pre-War period. Party in response to these charges, Hart set out to clarify and refine his thinking.

Despite – and I hope to show in some ways *because* of – this initial unpopularity, Hart developed and expressed a legal worldview – at general and specific levels – that resonated profoundly with the Legal Process theory that dominated American legal thought at the time of his visit. On occasion, scholars have identified a *theoretical resonance* between H.L.A. Hart's analytical positivism and process theory, though the connection remains largely unexplored. Anthony Sebok drew attention to a connection between (Henry) Hart and Sacks's account of legal authority and H.L.A. Hart's idea of the rule of recognition,²² claiming that the central picture of law in *The Legal Process* is basically positivistic.²³ Michael Dorf argued that H.L.A. Hart's positivism "entails a view about the institutional allocation of power remarkably close to the one articulated by (Henry) Hart and Sacks in *The Legal Process*."²⁴ More specifically, Dorf argued that (Henry) Hart and Sacks's "principle of institutional settlement"²⁵ – the idea "that decisions which are the duly arrived at result of duly established procedures... ought to be accepted as binding upon the whole society unless and until they are duly changed"²⁶ – is statement of legal positivism and represents "an effort to operationalize ... the 'rule

²² Anthony J. Sebok, *Misunderstanding Positivism*, 93 Mich. Law Rev. 2054, 2108 (1995). For a more skeptical discussion of the relationship between positivism and the process school, see Brian Leiter, *Positivism, Formalism, Realism*, 99 Colum. Law. Rev. 1138, 1155-60 (1999) (book review). For more on the rule of recognition see generally MacCormick, 130-53.

²³ See Leiter, *Positivism, Realism, Formalism*, for an opposing view (agreeing with Barzun). The point of this article is not to establish whether Hart and Sacks were positivists. On one hand, their view of law was oriented around the principle of institutional settlement. On the other hand, their purposive approach to law involved an integration of law and value. It seems like they endorsed the sources thesis but rejected the separation thesis, which, in H.L.A. Hart's modern formulation, was the most significant component of positivism.

²⁴ Dorf, 910.

²⁵ Dorf, 922. For background on the Principle of Institutional Settlement see Sebok, 2106-7.

²⁶ Dorf, 922.

of recognition,”²⁷ H.L.A. Hart’s social rule that identified valid legal norms. Charles L. Barzun pointed out that (Henry) Hart and Sacks offered a picture of law’s basic origins – consisting of the need for one set of substantive “understandings or arrangements” to guide “community life” and “another set” of second-order “arrangements... to clarify what the substantive arrangements require in specific instances;... to determine when one of the substantive arrangements has been violated; ... and to make a change to the existing set of substantive arrangements” – that is “strikingly similar” to H.L.A. Hart’s hierarchy of primary rules and secondary rules of adjudication, change, and recognition.²⁸ On a final, intellectual historical note, scholars have observed that process theory and analytical positivism were therefore both part of the broad “post-War liberal project,”²⁹ seeking an understanding of law that would bolster liberal values, distinguishing liberal democracy from Nazism and fascism.

My contention, however, is that a more complete understanding of the historical circumstances of H.L.A. Hart’s analytical positivism and the Legal Process School’s ideas will bring our understanding of the connections between these movements into sharp focus – connections that remain poorly understood in part because of the strong, and widely recognized links between process theory and the work of Fuller and Ronald Dworkin, theorists whom Hart argued against in celebrated debates.³⁰ This dissertation

²⁷ Dorf, 922.

²⁸ Barzun, 19. Barzun says, however, that it is “deeply misleading” to take the characterization of process theory as positivistic too far (Barzun, 18). Similarly, Eskridge and Frickey prefer “rationalism” to “positivism” as a description of the process ethos, noting that process theory involved the “interconnected integrity of law and morals.” See Eskridge and Frickey, lv. For information on Hart’s hierarchy of rules see generally MacCormack, 92-121.

²⁹ Anthony Sebok, *Reading the Legal Process*, 94 Michigan Law Review 1571, 1575 (1996) (observing that “*The Legal Process* represents a significant episode in the post-War liberal project associated with Robert Dahl and John Rawls). See also Edward A. Purcell, Jr. *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 The American Historical Review (1969). For Hart’s liberalism see Lacey, 56-7, 221-22; Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 New York University Law Review 1059 (2008); See also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. Law Rev. 593 (1958).

³⁰ See Dorf, 910. For more information on the Hart-Fuller debate and its legacy see generally Peter Cane ed., *The Hart-Fuller Debate in the Twenty-First Century* (2010); For more information on the Hart-Dworkin debate see generally Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed* (Public Law And Legal Theory Working Paper Series, Working Paper No. 77, 2007). For connections between Dworkin and the process school see

brings history and theory to bear on the claim that Hart and the Legal Process School shared much more in common than we have previously thought.

Steeped in the context of the Legal Process School – in response to their background hostility to analytical jurisprudence and in defiance of continuing American anti-positivism -- Hart formulated and defended a truly *liberal* vision of legal positivism, an outlook according to which a clear separation of law and morality was the lynchpin of a liberal society. This new formulation grew strongly out of the preconceptions Hart encountered among his new friends and colleagues: Americans viewed legal positivism with suspicion. Yet this newer formulation of Hart's outlook soon came into conflict with the Warren Court's emphasis on fundamental rights and the judicial enforcement of the moral character of open-ended Constitutional provisions – an approach to the role of the Supreme Court in American life that took seriously law's moral basis. The Legal Process School's post-New Deal theory of the limited role of Courts in society soon unraveled, and, according to the same process, Hart's ideas were consigned to the margins of American legal thinking. If the history of American philosophy was the source of liberal legal positivism's rise, the demands of American politics led of liberal legal positivism's fall. The story of H.L.A. Hart's America illuminates theories of abstract legal philosophy, but also provides a window into the history of ideas, revealing a story of intelligent people trying to understand the world around them in light of the resources and constraints of their intellectual context, and the demands of their moment in political history.

D. The Plan of the Dissertation

The first part of this dissertation defends the claim that although Hart and the process theorists developed their theories in different intellectual contexts, their agendas harmonized by 1956. Chapter 1 seeks to provide a common historical background for H.L.A. Hart and American legal thought at mid-century, describing the rise of Hart's

generally Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks* 29 Ariz. L. Rev. 413 (1987).

unique form of linguistic jurisprudence in tandem with the history of formalist and realist movements in the United States. I defend the thesis that American and English legal thought found themselves at similar crossroads as the post-War era began. Chapter 2 analyzes, more specifically, the rise of the Legal Process School in tandem with Hart's growing interest in the United States, arguing that Hart and the Process School found themselves with strikingly similar intellectual agendas in the 1950s, setting the stage for Hart's arrival at Harvard in the fall of 1956.

Despite Hart's and the process theorists' common agenda, Hart's ideas were viewed with deep suspicion in the United States: his "analytical jurisprudence" seemed to resonate with legal formalism – the *ancien regime* of American legal thought. And Hart's commitment to the fact-value distinction in legal analysis and his broadly speaking positivist approach to legal analysis linked him with the realist movement; his view of law was perceived as unable to give voice to fundamental values in the law that animate and guide liberal democracy. In response to these perceptions, Hart attempted to reformulate and clarify his thinking, aiming to a vision of genuinely liberal legal positivism – the project I chronicle in the next section of this dissertation, which analyzes H.L.A. Hart's intellectual experience at Harvard in 1956-57.

Chapter 3 provides the first historical analysis of an influential faculty seminar at Harvard in which Hart and the process theorists interacted closely: the Legal Philosophy Discussion Group, and a fresh take on Hart's arrival at Harvard and impressions of the American jurisprudential scene. This discussion will set the stage for Hart's first academic contribution to American legal theory.

Chapter 4, therefore, provides the first ever in-depth analysis of H.L.A. Hart's lost essay *Discretion*, which he presented to that group shortly after his arrival. I hope to demonstrate that *Discretion* is a key part of Hart's intellectual growth and fills an important gap in Hart's work. As a new archival discovery, it is worthy of extensive analysis. A careful reading of *Discretion* reveals that Hart presented a theory in lockstep

with the key themes of the Legal Process School.³¹ Reasoned elaboration, constraints on judicial decision-making, and the recognition that law is a dynamic, multi-institutional enterprise all take center stage in his analysis. Further, Hart's understanding of the way indeterminacy related to the rule of law resonated strongly with process theory: indeterminacy was an inevitable, but perfectly acceptable, part of the legal system as long as it was resolved according to the appropriate method. Most significantly, *Discretion* illustrates the extent to which H.L.A. Hart and the leading figures of the process school shared a common moment in the history of ideas -- both institutionally, on the Harvard campus and in the Legal Philosophy Discussion Group in 1956-57, and theoretically, as seekers of a middle road between formalism and Realism.

Next, I examine the ways in which Hart's ideas developed after *Discretion*, and in the ways his Harvard colleagues responded to his thinking, pushed back on it, or integrated it into their own work. Chapter 5 describes how Hart's colleagues responded to *Discretion* in the weeks after it was written, arguing that there was a now forgotten "Hart-Hart" debate between H.L.A. Hart and Henry Hart over the role of discretion in the legal system -- a debate that turned out to be more about methodology than about substance. The Hart-Hart debate illuminates the unpopularity of the linguistic method in America as well as the basic resonance between Hart's agenda and the work of the Legal Process School. It also brings two titanic legal figures -- the two Harts -- into conversation.

Chapter 6 turns to better known material, analyzing an essay by Lon Fuller, *Human Purpose and Natural Law*, and defending the proposition that this essay represented Fuller's first response to Hart's *Discretion*, forming, as it were, a "pre-Hart-Fuller Debate Hart-Fuller Debate." I use *Human Purpose and Natural Law* to illustrate the crux of the philosophical resistance to Hart's ideas -- specifically his commitment to the fact-value distinction. I interpret *Human Purpose and Natural Law* as a rehearsal for Fuller's more famous response to Hart the next year.

³¹ The Legal Process School, of course, was a somewhat amorphous group, and its membership and theoretical precepts are difficult to pin down precisely; this article does not attempt to problematize the Process School, but rather to draw attention to aspects of its history and context.

Chapter 7 describes and analyzes Hart's first published attempt to defend his philosophical approach from a variety of American criticisms, largely expressed in a scathing critique by Edgar Bodenheimer, a professor who was not part of the Process School at Harvard, but who nevertheless was connected to the American jurisprudential zeitgeist and was able to explain, in raw form, America's initial hostility to Hart's ideas. I defend the thesis that in responding to Bodenheimer's challenge, Hart was able significantly to clarify his own thinking and set out on the trajectory that led to his most significant intellectual accomplishments.

Chapter 8 revisits the "pre-Hart-Fuller Debate Hart-Fuller Debate" by analyzing an essay by Fuller that has not seen the light of day for more than half a century. Fuller's "Reply to Critics" provides a fascinating picture of his continuing debate with Hart over the possibility of a value-neutral description of purposive human behavior. It clarifies the precise terms of Fuller's clash with Hart, and illuminates the historical context in which the Hart Fuller debate took shape. Like the section on *Discretion*, this chapter draws on entirely unknown archival resources, and presents a lost essay by a celebrated thinker, albeit one that is of less moment than Hart's *Discretion*.

Chapter 9 analyzes the immediate historical circumstances of Hart's Holmes Lecture, *Positivism and the Separation of Law and Morals* – the culmination of his year at Harvard, which became an essay we now regard as one of the most significant contributions to legal philosophy *ever*. I draw attention to the institutional and situational history of this lecture, defending the proposition that the Holmes Lecture is part of a chain of work that Hart completed in the United States in collaboration with the Legal Process School, and should be analyzed with that context clear in mind. Hart's Holmes Lecture represented the clearest statement of Hart's liberal legal positivism – the philosophical outlook he had been struggling to formulate and defend all year, and the outlook that would soon come under fire in political context.

The final part of this dissertation describes the fraught political context in which Hart's Holmes Lecture, and his idea of liberal positivism, was received. The central contention is that Hart's ideas, though intended as abstract contributions to political and legal philosophy *informed* by politics, were ultimately unable to transcend the burgeoning debate about the foundations of judicial review in the wake of *Brown vs. Board of Education*. Chapter 10 makes the observation that Hart's Holmes Lecture was published at exactly the moment when the great judge Learned Hand delivered *his* Holmes Lecture excoriating the foundations of judicial review. Hart's lecture and Hand's lecture were read and interpreted together, and characterizes the theoretical dilemmas that confronted the Legal Process School in the wake of Hand's neo-realist critique of the Supreme Court.

Chapter 11 describes the last stand of process theory – Herbert Wechsler's Holmes Lecture in 1959, *Toward Neutral Principles of Constitutional Law*, presented as a response to Hand. I analyze the reception of Wechsler's lecture based on previously untapped archival resources and conclude that Wechsler's reconstruction of judicial review, which drew heavily on Hart's *Discretion* essay, was widely misinterpreted and had the unfortunate effect of setting process theory more conclusively at odds with the Warren Court's rights revolution. Had Hart's *Discretion* been published alongside his Holmes Lecture, it would have been clear that Hart largely agreed with Wechsler about the conditions for valid judicial decisions – which would have resolved some confusion about Hart's theory of judicial decision-making, but ultimately not have paved the road for broader acceptance of his liberal legal positivism.

I conclude by arguing that Hart's agenda for legal theory as he expressed in the Holmes Lecture conflicted with the approach to Court enforcement of fundamental rights that was gaining momentum at the time, returning Hart's methodological approach to the right, this time for political, as opposed to philosophical reasons. Hart did, however, have a vision for participatory American democracy, a form of self-government less reliant on courts and more reliant on rational public discourse, which we must recognize

in the context of his other writings if we are fully to appreciate that the star of Hart's liberal legal positivism still shines bright.

Part I: Anglo-American Jurisprudence at Mid-Century

Chapter 1. A New Jurisprudence for a New World

Like many people of his generation, On V.E. Day, 1945, Herbert Lionel Adolphus Hart looked forward into a world of open possibility. For nearly a decade, Hart had been involved – with increasing acclaim – in the practice of law and the affairs of the state. His talent as a barrister was nearly unmatched. His laser sharp mind and old-fashioned (though not uncritical) patriotism made him a brilliant intelligence officer during World War II. Yet despite these successes, Hart knew, deep down, that his true love lay in the world of ideas – in the pure philosophical investigation that his tutors had first revealed to him as an undergraduate. Hart fulfilled a long held desire and returned to Oxford to teach philosophy at New College.¹ Although he was thirty-eight, his career had just begun.

Hart's new beginning was not unique among legal theorists. Though Hart was likely unaware of the company he kept, American scholars of the same generation were making a fresh start at exactly the same time – returning to universities ready to embark on an intellectual journey after transformative wartime experiences. Henry Hart, for example, served in the Roosevelt Administration before returning to Harvard Law School. Herbert Wechsler served as a law clerk during the Nuremburg Trials before setting out on an academic career at Columbia.

The fact was that in Britain and the United States, the end of World War II marked a new era for philosophy as well as for politics – the birth of a new political paradigm that demanded new forms of political philosophy. The beginning of the post-

¹ A. M. Honore, Draft of “Herbert Lionel Adolphus Hart” in Hart Papers, New College, Oxford. Box 2:15. Published as A. M. Honore, “Herbert Lionel Adolphus Hart 1907-1992” in *Proceedings of the British Academy* 84 (1993).

war era presented a blank slate for a new social contract – political, legal, and, indeed, philosophical – that would require fresh understanding, analysis, justification, and criticism. Would postwar liberalism be more welfarist or more libertarian? How would political institutions evolve after the period of intense strain? How would scholars understand the birth of international law, and, not much later, the laws of common-market Europe, in relation to the laws of sovereign states? Ironically in some ways, the end of World War II ushered in an age of political and philosophical – indeed *political philosophical* – revolution.

This chapter aims to provide a brief overview of the history of legal philosophy, bringing the history of English jurisprudence into conversation with the history of American Legal Thought. It will become clear that H.L.A. Hart – heir to the English tradition – and the Legal Process School – heirs to the American tradition – found themselves in a strikingly common intellectual historical position as the postwar era began. To understand how and why, we must examine the relevant histories as part of the same story.

A. H.L.A. Hart and The Linguistic Revolution

After leaving the Intelligence service, Hart's prospective vision, and his clarity surrounding his own real ambitions led him back to where his intellectual life had started: the University of Oxford, one of the institutions the nation had gone to war to save. To understand Hart's intellectual trajectory, we must first visit that Oxford – the Oxford of the immediate post-war years – catch a glimpse of Hart's immediate philosophical milieu, and understand the ideas and networks that shaped Hart's view of the intellectual world. He found himself in the middle of a circle that was alive with electrifying, daring new approaches to philosophy that made post-war Oxford, for someone with a sharp mind and philosophical outlook, one of the most exciting places on earth.

As a boy, and as a barrister – and throughout his whole life – Hart was obsessed with language. "I'd always been passionately interested in language," he said later. "As a

schoolboy I tried to learn about a dozen languages. Words had always fascinated me.”² The timing of Hart’s linguistic passion could not have been better. The seven years after his return to Oxford, as he recalled it, “fell within the period when the approach to philosophy which became known as ‘linguistic philosophy’ was at its most influential.”³

The post-War linguistic turn in analytic philosophy⁴ – which must be distinguished from other “linguistic turns,” which are quite different -- took place at Cambridge and at Oxford, but the two movements were distinct. While the Cambridge movement was inspired by the later work of Ludwig Wittgenstein, the Oxford movement, emerging in parallel, arose under the energetic leadership of J.L. Austin. As Hart would put it later, the linguistic approach to philosophy was “inspired by the recognition of the great variety of types of human discourse and meaningful communication, and with this recognition there went a conviction that longstanding philosophical perplexities could often be resolved not by the deployment of some general theory but by sensitive piecemeal discrimination and characterization of the different ways, some reflecting different forms of human life, in which human language is used.”⁵ Put differently, the guiding thought was that “we may use... a sharpened awareness of words to sharpen our perception of the phenomena.”⁶

² David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 *Journal of Law and Society* 267, 271-2 (2005).

³ Hart, *Essays in Jurisprudence and Philosophy*, 2.

⁴ It is important to recognize that linguistic philosophy was not entirely a post-war movement – it had deep roots in prewar thought at Oxford and in Cambridge, where Ludwig Wittgenstein was pursuing a related, though distinguishable project, focusing also on the function of words in ordinary discourse. It was, however, in the post-War decade that linguistic philosophy gained the most momentum.

⁵ Hart, *Essays in Jurisprudence and Philosophy*, 2.

⁶ H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 2nd Ed., 1994. vi. Interestingly, Hart was slightly misquoting Austin in this famous passage. The original version from Austin reads: “When we examine what we should say when, what words we should use in what situations, we are looking not *merely* at words (or ‘meanings’, whatever they may be), but also at the realities we use the words to talk about: We are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena.” J.L. Austin, *Philosophical Papers*, Oxford 1961, 130. Hart’s distillation bespoke a stronger emphasis on the importance of studying language alone, although Hart certainly did not disagree with the thrust of Austin’s original passage.

This approach to philosophy was revolutionary – but it was, perhaps, the natural outcome of its immediate philosophical ancestry. Specifically, linguistic philosophy was intended as an improvement over the logical positivism of the Vienna Circle and A.J. Ayer. According to Hart’s own reflection: “According to this [linguistic] conception of philosophy it had been a blinding error of much philosophy in the past, and most recently and notably of the Logical Positivism of the pre-war years, to assume that there are only a few forms of discourse (empirical ‘fact-stating’ discourse or statements of definitional or logically necessary truths) which are meaningful, and to dismiss as meaningless or as mere expressions of feeling all other uses of language which, as in the case of some metaphysical statements or moral judgments, could not be shown to be disguised or complex forms of the few favored types of discourse.”⁷

Soon after returning to Oxford, and despite the intense workload of an English academic in the immediate post-War years who faced the daunting task of educating an entire generation of survivors descending on universities around the same time, Hart established himself as a rising star in Oxford’s “powerful philosophical community.”⁸ Besides building a reputation as a sharp philosophical interlocutor, Hart “had formed deep intellectual friendships not only with his old friends [Isaiah] Berlin and [Stuart] Hampshire but also with [J.L.] Austin and [Peter] Strawson.”⁹ Hart became a leader of the linguistic school.

At this stage in his career, Hart was a philosopher – not a *legal* philosopher. Arguably, this description more accurately captured Hart’s interests throughout his life, but it was undeniably his focus at this early stage. Hart was primarily concerned with academic philosophy, not academic law. Of the three articles and two reviews¹⁰ he published between 1945 and 1952, all but one took on classic philosophy topics. Hart published one article called “Is there Knowledge by Acquaintance” in which he undertook “a critical analysis of Russell’s theory of knowledge, from an Austinian point

⁷ Hart, *Essays in Jurisprudence and Philosophy*, 3.

⁸ Lacey, 147.

⁹ Lacey, 147.

¹⁰ Lacey, 145.

of view.”¹¹ Another article, “A Logician’s Fairy Tale,” was a “satirical analysis of the presuppositions of logic and of the pitfalls of a philosophical outlook dominated by an excessive reliance on formal logic,”¹² a classic “blinding error”¹³ of the Logical Positivists. The skeleton of the linguistic approach is obvious in the piece: “The modern logician,” Hart wrote, “in spite of the arsenal of weapons at his disposal, involves himself in paradox and absurdity in trying to *say* what it is that the storyteller does with words.”¹⁴ Hart’s hostility to over-obsession with formal logic, which in his view failed to account for the ambiguities of real discourse, evidently became famous in Oxford philosophical circles. One philosopher, writing to congratulate Hart on his election as Professor of Jurisprudence in 1952, hoped, despite the responsibilities of his new job, that Hart would still find time to poke fun at people who believed natural language could adequately be expressed in first-order logic: “perhaps you will continue to come to the philosophical Society and castigate those who wish to formulate ‘all’ statements into ‘(x)(>)’ – a class to which I am busy spending a year attempting to assimilate myself.”¹⁵

Hart’s rise in Oxford’s philosophical circles took place in the seminar classroom, the lecture hall, and in Oxford’s ubiquitous Senior Common Rooms – but also in J.L. Austin’s apartments in Magdalen College, where on Saturday mornings Austin, reigning supreme as the leader of linguistic philosophy, convened the young glitterati of his movement for sessions of intense discussion and debate.¹⁶ Austin partly used the group to expand his hegemony over Oxford philosophy, but the group mainly existed “to provide some stimulus and intellectual refreshment for the hard-working professional teachers,”¹⁷ whose day jobs contrasted with the lofty statutory Professors, who had significantly lighter, or non-existent, teaching loads. Brian Simpson recalled that some, but not all, of the best known figures from post-War Oxford participated in Austin’s Saturday group: “those who attended in addition to Hart were George Paul, Jim Urmson,

¹¹ Lacey, 145.

¹² Lacey, 145.

¹³ Hart, *Essays in Jurisprudence and Philosophy*, 3.

¹⁴ H. L. A. Hart, *A Logician’s Fairytale*, *The Philosophical Review*, Vol. 60, No. 2 (Apr., 1951), 198.

¹⁵ Marcus Dick to H.L.A. Hart, 8 March 1952. Hart Papers, New College, Oxford. Box 3:24.

¹⁶ Brian Simpson, *Reflections on the Concept of Law*. Oxford: Oxford University Press, 2011. 45.

¹⁷ Lacey, 133.

Tony Woozley, Richard Hare, Peter Strawson, Geoffrey and Mary Warnock, Phillipa Foot, Tony Honore, and Freidrich Waismann. There were some notable absences – Isaiah Berlin by choice, he having given up the attempt to participate in Oxford philosophy.”¹⁸

Hart later cited members of this group as among his greatest intellectual influences. In conversation with David Sugarman in 1988, Hart identified Jim Urmson, “a very clever, fine, patient philosopher,” George Paul, “a very clever philosopher” with whom Hart had “continuous conversations,” and Freidrich Waismann, who was “very important in making me understand more of the philosophy of science, of which I knew nothing,” among others as chief influences. Austin’s influence, however, loomed largest. “If one were to concoct a league table of the philosophical figures who influenced you the most,” Sugarman asked, “would J.L. Austin be the first?” Hart replied simply and immediately: “Yes.”¹⁹

Hart was on the vanguard of a new philosophical movement. He was at the epicenter of world philosophy, pioneering a completely novel approach to philosophical analysis. In Oxford, Philosophy really was the queen of the sciences, and some of the most exciting work in the university was taking place on Logic Lane.

B. Jurisprudence in England: 1776-1952

Exciting philosophical work was decidedly *not* taking place in the Law faculty. While philosophy was raging forward, jurisprudence remained somnolent. In Neil Duxbury’s words, “If ever a subject had become moribund, it was English jurisprudence.”²⁰ There was little progress in jurisprudence for at least a century. Even well into the twentieth century, Neil MacCormick observed, “jurisprudence in the

¹⁸ Simpson, 45.

¹⁹ Sugarman interview, 275.

²⁰ Neil Duxbury, *English Jurisprudence between Austin and Hart*, 91 *Virginia Law Review*, (2005), 2.

universities had become a routine reading and re-reading of a canon of texts and text-books.”²¹

The story of the philosophy of law in Britain, at least the part of it most relevant to Hart, had been much more exciting in the late eighteenth and early nineteenth centuries when Jeremy Bentham and John Austin developed a general theory of law that sought to demystify legal institutions and expose the quasi-arbitrary nature of legal authority. Laws were not divinely inspired or naturally ordained, Bentham and Austin believed. Law, in their view, was in essence a human construction, one that needed to be vigilantly maintained and constantly reformed. And contra-William Blackstone, who located law’s authority in its long, evolving history, Bentham and Austin attributed law’s authority to the command of the present sovereign. To them, a legal rule was an order backed by a threat; the obligation to follow the law was akin to the obligation to comply with the orders of a gunman pointing a gun to one’s head. Bentham believed that only by understanding law *realistically* – without the pseudo-mystical trappings of divine law, natural rights (he termed natural rights “nonsense upon stilts”), or excessive reverence for tradition – would people be able genuinely to govern themselves. If he could demystify the law, we could perhaps be liberated from the most atrocious forms of it: Bentham set out to “pluck the mask of mystery from its face.”²² Austin, Bentham’s disciple, consolidated Bentham’s legal philosophy, but also moderated it and “deradicalized”²³ it, publishing *The Province of Jurisprudence Determined*, a book that would dominate British jurisprudence for over a century, in 1832.

A persistent theme in Bentham’s and Austin’s writing was the notion that law is an autonomous science: a discipline with the internal integrity and self-sufficiency of, say, chemistry or physics. For Bentham and Austin, law’s autonomy meant that it was freed from *history* – the persistent, traditionalist undercurrent in Blackstone’s thought

²¹ Neil MacCormick, quoted in Duxbury, *English Jurisprudence between Austin and Hart*, 2.

²² H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 594 (1958).

²³ See in Morton J. Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 *Oxford Journal of Legal Studies* 557-562 (1997).

that, while having the distinct advantage of jibing with the historicist character of the English Common Law, had the distinct disadvantage, in Bentham's eyes, of amounting to an apologia for the status quo. Instead, Bentham and Austin saw law as a present-oriented institutional arrangement that could be criticized and reformed according to utilitarian ideals.

For Bentham and Austin, law's autonomy also meant that legal scholarship and the legal *curriculum* should be as scientific and legalistic as possible – a theme that resonated profoundly in nineteenth century America, where Austin's work was read and revered.²⁴

C. Classical Legal Thought in America

Nineteenth century Cambridge, Massachusetts – the capital of American intellectual life – seemed a world away from the England of Bentham and Austin. But in fact, trans-Atlantic legal-philosophical influence was a major part of nineteenth century jurisprudential history. The story of American legal ideas in this period grew, in part, out of the influence of the mother country – and to see how, we must revisit the birth of the modern American law school.

The story started with natural science. As a young man in the 1850s, Charles William Eliot, who would serve as President of Harvard University from 1869-1909, was a chemist. Eliot started his career down the road at the newly formed Massachusetts Institute of Technology, where he developed a novel method for teaching chemistry to undergraduates. Rather than lecture, Eliot asked his students to perform experiments and make observations about the interaction of different chemicals. Students would induce from their observations general rules about the way chemicals interact, and in turn test those general rules against future observations.²⁵ Scientific knowledge would be refined

²⁴ Anthony J. Sebok, *Misunderstanding Positivism*, 93 *Michigan Law Review* 2086 (1995).

²⁵ Neil Duxbury, *Patterns of American Jurisprudence* 13 (1995).

and approach a sort of equilibrium between general rules hypothesized by the scientist and specific observations.²⁶

Years later, after taking office as Harvard's President, Eliot quietly appointed a relatively unknown New York lawyer as Professor, and soon after as Dean, at the Harvard Law School, in 1870. Christopher Columbus Langdell – originally a botanist, and, like Eliot, an admirer of the natural sciences -- would revolutionize American legal education and solidify Harvard Law School's hegemony over the American legal profession. He clearly made Eliot proud. Reflecting back on his career in 1915, Eliot wrote, "The putting of Langdell in charge of the Law School was the best piece of work I did for Harvard University."²⁷

Langdell, however, also became a giant in American legal *philosophy* – not for his institutional leadership, however mighty, but for his style of scholarship and the development of a mode of legal thinking, a style known sometimes as "legal formalism," "legal science," or "Classical Legal Thought." Langdell, who read and admired Austin, introduced to America a theory of law as an autonomous, formalist web with a crystalline structure that invited the use of logic – inductive and deductive. His legal approach was deeply connected to broader social and institutional trends: with the development of the law school as a distinct institutional form, with the establishment of legal scholarship as a valid academic discipline among the others in the contemporary university, and, importantly, with the rise of laissez-faire economics in the court system, the philosophy of Social Darwinism, and the libertarianism of the Gilded Age.²⁸

Like Eliot, who believed that the laboratory sciences required empirical observation, inductive rules, and a sort of epistemic equilibrium between the two, Langdell thought of legal knowledge as a kind of equilibrium between specific cases and

²⁶ Duxbury, *Patterns of American Jurisprudence*, 13.

²⁷ Letter from Charles W. Eliot to Henry S. Pritchett, *Correspondence of Charles W. Eliot*, Small Manuscript Collection (On File at the Harvard Law School Library).

²⁸ See generally Duxbury, *Patterns of American Jurisprudence*, ch. 1.; Sebok, *Misunderstanding Positivism*.

general doctrines. Following the lead of the natural sciences – after all, he had been trained as a botanist – Langdell treated the common law as a mass of raw, empirical data in need of organization and analysis. To Langdell, the law library was a “laboratory,” and the objective of legal scholarship was to identify doctrinally salient cases, and to construct on their basis fundamental doctrines that were in turn taken to govern the entire corpus of legal material.²⁹ “Law, considered as a science, consists of certain principles or doctrines,” Langdell wrote. “To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.”³⁰ And while Langdell recognized the importance of legal history, the purpose of legal scholarship was to understand the doctrines that exist in the present: “Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bears an exceedingly small proportion to all that have been reported.”³¹

Though it came to be linked with the political right, Langdell’s was a Benthamite project in so far as set out to simplify and demystify the law, and free the concept of legal authority from the hold of tradition and locate it in a form of present reason. “If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number”³² Langdell said. The case method of teaching, which Langdell developed, reflected that philosophical vision.³³ Langdell’s students would be given books containing excerpts from cases the faculty deemed doctrinally significant, and by digesting those special cases, students would come to understand the principles and doctrines that govern all cases. Once a

²⁹ See e.g. Thomas C. Grey, *Modern American Legal Thought*, 106 *Yale Law Journal* (1996).

³⁰ Duxbury, *Patterns of American Jurisprudence*, 14 (quoting Langdell).

³¹ Neil Duxbury, *Patterns of American Jurisprudence*, 14 (quoting Langdell).

³² Duxbury, *Patterns of American Jurisprudence*, 14 (quoting Langdell).

³³ See Grey, *Modern American Legal Thought*; Robert W. Gordon, *The Case for (And against) Harvard*, 93 *Michigan Law Review* 1231 (1995).

student knew the doctrine, he could apply it to any new case with ease, and then apply the insights of the new case back into his understanding of the doctrine, achieving a dynamic equilibrium. It was an efficient picture of legal epistemology.

The connection between Langdell's legal science and the jurisprudence of Bentham and Austin ran deep. Like Austin, Langdell and his followers held that law consisted of rules set down by authoritative human institutions – that law was an “expression of human will.”³⁴ And the Langdellians subscribed to the view that “every valid legal norm was promulgated by the legal system's sovereign, and the norm's authority can be traced to the sovereign.”³⁵ One professor explicitly observed that as a historical matter the pioneering English utilitarians, “– especially Austin – were closely associated with American formalism”³⁶ even in the nineteenth century. And like Langdell's fundamental jurisprudential outlook, his educational reforms had an Austinian air – largely because they attempted to dethrone Blackstone. “American legal education before Langdell was effectively Blackstone imported,” another scholar explained. “The fundamental principles of the English common law were handed down to students from old English cases and treatises,” just as science education before Eliot was based on lectures and memorization rather than experimentation.³⁷

Like Austin, Langdell insisted on law's disciplinary autonomy. This is the most important point of connection between the two jurists, who believed that every legal question could be answered with reference to legal materials, and nothing else. “The Langdellians treated law as an intellectual discipline independent of theology, moral philosophy, economics, or political science,” one professor wrote -- “one that involved the application of scientific methods to common law materials.”³⁸ This position forecloses the consideration of outcomes, utility, justice, morality, and anything not

³⁴ Sebok, *Misunderstanding Positivism*, 2064.

³⁵ Sebok, *Misunderstanding Positivism*, 2064.

³⁶ Sebok, *Misunderstanding Positivism*, 2069.

³⁷ Duxbury, *Patterns of American Jurisprudence*, 19.

³⁸ Grey, *Modern American Legal Thought*, 495.

strictly speaking legal, in the decision of a legal question or the resolution of a legal dispute. Here is an example:

Langdell illustrated the character of his legal thought in his explanation of why a contract by mail could not possibly be formed when the acceptance was sent (the now-familiar mailbox rule), but only when it was received and read. An acceptance had to serve not only as an objective manifestation of the offeree's intent, but also as a promise; otherwise no consideration would support the contract. The offeree could indeed objectively manifest intent to accept by mailing the acceptance, but because a promise by its nature had to be communicated, there could be no consideration until the letter was received and read by the offeror. Langdell insisted on the logical necessity of this conclusion, which in his view rendered "irrelevant" any argument that the mailbox rule was fairer or better served the interests of the parties. The mailbox rule would fail the requirement of systematicity, which required that legal rules must follow from a few fundamental principles rather than from any weighing of practical and moral considerations. Because arguments of justice and convenience were extralegal, they could not be invoked to justify an anomalous rule without violating the requirement of legal autonomy.³⁹

The Langdellians took autonomy further than Austin, however, with their insistence that *judges* decide cases with no reference to extralegal materials. This theory of judicial decision-making would be ridiculed in the twentieth century under the alias "mechanical jurisprudence," a term that conjured up the image of the judge as a hyper-neutral, inhuman machine, an impersonal operator that devours information about a specific case and issues forth a definite, unassailable ruling. But the appeal to nineteenth century scholars is clear: If judges had no discretion, how could they be criticized? If law was a science, how could it be denied its rightful place among the celebrated disciplines of the university? If legal reasoning was a special skill to be learned, how could the law be thought of as anything other than a legitimate, respectable, high-status profession?

D. The Conservativization of Legal Formalism

In the early nineteenth century, Austin had "deradicalized" Bentham. In the early twentieth century in the United States – the world capital of jurisprudence for the hundred

³⁹ Grey, *Modern American Legal Thought*, 496.

years or so after Bentham's death⁴⁰ --, new economic connotations transformed Langdell's legal formalism into a form of political conservatism.

While Austin's jurisprudence was close to hegemonic (and had spread to the United States), just one significant theoretical alternative emerged in England or Europe in the nineteenth century: the historical jurisprudence of Henry Maine and Freidrich Carl von Savigny. And "Even that," Duxbury noted, "had run its course by the early twentieth century."⁴¹ English jurisprudence was caught in an old quarrel between utilitarianism and English history, which had been repeated many times before.

At the end of the nineteenth century in England, just as in Bentham's day, utilitarianism remained the legal philosophy of the Liberal left, just as historical jurisprudence remained the legal philosophical of the Tory right. In the United States, however, the legal formalism that owed so much to Bentham and Austin took on a different political hue. Far from being the legal philosophy of reform, American legal formalism became the philosophy of laissez faire – indeed "liberal" in the classical sense, yet soon at odds with the nascent progressivism of a new American left, which interpreted the political meanings of social philosophy through a completely different lens.

Into the early twentieth century, the Langdellians clung to the notion that their legal philosophy embodied "neutrality." But their supposedly neutral philosophy reflected broader social trends and came to represent many of the uglier aspects of American society in the Gilded Age – things one would be hard pressed to call neutral. Specifically, Langdell's legal science was intimately connected with classical liberalism – in particular, with the laissez-faire rulings of the United States Supreme Court and the ideology with which those rulings were associated.⁴² True to form, jurists in the late nineteenth century believed strongly in the genuine neutrality of free economic exchange. Just as "American classical economists – in a typical nineteenth century bid to invest

⁴⁰ Duxbury, *English Jurisprudence Between Austin and Hart*, 2.

⁴¹ Duxbury, *English Jurisprudence Between Austin and Hart*, 2.

⁴² See generally, Duxbury, *Patterns of American Jurisprudence*, ch. 1.

their discipline with ‘scientific’ respectability –... elevated their belief in the desirability of free exchange to the level of an a priori principle,”⁴³ nineteenth century jurists sought to bolster the neutrality – and by extension the autonomy, formality, and unassailability – of the law by enforcing the supposedly neutral principles of laissez-faire. Yet as the inequities of the Gilded Age grew, it became harder to defend the neutrality of classical liberalism – and consequently harder to defend the neutrality of a judicial process that seemed always to uphold laissez faire principles, and harder to defend the seemingly complicit formalist legal philosophy of the Langdellians. A particularly infamous notion, “freedom of contract,” brought formalist legal thought to a tipping point in 1905, two years before H.L.A. Hart’s birth.

In *Lochner v. New York*, the Supreme Court struck down a maximum hours statute for bakers – legislation that grew out of the growing call for a more progressive regulation of the economy -- on the grounds that it violated the “freedom of contract” implicit the United States Constitution’s Fourteenth Amendment.⁴⁴ The court claimed that “the statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer.”⁴⁵ *Lochner* has become a paradigmatic example of the way the classical liberalism of that era infiltrated the court system, and it was widely criticized in its own day as an example of unwarranted judicial activism. Post-*Lochner*, it was hard to believe the Langdellians when they trumpeted the neutrality and “mechanical” character of the judicial process. Progressive reformers, well on the rise in American politics by 1905, began to see Langdell’s conception of law as a reactionary impediment to the improvement of society, an ideological ruse that did little but protect the entrenched interests of the rich. Legal formalism had, in the end, become conservative.⁴⁶ Along with it, the classical legal positivism of Austin had come to stand for an increasingly unpopular economic system. Now, classical liberalism seemed a blind sanction for economic exploitation, and Langdell’s system of legal science a creature of the right.

⁴³ Duxbury, *Patterns of American Jurisprudence*, 29.

⁴⁴ 198 U.S. 45 (1905).

⁴⁵ 198 U.S. 45 (1905).

⁴⁶ See generally Sebok, “Misunderstanding Positivism”; Duxbury, *Patterns*, ch. 1.

E. Progressivism

Lochner, however, was not quite decided unanimously. There was one nonagenarian dissenter – a man whose name has echoed through the ages of American law, and a man whom H.L.A. Hart would come profoundly to revere. Although he moved in the same Boston Brahmin circles as the founders of the formalist movement,⁴⁷ Oliver Wendell Holmes, Jr. was not a Langdellian. In 1897, eight years before *Lochner*, Holmes had delivered a lecture at Boston University entitled “The Path of the Law.”⁴⁸ It would become one of the most famous pieces in the American legal canon, and it set off a new, post-formalist movement in American legal thought – progressivism – that would mature into Legal Realism in the following decades.

Contra-Langdell, “The Path of the Law” excoriated the idea that legal reasoning is determinate, formalistic, or deductive, warning against the dangerous “notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”⁴⁹ Like the Langdellians, Holmes couched much of his philosophical position in a discussion of legal education – but education was something he thought Langdell got badly wrong. “The training of lawyers is a training in logic,” Holmes said. “The processes of analogy, discrimination, and deduction are those in which they are most at home.”⁵⁰ As a result, judicial decisions have assumed a peculiar style: “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.”⁵¹ But in Holmes’s view, the law was not entirely logical. As early as 1881, Holmes had written, famously, “The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot

⁴⁷ See Louis Menand, *The Metaphysical Club: A Story of Ideas in America*. New York: Farrar, Straus, and Giroux, 2001.

⁴⁸ Oliver Wendell Holmes, *The Path of the Law*, reprinted in 110 *Harvard Law Review* 991 (1997).

⁴⁹ Holmes, *The Path of the Law*, 998.

⁵⁰ Holmes, *The Path of the Law*, 998.

⁵¹ Holmes, *The Path of the Law*, 998.

be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”⁵² This famous statement sounded like a reconciliation of utilitarianism and history – the great English divide – and indeed, Holmes may have envisioned the progressive, proto-Realist jurisprudence as a synthesis of those two lines of English thought.

At the same time, Holmes was skeptical of logic itself – not just logic as applied to the law. Legal formalism and Langdell’s “mechanical jurisprudence” could provide no certainty in law, no clearly right answer, because logic – in Holmes’s view nothing but a “rhetorical form” – merely disguised the exercise of will. “Certainty,” Holmes told the Boston University students, against everything they had learned from their law professors, “generally is illusion... Behind the logical form lies a judgment... *You can give any conclusion a logical form.*”⁵³

Besides challenging the deductive nature of legal reasoning, Holmes challenged the laissez faire principles that had seeped into judicial decision-making on the basis of their alleged neutrality. Dissenting in *Lochner*, he wrote, “This case is decided upon an economic theory which a large part of the country does not entertain,”⁵⁴ denouncing the neutrality of the laissez faire worldview. He added, dramatically, “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”⁵⁵ Pressing further, he wrote, “A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.”⁵⁶ All of these theories, he believed, were nefariously used to justify the court’s unjustifiable political interventions.

Thus Holmes sketched in his academic and judicial writing the basic progressive critique of Classical Legal Thought. The law was not a formalist web in which deductive

⁵² Oliver Wendell Holmes, *The Common Law* (1881) (Lecture 1).

⁵³ Holmes, *The Path of the Law*, 998 (italics added).

⁵⁴ 198 U.S. 45 (1905), Holmes, J. dissenting.

⁵⁵ 198 U.S. 45 (1905), Holmes, J. dissenting.

⁵⁶ 198 U.S. 45 (1905), Holmes, J. dissenting.

reasoning was appropriate; it was a social institution one could only come to understand through worldly experience. Further, legal education was flawed because it idolized deductive thinking rather than a comprehensive understanding of social reality. Finally, the supposedly neutral principles of the Langdellian era, expressed most dramatically in the *Lochner* decision, were not neutral at all. They had a particular ideological function: the function was to justify accelerating judicial protection of the Gilded Age economic regime in the face of progressive reform movements.

F. Realism

Holmes's critique of Langdellian legal science and the progressive program he helped to launch were consolidated and radicalized in the following decades.⁵⁷ Out of early progressive legal thought grew what became one of the most important jurisprudential movements in American history. Legal realism, by now the stuff of legend, had its heyday in the 1930s and early 1940s and represented the climax of the twentieth century critique of Classical legal thought. Some historians have maintained that realism represented a departure from progressive legal thought, but in reality the movement was an extension of the basic progressive project.⁵⁸

Legal Realism was less a systematic theory than a general jurisprudential worldview. One historian called it a "mood."⁵⁹ Yet although realism was a diverse movement with many different proponents and internal disputes, by the 1930s, legal realists at Yale, Columbia, and Johns Hopkins Universities were nonetheless propounding theories of law with clear unifying characteristics. Here is a stylized, caricatured picture of realism intended to bring to light the general animating mood:

Broadly, realists adopted a "functional approach" whereby law was seen as a tool of social reform, rather than as a body of doctrines, cases, or rules. The key to

⁵⁷ Grey, *Modern American Legal Thought*, 500.

⁵⁸ Grey, *Modern American Legal Thought*, 500.

⁵⁹ Duxbury, *Patterns of American Jurisprudence*, 69.

understanding the nature of law was to understand the way law functioned in society. Realists believed that law, a social phenomenon, could only be understood in social context. Consequently, they rejected the *autonomy* of law, so long a pillar of Anglo-American legal thought, and were eager to integrate legal studies with the social sciences: with sociology, political science, and Veblen's institutionalist economics. Realists were overwhelmingly skeptical of "mechanical jurisprudence"; they regarded it as a gross misunderstanding of how law worked and as a ruse designed to thwart progressive social reforms. They believed that, in reality, the law on the books was a poor predictor of the outcomes of cases before courts. One realist, Jerome Frank, went so far as to say that the best predictor of a case's outcome may be what the judge had for breakfast – a dramatic and obviously tongue-in-cheek illustration of the basic idea that the legal reasoning on display in judicial decisions is what Holmes called a "rhetorical form" that likely bears little resemblance to the genuine motivation for rulings, and little guide to understanding the real drivers of judicial behavior. Extending the progressive critique that law is not a formal system of rules and doctrines, some realists expressed skepticism about the existence of rules at all. Many of them held, reductively, that the law was nothing but the actual actions of courts and officials or the predictions of those actions.⁶⁰

For Realists, the law was a tool that government could use to bring about large-scale social reforms. Realism, in this sense, was the theoretical partner to the development of the administrative state – which took dramatic form in the 1930s as President Franklin Delano Roosevelt crafted the New Deal aided in large part by legal realists. Further, realism was a theory that upgraded the status of government bureaucrats – technocrats, administrators, central bankers, New Dealers of all kinds – and downgraded the status of judges. Judges did not apply objective doctrines and principles. Objective doctrines did not even exist. Some realists went so far as to say that judges simply "made it up" according to their own prejudices, no matter how objective they

⁶⁰ See generally Duxbury, *Patterns of American Jurisprudence*, ch. 2; Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, 11 *Treatise Legal Philosophy and General Jurisprudence* (Springer, 2011); Grey, *Modern American Legal Thought*; Laura Kalman, *Legal Realism at Yale, 1927-1960*. Chapel Hill: University of North Carolina Press (1986); William Twining, *Karl Llewellyn and the Realist Movement*. London: Weidenfeld and Nicolson (1973).

attempted to me. An understanding of this jurisprudential outlook helps to contextualize President Roosevelt's infamous court packing plan, whereby he attempted to increase the number of Justices in order to pack the court with members sympathetic to his policies. Judges were not high priests of democracy: they were powerful political agents.⁶¹ Many proponents of realism were associated with the Roosevelt Administration and the New Deal in some way or other.

This stylized picture of legal realism is designed to demonstrate that realism represented the high point in the reaction to the Classicism of Langdell, but we must also remember that realism was part of a broader functionalist movement in American social thought – a “revolt against formalism” that encompassed most of the social sciences. The phrase “revolt against formalism” was popularized in 1949 with the publication of Morton White's *Social Thought in America: The Revolt Against Formalism*.⁶² White pointed out that the main currents of American social thought in the twentieth century, of which legal realism was part, shared something in common: “Instrumentalism in philosophy, institutionalism in economics, legal realism in the law, economic determinism in politics and literature, the new history. From a methodological as well as a political and ethical point of view they unite to form the distinctive liberal *Weltanschauung* of twentieth-century America.”⁶³

The American intellectual scene may for once have been unified around a general theme, but legal realism, with its brash skepticism and reformist fervor, would soon face challenges of its own. First, although realism was the approach to law that made the New Deal imaginable – law as policy, law as a tool of social progress, judges as political officials, and so forth – the theory proved, ironically, ill-equipped to make theoretical sense of the post-New Deal administrative state, and the political philosophical problems it presented once established. Realism had exposed choice in law, yes, but it had made

⁶¹ See generally Duxbury, *Patterns of American Jurisprudence*, ch. 2; Postema; Grey; Kalman, *Legal Realism at Yale*; Twining.

⁶² See generally Morton White, *Social Thought in America: The Revolt Against Formalism*. New York: Viking, 1949.

⁶³ Morton G. White, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, 8 *Journal of the History of Ideas* 131, 131 (1947).

little effort to direct or constrain it – demands that grew exponentially alongside expanding government. Further, realism was myopically focused on the judiciary, while the New Deal dramatically increased the scope and variety of legal officials, each with different tasks. Realism lacked the theoretical resources to conduct or harmonize these proliferating institutions, drawing attention to the fact of chaos instead of paving a road to dynamic institutional equilibrium. Second, realism’s factual reductionism, which associated law with power and authority, and realism’s broadly positivist approach to law, seemed ominously to resonate with the rise of Fascism in Europe, and communism in the Soviet Union.⁶⁴ Realism, in equating law with the action of state officials, seemed to confer the status of “law” on the behavior of regimes that, to many observers, could not rightly be called law-like. On a more theoretical level, realism’s fact-value distinction became unpopular, and realism’s ignorance of the purposes and values embedded in law, and the social ends law sought, rendered realism a poor theory for an age of ideological conflict. For the realists, law was power, and the rhetoric of “rules” and “rule application” was just that: rhetoric. But, if legal theory were to make sense of a more complicated government, and provide some way of distinguishing liberal democracy from totalitarianism, perhaps legal theorists would have to return to rules, replacing the Realists’ “rule skepticism” with something less reductive, less cynical, less nihilistic. Maybe law really did have something to do with rules after all – and maybe there was a way for legal theory to be rule-oriented without being formalistic.

G. Taking the Chair

After the American realists had expressed their iconoclastic form of “rule skepticism,” though probably not in direct response, J.L. Austin’s Saturday Morning philosophy club in Oxford was diving into a very similar philosophical problem with their new linguistic philosophy. In Austin’s Saturday morning group, H.L.A. Hart started thinking about *rules* – a topic that would occupy much of his later philosophical life and that portended the shift of his philosophical attention to the law. “We devoted term after

⁶⁴ See Morton J. Horwitz, “Post-War Legal Thought” in *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (1992), 247-269.

term to studying rules and the concept of a rule in the Saturday morning meetings,” he recalled.⁶⁵ Unlike the logical positivists, who sought underlying unity, the linguistic philosophers reveled in diversity. As the absent Isaiah Berlin might have put it, they were foxes, not hedgehogs. “We used to look at every kind of rule,” Hart said – “rules of games, morning rules, legal rules.”⁶⁶ More specifically, “under Austin’s stimulating guidance” the group studied “the general concept of a rule of conduct which we sought to clarify by considering different systems of rules, legal and non-legal (e.g. Games, social clubs etc.) and by considering the meaning of the different expressions (“following” “obeying” “applying”) used in conjunction with rules, and by identifying the differences between the various functions of rules such as that of determining the validity of transactions (e.g. contracts or transfers of property or legislation) contrasted with that of imposing duties or obligations or conferring rights.”⁶⁷ Hart was quickly fascinated with the general philosophical questions – what is a rule in general? – but also with the specific legal insights that could be drawn from the linguistic method. “I thought that there was a lot of muddle, say, about the notion of a corporation,” Hart said – “whether it was a fictitious entity or a real entity, was not seen; and what was at stake was the specific use of language in the application of rules of various sorts. And this was a thing worth looking into.”⁶⁸ This was not the only time in his life that Hart would participate in a foxy philosophy discussion group devoted to the collaborative examination of diverse manifestations of a vexing core phenomenon: he would have much the same experience at Harvard in 1956, where he undertook a strikingly similar analysis of “discretion.” It was a time of great consequence for his career that we will turn to in due course.

In 1952, Hart was elected Professor of Jurisprudence for the whole of the University of Oxford – an exceptionally prestigious post to which Hart’s election was not entirely foreseeable in advance. Hart’s election was the first occasion on which a philosopher – not a lawyer – took on the University’s only official jurisprudence post.

⁶⁵ Sugarman interview, 277.

⁶⁶ Sugarman interview, 277.

⁶⁷ H.L.A. Hart, Draft of Interview for *Doxa*, 1989. (H.L.A. Hart Papers, Box 2, Folder 14, On File with the Library of New College, Oxford.)

⁶⁸ Sugarman interview, 277.

When Hart assumed the responsibilities of Professor, he became an institutional part of the long history of British *legal* thought – not just the history of British philosophy. Yet even as Hart shifted his subject matter away from classic philosophy topics toward the law and began to develop his distinctive analytical jurisprudence, he remained under the spell of J.L. Austin. Although he had become the Professor of Jurisprudence, it was to J.L. Austin the philosopher that he looked for inspiration, not to John Austin the jurist. What previous recognizably legal philosophy he had put into writing also reflected Austin's influence. One essay, "The Ascription of Responsibility and Rights," which resulted directly from the seminars he conducted with Austin, "exemplified the cross-fertilization between law and linguistic philosophy which was to make [Hart] famous over the next decade. The paper applied a radical linguistic analysis" to the twin concepts of responsibility and rights, "arguing that they were not descriptive of anything in the world but rather made sense within the practices of attribution or ascription in contexts such as legal argumentation."⁶⁹ Although "Hart later disowned this piece,"⁷⁰ the style of analysis and the subjects being discussed betrays a strong similarity with his later work. Later, in his Inaugural lecture, Hart doggedly pursued linguistic themes, devoting much of the lecture to laying out the philosophy of rules, and how an Austinian analysis of the concept of a rule could bear fruit for the study of the law. Hart recalled that he "chose the subject matter of the lecture... largely through Austin."⁷¹

Hart and Austin fell into a happy partnership whereby Austin developed the linguistic methodology and Hart focused on its connections with jurisprudence. Austin was the expert in linguistic analysis, and Hart had the legal expertise and command of legal language from his time at the bar to generate countless examples upon which linguistic analysis could be deployed. "The general importance of my eight years of practice as a lawyer for my subsequent work as a legal philosopher," Hart recalled, "was mainly in providing me with a detailed knowledge of some branches of the law as a subject for philosophical reflection to which I could apply some very useful philosophical

⁶⁹ Lacey, 146.

⁷⁰ Simpson, *Reflections on the Concept of Law*, 50.

⁷¹ Sugarman interview, 277.

distinctions and techniques.”⁷² Hart’s expertise meshed perfectly with Oxford’s new linguistic method. “The combination of legal expertise and philosophical insight,” Lacey wrote, “equipped [Hart]... to make an original contribution to a field which was crying out for someone with insight into the social practices in which linguistic usage develops.”⁷³ By 1952, Hart had proved that he was exactly the right person to bring jurisprudence and philosophy into contact. It was Hart alone who could ask, and answer: What *was* a rule? What *was* law?

At the time of his election, Hart reveled in the possibilities and vitality of linguistic philosophy, but he was understandably less enthusiastic about the state of British jurisprudence. Hart thought that little of value had been contributed to British jurisprudence since 1832, and that little was being contributed in his own time: in his words, the subject was “in a very bad way.”⁷⁴ Hart recalled that jurisprudence in Britain “had no broad principles, no broad faith; it confronted no large questions. Typical of the period... It focused on technical, legal problems. There were no large-scale inquiries into the philosophical dimensions of law. I thought it was very boring and had shut its eyes to a lot of interesting things which both my legal experience and my time as a philosophy don had made me alert to. There was no legal philosophy. Jurisprudence had become a kind of closed subject... and very few people had ever thought of revising it.”⁷⁵ Hart’s main critique of recent jurisprudence, whether analytical or historical in nature, was that it was un-philosophical. Most of the work that came under the heading “jurisprudence” simply involved the development of legal doctrine instead of philosophical inquiry into fundamentals. “The expression, ‘philosophy of law,’” Hart observed, “has never become domesticated in England. The words have still a foreign ring, and even to the academic lawyer the effort to relate the subject of his study to some theoretical *Weltanschauung* has seldom seemed worthwhile; if he believes at all that there are points where law and metaphysics meet, these are felt to be on the periphery of his concerns if not in an outer

⁷² H.L.A. Hart, Draft of Interview for *Doxa*, 1989. (H.L.A. Hart Papers, Box 2, Folder 14, On File with the Library of New College, Oxford.)

⁷³ Lacey, 145.

⁷⁴ Sugarman interview, 276.

⁷⁵ Sugarman interview, 276.

darkness.”⁷⁶ Hart acknowledged some recent work in English jurisprudence, most notably by Glanville Williams, W.W. Buckland, and Hart’s immediate predecessor as Professor of Jurisprudence, Arthur Goodhart, only to suggest that their work lacked philosophical rigor by any standard, not just by the standards of the new linguistic movement.⁷⁷ Jurisprudence should remain analytical as opposed to historical, Hart argued, but the linguistic method should inspire, and revitalize, the analysis.

In other words, Hart believed that jurisprudence needed to be infused with the magic of the new linguistic movement to come back to life. “I think,” Hart wrote, “the auspices are very favorable for a rapprochement between jurisprudence and philosophy.”⁷⁸ Hart incorporated this ethos into his intellectual identity: he was firmly a disciple of J.L. Austin, and firmly committed to reviving British jurisprudence from a century of obsolescence. He started as a linguistic philosopher and had become an analytical jurist. He believed in the power of analytic philosophy, specifically linguistic philosophy, to shed light on the law through a careful analysis of how legal language was used. And while he thought that his new methodology could rescue British jurisprudence, which needed rescuing, Hart knew that American jurisprudence was a different, more complicated beast – for it was at this moment, in the early 1950s, that Hart opened his eyes to legal philosophy in the United States.

⁷⁶ H. L. A. Hart, *Philosophy of Law and Jurisprudence in Britain (1945-1952)*, 2 *The American Journal of Comparative Law* 357 (1953).

⁷⁷ Hart, *Philosophy of Law and Jurisprudence in Britain*, 362.

⁷⁸ Hart, *Philosophy of Law and Jurisprudence in Britain*, 364.

Chapter 2. H.L.A Hart and American Legal Thought 1945-1956

While Hart was reigniting English Jurisprudence after a century of little progress, the American jurisprudential scene was vibrant -- and politically fraught. American legal thought had witnessed the rise and fall of Formalism – at first a brilliant synthesis of law as science, then the theoretical partner of laissez faire – as well as the rise and fall of Realism – at first the iconoclastic statement of law as power, brimming with optimism for the future, then a theory at best unable to make sense of the regulatory state and at worst the partner of totalitarianism. American legal thought became all the more intense with the development of a post-Realist philosophy of “Legal Process” – a philosophy with which Hart would come into direct contact.

A. The Process Ethos

In the late 1930s and early 1940s, a group of American professors developed a new approach to legal scholarship as an improvement on and replacement for legal Realism.¹ The new “process” approach aimed to capture the institutional reality of the post-New Deal administrative state while placing central importance on anti-fascist, anti-communist values. The New Deal called for a theory of law that could make sense of the

¹ See generally *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 *American Historical Review* 424 (1969); Eskridge and Frickey, *The Making of the Legal Process*; Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 *Va. L. Rev.* 1 (2013); Duxbury, *Patterns of American Jurisprudence*, at 205-301; G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *Virg. Law Rev.* 279 (1973); Horwitz, 247-68; Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, 11 *Treatise Legal Phil. Gen. Jurisprudence* (2011). Although different scholars have characterized Process theory differently, several key ideas stand out. For example, Eskridge and Frickey, Barzun, White, and Duxbury each draw attention to slightly different aspects of Process theory, although the major themes of the movement stand out in each. Many scholars emphasize that the theory is hard to pin down.

complexity of regulatory government.² Concurrently, the specter of fascism in Germany and Italy and communism in the Soviet Union demanded a legal theory that reflected the values of a free society -- a theory that showed how a complex administrative state could be “lawlike and legitimate.”³

Simply stated, the new “process theorists”⁴ directed their study to decision-making processes – the proliferation of which characterized post-New Deal government, the dismantling of which contributed to the consolidation of power in foreign dictatorships, and the integrity of which could anchor the concept of justice in a pluralistic society. Process theorists set out, first, to ask how legal decisions are made and which officials or institutions should make them, and, second, to use the study of “comparative institutional analysis”⁵ to infer normative requirements binding legal officials.⁶

1. Purposive Law and the Fact-Value Distinction

At the most basic level, process theorists understood government as a tool to solve society’s problems. In *The Legal Process*, Hart and Sacks characterized law as “a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.”⁷ The law, defined as a “purposive activity”⁸ undertaken to solve the

² White, *The Evolution of Reasoned Elaboration*, 280-85; see generally Eskridge and Frickey. Many of the process theorists, including Henry Hart, worked in or had close ties to the Roosevelt Administration.

³ Eskridge and Frickey, 2048-49. For information on the foreign dimension see generally Purcell, *Legal Realism and the Crisis of Democratic Theory*; Horwitz, *The Transformation of American Law*, 250-52.

⁴ Barzun, *The Forgotten Foundations of Hart and Sacks*, 6.

⁵ Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan. L. Rev. 2113, 2123 (2003)

⁶ This is a simplified explanation. I do not attempt to analyze the intellectual origins of process theory in detail or to take a position in the debates surrounding the movement’s rise. For excellent discussions see generally Barzun; Purcell; Eskridge and Frickey; Sebok, *Misunderstanding Positivism*; White; Duxbury, *Patterns of American Jurisprudence*, 205-301; Postema.

⁷ See Eskridge and Frickey, 2042 (quoting Hart and Sacks at 166).

problems of community life, was conceptually inseparable from the goals and aspirations that motivated it.⁹

The purposive approach to law was part of a broader intellectual trend toward an integration of fact and value. At that time, as Charles L. Barzun pointed out, intellectuals working “in philosophy, the natural sciences, and the social sciences... were beginning to question the possibility and profitability of rigidly separating questions of fact from questions of value.”¹⁰ Lon Fuller had led the campaign to reunite facts and values in legal theory since the early 1940s starting with his book *Law in Quest of Itself*,¹¹ in which he argued that it was impossible to define law, or to say anything adequate about it, without reference to its value-laden aims. For Fuller, law was a “striving,” something teleological; what law *is* could not be understood except as something ever “in quest of itself” — ever in quest, that is, of its very *best* self. Henry Hart — with whom Fuller formed a “mutual admiration society”¹² -- picked up the same theme in 1951, remarking that “law as it is *is* a continuous process of becoming. If morality has a place in the ‘becoming,’ it has a place in the ‘is.’”¹³

The purposive approach to law and the integration of fact and value lay at the core of the process theorists’ reaction to legal Realism. In their view, one of realism’s principal flaws was its insistence on the fact-value distinction. Henry Hart’s 1963 Holmes Lectures,¹⁴ for example, argued that the fact-value separation “would condemn

⁸ See for example Lon L. Fuller, *Law in Quest of Itself* (1940); Henry M Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 166 (William N. Eskridge and Phillip Frickey eds., 1994) (1994); Eskridge and Frickey, 2042.

⁹ See generally, Eskridge and Frickey.

¹⁰ Barzun, *The Forgotten Foundations of Hart and Sacks*, 35-36.

¹¹ Lon L. Fuller, *Law in Quest of Itself* (1940). See also generally Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (2011).

¹² Dorf, Legal Indeterminacy and Institutional Design, 78 New York University Law Review 875, 921 (2003) (citing Eskridge and Frickey, *Critical and Historical Introduction*, lxxxiii). Dorf went on to suggest that Henry Hart drifted away from Lon Fuller’s jurisprudential view in later years, moving closer to H.L.A. Hart’s positivism.

¹³ Henry Hart, *Holmes’s Positivism: An Addendum*, 64 Harvard Law Review 929, 930 (1951) (Quoted in Barzun, *The Forgotten Foundations of Hart and Sacks*, 1).

¹⁴ Barzun, 12-13, notes that this lecture reiterated ideas in *The Legal Process* only “with slight modifications.”

any legal theory to futility since we would not then be able to decide whether decisions were sound, who ought to make them, or what values they should reflect.”¹⁵ The lectures were, in Philip Bobbitt’s words, Henry Hart’s “*cri de coeur* against legal realism.”¹⁶

2. Dynamic Institutionalism and Reasoned Elaboration

Another problem with realism was its failure to develop a theory that could direct and harmonize the actions of different organs of government. Process theorists aimed to make sense of the complexity of modern government by asking who should decide what, and how – in Akhil Amar’s words, “who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made.”¹⁷ Accordingly, process theorists developed a theory of institutional competence as they tried to determine how different tasks should be allocated to different institutions. “Legal scholars could examine courts, legislatures, administrative agencies, executives, juries, etc.,” Guido Calabresi wrote, characterizing the process approach, “and shed light on the particular attributes of each of these that would make a given institution especially suited to decide some issues rather than others.”¹⁸

Legislatures, agencies, or organs of the executive branch might have been well suited, in terms of expertise and democratic mandate, to make policy determinations – but process theorists believed that *courts* were uniquely capable of resolving disputes in accord with reason and principle. This observation yielded a simple normative standard: judges should respect that some problems were best resolved by other institutions, and settle the problems for which courts were indeed the appropriate forum according to a method that reflected courts’ special abilities. Judicial decisions should be rational, they should appeal to general principles rather than to policy preferences, and they should be

¹⁵ Philip Bobbitt, *Constitutional Fate*, 56 (1984).

¹⁶ *Id.* at 56.

¹⁷ Akhil Reed Amar, *Law Story Hart and Wechsler's the Federal Courts and the Federal System*, 102 *Harvard Law Review* 668, 691 (book review).

¹⁸ Calabresi, *An Introduction to Legal Thought*, 2123. It is also worth noting that the process ethos itself reflected the comparative advantage of lawyers in a professional society. Lawyers were skilled in processes of decision-making.

faithfully explained in writing. When legal rules failed to determine an outcome for a case, forcing a judge to “make” law, the judge should perform a “reasoned elaboration” of existing law, rationally extending it until the case was resolved.

Further, because law was inherently purposive, reasoned elaboration required an effort to further law’s *goals* – not just the general goals of the legal order as a whole, but also the specific goals of the individual laws in question. As a corollary of their basic purposive stance, Hart and Sacks held that “[e]very statute and every doctrine of unwritten law developed by the decisional procedure has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or agree exactly how it should be phrased,”¹⁹ that imbued it with meaning. Reasoned elaboration aimed to clarify and vindicate such purposes.

The theory of reasoned elaboration solved two problems: it justified the judicial function and constrained it. The theory carved out a space for judges in the post-New Deal administrative state, providing a positive guide for the contribution of courts to the dynamic legal system as a whole. Simultaneously, the theory ensured that the power of courts was limited by demanding that judges defer to other institutions where appropriate, and insisting that judicial decisions be transparent, rational, and rooted in purpose. As Richard Fallon wrote, characterizing process theory’s approach to judicial power, “While the judicial role is irreducibly creative in some respects, it is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decision-makers.”²⁰

Set in post-Realist context, the theory of reasoned elaboration was a significant accomplishment. Process theorists could maintain that legal indeterminacy posed little

¹⁹ Hart and Sacks, 148. It is important to note that Hart and Sacks seemed to have in mind a particular attitude to purposes, the identification of which should not take place “in the mood of a cynical political observer, taking account of all the short-run currents of political expedience that swirl around any legislative session. It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”

²⁰ Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 966 (1994).

threat to the rule of law, as long as indeterminacy was resolved in the right manner. Limited judicial lawmaking constrained by the obligation of reasoned elaboration was in fact part of the social and institutional equilibrium that resulted from the right institutions soundly carrying out the right tasks – part of the rule of law itself.²¹

3. The Golden Age

Process theory “achieved consensus status after the War.”²² Starting in 1951, “the *Harvard Law Review* initiated the practice of inviting legal scholars to write Forewords to its analysis of the Supreme Court’s work for the preceding term.”²³ The Forewords reflected a collective effort to hold the Supreme Court to the standards of reasoned elaboration. “Early Forewords decried the Vinson Court’s tendency to dispose of cases without giving any reasons at all,”²⁴ and Albert Sacks’ Foreword to the 1953 term expressed concern about the overuse of “per curiam opinions in which the reasons for the decision are either omitted or set forth in a few sentences.”²⁵ In 1953, Henry Hart and Herbert Wechsler published one of the movement’s most “defining” casebooks, *Federal Courts in a Federal System*.²⁶ And throughout the 1950s, Henry Hart and Albert Sacks continued to edit and refine the materials that would become *The Legal Process*,²⁷ at that

²¹ As Laura Kalman observed, “Once the legal realists had questioned the existence of principled decision making, academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions.” Kalman, *The Strange Career of Legal Liberalism*, 5.

²² Eskridge and Frickey, 2049.

²³ White, 286. The *Harvard Law Review* Forewords began in a modified form in 1949, but were unsigned and written by students for the first two years.

²⁴ White, 286.

²⁵ Albert Sacks, *The Supreme Court 1953 Term – Foreword*, 68 *Harvard Law Review* 96, 99 (1954) (quoted in Duxbury, *Patterns of American Jurisprudence*, 237). Overall, “the authors of successive Forewords gradually expanded and sharpened the focus of their critique,” pursuing the “Reasoned Elaborationist” agenda with greater and greater clarity. White, 287-7.

²⁶ For an excellent history of Hart and Wechsler’s casebook and an insightful interpretation of its significance and its “defining” place in process theory, see Amar, *Law Story*.

²⁷ For a meticulously researched and extremely illuminating documentary history of *The Legal Process* materials, see Eskridge and Frickey, *The Making of the Legal Process*.

point still an assortment of educational materials first compiled before World War II.²⁸ Process theory had reached its “golden age.”²⁹

Soon, however, process theorists found themselves racing to keep up with a changing political landscape. After 1954, the question of how to understand *Brown v Board of Education* loomed large.³⁰ *Brown* – decided just as process theory had achieved academic “consensus” – shifted academic priorities. The landmark decision called not just for a theory of how courts could contribute to “a dynamic, problem-solving government that is also lawlike and legitimate,”³¹ but also for a theory of when and how courts could override electoral majorities in pursuit of substantive justice, effecting “policy change with nationwide impact”³² to build a more inclusive democracy. The process school’s most significant ideas – the purposive approach to law, institutional competence, and reasoned elaboration – had emerged as political change drew attention to realism’s shortcomings. But now, political change was beginning to draw attention to *process theory’s* shortcomings.³³ The process theorists were strong supporters of civil

²⁸ Eskridge and Frickey, 2042.

²⁹ Amar, 691.

³⁰ Kalman, *The Strange Career of Legal Liberalism*, 5 (commenting on how *Brown* became an urgent concern for law professors).

³¹ Eskridge and Frickey, 2047.

³² Kalman, *The Strange Career of Legal Liberalism*, 2.

³³ According to Michael Dorf, “[Henry] Hart and Sacks assumed that the sorts of conflict that law was needed to resolve would occur principally along economic lines: management versus labor, producer versus consumer, and so forth. When new lines of conflict emerged – most prominently in the form of the Civil Rights movement and successor rights movements – it became clear that deference to one or another existing institutional settlement would pit substantive justice against the idea of a circumscribed judicial role. Issues of racial inequality had, of course, been central to the entire American experience, but it was not until the Warren Court that the vindication of the fundamental rights of citizens (other than property rights) came to be understood as a basic function of courts.” Dorf, *Legal Indeterminacy and Institutional Design*, 930-31. As Akhil Amar explained, “*Brown* called into question every central tenet of the legal process theory embodied in the first edition of *Federal Courts in the Federal System*,” a classic process school textbook co-authored by Henry Hart and Herbert Wechsler the year before the *Brown* decision. Amar, *Law Story*, 702. And in Eskridge and Frickey’s words, “The prominence of civil rights on the nation’s public law agenda unraveled the intellectual consensus achieved during World War II, and hence undermined important conceptual foundations of *The Legal Process*” -- the notion that even though citizens might harbor deep disagreements about questions of value, they might nevertheless agree about how to decide what to do in national politics. Eskridge and Frickey, 2049.

rights, and they welcomed aggressive desegregation.³⁴ By and large, they were political liberals. But *Brown* suggested a much more potent role for Courts than the process theorists had envisioned. And, even though the process theorists likely agreed with *Brown*'s result, it was not clear if the opinion's superficially policy-oriented *reasoning* satisfied the demands of institutional competence and reasoned elaboration. The 1958 version of *The Legal Process* did not even *mention Brown* a single time; Hart and Sacks did not know what to say about it.³⁵

B. The Americanization of H.L.A. Hart

A few years earlier and an ocean away, H.L.A. Hart had embarked on a completely novel intellectual project at Oxford: combining the study of law with the latest form of analytic philosophy, and the process theorists were watching closely. In the spring of 1955, Lon Fuller, the most philosophically minded of the Process theorists, proposed that Harvard invite Hart to spend a year as a visiting professor.³⁶ Harvard's process-mania had spurred an interest in what other forms of legal theory might contribute to the process generation's project,³⁷ and although Hart's form of linguistic analysis was "far from congenial"³⁸ at Harvard, Fuller was eager to engage with it, recognizing – cautiously -- that linguistic philosophy represented a significant advance over previous movements in the analytic tradition.³⁹ Fuller equally envisioned Hart "taking back to England a real understanding of the currents of legal thought in this

³⁴ See Eskridge and Frickey, 2050 n114 (commenting on Henry Hart and Sacks's involvement in the Civil Rights Movement).

³⁵ The relationship between process theory and the Warren Court's race cases became an explosive issue by the end of the decade, as discussed in Chapters 8 and 9 below. See Learned Hand, *The Bill of Rights* (1958); and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harvard Law Review* 1 (1959). Eskridge and Frickey, 2048, note that Wechsler developed the ideas for *Neutral Principles* while participating in the Legal Philosophy Discussion Group. See also, William Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court 1941-53*, 458-59 (2006).

³⁶ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

³⁷ On Hart's invitation, see generally Lacey, 184.

³⁸ Nicola Lacey, *The Path Not Taken*, 127 *Harvard Law Review* (2013) (forthcoming).

³⁹ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

country”⁴⁰; Fuller hoped that Hart would become invested in American problems and direct his philosophical powers to them.

“Professor Hart’s visit to this country,” Fuller continued, “would help greatly to bridge this gap” between Britain and America. “During the past thirty years or so there has been a widening gulf between American Legal philosophy and the legal philosophy of the other English speaking countries” Fuller observed. “The difference in interest and in general mood and temper,” he wrote, “has become so great that even the heritage of a common language has at time seemed in danger of being lost in this field.”⁴¹ The greatest recent British development still lost on the United States was the linguistic method, and Fuller particularly hoped that Hart could help spread linguistic analysis to the United States. As Fuller put it, “There is everywhere a developing interest in the bearing that semantic and logical studies may have on legal philosophy. So far the influence of this new concern has been largely negative and inhibitive in this country: Instead of promoting a sharper and more communicable definition of philosophical issues, semantics has been interpreted as saying that all the ancient and familiar disputes of philosophy are a meaningless play with verbal counters.”⁴² Linguistic philosophy, Fuller recognized, was qualitatively different from “semantic theories” of the past, and represented a significant advance over previous creatures of the analytic tradition. “Professor Hart has been through the school of “logical positivism” in England,” Fuller wrote -- as if logical positivism were a Continental burden to be endured – “and has been influential in helping to bring English thought out of an impasse between semantics and conventional philosophy. There is no doubt that he would exercise a similar influence in this country, particularly after he has become able to orient his writings toward the current interests of legal philosophy here.”⁴³

⁴⁰ Id.

⁴¹ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

⁴² Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

⁴³ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

For Fuller, then, the value of Hart's visit was that Hart would spread linguistic philosophy to America but also that he would become invested in American problems. His fundamental hope was that Hart would learn from the American tradition, take American ideas to Britain, and direct his philosophical powers to the advancement of American debates. Although, as we have seen, Hart was already a close follower of American legal life, Fuller wanted to Americanize him further. The argument for Hart's appointment was in this sense not without a strain of American exceptionalism. "From the standpoint of his taking back to England a real understanding of the currents of legal thought in this country," Fuller wrote, "we believe it is essential that he have a chance not merely to hold brief talks with various individuals, but that he be able to settle down in one place and become familiar with the voluminous American literature."⁴⁴ And it had to happen at Harvard: he noted (as a prosaic coda), "the problem of securing American books is still a very real one in England."⁴⁵

Not surprisingly, philosophical progress in Fuller's mind was inseparable from curricular reform. He pointed out that since one of Hart's major institutional accomplishments at Oxford was the improving conversation between academic philosophy and academic law, Hart's appointment to a joint position in the philosophy department and the Law School could "bring the Law School and the Department of Philosophy at Harvard into closer contact. Our experience indicates that a joint appointment to two departments or schools is not only valuable in this respect, but almost indispensable if significant gains are to be realized."⁴⁶ Although Hart's analytic philosophy differed in substance and style from the sociology that was so popular in the American law schools, the very thought of hosting a visiting professor from another country reflected the legacy of the interdisciplinary, comparative dimension of the Realist project. Hart's appointment grew out of the same enthusiasm for international perspectives that led another friend Hart was shortly to make, Hessel Yntema, to found

⁴⁴ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

⁴⁵ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

⁴⁶ Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

the *American Journal of Comparative Law*, to which Hart had contributed, four years earlier. For new ideas and new ways of teaching, Fuller was looking to Britain to inspiration.

Hart eagerly accepted the invitation. His interest in the United States was already deepening. Starting in the early 1950s, Hart nursed a growing fascination with American legal thought – an interest that led him to devour American jurisprudence, teach it at Oxford, and publish several articles in American journals. He was sufficiently engaged with American intellectual life by the time he arrived at Harvard in the fall of 1956 that he was already established as a trans-Atlantic legal figure.

1. Hart's 1952 Visit

In fact, Hart had visited the United States once before, in 1952, when he attended an academic conference just outside New York City.⁴⁷ Freshly minted as the Professor of Jurisprudence, Hart travelled to New York to attend what was billed as the “first conference of legal and political philosophy” sponsored by the Rockefeller Foundation at Arden House, the upstate Harriman family estate bequeathed to Columbia University a few years earlier.⁴⁸ The short guest list, which included some of the leading lights of American law and policy, reflected the interdisciplinarity of American legal scholarship at midcentury, and the ease with which legal scholars shifted between academic disciplines and between the academy and government. Presiding was Dean Rusk, newly appointed President of the Rockefeller Foundation and future United States Secretary of State. Other attendees who would have been of particular intellectual interest to Hart included Edward Levi, the dean of the University of Chicago Law School who would go on to serve as the President of the University of Chicago and United States Attorney General in the administration of President Gerald R. Ford. Besides excelling as a

⁴⁷ See List of Addresses of the Participants in the First Conference on Legal and Political Philosophy, Arden House, October 31-November 3 1952 (undated) (on file at the Harvard Law School Library, Fuller Papers, Box 3, Folder 5).

⁴⁸ See Program for the First Conference on Legal and Political Philosophy (on file at the Harvard Law School Library, Fuller Papers Box 3, Folder 5.)

university administrator and national figure, Levi had a strong interest in the philosophy of law, particularly in developing a post-Realist theory of legal reasoning. Levi had written a short book in 1948 entitled *An Introduction to Legal Reasoning* in which he argued, among other things, that legal reasoning was neither deductive, as Classical legal thinkers preached in the nineteenth century, nor inductive, as in the natural sciences, but instead *analogical*, neither wholly determinate nor wholly arbitrary.⁴⁹ It was a view that would resonate with Hart, who adopted a similar theory of legal reasoning in his mature work, although with important differences. If Levi was a lawyer's lawyer, both professor and public servant, other attendees pursued scholarship that combined the law with other social sciences. The economist Joseph Spengler was present – whose work often focused on economic explanations of real social problems, including legal ones – as well as two important figures associated with legal Realism: Jerome Hall and Hessel Yntema. Hall was an expert in criminal law, one of Hart's main philosophical interests, and in jurisprudence, and although Hall did not produce any of the central texts of the realist movement, he did contribute significantly to the late-realist project, carrying forward the interdisciplinary analysis of legal problems and playing a crucial role in the foundation of "law and society" as a sub-discipline. In Yntema, however, Hart met a towering figure in American realism, someone who had been part of the movement since its early days and who was still committed to broadening and contextualizing American legal education.⁵⁰

Perhaps most fatefully, this New York conference was the first occasion on which Hart encountered Lon Fuller – the Harvard legal philosopher, and eloquent critic of Realism, in conversation with whom Hart would just a few years later develop some of his most important ideas. It is not clear whether the two men became particularly well acquainted that weekend, whether they liked each other, or whether they had a serious intellectual exchange, but it was the first in a series of meetings and exchanges that would change the history of legal philosophy.

⁴⁹ Edward Levi, *An Introduction to Legal Reasoning* (1948).

⁵⁰ Duxbury, *Patterns of American Jurisprudence*, 85.

In late 1951 and 1952, shortly before the Rockefeller Foundation conference, Hessel Yntema had founded *The American Journal of Comparative Law*, as part of his long campaign, firmly derivative of the realist agenda, to broaden the focus of American legal scholars and of American legal education to include comparative institutional scholarship.⁵¹ What could American lawyers learn from the rest of the world? It was a question that reflected the confluence of the late-realist interdisciplinary agenda with the new internationalism of American society after World War II. Yntema, who stewarded the new journal from its first edition in 1952 until his death in 1966, hoped to include “surveys of significant foreign developments,” and “articles... comparative in scope and primarily directed to readers in the United States.”⁵² He expressed the purpose of the journal in these words:

to enable the lawyer or the law teacher who has to deal with the new and acute international problems of today, adequate sources of information are needed, so that the intelligence and devotion which the Bar of the United States has so conspicuously exhibited in the development of our domestic laws may not have to operate in considering these problems without sufficient understanding or perchance in a vacuum. This need it is the purpose of the new *American Journal of Comparative Law* to subserve.⁵³

Praise poured in for the new journal, again highlighting the broadening internationalism of some American legal scholars – unsurprisingly, largely from those scholars associated with the realist or sociological jurisprudential schools. Among early supporters, besides Jerome Hall, was the ageing Roscoe Pound, the titanic former Dean of Harvard Law School who in his later years became an outspoken critic of the realist movement (while remaining committed to “sociological jurisprudence,” a term he had coined several decades earlier), and a relatively obscure professor from the University of Utah named Edgar Bodenheimer.⁵⁴ Hart would encounter many of these figures in the decade to come. His future exchange with Bodenheimer, though, would be of particular significance.

⁵¹ Hessel E. Yntema, 10 University of Michigan Law School's Law Quadrangle Notes, (*Spring 1966*).

⁵² Vera Bolgar, *The American Journal of Comparative Law 1952-1966*. 15 *The American Journal of Comparative Law* 24 (1966 - 1967).

⁵³ Hessel Yntema, “The American Journal of Comparative Law: A New Magazine for Lawyers,” *American Bar Association Journal* 131 (1952). Reproduced in Bolgar, 27.

⁵⁴ Bolgar, 55.

Yntema's new journal also received a warm welcome in Britain. The 1953 edition of *The Modern Law Review*, the most interdisciplinary of the British legal journals, closely associated with the London School of Economics, observed,

The appearance of a new law journal is no doubt less of an event in the U.S.A. than it is here, but in view of the outstanding work which has been done in that country of recent years in comparative law the absence of such a periodical has been an obvious gap in their legal literature. We in England therefore welcome most heartily The American Journal of Comparative Law which comes out under the distinguished editorship of Professor Hessel E. Yntema, supported by a board of specialists in the subject whose names furnish a warranty of high quality, a warranty which is certainly implemented in the first volume.⁵⁵

The enthusiasm for Yntema's new journal on both sides of the Atlantic reveals something important about the legal world in the early 1950s: scholars in Britain were looking to America for inspiration, and scholars in America were looking to the rest of the world, Britain included, to feed their insatiable appetite for comparative insights. The situation was no different with legal philosophy: it was a time when Americans wanted to learn more about British jurisprudence, and British scholars wanted to learn more about America.

It was in this spirit that Hart accepted Yntema's invitation, probably given when the two met in New York in 1952, to write an essay comparing British and American jurisprudence since 1945. The essay Hart wrote, "Philosophy of Law and Jurisprudence in Britain 1945-52", was presented as a review of post-War British legal philosophy and was published in the second edition of *The American Journal of Comparative Law* in the Summer of 1953, under Yntema's editorship.⁵⁶ The article, one of Hart's first published works about law (as opposed to philosophy), reflects his shifting attention to the United States and provides a fascinating picture of how his views on America were evolving in the early fifties. Although the review was presented as an explanation of developments

⁵⁵ 16 *The Modern Law Review* 411 (1953). Reproduced in Bolgar, 27.

⁵⁶ H. L. A. Hart, *Philosophy of Law and Jurisprudence in Britain (1945-1952)*, 2 *Am. J. Comp. L.* 355 (1953)

in Britain to an American audience, it also reveals Hart's early interest in American legal thought.

Hart opened his essay by pointing out that the legal profession has different structural features in each country, which create different conditions for the production of legal scholarship and legal philosophy. "First, but least important," Hart wrote,

is the difference in scale. The number of practicing lawyers, law teachers, and students in Britain is minute in comparison with the United States, and the opportunities for the publication of articles on general or abstract subjects connected with the law is correspondingly small. There are at present five legal and four philosophical journals where such articles may occasionally appear; so compared with the vast flood of American legal writing, the work of English philosophers and jurists is bound to appear a mere trickle.⁵⁷

The second important difference between the two countries' professions, Hart pointed out, was that "the English legal profession is still divided into two rigorously separated branches, and in spite of a certain overlap in litigation... this division between solicitors and barristers still represents a genuine specialization of function."⁵⁸

But the most important difference had to do with legal education. "In England," Hart wrote, "a university degree is not required as a qualification for entry into either branch of the legal profession, and though a considerable number of solicitors and barristers in fact have university degrees, a large percentage of these have graduated in other subjects than law."⁵⁹ Legal education *was* profoundly different in America. Langdell, the great legal scientist and by the 1950s a philosophical pariah, left a lasting legacy on the shape of the law school: he made law a postgraduate subject, instituted the case-method, professionalized the law teachers, and helped to usher in the law degree as a badge of membership in a newly consolidated legal profession.⁶⁰ Although other law schools lagged behind Harvard in adopting the basic Langdellian scheme, they soon

⁵⁷ Hart, *Philosophy of Law and Jurisprudence in Britain*, 355.

⁵⁸ Hart, *Philosophy of Law and Jurisprudence in Britain*, 355.

⁵⁹ Hart, *Philosophy of Law and Jurisprudence in Britain*, 356.

⁶⁰ See Gordon, *The Case for (and Against) Harvard*.

followed suit, and while Yale and Columbia law schools, for example, prided themselves on hosting legal scholars who dissented from various forms of Harvard intellectual orthodoxy, almost all law schools adopted Langdell's model of professional education, and retained it even through the realist period.⁶¹ Not so in England: Hart's law students were undergraduates, and the study of law came at the expense of the study of other subjects. And while law school in America was assuming greater and greater intellectual prestige, in Britain it continued to play second fiddle to the humanities. In Brian Simpson's words, the Oxford law faculty was a "dumping ground" for students who would not make it in "real" subjects like philosophy, modern greats, or history.⁶² British legal education, thus, stood in stark contrast to the professionalized, financially successful Harvard Law School, which could attract the most talented students from every undergraduate discipline.

"Analytic jurisprudence," Hart foresaw, would be a permanent fixture of English legal thought, but at the same time, Hart recognized that he needed to justify analytical jurisprudence as part of the Oxford curriculum. And foreshadowing a new chapter in his own work, Hart implied clearly that American approaches were worthy of careful study.

Hart returned to England, energized, and launched an Americanization campaign. To start, he began to modify the Oxford jurisprudence curriculum to include more American writers, encouraging his students to read Oliver Wendell Holmes, Roscoe Pound, Benjamin Cardozo, John Chipman Gray, and Wesley Newcomb Hohfeld.⁶³

⁶¹ See generally Kalman, *Legal Realism at Yale*; Laura Kalman, *Yale Law School and the Sixties*, ch. 1.

⁶² Simpson, *Reflections on the Concept of Law*, 65.

⁶³ Simpson, 358. This inference is drawn from the difference between the list appearing in Hart's article and the official list. What is noteworthy about Hart's list is that it reproduced exactly the official list of recommended reading in the Oxford *Examination Statutes*, but added the five American texts – a revision that reflects Hart's growing interest in American thought and his belief that American writers were of jurisprudential significance even for Oxford undergraduates. See Simpson, *Reflections on the Concept of Law*, 54. For Holmes in particular see Simpson at 54.

Hart also shifted the emphasis of Oxford's jurisprudence examinations toward the United States. Before Hart took the curricular reins, the examination questions largely reflected the doctrinal nature of jurisprudence in Britain, the intellectual hegemony of Austin, and the legacy of the historical approach. The doctrinal emphasis was on display in 1949, when students were asked, "To what extent is the Court of Appeal bound by precedents?"⁶⁴ Students sitting their final exams in 1950 were invited to comment on specific quotations from Bentham and Austin,⁶⁵ and were asked general questions making direct reference to Austin's theories like "Do you regard enforcement as an essential element in the definition of law?"⁶⁶ In 1951, students were asked to comment on a quotation from Sir Thomas Holland, a prominent nineteenth century British jurist,⁶⁷ and in 1952, students were invited to compare Bentham's utilitarian theory with the historical approach.⁶⁸

While there were almost no questions about American writers in the years leading up to Hart's election, questions about American writers made a dramatic entrance after Hart took over as Professor. Students sitting their exams in 1953, during Hart's first year as Professor, were still asked to discuss Austin⁶⁹ and given broad questions like "Is law a science or an art?"⁷⁰, but they were also invited to analyze a quotation from Roscoe Pound about the function of economics in law.⁷¹ Langdell himself appeared on the Oxford jurisprudence examination in 1954,⁷² and in 1955, students were asked, "What is sociological jurisprudence?"⁷³ as well as, "Is a right merely the correlative of a duty?"⁷⁴ a question making direct reference to a prominent realist in whom Hart was particularly interested, Wesley Newcomb Hohfeld. In 1956, students were asked if "the pith and

⁶⁴ Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" paper, Trinity Term 1949, Question 2.

⁶⁵ "Jurisprudence," Trinity Term 1950, q 1.

⁶⁶ "Jurisprudence," Trinity Term 1950, q 4.

⁶⁷ "Jurisprudence," Trinity Term 1951, q 8.

⁶⁸ "Jurisprudence," Trinity Term 1952, q 10.

⁶⁹ "Jurisprudence," Trinity Term 1953, q 3.

⁷⁰ "Jurisprudence," Trinity Term 1953, q 1.

⁷¹ "Jurisprudence," Trinity Term 1953, q 11.

⁷² "Jurisprudence," Trinity Term 1954, q 6.

⁷³ "Jurisprudence," Trinity Term 1955, q 7.

⁷⁴ "Jurisprudence," Trinity Term 1955, q 5.

substance of American realist jurisprudence” could “be conveniently stated in a short paragraph,” and invited to “estimate the importance of this jurisprudential approach.”⁷⁵

The American tradition continued to leave its mark on Oxford examination papers throughout the 1950s and 1960s. The examination given in 1963, for example, asked students whether they agreed with Langdell when he said that “Law is a science, and all the available materials of that science are to be found in printed books.”⁷⁶ The same examination invited students to defend or refute a quotation about Realism – “Realistic jurisprudence is a good medicine for a sick and troubled society. The America of the early 1930s was such a society”⁷⁷ – and asked them to “estimate the contribution to jurisprudence of Roscoe Pound.”⁷⁸

In short, Hart recognized that the most exciting ideas in the previous century of legal philosophy had been generated in America, and he largely saw through the sometimes un-philosophical form American ideas assumed. While much of the American tradition might have been manifested, in form if not in substance, as treatises on legal doctrine rather than as systematic legal philosophies, Hart recognized that these works were nonetheless of philosophical significance, and that nuggets of philosophical insight could be drawn forth with careful analysis. While American jurisprudence had a different flavor from British jurisprudence, Hart thought it was *jurisprudence* nonetheless. Even at this early stage in his development as a legal philosopher, Hart thought American ideas worthy of a place in the jurisprudential pantheon.

2. Hart’s Early Critique of Realism

As Hart was asking his students to “estimate the importance” of the Realist approach, he was developing a critique of Realism himself. Hart’s Inaugural Lecture, delivered to mark the beginning of his tenure as Professor and later published as

⁷⁵ “Jurisprudence,” Trinity Term 1956, q 7.

⁷⁶ “Jurisprudence,” Trinity Term 1963, q 2.

⁷⁷ “Jurisprudence,” Trinity Term 1963, q 10.

⁷⁸ “Jurisprudence,” Trinity Term 1963, q 14.

‘Definition and Theory in Jurisprudence,’⁷⁹ revealed the early stages of anti-Realist thought that would find mature expression in Hart’s later work.⁸⁰ It is notable that Hart does not criticize the realists, at this stage, for failing to take stock of the “internal aspect of rules,” a crucial aspect of his mature critique of realist thought.⁸¹ In 1952, his criticisms were quite different.

a. Rejecting the Prediction Theory of Law

Hart opened his Inaugural lecture with a discussion of different ways previous jurisprudential scholars have approached the problem of definition, which arose when one was asked to define a legal term, or to answer a question like “What is a corporation?” or “What is a right?” Hart rejected several approaches out of hand: the approach that holds that a definition is a synonym, and the approach that holds that a definition specifies the class to which a thing belongs and then states what distinguishes that thing from other members of the class (Aristotle’s famous example, “Man is the rational animal,” illustrates this approach). Although Hart’s Inaugural Lecture did not launch a full-throated attack on Realism, he immediately objected to the Realists’ approach to definition: the “prediction theory of law,” the view that law *is* nothing more than a prediction of what officials will do.

How would a realist define a “right”? “The American Realists,” Hart wrote, “striving to give us an answer in terms of plain fact tell us that a right is a term by which we describe the prophesies we make of the probable behavior of courts or officials.”⁸² Hart’s footnote at this point went to Walter Wheeler Cook, a leading realist of the 1920s, but Hart was referring to a view, sometimes called the “prediction theory of law,” according to which legal statements, definitions chief among them, are merely predictions about the behavior of officials, that dates back to Holmes’s work from the late

⁷⁹ H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954), reprinted in Hart, *Essays in Jurisprudence and Philosophy*, 21-48.

⁸⁰ Hart, *The Concept of Law*, 124-54.

⁸¹ Hart, *The Concept of Law*, ch. 7.

⁸² Hart, *Essays in Jurisprudence and Philosophy*, 28.

nineteenth century. The problem with the prediction theory, for Hart, was that it located the meaning of legal statements in the future, rather than in the present. “A has a right,” Hart said, “is not... used to predict the future, as the American realists say; it refers to the present, as their opponents claim.”⁸³

Hart’s point about time came on the way to Hart’s larger point about definition: that legal terms could only be defined with reference to their functions in ordinary legal discourse – not with reference to synonyms, categories and specifications, or correspondence to objects in the outside world, but with reference to the circumstances under which characteristic sentences in which the term occurs are true. “What was needed,” Hart later recalled, “was a close examination of the way in which statements e.g. of legal rights or of duties of a limited company relate to the world in conjunction with legal rules, and the important first step to take was to ask under what conditions statements of this kind have a truth value and are true.”⁸⁴

Interestingly, Hart proposed a reason explaining why legal realism arose in America and not in Britain. He attributed it to the judiciary’s role in the politics of each country. “There are, I think, no ‘legal realists’ in England in the American sense of these words,” Hart wrote. “For important as the courts are, they have never appeared so important or so free in their operation as to make plausible the contention that law is merely a prediction of what the courts will do or the definition of legal rights and duties in terms of remedies.”⁸⁵ He thought American scholars, intoxicated by the power of courts, and had devised a flawed theory of law to reflect an unusual institutional context. Potent, interventionist courts of the sort Britain lacked – the courts that produced *Lochner*, for example – tempted theorists to endorse a form of philosophical reductionism that defined law only in terms of the actions of those courts. At the very least, Hart took the relative impotence of British courts as a counterexample to the prediction theory: how can the law be only what courts do as a matter of general jurisprudence, when in Britain, courts are responsible only for a small portion of the law and even for that portion do not

⁸³ Hart, *Essays in Jurisprudence and Philosophy*, 28.

⁸⁴ Hart, *Essays in Jurisprudence and Philosophy*, 3.

⁸⁵ Hart, *Philosophy of Law and Jurisprudence in Britain*, 362.

have the final say? This concern with the relationship between legal philosophy and institutional design would fall out of Hart's work in later years; it was part, in Nicola Lacey's words, of Hart's "Path Not Taken."⁸⁶ But the first essay Hart composed in America – *Discretion*, which I discuss in Chapter 4 – returned to the theme, as we shall see.

b. Hart and Hohfeld

In the early 1950s, Hart developed a special interest in one realist thinker in particular. From the start, he found particular common cause with Wesley Newcomb Hohfeld, a prominent early realist who deployed a form of linguistic analysis – somewhat alike, though not genealogically akin to, J.L. Austin's ordinary language philosophy -- to analyze the function of law in practice. Although they disagreed on many points, Hart found in Hohfeld a forerunner to his own linguistically-focused analytical jurisprudence. Describing his methodology in a 1917 paper entitled "Fundamental Legal Conceptions as Applied in Judicial Reasoning,"⁸⁷ Hohfeld lauded the value of clear thought and precise expression, stressing the practical value of clear thinking: "The great practical importance of accurate thought and precise expression as regards basic legal ideas and their embodiment in a terminology not calculated to mislead is not always fully realized-- especially by the student not yet far advanced in his legal work."⁸⁸ For Hohfeld, attention to language was an important analytical tool, but also a method that would bolster the usefulness of legal theory to practicing lawyers. "It is even true," he continued, "that many an experienced lawyer has all too thoughtlessly assumed that those matters usually considered in works on so-called "jurisprudence-" are merely "academic" in character and devoid of substantial utility for the practitioner or judge."⁸⁹ In other words, if legal theorists looked to what lawyers actually said, their theories would be more realistic – hence Hohfeld's place in the realist canon. As a result, Hohfeld's jurisprudence made use

⁸⁶ Nicola Lacey, *The Path Not Taken*, 127 Harvard Law Review (2013) (forthcoming).

⁸⁷ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *The Yale Law Journal* 710 (1917).

⁸⁸ Hohfeld, *Fundamental Legal Conceptions*, 711.

⁸⁹ Hohfeld, *Fundamental Legal Conceptions*, 711.

of “frequent concrete examples of judicial usage, and hence for liberal quotations from apposite judicial opinions.”⁹⁰ Hart’s Inaugural lecture praised parts of Hohfeld’s theory of corporations (a theory expressed “with a requisite degree of subtlety”, Hart said), while disagreeing with it, and praised Hohfeld for his attention to linguistic detail.⁹¹ Hart further devoted two lengthy footnotes in his inaugural lecture to discussion of Hohfeld’s work, explaining and charitably extending Hohfeld’s theories, and ultimately expressing his disagreement.⁹² Hart’s interest in Hohfeld would grow: in an essay published a few years later he mentioned Hohfeld no fewer than five times, frequently mentioning him alongside the Austrian jurist Hans Kelsen and Austin as one of his principal forerunners in the analytic tradition.⁹³

c. Embrace of the Realist Rejection of “Mechanical Jurisprudence”

Although he found a kindred spirit in Hohfeld, Hart still disputed Realist theory on philosophical grounds. Unlike the realists, Hart believed that abstract legal concepts should be defined with reference to the ordinary usage of the terms used to denote them, not with reference to a future state of affairs; he believed that the English constitution provided a counter-example to the prediction theory of law, and that realism partly grew out of a collective American obsession with the judiciary.

But despite these critiques, Hart was more sympathetic to the Realists’ view of legal reasoning. “The American Realist theories,” he wrote in 1957, “have much to tell us of value about the judicial process and how small a part deduction from predetermined premises may play in it.”⁹⁴ Hart agreed with the Realists’ claim that judges sometimes “make” rather than merely “find” law, and he admired Realism’s critique of formalism and “mechanical jurisprudence.” In 1953, Hart admonished legal scholars to

⁹⁰ Hohfeld, *Fundamental Legal Conceptions*, 712.

⁹¹ Hart, *Essays in Jurisprudence and Philosophy*, 41.

⁹² Hart, *Definition and Theory in Jurisprudence*, n15 and n22; see *Essays in Jurisprudence and Philosophy*, 34, 42.

⁹³ H. L. A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 *University of Pennsylvania Law Review* 956, 959 (1957).

⁹⁴ Hart, *Essays in Jurisprudence and Philosophy*, 25.

“emancipate themselves finally from the notion that deductive proof exhausts the notion of reasoning which has inspired both dogmatic obscurity and skeptical extravagance in the past.”⁹⁵

d. The Separation of Legal Reasoning and Legal Theory

But perhaps more importantly, Hart found fault with the Realists for failing to separate their insights into adjudication from definitional claims about the nature of law. This theme would return strongly during Hart’s visit to Harvard, in an essay assessing the consequences of purposive analysis in legal reasoning.⁹⁶ In Hart’s estimation, the Realists were too quick to leap from the existence of judicial choice to the prediction theory of law. Realism painted an important picture of judicial behavior, Hart wrote, but “the lesson is blurred when it is presented as a matter of definition of ‘law’.”⁹⁷ In other words, Hart saw an important difference between an epistemic theory of legal reasoning and an ontological theory of law -- a distinction he thought the Realists had overlooked.

Clear distinctions mattered to Hart. His guiding belief was that analytic philosophy – proceeding with careful distinctions, logical rigor, linguistic analysis, and a rigid fact-value separation – could advance the study of jurisprudence by “elucidating concepts” in legal life, revealing the structures of power in society, and laying bare the moral choices citizens must make.⁹⁸ Hart’s hope was that the analytic method could make good on Jeremy Bentham’s aspiration to “pluck the mask of mystery from the face of jurisprudence.” In temperament, therefore, Hart was sympathetic to Realism’s demystifying aims. He respected iconoclasm. He admired Bentham over Blackstone,

⁹⁵ Hart, *Philosophy of Law and Jurisprudence in Britain*, 364.

⁹⁶ See for example Hart, *Discretion*, 15.

⁹⁷ Hart, *Essays in Jurisprudence and Philosophy*, 25.

⁹⁸ For Hart, the conceptual separation between law and morality was not just an element of philosophical methodology. It was also a precept aiming at a liberal ideal. His “implication [was] that things will turn out better, in terms of resistance to tyranny, if citizens understand that there are always two separate questions to be confronted: first, is this a valid rule of law? Second, should it be obeyed?” Lacey, 198-99.

Llewellyn over Langdell.⁹⁹ But Hart demanded a level of philosophical rigor that Realism, in his assessment, lacked.

Not surprisingly, it was Hart's philosophical methodology that set him most at odds with his American contemporaries in advance of his year at Harvard. Hart's analytical approach conflicted with prevailing American approaches to legal scholarship (including process theory), which preferred institutional to conceptual analysis and insisted on a fact-value fusion. This tension flared up three months before Hart arrived at Harvard, when Edgar Bodenheimer,¹⁰⁰ an American professor sympathetic to though not directly part of the Process School, sharply criticized Hart's focus on analytical, as opposed to sociological jurisprudence, arguing that Hart's philosophical approach was of little value to legal education or legal theory.

3. Bodenheimer's Critique

Even Bodenheimer's title, drawing attention to the "usefulness" of analytical jurisprudence, underlined his pragmatism. Indeed, from the start, Bodenheimer's essay – "Modern Analytical Jurisprudence and the Limits of Its Usefulness," a direct critique of Hart – revealed a pragmatic streak. It is therefore not surprising that Bodenheimer chose to deliver his attack on Hart at a meeting of the Association of American Law Schools in December of 1955, a forum that reflected the broad battle raging in America throughout the 1950s about the goals and means of legal education.¹⁰¹ Indeed, Bodenheimer's typically American pragmatism was at its most pronounced when he discussed education, interrogating the usefulness of Hart's linguistic philosophy to American law schools.

Bodenheimer's interest in legal education reflected the close connection between legal education and legal philosophy in the United States, where philosophical

⁹⁹ For this apt alliteration, see Grant Gilmore, *The Ages of American Law*, 68 (1977).

¹⁰⁰ Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. Pa. Law Rev. 1080 (1956).

¹⁰¹ Bodenheimer, *Modern Analytical Jurisprudence*, 1080.

movements often expressed themselves as calls for educational reform.¹⁰² Just as Langdell's legal philosophy was inseparable from the case method of instruction, legal realism was inseparable from largely unheeded calls for curricular interdisciplinarity. But by the early 1950s, the debate about the legal curriculum had reached a crescendo. Harvard, in particular, "had been under pressure to reform itself" since the end of the Second World War.¹⁰³ To start with, there was growing anxiety that the law school put too much pressure on students, thwarting their personal and intellectual growth.¹⁰⁴ "After the war, a commission had been set up under the chairmanship of Supreme Court Justice and Harvard alumnus Felix Frankfurter, and the commission's report in 1947 was less than flattering.... It was felt that students were put under too much pressure, with the almost exclusive use of Socratic teaching methods and the practice of putting each graduate in order of merit creating intolerable strain."¹⁰⁵

But more important than the pressure of study was the substance of the curriculum, which came under particularly harsh scrutiny mainly from the realist camp, whose members wanted legal education to depart from the purely doctrinal, case-based style of Langdell's era. Although law teaching at that time still conformed largely to the Langdellian case method,¹⁰⁶ many realist and sociologically minded professors criticized "the syllabus... as unduly narrow and as paying insufficient attention to interdisciplinary, comparative, and international questions."¹⁰⁷ They wanted the curriculum to better reflect Realism's functionalist agenda, or, at the very least, have *something* to do with social reality, not just legal concepts.¹⁰⁸ And that, for Bodenheimer, was precisely the criterion on which Hart's analytical jurisprudence fell short. Bodenheimer considered Hart's jurisprudence a "jurisprudence of definitions," and although Bodenheimer admitted that "there may still be a need for an explanation of the hard core of legal words of art, as a starting point for the comprehension of their functional significance within the

¹⁰² See generally Kalman, *Yale Law School and the Sixties*; Kalman, *Legal Realism at Yale*.

¹⁰³ Lacey, 182.

¹⁰⁴ Lacey, 182.

¹⁰⁵ Lacey, 182.

¹⁰⁶ See generally Kalman, *Yale Law School and the Sixties*, ch. 1.

¹⁰⁷ Lacey, 182.

¹⁰⁸ Lacey, 182. See generally Kalman, *Yale Law School and the Sixties*; Kalman, *The Strange Career of Legal Liberalism*; Duxbury, *Patterns of American Jurisprudence*, ch. 3.

normative system,” he rejected the notion that “definition” was something worth pursuing as a special branch of legal scholarship. “It is hard,” he wrote, “to see why a separate branch of the law and a special course in the legal curriculum of a university should be devoted” to a task as unimportant as the definition of terms.¹⁰⁹ What definition the law really needed could be supplied not by philosophers but by lawyers “within the framework of the special disciplines of the law.”¹¹⁰ It would be much wiser, thought Bodenheimer, to devote a “special course” or ‘separate branch of the law’ to the study of law’s social manifestation or to comparative and international considerations.¹¹¹ Hart, to Bodenheimer an enemy of the interdisciplinary understanding law’s social function, was starting to be seen as a sort of *neo-Langdellian*.

It was this association that formed the backdrop to Bodenheimer’s theoretical critique, which built on his educational critique. To Bodenheimer, the problem with Hart was not just that he was old-fashioned and conservative when it came to legal education: his jurisprudence was theoretically flawed as well. Bodenheimer’s main objection was that Hart’s theory of definitions, however new and improved, was doomed because legal concepts and legal terms are not the kinds of things that can be defined well. Building up to this critique, Bodenheimer acknowledged Hart’s displeasure with old-fashioned means of legal definition, citing “the main drawback of the older analytic approach in the attempt to supply dictionary-like definitions of fundamental legal conceptions in abstraction from the specific context in which the defined words are used,”¹¹² and correctly described Hart’s alternative approach as “a mode of analysis under which legal words are elucidated by “considering the conditions under which statements in which they have their characteristic use are true.””¹¹³ Bodenheimer proposed one incorrect version of Hart’s approach -- “The novelty of Professor Hart’s approach,” he said, “appears to consist in a plea to replace definitions by (more elaborate) explanations, i.e.,

¹⁰⁹ Bodenheimer, *Modern Analytical Jurisprudence*, 1085.

¹¹⁰ Bodenheimer, *Modern Analytical Jurisprudence*, 1085.

¹¹¹ Bodenheimer, *Modern Analytical Jurisprudence*, 1085.

¹¹² Bodenheimer, *Modern Analytical Jurisprudence*, 1081.

¹¹³ Bodenheimer, *Modern Analytical Jurisprudence*, 1081.

to describe legal terms in three or four sentences rather than one brief phrase”¹¹⁴ – before amending his assessment to acknowledge that Hart “in reality” had “something more basic and original in mind than merely substituting a Columbia Encyclopedia of legal terms for a Webster Dictionary of legal definitions.”¹¹⁵

It is unclear how fully Bodenheimer understood the real novelty of Hart’s approach to definition, which emphasized the careful study of relevant usage in order to determine the conditions under which statements were true, rather than by constructing genus and species taxonomies or by matching words to corresponding external objects or to synonymous expressions.¹¹⁶ But what is clear is that Bodenheimer thought that no matter the sophistication of Hart’s theory of definition, the entire project of advancing jurisprudence through definition was in vain. The danger of a “jurisprudence of definitions,” Bodenheimer insisted, “was recognized even in Roman times,” when “the leading jurists of the classical period of Roman law heeded the warning for the most part and were wary of excessive reliance on dogmatically defined terms.”¹¹⁷ And he did not believe that Hart’s new linguistic method would make things any better. “The method of amplification in the elucidation of legal concepts which Professor Hart appears to favor would not result in a measurable improvement of our legal methodology,” because *any* definitional scheme would “suffer from a... lack of adequacy in correctly depicting the manifold and often inconsistent uses of these terms in the different legal contexts in which they play a part.”¹¹⁸ This objection was, of course, ironic given that Hart’s method of definition was designed to be sensitive to linguistic diversity and to capture the subtle ambiguities of meaning that occur in real discourse, in turn making legal definition more precise and realistic, not less.¹¹⁹

¹¹⁴ Bodenheimer, *Modern Analytical Jurisprudence*, 1081.

¹¹⁵ Bodenheimer, *Modern Analytical Jurisprudence*, 1082.

¹¹⁶ See Hart, *Definition and Theory in Jurisprudence* in *Essays in Jurisprudence and Philosophy*, 21-48.

¹¹⁷ Bodenheimer, *Modern Analytical Jurisprudence*, 1082.

¹¹⁸ Bodenheimer, *Modern Analytical Jurisprudence*, 1083.

¹¹⁹ Interestingly, in *The Concept of Law* published five years after his visit to Harvard, Hart retreated from his earlier focus on definition. Chapter 1 endorses a more modest role for definition in legal theory than Hart’s Inaugural Lecture.

Bodenheimer was as skeptical of the “elucidation of concepts” as he was of the definition of terms. The project could at best provide a “conceptual aid”: “It should by no means be denied that an elucidation of the role of legal concepts and of the function of classification in law is a proper subject of jurisprudential inquiry. The study of law cannot dispense with conceptual aids.”¹²⁰ But the benefit to be gained from conceptual clarification was limited, because concepts were by nature vague and could only be clarified partially. “It lies in the nature of a concept,” he wrote, “that it is fixed and definite only in its kernel or core, and that it becomes blurred and indistinct as we move from the center toward the periphery.”¹²¹ Given that built-in vagueness, thought Bodenheimer, conceptual elucidation was doomed.

Hart, ironically, fully endorsed almost exactly the same view of conceptual ambiguity, yet also believed that the linguistic method was specifically equipped to tackle it. In fact, Bodenheimer’s spatial metaphor invoking the “core” and “periphery” of concepts would reappear in Hart’s writings¹²², where he would use similar language to illustrate the indeterminacy of legal rules and the futility of “mechanical jurisprudence,” which he borrowed from the Realists. Yet from Bodenheimer’s perspective, the idea that jurisprudence could be advanced through the definition of terms or the elucidation of concepts simply bespoke a crippling focus on concepts and logic over experience. Bodenheimer believed that by focusing on definitions and conceptual elucidation, Hart’s theory ignored law’s social context, the ambiguity of legal language, and the indeterminacy of legal rules. In Bodenheimer’s view, by restoring the priority of concepts over context, Hart’s analytical jurisprudence represented the re-birth of Classical Legal Thought.

At the same time, though, Bodenheimer described Hart as a “radical positivist,”¹²³ a stinging critique in post-War America. Positivism was anathema to post-War scholars partly because it involved the fact-value distinction, and all of its problems -- but also

¹²⁰ Bodenheimer, *Modern Analytical Jurisprudence*, 1083.

¹²¹ Bodenheimer, *Modern Analytical Jurisprudence*, 1083.

¹²² See Hart, *Positivism and the Separation of Law and Morals*.

¹²³ Bodenheimer, *Modern Analytical Jurisprudence*, 1983.

because it harkened back to legal Realism, and all of *its* problems.¹²⁴ Positivism amounted to a rejection of the post-Realist understanding of law as a “purposive activity” undertaken to realize social goals, and an endorsement of the Realist understanding of law as power. “The problem with legal positivism generally, [Lon] Fuller argued, rests in ‘its objective of some clear-cut distinction between law and morality’. By failing ‘sufficiently to realize that... in the moving world of law, the is and the ought are inseparably linked,’ legal positivists, realists included, denied the moral quality, and hence the reality, of law.”¹²⁵ Accordingly, for Fuller, Henry Hart, and many other leading American thinkers – many of them associated with the process school -- realism was but one form of positivism, and positivism lay at the core of realism’s inability to stand up to foreign horrors. Hart himself understood the taboo against positivism all too well: “The word ‘positivist’ had a tremendously evil ring [at Harvard],” Hart recalled. “I remember hearing somebody say, ‘You know he’s a positivist, but he’s quite a nice man’.”¹²⁶

4. Hart’s Newfound Trajectory

Hart believed – correctly -- that Bodenheimer had plainly misread his work.¹²⁷ But Bodenheimer’s critique is important in two respects. First, it helps to reveal how Hart’s new jurisprudence was being received in America in advance of his arrival. It did not go over well: Hart’s approach looked like the devil *and* the deep blue sea. On one hand, “analytical jurisprudence” and Hart’s emphasis on “conceptual analysis” harkened back to the worst of legal formalism. For Bodenheimer, Hart’s “analytical jurisprudence” constituted an endorsement of legal formalism – the outdated, conservative *ancien regime*

¹²⁴ Sebok, Misunderstanding Positivism, 2095-2099 (commenting on associations between realism and positivism in the post-War period).

¹²⁵ Duxbury, *Patterns of American Jurisprudence*, 224.

¹²⁶ David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 *Journal of Law and Society* 267, 279 (2005).

¹²⁷ H.L.A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. Pa. Law Rev. 953, 953 (1957).

of American legal thought.¹²⁸ He declared that Hart “does not advocate going outside the boundaries of pure legal reasoning, apparently believing that law is a self-contained science.”¹²⁹ On the other hand, by insisting on a separation of fact from value, Hart called back to the worst of valueless legal realism and invited criticism rooted in the pejorative connotations of “positivism.”

Second, Bodenheimer’s critique influenced Hart’s intellectual trajectory. In response, Hart grew determined to clarify his ideas and more firmly distinguish his position from formalism and Realism. Bodenheimer’s accusation that Hart was everything the Legal Process School was not had the ironic effect of pushing Hart’s agenda into striking harmony with process theory. The critique, Hart wrote, “stirred me from dogmatic slumbers.”¹³⁰

Perhaps because the web of connotations was so fraught, Hart returned repeatedly during his year at Harvard to the task of clarifying the true relationship between positivism, formalism, and realism. In his Holmes Lecture, delivered at the end of his visit, in April 1957, Hart would reclaim the moniker “positivism,” distinguish it from both formalism and realism, and defend the fact-value separation as an element of liberal legal thought. It was a synthetic statement of his jurisprudence that would bring him lasting fame. But at the beginning of his year at Harvard, Hart was just starting to refine these ideas. He started the year in search of the words to defend his analytical approach from the charge that that it was formalistic, while simultaneously distinguishing his jurisprudence from realism and aiming toward a liberal defense of the fact-value separation.

¹²⁸ See for example Sebok, *Misunderstanding Positivism*, 2068-75 (discussing associations between “analytical jurisprudence,” classical positivism, and formalism). “Conceptual analysis” could have been mistaken for “conceptualism,” a term linked with legal formalism.

¹²⁹ Bodenheimer, *Modern Analytical Jurisprudence*, 1080. The connection established an implicit link between Hart’s jurisprudence and the laissez faire classical liberalism of the formalist era – an association that was particularly troubling for Hart, a left-leaning liberal. See Duxbury, *Patterns of American Jurisprudence*, 9-65 (discussing the connections between formalism and laissez faire).

¹³⁰ Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 953 (referring obviously to Kant).

In short, when Hart boarded the Queen Elizabeth in September of 1956 and set sail for the United States,¹³¹ he was embarking on a intellectual Odyssey, searching for a philosophically rigorous middle way between formalism and realism – extremes that he would decades later call the “Scylla and Charybdis”¹³² of American legal thought. And crucially, he shared with process theory a common project. Hart and the process theorists were charting similar courses through the same intellectual history.¹³³ Both dismissed legal formalism as hopelessly outdated and plainly false. Both rejected the theoretical foundations of legal Realism while accepting indeterminacy and remaining sympathetic to the project of progressive reform. And most important, both faced moments of reckoning. Hart’s jurisprudence required fresh articulation in light of American misunderstandings. And process theory – still holding “consensus status” -- needed to “[come] to grips with *Brown*.”¹³⁴

¹³¹ Lacey, 179.

¹³² H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream* 11 Ga. L. Rev. 969 (1977).

¹³³ It is important to remember, as Lacey points out, that Hart drew his “primary philosophical resources” from English empiricist philosophy. See Lacey, *The Path Not Taken*. By the same token, the process theorists were engaging with a wide variety of American philosophy, notably pragmatism and contemporary social theory. See Barzun, *The Forgotten Foundations of Hart and Sacks*. Still, Hart and the process theorists found themselves with similar projects in 1956.

¹³⁴ Amar, 703.

Part II: H.L.A. Hart at Harvard 1956-57

Chapter 3. Hart's Debut

A. Hart's Arrival in America

On the eve of his trip, Hart “felt himself to be at a turning point.”¹ In his diary he recorded his feeling of open possibility: “At the moment, I feel full of great happiness in contemplating my good luck in getting what at the moment seems a God-sent opportunity.”² As he reflected on his career later in life, Hart regularly cited Harvard as a titanic intellectual influence. “I mean for me it was very important to be able to go away to America ... that’s all,” he told Brian Harrison. “I mean I knew Americans, but somehow many people must have felt this thing – it relaxed one’s neuroses... it made one less cautious... and several people said, ‘oh you’re quite changed since you’ve been to America.’”³

“It’s partly, isn’t it,” suggested Harrison, “that you realize that you’re onto a sort of world movement, a world intellectual movement,”⁴ drawing attention to the trans-nationalism of Hart’s achievement and the harmony of the British and American intellectual agendas in the post-War decades. “It’s partly that,” Hart said, yes, “but... the enormous value for the teacher is that you see your old stuff in an absolutely different light when questions come from clever... students who are from a totally different

¹ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* 180 (2004).

² Lacey, 180.

³ Unpublished Interview of Hart by Michael Brock and Brian Harrison, 19 May 1988. (On File with the Library of New College, Oxford, H.L.A. Hart Papers, Box 2, Folder 14).

⁴ Brock-Harrison Interview.

background and education. So ideas started pullulating at a rather alarming rate. I thought, ‘am I going mad?’ I was getting so many different things inside.”⁵

H.L.A. Hart arrived at Harvard at a moment of peculiar intellectual intensity – a moment when the process movement was near the apex of its “golden age”⁶ yet simultaneously shaken by the legal upheaval of the fifties, and a moment when Hart himself was beginning to find his voice. The year that followed would be an *annus mirabilis* in the history of legal theory. (Henry) Hart and Sacks would complete the final “tentative edition” of *The Legal Process* materials.⁷ Lon Fuller would present the first draft of his classic article “The Forms and Limits of Adjudication,”⁸ widely read but formally unpublished until after his death. Herbert Wechsler developed the key ideas that he would later publish as *Toward Neutral Principles of Constitutional Law*,⁹ an article that would become famous – perhaps infamous – for setting process theory at odds with the Court’s reasoning in *Brown*. This was also the year when H.L.A. Hart “developed or laid the foundations for the vast majority of his work over the next decade.”¹⁰ In the spring, Hart delivered his famous Holmes Lecture, *Positivism and the Separation of Law and Morals*, provoking a response from Fuller and kicking off the fabled Hart-Fuller debate.¹¹

Harvard found in Hart’s visit a reason to expand the course offerings in pure jurisprudence, “with no fewer than four separate courses available to second- and third-year students”¹² Besides Hart, the main instructors were Fuller and Julius Stone, a visitor from the University of Sydney. The three taught a course together covering “Austin, Holmes, Gray, Maine, Bentham, J.S. Mill, Hohfeld, Aristotle on Justice, Cardozo’s *The*

⁵ Brock Harrison Interview.

⁶ Amar, *Law Story*, 691.

⁷ See Eskridge and Frickey, 2048.

⁸ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harvard Law Review 353.

⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. Law Rev. 1 (1959). Eskridge and Frickey, 2048, note that Wechsler formulated his key ideas for that article at Harvard in 1956-57.

¹⁰ Lacey, 190

¹¹ Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harv. Law Rev. 630 (1958).

¹² Lacey, 184.

Nature of the Judicial Process, and Pound's *Introduction to Legal Philosophy*.”¹³ By one professor's figuring, the faculty offered a total of six different legal philosophy courses for students.¹⁴ The *Harvard Law Record* declared 1956-57 “Harvard's Jurisprudence Year.”¹⁵ The course Hart taught, while providing students with the chance to try their hand at philosophy, also provided Hart with the opportunity to deepen his knowledge of the American canon. The reading list alone – strongly overlapping with the list Hart recommended to Oxford undergraduates – has a trans-Atlantic flavor. Austin and Mill were staples of the British political tradition, of course, but with the exception of Henry Maine, the most important representative of the historical school of British jurisprudence, the other writers were all American. The students, Hart told his wife, “are all enormously big (physically)! So you can imagine I view my jurisprudence classes... with alarm. Nothing could be more unlike their super technical education than what I am (ill) prepared to offer. But I suppose they must have had some inkling. So we shall see.”¹⁶

Although Britain and America were still in the honeymoon of their newly forged “special relationship,” Harvard and Oxford could not have been more different, particularly in their philosophical fashions. Harvard philosophers were aware of the ordinary language movement afoot in Britain, but it “was far from the flavor of the month,”¹⁷ and although Fuller was clearly intrigued by the new methodology, it was generally regarded with some suspicion. In Oxford, philosophy reigned as the unchallenged Queen of the Sciences, and, of all the disciplines, it had the most intellectual momentum and prestige, in stark contrast to law.¹⁸ At Harvard, Hart was astonished to find that “the relative status of law and philosophy was exactly the reverse

¹³ Lacey, 184.

¹⁴ Samuel Shuman, *Harvard's Jurisprudence Year*, *Harvard Law Record*, 8 (1956). Shuman lists seven seminars total, but one – the Legal Philosophy Discussion Group – was only for faculty.

¹⁵ Lacey, 184 (discussing the excitement surrounding Hart and the other visiting professors, Julius Stone and Herbert Wechsler).

¹⁶ Letter from H.L.A. Hart to Jenifer Hart, September 14, 1956. (On File with the Library of New College, Oxford.)

¹⁷ Lacey, 181. Hart also likely encountered W. V. O. Quine, the most prominent philosopher then on the Harvard faculty. Fuller and Quine shared a brief correspondence, but there is little evidence to suggest that Quine participated in the life of the Law School in any serious way.

¹⁸ Simpson, *Reflections on the Concept of Law*, 65.

of that in England, with the law school dominating the scene in terms of confidence, ability to recruit scholars and students, reputation, and wealth.”¹⁹ “It’s so odd,” Hart wrote – “after philosophy being the Queen of the faculties at Oxford to find it the Cinderella here and law right up. Certainly the lawyers are far cleverer.”²⁰

When it came to undergraduate education, Hart marveled at the breadth of Harvard’s liberal arts curriculum: “when he [the student] arrives there is spread before him an enormous array of subjects from which, at any rate for the first two years, he is encouraged to pick and choose what, by our standards, is a somewhat astonishing collection. He enters in fact a vast intellectual bazaar, or as the American sometimes term it, a candy shop.”²¹ And while Hart was disdainful of professional American philosophers for their lack of precision and clarity, he admired the youthful exuberance of Harvard students and their hunger for knowledge, even if they were generally less polished than the Old Etonians that packed his Oxford lectures. “The student in America, even in those universities, which, as in the east, more approximate to ours,” Hart said, “arrives in a totally different state from our schoolboys. He knows far less, he is the master of far fewer verbal skills, he is less used to the grind of detailed accuracy in writing and less practiced in the expression of precise nuances of thought. But he comes unburnt-out, unblasé, with a vast enthusiasm and an enormous desire for knowledge.”²² Exactly this could have been said about Hart himself.

Hart “was immediately beguiled by Cambridge.”²³ In a letter home shortly after his arrival, he described “the buzz and manifest prosperity on the streets”²⁴ tried to conjure up for his family a vision of “the pace of life”²⁵ in the United States: “the ranges of goods in the shops, the cars, the speed, the enormous factories, power stations, mixtures of races, size of the newspapers, is extraordinarily impressive and even

¹⁹ Lacey, 181.

²⁰ Lacey, 187.

²¹ H. L. A. Hart, *A View of America*, *The Listener* 89 (1958).

²² Hart, *A View of America*.

²³ Lacey, 180.

²⁴ Lacey, 180.

²⁵ Lacey, 180.

exhilarating. I never feel *tired* here as opposed to mentally bruised and battered by all there is to experience.”²⁶ “On his first contact with the University, he wondered at the amazing facilities of the Law School, with its ‘vast buildings, august traditions, very much the ante-room of the U.S. Supreme Court’, where he was given a ‘grand office and carte blanche for all the wonderful facilities’ including the right to borrow books from the best law library in the world.”²⁷ In Hart’s spare time, he tore through the massive store of American textbooks, case law, and jurisprudential writing. “I had a great deal of spare time,” he recalled. “And when I wasn’t flying round the United States enjoyably, I was wondering, ‘oughtn’t I to read this vast American literature in the cellars of the Harvard Law School?’” Which I did.”²⁸

Lacey reported that at first, Hart found the Law school “atmosphere ‘intimidating’, with the vastly confident students destined for the top of the legal profession, ‘working all day and all night’, and the prospect of the classes ‘terrifying’, [Hart] found his colleagues less alarming than he had feared. A few days after his letter home, he was writing in his diary: ‘The Law School wonderful: the initial apprehension has worn off. Everyone – even those I ought to have expected to be hostile or contemptuous – is most friendly and apparently sincere in this. The Professors are potentates but magnanimous and it is a surprise to find references to myself (appreciative though also critical) in their case books and materials.’”²⁹ Hart’s most intense contact with the “potentates” took place in a faculty seminar founded in large part to mark his visit – a seminar which became a critical forum for the development of process theory and analytical positivism alike: the Legal Philosophy Discussion Group.

B. The Legal Philosophy Discussion Group

Near the beginning of the fall semester, Paul Freund, Lon Fuller and Henry Hart wrote to a few of their friends on the faculty to organize a faculty discussion group to

²⁶ Quoted in Lacey, 180.

²⁷ Lacey, 180.

²⁸ Brock-Harrison interview.

²⁹ Lacey, 180

address issues in legal philosophy.³⁰ The trio “constituted themselves as an organizing committee” and reported that they had “co-opted” a small group including John Dawson, Carl Friedrich, and Morton White and the three visiting professors, H.L.A. Hart, Julius Stone³¹, and Herbert Wechsler, “to serve as charter members”³² -- the “Founding Fathers” of the group.³³ The “founding fathers” agreed to meet every three weeks at the Signet Society for dinner and discussion, and while they hoped other professors would participate, they decided that the invitation to the rest of the faculty “will be phrased in such terms as to discourage anything like a unanimous response. In particular, those who join will be asked to assume a serious commitment to become regular attendants at the meetings.”³⁴ They decided to devote the year’s discussion to “a single general topic”: “Administrative and Judicial Discretion.”³⁵

A few days later, on October 3, 1956, the “founding fathers” announced the group to the entire faculty,³⁶ citing the opportunity to learn from H.L.A. Hart and the other visiting professors as a principal motivation for the group’s formation. “As you know,”

³⁰ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to the “Law School Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

³¹ Julius Stone and H.L.A. Hart had a difficult relationship at Harvard. For more, see Lacey, 189-90 (describing Hart’s uneasy relationship with Stone), and Leonie Star, *Julius Stone: An Intellectual Life*, (1992).

³² Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to the “Law School Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

³³ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to the “Law School Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

³⁴ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to the “Law School Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

³⁵ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to the “Law School Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

³⁶ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Law Faculty” (October 3, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7). Again, the organizers reiterated that the Legal Philosophy Discussion Group was intended to be a serious academic commitment: “We are asking that those who join the group enter a firm commitment to subscribe to a kind of season ticket and to undertake whatever preparation may be required to permit them to participate actively in the discussions.”

they wrote, “we are fortunate in having as visitors this year a number of scholars distinguished in jurisprudence and related subjects... we should take advantage of the opportunity thus presented by organizing a group of the discussion of problems of legal philosophy.”³⁷ Besides the nine “founding fathers,” twenty-three professors joined: Robert Braucher, Kingman Brewster, Ernest Brown, David Cavers, Abram Chayes, Archibald Cox, Charles Fairman, Charles Haar, David Herwitz, Mark DeWolf Howe, Louis Jaffe, Benjamin Kaplan, Milton Katz, Robert Keeton, Louis Loss, John McNaughton, Albert Sacks, Samuel Shuman, Donald Trautman, and Donald Turner. Erwin Griswold, Livingston Hall, and Stanley Surrey expressed interest but missed the first meeting.³⁸

The organizers set out to construct an agenda for the year by determining “what aspect of the problem of judicial and administrative discretion” was “of the greatest personal interest” to each participant.³⁹ In the memorandum framing the first discussion, the organizers seemed particularly interested in how diverse forms of discretion were related to each other, conceptually and functionally. “It may be suggested,” they noted,

“that the problem of ‘discretion’ and its counterpart, ‘the rule of law,’ assume very different aspects depending upon: (1) the form of law, say, code law v. common law; (2) the area of law, say, commercial law v. criminal law; (3) the governmental function involved, say, adjudication of a dispute by a court of equity v. ... equity receivership;” and “(4) whether the agency of government is charged with perfecting a market... or laying down the rules for a regime of

³⁷ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Law Faculty” (October 3, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

³⁸ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Legal Philosophy Discussion Group” (October 8, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7). This brought the total membership to as high as 32 – not surprisingly for 1956, all of them men.

³⁹ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Legal Philosophy Discussion Group” (October 8, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

bargaining..., on the one hand, or, on the other, supplanting a market... or taking over some of the functions of a market...”⁴⁰

This initial memo, setting the tone for the year, offers several insights about the group and its members’ interests. To start, it was clear that the organizers were captivated with economics – in particular, with how the regulatory state could partner with the invisible hand of markets to realize social goals, revealing in process theory an economic strand of Cold War liberalism.⁴¹ It was also clear that the group took law’s diversity seriously. They set out to investigate the workings of the whole legal system, looking beyond the judiciary to explore discretion in disparate parts of the law (for example, in administrative decisions and criminal sentencing as well as in statutory and constitutional interpretation).⁴² The group’s membership was particularly suited to this cross-functional study: in Henry Hart the group had an expert on legislation and statutory interpretation; in H.L.A. Hart and Lon Fuller they had experts in general jurisprudence; and in Herbert Wechsler and Paul Freund they had experts in constitutional

⁴⁰ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Legal Philosophy Discussion Group” (October 8, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

⁴¹ Many process theorists were alumni of the Roosevelt administration and believed in the power of well-regulated, but basically free markets as the path to growth and as a component of a free society. The initial reading packet of “hastily prepared materials” that were “intended simply to serve as pump-priming” for the group’s first, organizational meeting, which would not feature an introductory talk from one of the participants, included “Planning and the Rule of Law”, an essay that originally appeared as chapter six of Freidrich A. Hayek’s *The Road to Serfdom*, and an excerpt from another essay by Hayek entitled “Judicial and Administrative Discretion Under the Civil and Common Law Systems” taken from a series of lectures Hayek had given the previous year entitled “The Political Ideal and the Rule of Law.” See Reading Packet Included with Memorandum. For connections between economic theory and jurisprudence in this period see generally Postema, 141-180.

⁴² The rest of the initial reading packet reflected the group’s attention to the diverse situations in which discretion arises and to the importance of bringing international and non-lawyerly perspectives to bear on the study of law. One essay, “Administrative Discretion and the Rule of Law” was firmly rooted in legal sociology. Another, “On the Individuation of the Criminal Law” brought criminal law to bear on the question of discretion. Who were these first two essays by? An excerpt from Karl Llewellyn’s essay (translated from Llewellyn’s original German), “When does the ‘Application’ of a Rule Involve an Extension of it,” and an excerpt from Hessel Yntema, “On the Importance of General Principles to Control Decision” presented issues of general jurisprudence. The packet even included a snippet from Ludwig Wittgenstein’s *Philosophical Investigations*, “On the Interpretation of a Directive.” The final reading was an excerpt from Roscoe Pound’s “Justice According to Law.” See Reading Packet Included with Memorandum.

adjudication.⁴³ Different genres of legal scholarship, the organizers hoped, could be synthesized to produce a comprehensive understanding of discretion. The memo reveals, further, that the group envisioned a connection between the “government function involved” and the way discretion is exercised, gesturing to the concept of institutional competence, well-established by then. Finally, the organizers posed “the problem of ‘discretion’” and “the rule of law” as “counterpart[s].” In their view, a satisfactory solution to the problem of discretion was important to the conceptual integrity of the rule of law. This statement of the group’s task reflected the group’s post-realist, post-*Brown* intellectual position. Perhaps taking similar observations as his cue, H.L.A. Hart pursued each of these themes in his “Discretion” paper a few weeks later.⁴⁴

The group’s meetings turned out to be enormously popular. As one participant reported in the *Harvard Law School Bulletin*, the meetings officially adjourned at 10:30pm, but on occasion “the [Signet] Club steward has had to threaten to shut off the heat in order to compel some of the more perseverant discussants to abandon the cause.”⁴⁵ Through the year, a range of professors would lead the group’s discussions, presenting papers on a number of related topics. The group discussed papers by Henry Hart and Julius Stone, in the fall, and Jack Dawson, Kingman Brewster, and Donald Turner, Carl Friedrich, and Louis Jaffe, in the spring.⁴⁶ The task of kicking off the year’s discussions with the first paper, though, fell to H.L.A. Hart. Methodological suspicion aside, the group wanted to learn what Hart’s linguistic philosophy could contribute to their project. “Behind all of these questions is, of course, the more fundamental one of the power of words, or of concepts expressed in words, to direct and control human

⁴³ Eskridge and Frickey observe: “The authors were centrally concerned with the control of discretion – Hart and Sacks at the retail level of statutory and common law interpretation, Wechsler at the wholesale level of constitutional law, and Fuller at the meta-level of jurisprudence.” See Eskridge and Frickey, 2048.

⁴⁴ Hart’s attention to market economics – for example, his attention to Interstate Commerce Commission rate fixing – is particularly unusual in the context of his more abstract other work. Further, Hart’s claim that human beings, and therefore lawmakers, inherently operate with imperfect information, as discussed below, resonated with Hayek’s work.

⁴⁵ Shuman, *Harvard’s Jurisprudence Year*, 18.

⁴⁶ Shuman, *Harvard’s Jurisprudence Year*, 18.

action,” the organizers wrote. “In this aspect the problem becomes one of philosophy...”⁴⁷

⁴⁷ Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Legal Philosophy Discussion Group” (October 8, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7). The memorandum adds “..and psychology,” reflecting the view (pioneered by the Realists) that psychology had much to offer the study of judicial behavior.

Chapter 4. H.L.A. Hart's *Discretion*

At his talk, Hart distributed a three-page outline of his remarks, and then circulated the complete typewritten paper a few weeks later, on November 19 -- “practically verbatim what I said last time,” he noted, though clearly revised and reworked in the aftermath of the group’s meeting to clarify points that were met with confusion. Although he noted that his paper was somewhat unpolished – “so fugitive a piece does not deserve so durable a form,” he wrote – it was carefully thought out and formally written, reflecting his strong interest in the subject and his respect for his audience.¹ “Paper-preparing” for *Discretion*, he wrote to his wife, “took some time.”² Although *Discretion* was in some respects a rehearsal for parts of his later, published work,³ the essay presented vivid examples, detailed explanations of ideas he would mention only in passing in other writings, and ideas that, in the context of his broader work, mark uncharted territory.

A. Clarifying Fundamental Questions

In the wake of Bodenheimer’s criticism – and in light of the general air of suspicion about the value of his analytic method -- Hart wanted to demonstrate that conceptual analysis was useful to jurisprudence, not a theoretical straitjacket.⁴ *Discretion*, seen this way, was intended as an example for the American academy of how

¹ See Hart, *Discretion*.

² Letter from H.L.A. Hart to Jennifer Hart, cited above.

³ See for example Hart, *The Concept of Law*, 272, where he expresses his “picture of the law as in part indeterminate or incomplete and of the judge as filling the gaps by exercising a limited law creating discretion...”

⁴ It is worth noting that this may have been one of the very first occasions on which many of the group’s members met Hart or heard any of his ideas directly from him. Their preconceptions about “analytical jurisprudence” would have been at the front of Hart’s mind as he prepared his paper.

the analytical approach to definition and the “elucidation of concepts” could be profitably employed.

Discretion began by specifying five questions Hart believed were most important to bring forward, questions he thought had been lurking behind the group’s discussion without being stated clearly. “I have the conviction that if we could only say clearly what the questions are, the answers to them might not appear so elusive,” Hart wrote. He believed that clarity in questions led to clarity in answers. Hart’s questions indicated his attention both to conceptual structure and to social reality, reflecting the unique blend of “analytic jurisprudence” and “descriptive sociology” that would reappear in *The Concept of Law*.⁵ Hart’s questions also revealed his attention to questions of institutional design, a theme largely absent from his later work.

Most important, Hart insisted on investigating what discretion *was* separately from investigating where discretion should fit into the legal system.⁶ Therefore, he led with the abstract, descriptive question about discretion’s conceptual nature: “What is discretion or what is the exercise of discretion?”⁷ Only then did Hart move on to questions of the place and function of discretion in a legal system – suggesting a more normative agenda concerning the proper place of discretion in law. To start, “Under what conditions and why do we in fact accept discretion or tolerate discretion and if so, why?”⁸ Then he turned to discretion’s necessity and relation to the broader values of a legal

⁵ In the preface to *The Concept of Law*, H.L.A. Hart wrote that his book was simultaneously “an essay in analytical jurisprudence” and “an essay in descriptive sociology.” Hart, *The Concept of Law*, vi.

⁶ Hart specifically excluded psychological questions from his discussion (noting that they had been raised by Paul Freund), citing his belief that “if we clearly understand what it is to exercise a discretion and what in different fields counts as the satisfactory exercise of a discretion we shall not really have to fact an independent psychological question of the form: what are the psychological conditions of its sound exercise or how are we psychologically able to exercise a discretion.” Hart further believed that studying the psychological aspects of discretion would conceal the fundamental philosophical questions in need of resolution: “I think this question which looks on the surface to be one of empirical psychology perhaps really expresses in a rather misleading form just our initial unclarity about what discretion is and what in various fields we count as a sound exercise of discretion.”

⁷ Hart, *Discretion*, 1.

⁸ Hart, *Discretion*, 1.

system: “Must we accept discretion or tolerate discretion and if so, why?”⁹ “What values does the use of discretion menace and what values does it maintain or promote?”¹⁰ And finally, “What can be done to maximize the beneficial operation of the use of discretion and to minimize any harm that it does?”¹¹ Satisfied that he had framed his questions clearly, Hart began to provide answers.

Hart’s argument in *Discretion*, reflecting the structure of his questions, was part descriptive and part normative. First, he explored the question “What is Discretion” as a matter of descriptive conceptual analysis. Discretion, he argued, was a form of decision-making that occupied an “intermediate place between choices dictated by purely personal or momentary whim”¹² on one hand, and the determinate application of clear rules, on the other. Discretion was a special form of *reasoned* decision-making that entailed constraints on the possible courses that the decision-maker may choose to take. In the second part of his essay, Hart moved into more normative territory, making an argument about the proper role of discretion in the legal system. For Hart, legal systems inherently contained spheres of indeterminacy. There were inevitably gaps in the law, and officials making decisions must fill those gaps. When they did so, Hart argued, legal officials ought to exercise discretion rather than arbitrary choice or whim. Resolved with sound discretion, as opposed to fiat, indeterminacy was fully consistent with the rule of law.

B. What is Discretion?

1. The Analytical Approach to Definition

Hart devoted a large portion of his paper to the first question: “What is discretion?” It was a classic application of Hart’s linguistic method. He believed that providing an account of a concept required analyzing the way ordinary speakers use the

⁹ Hart, *Discretion*, 1.

¹⁰ Hart, *Discretion*, 1.

¹¹ Hart, *Discretion*, 1.

¹² Hart, *Discretion*, 8.

words associated with that concept.¹³ To analyze discretion, therefore, Hart investigated the uses of the word “discretion” in a wide variety of different contexts – legal and non-legal -- and then inferred the general principles at play.¹⁴ While Hart was aware that there were borderline cases – penumbral situations that might or might not be classified as discretion -- he mainly aimed to contribute a clear theory of the *core* phenomenon. When we all agree discretion is present, what *is* it?¹⁵ A clear definition of the core phenomenon was, in Hart’s view, what the group needed most: “The position” of the group with respect to discretion, Hart speculated, was “parallel to a person who knows his way around town by rote but could not draw a map of it or the crude case where we can say that I can recognize an elephant but I could not define the term elephant for you.”¹⁶

2. Hart’s Taxonomy of Discretion in Law

Hart began his analysis of the core phenomenon by considering a broad list of cases where discretion occurred in the legal system. Hart was not concerned with discretion in courts alone; he was aware that discretion arises not just in statutory or

¹³ For information on the relationship between Hart’s analytical jurisprudence and linguistic philosophy, See MacCormick, 12-19. Hart himself wrote that in jurisprudence “it is particularly true that we may use, as Professor J.L. Austin said, ‘a sharpened awareness of words to sharpen our perception of the phenomena.’” See Hart, *The Concept of Law*, vi. Indeed, in order to answer the question “What is discretion?”, Hart followed the analytical method that he had acquired from J.L. Austin and the Oxford circle of analytic philosophy. There will no doubt be some debate, however, about whether Hart’s descriptions of ordinary usage are in fact correct.

¹⁴ Hart believed that there *will* be meaningful similarities. “It might of course be the case that the term discretion is hopelessly vague and used by courts and juristic writers in an entirely haphazard fashion,” Hart admitted. But “if this were the case the only observation which we could make about the meaning of the term discretion would be just this [i.e. that it is ‘hopelessly vague’]. But it seems to me very unlikely that this is in fact the case: if it were the case we must agree to discuss discretion without any expectation that we should in fact be talking about a common subject. What is likely to be the case as in all the major notions involved in the law is that we can find a set of characteristics which are found together in the standard case of discretion: that is in cases where everyone would agree that we have the phenomenon of discretion.” In other words, Hart believed that even though discretion arises in different forms in a number of different legal contexts – “rate fixing by the I.C.C., the grant or refusal of a specific performance by a court, the exercise of reprieve or pardon by the executive” – there is a core phenomenon common to every situation. See Hart, *Discretion*, 2.

¹⁵ Hart, *Discretion*, 3.

¹⁶ Hart, *Discretion*, 3.

constitutional interpretation, but also in many other settings. Although it would become clear that the role of judges was of special concern for Hart (as it was for the process theorists), he warned against focusing too much on one kind of example at the outset, advising the group, “to remind ourselves of the tremendous diversity of the situations in which this phenomenon appears, for nothing in this field is so misleading as over-concentration on one sort of example.”¹⁷

The main distinction in Hart’s taxonomy of discretion in law was simple.¹⁸ Sometimes, lawmakers explicitly delegate discretionary power to officials or institutions – the power, say, to set interest rates, end hunting season, appoint officials, issue licenses, and so on. In Hart’s terminology, these were examples of “Express or Avowed Discretion.” By contrast, in cases of “Tacit or Concealed Discretion,” the legal system does not *explicitly* grant discretionary authority to an official; instead, the official, making an effort to apply rules intended to be as dispositive as possible, finds that the rules do not yield a determinate result, making necessary the exercise of discretion. Key examples in this category were “disputable questions”¹⁹ in statutory interpretation and the application of precedent.²⁰ A third category, which received no further discussion, included cases of “Discretionary Interference or Dispensation from Acknowledged Rules”: pardons, and “injunction against exercise of common law remedies.”²¹

Hart further noted that institutions are sometimes charged with exercising multiple forms of discretion. “Express or Avowed Discretion” for example, can be exercised by “administrative bodies” (Hart identified the now-defunct Interstate Commerce Commission and “Fish and Game Commissioners” as possibilities), or by courts in the case of sentencing, “discretionary remedies,” and the application of standards, like “reasonable care,” so broad as to be understood as constituting an explicit

¹⁷ Hart, *Discretion*, 4.

¹⁸ Hart, *Discretion*, 5.

¹⁹ Hart, *Discretion*, 4.

²⁰ This distinction appears exactly in *The Concept of Law*, but without the terminology. See Hart, *The Concept of Law*, 128-33.

²¹ Hart, *Discretion*, 4.

grant of discretionary authority.²² Delving deeper into institutional roles, Hart pointed out that this form of standard-applying discretion is entrusted sometimes to judges, and sometimes to juries. Hart classified most appellate adjudication in “disputable cases” – the most politically charged form of decision-making on the list -- as “Tacit or Concealed” discretion exercised by courts.²³

3. Looking Beyond the Law: Discretion as a Middle Position

Having categorized the legal examples of discretion, Hart turned to examples beyond the law for more definitive clarification of the core phenomenon. “In attempting to define or elucidate this term we must for the moment avert our gaze from the Law,” Hart said, “because we shall find that the phenomenon of discretion which worries us in the Law has its roots and important place in our ordinary life.”²⁴ So what *is* discretion in ordinary life? And how do non-legal uses of the term affect our understanding of discretion in legal contexts? The full contour of Hart’s account began to take shape at this stage in the analysis, as he set out simultaneously to distinguish discretion from raw choice and from determinate rule application. This way of situating discretion stood in exact analytical parallel to the intellectual goal he shared with the process theorists: finding a rationally stable middle road between formalism (associated with determinate rule application) and realism (associated with “whim”).

a) Distinguishing Discretion from Arbitrary Choice

It was immediately apparent to Hart that “discretion” denoted something different from arbitrary choice. Although he was speaking in abstract terms, this distinction

²² Hart, *Discretion*, 4. The discussion of the due care standard reappears in *The Concept of Law*. See Hart, *The Concept of Law*, 132-33.

²³ It is unclear where some forms of discretion would fit into Hart’s taxonomy. For example, prosecutorial discretion (which he ignores) could be considered “Express or Avowed” because of the prosecutor’s legal right to decide which cases to bring. Or it could be considered “Tacit or Concealed” because, faced with limited resources, prosecutors must make choices and cannot take up every case. Or, it could count as “Dispensation from Acknowledged Rules” for potential defendants. Or perhaps prosecutorial discretion presents a mix of all three.

²⁴ Hart, *Discretion*, 6.

constituted a tacit rejection of legal Realism and its (sometimes caricatured) account of judicial decision-making. As Hart put it, discretion is not present in “cases where in choosing we merely indulge our personal immediate whim or desire.”²⁵ Far from denoting the whimsical exercise of choice, “discretion is... the name of an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence: it is the power of discerning or distinguishing what in various fields is appropriate to be done and etymologically connected with the notion of discerning.”²⁶ “Hence,” he said, “we speak of years of discretion meaning not merely the age at which a human being is able to choose (because we can choose long before this) but merely the age when the judgment or discernment to be exercised in choice is ripe.”²⁷ “A discrete person,” he continued, “is not someone who just remains silent but who chooses to be silent when silence is called for.”²⁸

To illustrate, Hart asked his audience to confront a dilemma that weighed heavily on the legal process generation: “Will you have a martini or a sherry?”²⁹ Specifically, how would you defend your choice from criticism? “You choose a martini and I ask why,” Hart supposed; “you reply ‘Because I like it better – that’s all.’”³⁰ This, for Hart, was not an exercise of discretion: “the chooser accepts no principle as justifying his choice: he is not attempting to do something which he would represent as wise or sound or something giving effect to a principle deserving of rational approval and does not invite criticism of it by any such standards.”³¹ A “choice”, he argued, counted as discretion only if it invited a *reasoned defense* grounded in principles “deserving of rational approval.”³² Of course, if the person who chose the martini could in fact offer a

²⁵ Hart, *Discretion*, 6.

²⁶ Hart, *Discretion*, 6.

²⁷ Hart, *Discretion*, 6.

²⁸ Hart, *Discretion*, 6.

²⁹ Hart, *Discretion*, 6. Hart’s examples, which provide an amusing picture of the concerns of the Mad Men era academic elite, reflected Hart’s keen sense of humor.

³⁰ Hart, *Discretion*, 6. Slight correction to original text: repeated word omitted.

³¹ Hart, *Discretion*, 6.

³² Hart, *Discretion*, 6.

rational defense, Hart conceded that it might have been a discretionary decision after all.³³

b) Distinguishing Discretion from the Determinate Application of Rules

Having distinguished discretion from raw choice, Hart's next step was to distinguish discretion from another decision-making extreme: the determinate application of rules, whereby judges (and other officials, if appropriate) simply apply rules mechanically in a way that provides a correct answer in every case. When "the principles are clear, determinate, highly specific and uniquely determine the particular thing we have to do," Hart said, "we do not classify them [the decisions] as cases of discretion and it would be confusing to do so."³⁴ Although Hart was describing an abstract mode of decision-making, his audience would have understood him as rejecting the (again, sometimes caricatured) formalist idea that the law is a determinate, deductive science.

To illustrate, Hart invited his audience to consider yet another puzzling predicament: sharpening a pencil. "I go to the drawer, and I am faced with a knife, three spoons, and two forks."³⁵ In the end, "I choose a knife: if asked why I would not here reply 'because I like it' but perhaps 'because I want to sharpen a pencil and this is the obvious way to do it.'"³⁶ In this case, Hart suggested, there is a *correct answer*. And where there is a correct answer, the word "discretion" seems out of place. "It seems to me absurd to speak of a choice of a knife as an exercise of discretion," Hart said. "It was the only sensible thing to do and when our aims are as determinate as this and the situation is as clear as this and the proper thing to do is patent to the elementary

³³ Hart, *Discretion*, 6. Hart offered the parallel example of voting in an election: if a choice is justified according to rational principles, as opposed to personal whim, then the decision may qualify as discretionary.

³⁴ Hart, *Discretion*, 7.

³⁵ Hart, *Discretion*, 7. Perhaps Hart was unaware that specially designed pencil-sharpeners have been available since at least 1837. See *Antique Pencil Sharpeners, The Early Office Museum*, available at http://www.officemuseum.com/sharpener_small.htm (last visited August 5, 2013).

³⁶ Hart, *Discretion*, 7.

knowledge of what will produce what, we choose indeed correctly but not in the exercise of discretion.”³⁷

Consider as another example an American ritual that may have caught Hart by surprise: “‘The Star Spangled Banner’ is played: I stand up. ‘Why did you stand up?’ I reply not indeed by saying ‘because I wanted to’ but I cite the established rule which quite unambiguously specifies what I am to do in this particular case. Here I have done the correct thing. I have made the right choice but it would be misleading to describe as the exercise of a discretion.”³⁸ On Hart’s analysis, if the answer is clear from the start, and there is no plausible way the decision could have gone differently consistent with the rules being applied, the decision does not involve discretion.

c) A Middle Road Between Arbitrary Choice and Determinate Rules

Now that he had situated discretion in the “intermediate” space between arbitrary choice and determinate rule application, Hart drew out his understanding further with a more sophisticated example designed to reveal the general principles of discretion overall, present in legal and non-legal situations. He imagined that

“A young hostess is giving her first dinner party and the question arises shall she use for this occasion the best knives: they are old silver, very beautiful and they will set off the snowy tablecloth and the glasses. On the other hand they are undoubtedly heavy and somewhat difficult to handle: they are not a bit sharp and also their splendour might be thought a little bit showy to some.”³⁹

In broad strokes, the hostess’s aims are clear: “a pretty dinner table, admiration, but also the comfort of the guests and perhaps that of an old distinguished judge with somewhat shaky hands who is going to the party.”⁴⁰ Faced with these aims, and trade-offs in light of them, “the hostess ponders, she thinks out the possible disasters and some possible good

³⁷ Hart, *Discretion*, 8.

³⁸ Hart, *Discretion*, 8.

³⁹ Hart, *Discretion*, 8. Hart’s example again harkens back to the social mores of the 1950s, when sharpening pencils, selecting cocktails, and advising hostesses were apparently all the rage.

⁴⁰ Hart, *Discretion*, 8.

consequences from the courses before her:⁴¹ she balances one consideration against another and perhaps wonders whom she can consult. She asks someone who has had a lot of experience in this field, an old lady, who says sagaciously that ‘on the whole I think the wisest thing to do would be to use the second-best set.’⁴² Importantly, the old lady “can give reasons for this such as the danger of discomfiting old Mr. X. and his unfortunate behaviour when some small thing sets off his temper: she reminds the hostess of the possible jealousy of the younger guests, and so on.”⁴³

The travails of the young hostess demonstrated six features of discretion that, for Hart, constituted the core of the phenomenon. First, there is no “clear right” decision.⁴⁴ Second, “there is not a clear, definable aim” at a helpful level of specificity.⁴⁵ (Although some outcomes – “the discomfort of the guests, ugly appearance of the table”⁴⁶ -- may be obviously bad.) Third, the exact consequences of each possible decision are not clear.⁴⁷ Fourth, “within the vaguely defined aim of a successful dinner party there are distinguishable constituent values or elements (beauty of the table, comfort of the guests, etc.) but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them.”⁴⁸ Fifth, words like “wise” and “sound” make more sense to describe good decisions than words like “right” or “wrong.”⁴⁹

Sixth, Hart believed that discretionary decisions are *defended* in two different ways if they are called into question: justification and vindication.⁵⁰ As a justification, the hostess could defend her decision by appealing to her “honest attempt to give effect to such controlling principles or values as applied to the case and to strike impartially some

⁴¹ Hart, *Discretion*, 8. Original text slightly edited: the word “either” is omitted here.

⁴² Hart, *Discretion*, 8.

⁴³ Hart, *Discretion*, 8.

⁴⁴ Hart, *Discretion*, 9.

⁴⁵ Hart, *Discretion*, 9.

⁴⁶ Hart, *Discretion*, 9.

⁴⁷ Hart distinguished this case from the case of the pencil sharpener, where there was a “high probability” that a knife would in fact do the job.

⁴⁸ Hart, *Discretion*, 9, slightly edited for grammaticality.

⁴⁹ Hart, *Discretion*, 9.

⁵⁰ Hart, *Discretion*, 10.

compromise between them where they conflicted.”⁵¹ The justification of a discretionary decision, in other words, involved a recreation of the process through which the decision was made, and an appeal to the reasons that influenced the decision. Beyond this justificatory mode of defense, Hart pointed out that “the hostess might well appeal to the actual success of the dinner party” – a form of “vindication by results.”⁵² Hart was careful to point out, however, that a decision could be justified even if it happened to produce bad results. The decision-maker would live and learn.⁵³

C. The Proper Place of Discretion in Law

Hart’s account of discretion so far had much in common with process theory’s notion of reasoned elaboration: Hart believed that discretionary decisions were rooted in reason and founded on “principles deserving of rational approval,”⁵⁴ and that a defense of a discretionary decision involved a reconstruction of the reasoning process that produced it. The second part of Hart’s essay addressed the consequences of discretion in the legal system, asking why we should accept it and how it could be consistent with the rule of law. Hart argued that discretion was the appropriate way of resolving cases with no clear answer – precisely the virtue that allowed such inevitable interstices to be ruled by law instead of whim.

1. The Inevitability of Indeterminacy in the Legal System

⁵¹ Hart, *Discretion*, 10. If the hostess’s decision were challenged, “she would point out how her decision had been reached: that it had been preceded by as careful a consideration of the constituent elements in a successful dinner party as she could give; that she had attempted to work out what would happen on either course; that she had thought of similar cases in her own experience and that she had obtained the advice of an experienced person.”

⁵² Hart, *Discretion*, 10.

⁵³ Hart, *Discretion*, 10.

⁵⁴ Hart, *Discretion*, 6.

Hart believed that indeterminacy was *inevitable* in law – an essential part of the project of prospective lawmaking. Why? “Because we are men not gods.”⁵⁵ Our ability to regulate the future is inherently limited: “As part of the human predicament,” Hart said, we operate under “two handicaps.”⁵⁶ First, Hart believed that lawmakers could never know everything about the future world they were trying to regulate: the lawmaking enterprise was constrained by what he called a “Relative Ignorance of Fact.”⁵⁷ Second, even if we did live in a world of perfect information, Hart believed that the vagueness inherent in human aims would still preclude perfect prospective lawmaking: the second “handicap” was a “Relative Indeterminacy of Aim.” In sum, lawmakers craft legal rules without knowing everything about the future and in pursuit of aims that are multifaceted and not perfectly determinate. Indeterminacy was the inevitable result; lawmakers were inherently unable to craft laws that apply with perfect clarity to every future situation.

Hart illustrated these handicaps with an example that would become “the most famous hypothetical in the common law world”⁵⁸: the rule “no vehicles in the park.” In fact, it was in *Discretion* that this example made its debut in Hart’s work. The example would feature prominently in Hart’s Holmes Lecture the next April,⁵⁹ in *The Concept of*

⁵⁵ Hart, *Discretion*, 11. The remark about being “men not gods” appears verbatim in *The Concept of Law*. See Hart, *The Concept of Law*, 128. “The necessity for such choice is thrust upon us because we are men, not gods.”

⁵⁶ Hart, *Discretion*, 11. Again note that this distinction appears in *The Concept of Law* with very similar language, but without the categorical terms “Express or Avowed” or “Tacit or Concealed.” See Hart, *The Concept of Law*, 128-9.

⁵⁷ Hart, *Discretion*, 11. In *Discretion* Hart wrote: “If the world in which we have to act and choose,” Hart said, “consisted ... of a finite number of features or characteristics,” and “the modes in which these features could combine were limited to a finite number of these modes,” and “we knew both these features and modes of combination exhaustively then we could always know in advance all the possible circumstances in which a question of the application of a rule would arise and we could therefore in framing our rule specify exhaustively in advance all the cases to which it was to apply and those to which it was not.” Compare *The Concept of Law*: If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility.” See Hart, *The Concept of Law*, 128. It seems clear that Hart used the *Discretion* paper as a model for this section of the later book.

⁵⁸ Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N. Y. U. L. Rev. 1109, 1109 (2008).

⁵⁹ See Hart, *Positivism and the Separation of Law and Morals*.

Law,⁶⁰ and in much jurisprudential scholarship since.⁶¹ In *Discretion*, Hart's analysis of "no vehicles in the park" is familiar.⁶² There are some clear applications of the rule, envisioned when the rule was formulated – "the motor car, the horse and cart, the motor bicycle and the bus" – and some penumbral cases in which the application is unclear – "skates, bicycles, perambulators, and toy motor cars."⁶³ The aims of the rule against vehicles in the park were clear enough when cars and buses – cases foreseen -- were involved: "we know that we want peace in the park." But when it came to cases unforeseen -- "the scooter, the toy motorcar electrically propelled" (which he observed was "perhaps rather fast, moderately dangerous to the old but great fun for the young") -- "our aim is indeterminate," because "we have not settled whether some and if so what degree of peace in the park is to be sacrificed to those whose interest or pleasure it is to use these objects."⁶⁴ The Relative Indeterminacy of Aim was therefore fused in Hart's analysis with the Relative Ignorance of Fact.⁶⁵

⁶⁰ See for example Hart, *The Concept of Law*, 126.

⁶¹ See generally Schauer, *A Critical Guide to Vehicles in the Park*.

⁶² In his Holmes Lecture, Hart would deploy the example mainly to demonstrate the inherent vagueness of legal *language* (which also produced legal indeterminacy). But in *Discretion*, Hart used the example differently. He intended it to illustrate the idea that rules are indeterminate because no lawmaker can envision from the start all the cases that might require regulation or formulate aims with enough clarity to resolve future confusion fully. This account of indeterminacy dropped out of the Holmes Lecture but reappeared in *The Concept of Law*. See Hart, *The Concept of Law*, 126-33. Interestingly, Hart does not rely on the argument for indeterminacy from language vagueness in "Discretion."

⁶³ Hart, *Discretion*, 11.

⁶⁴ Hart, *Discretion*, 12.

⁶⁵ (Henry) Hart and Sacks, 128-9, offered their own vehicles in the park example, explaining how a "magistrate" would "decide whether a motorcycle is or is not a 'motor car' within the meaning of a speed statute." It is unlikely that (Henry) Hart and Sacks got the idea for this example from H.L.A. Hart, because this section of the casebook was finished by the time of H.L.A. Hart's visit. Schauer speculates that H.L.A. Hart may in fact have borrowed the example from his American colleagues: "Hart almost certainly drew the example from *McBoyle v. United States*, 283 U.S. 25 (1931), a case in which the question was whether an airplane was a vehicle for purposes of a federal statute prohibiting transporting a stolen vehicle across state lines. I suspect that ...Hart learned of it from Henry Hart, or Albert Sacks, or possibly even from Fuller himself." See Schauer, *A Critical Guide to Vehicles in the Park*, 1115 note 20.

Hart offered Interstate Commerce Commission rate fixing⁶⁶ as a further “dramatic illustration” of the limiting “handicaps” on prospective lawmaking. The *general* goal of the rate fixer, Hart observed, could be stated easily: finding “a rate which is reasonable and fair.”⁶⁷ This general aim is helpful to a limited extent: it does establish that some rates are clearly out of the question. A rate too high “would hold the public up to ransom for a vital service” and “defeat any purpose that we could have in regulating rates”, while “a rate too low to provide any possible incentive for running the railway organization or too low to provide returns higher than the occupations of sweeping the streets would normally have to be rejected”⁶⁸ Yet the general aim provides little guidance when it comes to which of the not clearly unacceptable rates should be selected. Hart concluded that behind the general goal, there are in fact many vague and conflicting aims at play: “a grand matrix capable of an indefinite number of different fillings or completions.”⁶⁹ Further, changing factual circumstances “reveal different factors requiring attention.”⁷⁰ For example, “there may be rates which owing to the predicament of a local industry would jeopardize the prosperity of millions but apart from this consideration might well be thought fair.”⁷¹

Indeterminacy, thus, was unavoidable. The world in which perfect prospective lawmaking were possible, he said, “would be the world of... mechanical jurisprudence which we have long been taught is not our world.”⁷² Still reeling from Bodenheimer’s false accusation that his analytic style amounted to “mechanical jurisprudence” in

⁶⁶ Although rate fixing is an exercise of “Express or Avowed Discretion,” the same analysis would apply in the case of “Tacit or Concealed Discretion” (like the “no vehicles in the park” example).

⁶⁷ Hart, *Discretion*, 12.

⁶⁸ Hart, *Discretion*, 12.

⁶⁹ Hart, *Discretion*, 14.

⁷⁰ Hart, *Discretion*, 14.

⁷¹ Hart, *Discretion*, 14.

⁷² Hart’s analysis of the intrinsic limitations of human knowledge would have appealed to many members of the discussion group, who were suspicious of central economic planning and attentive to information problems. Hart’s analysis of the problem of rate fixing would have been particularly relevant to the group, who had recently discussed excerpts from Hayek. Just as Hayek had argued that the centrally planned economy was a figment of the utopian imagination, Hart argued that the inherent limits of human knowledge foreclose the possibility of crafting totally determinate law for the future. See generally Postema, 141-180 (discussing Hayek’s contribution to mid-century American jurisprudence).

disguise, Hart was unambiguous in his fresh rejection of legal formalism: “Our world,” he said, “is indeed different.”⁷³ “When the actual case arises,” a judge will “have to weigh and choose between or make some compromise between competing interests.”⁷⁴ It was to the details of this decision-making process that Hart turned next, seeking guidance for officials lost in the penumbra.

2. *The Responsibility of Discretion*

What mode of decision-making should legal officials employ when they confronted indeterminacy, as they inevitably would? Hart’s answer was simple: discretion – the special mode of reasoned decision-making he had carefully distinguished from other possibilities.⁷⁵ “Discretion must take its place,” Hart wrote, “because the area is really one where reasonable and honest men may differ however well informed of the facts in particular cases.”⁷⁶ Pointedly, Hart expected legal officials *not* to treat legal indeterminacy as an opportunity for the exercise of personal choice. “When we are considering the use of discretion in the Law we are considering its use by officials who are holding a responsible public office,” Hart said. “It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them they will choose responsibly having regard to their office and not indulge in fancy or mere whim.”⁷⁷

⁷³ Hart, *Discretion*, 12. In *The Concept of Law*, Hart also compared the world of perfect information to the world of mechanical jurisprudence. See Hart, *The Concept of Law*, 128. But in *Discretion* he also stated, “Our world is indeed different” to emphasize to his Harvard audience his belief that analytical and mechanical jurisprudence were not allies.

⁷⁴ Hart, *Discretion*, 13.

⁷⁵ Reiterating a point he made earlier, Hart again observed that when the limitation on our ability to regulate the future is “patent at the outset,” lawmakers sometimes “confer a discretionary jurisdiction on some official or authority” to make relevant decisions in the future, when more information is available and the particular application of vague general aims is clearer, resulting in “Express or Avowed Discretion.” When the limitation is “not so patent” at the outset, lawmakers try to craft prospective rules, and “though we may proceed happily with them over a wide area,” in some cases “the rules break down and supply no unique answer in a given case.” Here the result is “Tacit or Disguised Discretion.” Hart, *Discretion*, 11. Note that here Hart calls it “Tacit or Disguised” whereas in other instances he calls it “Tacit or Concealed.”

⁷⁶ Hart, *Discretion*, 14.

⁷⁷ Hart, *Discretion*, 7.

Put slightly differently, Hart's view was that legal officials ought to make decisions that exemplify the features that set discretion apart from other forms of decision-making. The criteria for the best exercise of discretion were, in this sense, implicit in the concept of discretion itself. Hart's analysis placed central importance on rationality, the appropriate selection of factors for consideration, and means of justification.

a) Rationality

First, discretionary decisions were rational. Discretion, for Hart, *was* reasoned decision-making rooted in principles "deserving of rational approval,"⁷⁸ and sound discretionary decisions were decisions living up to that standard. More specifically, rationality in discretionary decision-making required a certain *method* of decision: "decisions involving discretion are rational primarily because of the manner in which they are made," he wrote, and must include "the determined effort to identify what are the various values which have to be considered and subjected in the course of discretion to some form of compromise and subordination."⁷⁹

Hart did not spell out exactly what he meant by "reason" or "rational approval." Indeed, a weakness of his essay is that he did not discuss in more detail how, precisely, the demand for rationality constrained decision-making. But he seemed to have expected sound discretionary reasoning to display not just logical integrity, but also a form of practical wisdom, associating the term "discretion" with "practical wisdom or sagacity or prudence"⁸⁰ and praising "rational" decisions with words like "wise" and "sound."⁸¹

As we have seen, Hart's stress on reason and rational justification in discretion is strikingly consistent with the process school's idea of reasoned elaboration as a normative requirement for sound judicial decision-making. Hart and the process theorists

⁷⁸ Hart, *Discretion*, 6.

⁷⁹ Hart, *Discretion*, 15.

⁸⁰ Hart, *Discretion*, 6.

⁸¹ Hart, *Discretion*, 9.

shared the view that “rationality” was a demanding requirement, and one that judges and other legal officials were obliged to fulfill.

b) Choice of Factors

Hart believed that all discretion – whether “Express or Avowed” or “Tacit or Concealed” – must be exercised rationally. But pushing further, he also believed that different types of discretionary decisions, arising in different positions in the legal process, required attention to different factors. Hart said that we must “characterize what in each field are the factors which require our attention if discretion is to be soundly exercised.”⁸²

For Hart, there was a connection between the *type* of discretion in question and *how* it should be exercised. “The type of factor to which weight would be properly attached in the exercise of discretion will vary in different types of situations,” he wrote.⁸³ Specifically, the “Express or Avowed” discretion arising from a specific regulatory delegation called for a different deliberative process from the “Tacit or Concealed” discretion arising from the indeterminacy of rules or from different possibilities for the use of precedent.⁸⁴ The way the discretion came about in the first place significantly influenced the factors that the official charged with exercising the discretion should consider when carrying it out. In fact, Hart’s specifically said that one of his principal motivations for distinguishing between “Tacit and Concealed” and “Express and Avowed” discretion was to show that these different forms of discretion require attention to different sets of factors, reflecting their different institutional provenances.⁸⁵

This point is significant: Hart acknowledged that the set of factors that should be considered in the exercise of discretion was a function of the *type* of discretion at issue,

⁸² Hart, *Discretion*, 15.

⁸³ Hart, *Discretion*, 5.

⁸⁴ Hart, *Discretion*, 5.

⁸⁵ Hart, *Discretion*, 5.

and therefore related to the position in the legal process of the official charged with exercising it. Although Hart fell short of specifying exactly what these factors were, it was clear that he believed an administrative official fixing a rate or a Fish and Game Commissioner deciding when to end hunting season should refer to a set of concerns quite different from an appellate judge interpreting a statute. Though Hart's theory on this point remained imperfectly developed, his analysis resonated with process theory's focus on institutional competence. He believed that officials in different settings should make decisions in light of factors appropriate to the specific role they were called upon to play – interpreter of rules, applier of standards, setter of rates, opener of free season on elk, and so forth.

c.) Justification

Finally, Hart thought that a sound exercise of discretion, if rational and based on the right factors, could be *justified*. Recall that Hart held that discretionary decisions were primarily justified by reconstructing the reasoning process that led to the decision, though they could also be vindicated by the actual success of the decision once implemented. This emphasis on justification – defense of decision-making by appeal to the process of the decision and the reasons for it – resonated with the process school's view that judges have a professional responsibility to explain their decisions in writing.⁸⁶

The process theorists were concerned with the written exposition of decisions partly because they believed that it helped to bolster the notion that adjudication was a professional craft, one that called for expertise, scrutiny, and continuous reflection.⁸⁷ H.L.A. Hart, too, believed that discretion was a craft that could be improved with experience. We “learn from a series of vindications certain new factors making for success to which we must also attend henceforth if our choices are to be justifiable.

⁸⁶ See for example the *Harvard Law Review* Forewords from the mid-1950s chastising the Court for overreliance on Per Curiam opinions. See White, *The Evolution of Reasoned Elaboration*, 286.

⁸⁷ See for example Dorf, *Legal Indeterminacy and Institutional Design*, 923.

There is a progressive evolutionary discovery of important and hence justifying factors.”⁸⁸

3. Hart’s Solution to the Problem of Legal Indeterminacy

Hart mentioned that discretion “worried” his colleagues. He was aware that the post-Realist, post-*Brown* process theorists were concerned that choice in law and the rule of law were in tension. Yet in Hart’s view, indeterminacy could be fully consistent with the rule of law if the officials charged with resolving it exercised genuine discretion: if they appealed to principles “deserving of rational approval” and identified and weighed the factors that were properly relevant. When it came to judges, Hart’s analysis was in lockstep with process theory: the criteria for good decisions provided a constraint on judicial power, ensuring that decisions were rooted in rational principle, not dependent on the personal “fancy” or “whim” of the judge, and grounded in appropriate factors.⁸⁹

For Hart, discretion presented a *solution* to the problem of indeterminacy, not a problem of its own. In light of the “handicaps” on our ability to regulate the future, it was the possibility of sound discretion that made the entire project of prospective lawmaking possible in the first place. Hart saw discretion as essential, not antithetical, to the rule of law: it was *the job to be done* when indeterminacy inevitably arose.

D. The Significance of *Discretion*

Discretion reveals much about Hart’s year at Harvard and his immediate intellectual milieu. It shows that Hart was something of a process theorist – at least when it came to adjudication. This is a novel discovery in the history of jurisprudence. Only a small group of scholars have known that Hart wrote an essay on discretion for the Legal

⁸⁸ Hart, *Discretion*, 10.

⁸⁹ Dorf also reminds us that for Hart, some (judicial) cases do not require discretion, because the outcome is clearly determined by stated rules. Thus part of Hart’s solution to the problem of indeterminacy could be that indeterminacy only arises in a small number of cases. *Discretion* adds to this analysis by demonstrating that Hart also believed that the style of reasoning involved in discretion presented another constraint on the range of possible outcomes.

Philosophy Discussion Group. Anthony Sebok read Hart's manuscript and gave it its greatest scholarly treatment to date, in a footnote in his book *Legal Positivism in American Jurisprudence* and in a short section of a separate article, insightfully analyzing some of the essay's broadest themes on the way to discussions of different topics.⁹⁰ The other scholars who have mentioned *Discretion* believed the essay had been lost completely. William Eskridge and Phillip Frickey referred to Hart's paper in their introduction to the 1994 edition – and first official publication -- of (Henry) Hart and Sacks' *The Legal Process*. Eskridge and Frickey stated that "H.L.A. Hart circulated his own paper on 'Discretion'⁹¹ ... very probably presenting a point of view willing to admit that much discretion could not be controlled by law."⁹² An article by Michael Dorf made reference to Hart's "lost"⁹³ essay and to the discussion group as part of an analysis of the philosophical foundations of the process movement.⁹⁴ Nicola Lacey, in her critically acclaimed biography of Hart, mentioned Hart's contribution to the discussion group and noted that he "provoked a stormy debate."⁹⁵ But Lacey was not aware that a copy of *Discretion* had survived. The remainder of the massive secondary literature on Hart and his legacy has ignored the essay completely.

⁹⁰ See Anthony Sebok, *Legal Positivism in American Jurisprudence*, 169 n 232 (2008) and Anthony Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 S.M.U. Law Rev. 75, 99-100 for the longest discussion of Hart's lost essay already published. Sebok insightfully noted the resonance to process theory and the relationship between the two Harts, but discusses Hart's *Discretion* only en route to other arguments. This interpretation of *Discretion* complements and builds on Sebok's brief discussion.

⁹¹ Eskridge and Frickey note that H.L.A. Hart's paper was "to be discussed with Henry Hart's paper." See William N. Eskridge, Jr. and Phillip P. Frickey, *Historical and Critical Introduction to Henry M Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law*, ci (William N. Eskridge and Phillip Frickey eds., 1994) (1994). Although H.L.A. Hart's and Henry Hart's papers may have been discussed together, H.L.A. Hart delivered his paper at the meeting before Henry Hart delivered his, giving Henry Hart a chance to draft his paper after hearing his English colleague's views. H.L.A. Hart's memorandum to the group on November 19th says that he delivered the paper "last time" (Hart, "Discretion"), while Henry Hart delivered his paper on November 20th. See Henry Hart, Notes for "The Place of Discretion in the Legal System" (November 20, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

⁹² Eskridge and Frickey, ci. Eskridge and Frickey mentioned the "Memorandum from H.L.A. Hart to the Legal Philosophy Discussion Group... circulating a paper on 'Discretion,' but no copy included..." The copy was in the archive in September 2012, along with the memorandum.

⁹³ Michael Dorf, *Legal Indeterminacy and Institutional Design*, (commenting on Eskridge and Frickey's discussion of H.L.A. Hart's contribution to the discussion group).

⁹⁴ Dorf, *Legal Indeterminacy and Institutional Design*, 922 n 179.

⁹⁵ Lacey, 188.

While adding much to our understanding of the intellectual history of Harvard's "Jurisprudence Year," *Discretion* enhances our knowledge of Hart's broader legal philosophy. In the context of Hart's work, the essay is unusual in two respects. First, Hart emerges from *Discretion* as a theorist interested in law's worldly functioning and the practical challenges of adjudication – not just in conceptual clarity. While many of Hart's other writings are abstract and more purely philosophical, the H.L.A. Hart of *Discretion* is sensitive to law's institutional form as well as its conceptual structure, sensitive to the challenges faced by officials interpreting legal texts as well as the logical problems posed by words, and sensitive to the chaotic workings of the administrative state as well as the philosophical nature of government and its authority.⁹⁶ Nicola Lacey's introduction perceptively argues that these institutional lines of thought ultimately did not "engage Hart's deepest interest."⁹⁷ Indeed, they all but disappeared from his work in later years. In this light, Hart's engagement with questions of institutional form in *Discretion* brings the process school's influence on his thinking at Harvard into even sharper focus.

Second, *Discretion* sketched a theory of legal reasoning. Hart's later work pressed further into the conceptual structure of legal systems, the relationship between law and morality,⁹⁸ and criminal law theory,⁹⁹ but, strangely, largely left this major theme of *Discretion* behind. Hart's relative silence on legal reasoning is a shortcoming of his legacy – one that left him vulnerable to attack in his debates with Fuller and Dworkin, in which legal reasoning was a primary axis of controversy. In fact, Hart regretted that *The Concept of Law*, his most famous book, skimmed over the topic so quickly: "I certainly wish to confess now that I said far too little... about the topic of adjudication and legal

⁹⁶ Neil MacCormick's "institutional theory of law" emerged partly in response to Hart's lack of attention to institutional matters. See Neil MacCormick, *Institutions of Law* v (2007) (discussing Hart's "unchallengeable" "place in history" yet his failure to address law's institutional manifestation).

⁹⁷ Nicola Lacey, *The Path Not Taken*.

⁹⁸ See e.g., H.L.A. Hart, *The Concept of Law* (1961), and H.L.A. Hart, *Law, Liberty, and Morality*, (1963).

⁹⁹ see, e.g. Hart, *Punishment and Responsibility*, (1968)

reasoning,”¹⁰⁰ he wrote. Scholars writing after Hart have repeatedly analyzed his theory of legal reasoning and the role of discretion in judicial decision-making based on the comparatively light treatment the topics receive published work.¹⁰¹ Gerald Postema, for example, perceptively observed that Hart believed that “deciding to apply a rule to an instance outside the settled core is often a matter of reasoned elaboration of the rule, drawing on diverse considerations running through the law.”¹⁰² The ideas in *Discretion* are consistent with what little Hart did say on the subject in later years, but they are far more comprehensive.¹⁰³ The essay fills a significant gap in Hart’s work.

As Lacey has argued,¹⁰⁴ in later work Hart may have shied away from legal reasoning out of anxiety that his understanding of it conflicted with his commitment to the rule of recognition as the ultimate criterion of legal validity, and with his commitment to the conceptual separation of law and morality – tensions that flared up in the *Postscript*, where Hart recycled some of the arguments from *Discretion* in an abridged and less illuminating form. While the essay may suggest why legal reasoning might have posed difficulties for Hart’s analytical positivism, it reveals, at the same time, arguments Hart envisioned to answer such concerns.

¹⁰⁰ Hart, *The Concept of Law*, 259.

¹⁰¹ See for example MacCormick, 121-33 (discussing “Judicial Discretion and the Judicial Role” in Hart’s philosophy); Bayles, 174-81 (discussing judicial discretion in Hart’s philosophy); Roger A. Shiner, *Hart on Judicial Discretion* (Sept. 30, 2011), Problemas (forthcoming).

¹⁰² Gerald Postema, *Positivism and the Separation of Realists from their Skepticism*, in Peter Cane, Ed. *The Hart-Fuller Debate in the 21st Century*, 264. Postema offers an excellent analysis of Hart’s understanding of the judicial role, and the discovery of the “Discretion” paper bolsters many of Postema’s claims.

¹⁰³ *The Concept of Law* and the *Postscript* advanced similar conclusions without much detail, as did a short preface Hart wrote in 1983, mentioning that the notion “that judges, when they reach a point at which the existing settled law fails to determine a decision either way, simply push aside their law-books and start to legislate de novo for the case in hand without further reference to the law... has never been my view” and briefly endorsing a form of reasoned, discretionary decision-making in response to indeterminacy. See Hart, *Essays in Jurisprudence and Philosophy*, 6-7 (1983). Hart’s account of the judicial process here, however, used slightly more Dworkinian language than the account he provided in the “Discretion” paper, perhaps reflecting Dworkin’s influence on his thinking. In the introduction to the *Essays in Jurisprudence and Philosophy*, he noted that “Very often in deciding such [indeterminate] cases courts cite some general principle or general aim or purpose which a considerable area of the preexisting law can be understood as exemplifying or advancing,” before rejecting the notion that this endeavor can render law fully determinate and “gapless.”

¹⁰⁴ Lacey, *The Path Not Taken*.

In other ways, *Discretion* represents a missing link in Hart's intellectual development. The essay was one of his first academic endeavors in the year that proved to be the major "turning point" in his philosophical life.¹⁰⁵ "Ideas started pullulating at a rather alarming rate," Hart reflected; "I thought, 'am I going mad?' I was getting so many different things inside."¹⁰⁶ In April of that year, Hart delivered his Holmes Lecture, "Positivism and the Separation of Law and Morals" -- a watershed event in the history of legal philosophy in which Hart expressed most of the key ideas in *The Concept of Law*, "the most influential book in legal philosophy ever written in English,"¹⁰⁷ published five years later. The Holmes Lecture and *The Concept of Law* both drew from the ideas he expressed in *Discretion* in the fall of 1956. In fact, Hart clearly had *Discretion* directly on hand when he drafted *The Concept of Law*: several passages from the essay appear nearly verbatim in the chapter addressed to "Formalism and Rule Skepticism."¹⁰⁸

It is to the intellectual chain in which *Discretion* was a missing link that we turn now -- examining *Discretion*'s influence on the other members of the Legal Philosophy Discussion Group, the development of Lon Fuller's work, and Hart's Holmes Lecture.

¹⁰⁵ For a magnificent account of Hart's year at Harvard, see Lacey, 178-208.

¹⁰⁶ Brock-Harrison interview.

¹⁰⁷ Leslie Green, Preface to the Third Edition of *The Concept of Law*, 2012.

¹⁰⁸ See Hart, *The Concept of Law*, 124-54.

Chapter 5. The Aftermath of *Discretion*

A few hours after Hart finished typing *Discretion*, on November 19th, 1956, he remained at his desk to write a long, happy letter to his children – “dictated on my marvelous machine to my marvelous secretary. You would adore this machine I am sure though sometimes it works very queerly: in order to get it to warm up so that it is ready for me to dictate I have to talk anything that comes into my head till a light starts flashing. What I usually do is to say, ‘Flash, Flash! FLASH! FLASH!!’ And then this comes out very oddly when the record is played back. Sometimes my voice rises to a terrible shriek and sometimes it is so deep it sounds like a cello.”¹

Hart congratulated his children on their recent success in school, and tried to paint a picture for them of how their educations might have been different if they had lived in the United States. His description of Groton illustrates Hart’s raw sense of wonder at American education – and his infectious enthusiasm for his temporary home:

“The children here don’t have marks or reports very frequently and I think they consider you are all bring rather severely treated by that kind of thing. Last Saturday I went to a school near here in the same state, Massachusetts, as this place: the school was called Groton and is quite a famous school designed on English lines. They call schools to which you pay to go as distinguished from the State schools ‘private’ schools, so they are like what we call public schools: indeed Groton is thought of by many people as the near equivalent of Winchester or Eton. Quite a lot of famous people including President Roosevelt went there: it is about seventy years old and of course that for America where everything is very much newer is quite old. It is out in the country with lovely scenery with mountains which you can see from the school gardens: there’s about 250 to 300 boys and lots of people have given lots of money to the school so there are quite a

¹ Letter from H.L.A. Hart to his Family, November 19, 1956. (On File with the Library of New College, Oxford.)

number of scholarships. I watched them play this extraordinary game of American football where they stop almost every five minutes and then pass the ball to each other in accordance with secret code words which they shout out and a great part of the game is to deceive the other side as to what they're going to do next. It seemed to me that they don't rush about nearly as much as at Rugger though some of the passes are very skillful indeed: they wear an extraordinary armour, a great helmet and something protecting their face as well and trousers that come down below the knees so they look as if they really expect violent treatment and to some extent they get it. I am told that the great games to watch are between the universities and there is a famous match here next week, Harvard against Yale. I went all over the schoolrooms, dormitories, etc.: all the boys have to make their own beds, sweep and keep clean their rooms but though they do this they are very comfortable indeed. The food is excellent and there is lots of warmth: they have a wonderful printing press which the boys operate and they print everything the school requires from the notices of services in chapel to the times for entertainment. Groton is rather a churchy school unlike most American schools where religion is not really taught at all. Groton has chapel twice a day and there is quite a religious tone about the place. They have one or two English masters who obviously enjoy being there: they would be paid much better than at an English school and they have lovely rooms and cars to take them into Boston when they want a little life. Of course no American school of his kind at any rate would dream of beating a boy and quite a lot of people here are horrified that this is ever done in an English school: so am I."²

Hart also tried his hand at explaining American Thanksgiving – a tradition his children must have found peculiar:

"Next Thursday is Thanksgiving Day here: this is celebrated as a holiday with lots to eat, especially turkey. The reason is that when the Pilgrim Fathers landed back in the Seventeenth Century they ran out of food very soon and were saved from starvation by a flock of turkeys which they shot down and ate together. I think with some red Indians with whom they had made peace. Very kind American friends here shower invitations on one to come and spend Thanksgiving day with them and I am going to dinner with a philosopher called Dreben. He was in Oxford for a year with his wife (who is a lawyer) three years ago and Mummy may remember him. He is very nice, very bright, and a wonderful mathematician who has invented something new about numbers which I couldn't explain. Thanksgiving Day is a feast here and I won't torment you by describing what they give one to eat. I have however discovered a new drink which you might sometimes have in England: it's called ginger ale float and it is just ginger ale

² Letter from H.L.A. Hart to his Family, November 19, 1956. (On File with the Library of New College, Oxford.)

with ice cream in it. The combination is marvelous and I'll stand you one when I return if you can get the ingredients.”³

It may have been America's physical scale – not its customs – that made the strongest impression on Hart. He evoked his awe at American's breathtaking expanse in the letter:

“Next Saturday I am going on a tremendous journey right over to the Pacific coast 3000 miles away. I leave Boston at 7:30 in the morning on a plane which does the trip of 3000 miles in an extraordinarily short time: it gets to San Francisco at four o'clock in the afternoon but owing to the fact that we are going so far west this means that the time is three hours in advance there so that the travelling time is actually something like eleven hours. We fly right across America over the Rocky Mountains and only stop once at Chicago for a half hour. I hope the clouds will not be too bad so that I can at least see the mountains but we do travel at some tremendous height (20,000 feet). The plane is a Super Constellation so I look forward to it very much. I am going to spend two and a half days only in San Francisco and I hope to see the place as well as giving my lectures there; then I'll take another plane right up near the Canadian border to Seattle which is not very far from Vancouver. After a day and a half there I am going to fly back by night to Boston and I shall arrive just in time for my class. It seems mad to go all this way for so little time and very tantalizing indeed. I'll send you postcards from San Francisco; it sounds like a most wonderful place. But the great question is how shall I wake up on Saturday morning in time to get to the Airport (which is about three quarters of an hour away from Cambridge) by 7:30. I think I shall have to buy an alarm clock... We suddenly had a snowstorm last week and I expect there is more to come.”⁴

Having just sent the written version of *Discretion* off to his colleagues, Hart's thoughts were far from legal philosophy. The moment of calm – unusual in a year, and a life, marked by panic, frenzy, and anxiety -- was perhaps an outgrowth of the pride Hart took in the essay he had just written. Two weeks earlier, and just a few days after his oral presentation to the Legal Philosophy Discussion Group, Hart had described the occasion in a letter to his wife. He noted that he had provoked “a strong debate trying to convince lawyers they had better start analyzing” the terms of their discussion more carefully,

³ Letter from H.L.A. Hart to his Family, November 19, 1956. (On File with the Library of New College, Oxford.)

⁴ Letter from H.L.A. Hart to his Family, November 19, 1956. (On File with the Library of New College, Oxford.)

instead of “asking 9 undifferentiated questions at once.”⁵ But most of all, he sounded pleased with his performance, impressed with his new colleagues, and hopeful for what the group could accomplish:

“In spite of (or perhaps because of) the storm, I was judged a success.... It’s quite commendable that these busy + rather proud lawyers with a v. vocational or practical slant should do this. So we’ll see what happens. ...the young lecturers ... were pleased to see the potentates challenged: not that the potentates are bad here: they are very good.”⁶

What Hart probably did not realize, writing to his children on a snowy afternoon in Cambridge, is that the ideas he had just expressed in *Discretion* would play pivotal roles in jurisprudence in the next half-century – provoking a debate with Henry Hart, launching his decades-long sparring-match with Lon Fuller, and mapping some of the arguments he deployed in his response, decades later, to Ronald Dworkin – a student of Fuller and both Harts and a prominent student at Harvard Law School during “Harvard’s Jurisprudence Year.”⁷ This chapter begins our discussion of the intellectual aftermath of *Discretion* by examining how Henry Hart responded to it, and how it shaped the discussions in the Legal Philosophy Discussion Group that autumn. The next Chapter will discuss the special influence it had on Lon Fuller.

A. The Hart-Hart Debate?

Hart reflected more publically on his participation in the Legal Philosophy Discussion Group the next winter in a BBC broadcast – “discharged on the British public, or such parts as listen to the Third Programme,”⁸ he joked to another participant in the group, and subsequently published in the BBC magazine *The Listener*. Fuller read Hart’s

⁵ Letter from H. L. A. Hart to Jenifer Hart (Nov. 4, 1956) (on file with the Library of New College, Oxford) (describing his talk on discretion). Lacey picked up on the language of this letter in the Biography when she noted that he “provoked a stormy debate”

⁶ Letter from H. L. A. Hart to Jenifer Hart (Nov. 4, 1956) (on file with the Library of New College, Oxford) (describing his talk on discretion).

⁷ Lacey, 185 (discussing Dworkin’s activities as a Harvard Law student that year).

⁸ Letter from H.L.A. Hart to Morton White, December 18, 1957 (on file with the Library of New College, Oxford)

reflection and sent copies to Felix Frankfurter⁹ and “present and former members” of the discussion group (which had reconvened the next year, without the visitors).¹⁰ This time, Hart sounded frustrated at his colleagues’ distaste for linguistic analysis:

“I remember meeting with some colleagues, lawyers and philosophers, to discuss the notion of a discretion in the judicial process. This is a matter of importance for Americans, who wonder whether or not their administrative agencies are not too free in the discretionary powers conferred upon them, and my friends detailed a large number of problems for discussion. I began with the suggestion that we might first consider what a discretion was, and how the judgments that we called discretionary differ from other forms of judgments which are the task of an official within the legal system to make. Nothing could have been more repellent than this suggestion that we should assist things by studying what was meant by the key words in the discussion.”¹¹

Hart was right: linguistic and conceptual analysis did not go over well at first. While H.L.A. Hart was giving his oral presentation, Henry Hart scribbled at the bottom of the handout, “I am very little concerned with the ‘true meaning’ of discretion, or with the meaning in which ‘discretion’ is used in ordinary speech,” noting that he preferred to focus on the “function of discretion, not verbal usage.”¹²

H.L.A. Hart looked warily on Henry Hart’s personal style at first, with an outsider’s detached amusement: “He was maddeningly nervous. Before giving an undergraduate lecture he would pace up and down smoking cigarettes for about two

⁹ See Letter from Felix Frankfurter to Lon Fuller, April 1, 1958 (on file with the Harvard Law School Library) (Fuller Papers Box 3, Folder 15). Justice Frankfurter wrote: “You are very generous to co-opt me into your legal philosophy discussion group, even if only to the extent of sending me the extract from H.L.A. Hart’s talk over the B.B.C. As a regular reader of *The Listener*, I had already seen the full text of his address, but this did not lessen in the slightest the pleasure you have me in remembering me among your correspondents.” Hart, for his part, steered clear of Frankfurter during his year in the United States; he once called Frankfurter a “chattering monkey.” See Lacey, 187.

¹⁰ See Memorandum from Lon L. Fuller, Professor of Law, Harvard Law School, to “Present and Former Members of the Legal Philosophy Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 8).

¹¹ H.L.A. Hart, *A View of America*, *The Listener* (1958).

¹² See “Outline of Paper on Discretion” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7) (this document is Henry Hart’s annotated copy of H.L.A. Hart’s handout).

hours.”¹³ But over the course of the year, the two Harts encountered each other “a lot” and developed a collegial relationship.¹⁴ In the wake of H.L.A. Hart’s analysis of discretion, they had occasion for a direct exchange – a Hart-Hart debate¹⁵ -- when Henry Hart delivered his own lecture on the same subject.

At the next meeting of the Legal Philosophy Discussion Group, which took place just one day after H.L.A. Hart circulated the written version of *Discretion*, Henry Hart addressed the group on “The Place of Discretion in the Legal System.” It was clear that he found H.L.A. Hart’s paper deeply provocative, and in many respects right, which may explain why he kept it in his files for the rest of his life and made reference to it in future correspondence.¹⁶ Henry Hart’s notes for his talk, which survive in his archive, reveal significant points of agreement, even direct influence, between the two Harts, while also clarifying their fundamental differences.¹⁷

Henry Hart reiterated the idea that indeterminacy is inevitable “because we are men, not gods,”¹⁸ specifically citing H.L.A. Hart and mentioning “[H.L.A.] Hart’s two interrelated factors of ignorance of future facts and ignorance of future aims.”¹⁹ Henry Hart seemed to restate the idea that aims and purposes, while important in law, are often vague, observing that “many purposes can be best judged from the perspective of application of policies,” in which case, “as Herbert [H.L.A.] Hart put it, aims can be seen

¹³ See David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 *Journal of Law and Society* 267, 280 (2005).

¹⁴ Sugarman interview, 280.

¹⁵ if Fuller, Devlin, and Dworkin will excuse the intrusion.

¹⁶ Letter from Henry Hart, Professor of Law, Harvard Law Sch., to Lon Fuller, Professor of Law, Harvard Law Sch., 3 (Nov. 5, 1957) (with copies to Al Sacks and John Dawson) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 4, Folder 2, and also preserved in the Papers of Henry M. Hart, Jr., Box 3, Folder 6) (referring to “Herbert Hart” and his contribution to their discussions on adjudication).

¹⁷ Notes of Henry M. Hart, Jr., Professor of Law, Harvard Law Sch., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7).

¹⁸ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 2.

¹⁹ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 2.

in conjunction with the specific situation to which decision relates.”²⁰ And like H.L.A. Hart, Henry Hart believed that the indulgence of personal whim had no place in law: “The idea of a ‘purely arbitrary’ but other- regarding choice,” he suggested, “is a legal and ethical monstrosity, and is inadmissible.”²¹

Thus for Henry Hart, the existence of indeterminacy in law posed a problem to be solved by identifying constraints on decision-making. Accordingly, he set out to characterize exactly what distinguished legitimate legal decision-making from “purely arbitrary” choice. For one, Henry Hart stated that the “bounds of permissible choice”²² are restricted in legitimate decision-making, reiterating H.L.A. Hart’s point that even though there is no right answer to discretionary decisions, there are wrong answers. Moreover, Henry Hart noted that the appropriate “factors and criteria to guide decision”²³ may provide a constraint, recalling H.L.A. Hart’s key idea that the factors to be considered in discretionary decision-making vary depending on the type of discretion in question.

Ultimately, Henry Hart seems to have believed that the term “discretion” was a misleading description of what judges should do in the sphere of indeterminacy. He proposed “reasoned elaboration” as an “alternative.”²⁴ The replacement is telling: while

²⁰ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 2.

²¹ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 4. He went on to distinguish between the case of legal officials for whom this was “self evident”, and private persons, where it is “more nearly arguable.” The phrases “but other-regarding” and “and ethical” are penciled in.

²² Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 4.

²³ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 5.

²⁴ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956), 5. There is a distinct sense in Henry Hart’s notes that he used the word “discretion” to denote relatively free, if not entirely arbitrary choice, in contrast to reasoned elaboration, despite H.L.A. Hart’s analysis to the contrary. See Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 101 (commenting on reasoned elaboration vs discretion in Henry Hart’s talk). In this sense, one might infer from Henry Hart’s essay alone that H.L.A. Hart had admitted that “much discretion could not be controlled by law.” See Eskridge and Frickey, *ci*. In fact, H.L.A. Hart believed that the concept of discretion itself provided an (internal) constraint, while Henry Hart seemed to believe that it was the (external) demand for

Henry Hart proposed reasoned elaboration as a guide for the exercise of discretion in law, H.L.A. Hart believed that the major tenants of reasoned elaboration were actually implicit in the concept of discretion itself: for H.L.A. Hart, genuine discretion, as opposed to arbitrary choice, *was* reasoned elaboration.

Despite the rational constraints of reasoned elaboration, Henry Hart still worried that decision-making in indeterminate cases permitted too much free choice. Accordingly, he turned to “pressures toward the reasoned elaboration of grounds of decisions, *even where this is not an obligation*,” focusing more on institutional design than on the ethics of official action.²⁵ Indeed, Henry Hart pushed beyond H.L.A. Hart’s analysis and identified “extrinsic checks” on discretionary power, including elections, impeachment, reappointment, and powers of review.²⁶ But H.L.A. Hart had mentioned, though not detailed, the possibility of extrinsic constraints the week before, highlighting the responsibility of reasoned discretion even though “it may of course be that the system fails to provide a remedy if they [officials] do indulge their whim”²⁷ – acknowledging the possibility of such remedies, but holding firm that the legal system asks more of those to whom it commits discretion than merely to evade extrinsic check.

As Henry Hart’s thinking developed, he began to wonder whether judicial decisions in indeterminate cases could ever be objectively correct. In November 1957, just months after H.L.A. Hart’s departure from Harvard, Henry Hart wrote to Fuller to explain the “analysis I have been reaching for lately in trying to distinguish the exercise of discretion from the exercise of the judicial function.” “Discretion, it seems to me,” he wrote, “involves the act of choice between two or more alternatives... each of which is regarded as permissible. Adjudication involves choice between two alternatives, one of

reasoned elaboration constrained discretion. Either way, the two Harts agreed on the importance of rational constraints on legal decision-making.

²⁵ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956) (Italics mine.).

²⁶ Notes of Henry M. Hart, Jr., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956).

²⁷ H. L. A. Hart, *Discretion*, 7.

which is regarded as right.”²⁸ He seemed to be searching for legal certainty, nursing a distinctly proto-Dworkinian sentiment and departing from H.L.A. Hart’s view that indeterminacy was an inherent part of law and discretion an inherent part of adjudication. Yet Henry Hart’s thinking did not take him down a fundamentally different track from H.L.A. Hart’s analysis in *Discretion*: Henry Hart went on to concede that “‘Right’ means rationally justifiable by reasoning from settled or properly assumed premises,”²⁹ which harmonized with H.L.A. Hart’s criterion for sound discretion.

Henry Hart’s famous Foreword to the 1958 Supreme Court Term (which he largely completed during the Legal Philosophy Discussion Group’s year³⁰) pursued the theme of rational certainty in law further. As G. Edward White interpreted it, Hart’s Foreword confessed a deep faith in reason. Hart suggested that: “given adequate time and discussion, the thinking of judges about particular cases, perhaps initially a product of their idiosyncratic presuppositions, could mature into something more synonymous with ‘reason,’ a suprapersonal construct.” Henry Hart’s Foreword “assumed that for every judicial problem there was ultimately a ‘reasonable’ solution.”³¹ Here, Henry Hart’s notion of judicial evolution toward reason is similar to a view H.L.A. Hart had expressed in *Discretion*: the idea that judges – perhaps even the legal system as an organic whole – can get better at discretionary decision-making with experience, in light of what he called the “progressive, evolutionary discovery of important hence justifying factors.”³² Although Henry Hart again flirted with the possibility of one “reasonable” solution” to every case, he ultimately agreed with H.L.A. Hart that indeterminacy was

²⁸ Letter from Henry Hart, Professor of Law, Harvard Law Sch., to Lon Fuller, Professor of Law, Harvard Law Sch., 3 (Nov. 5, 1957) (with copies to Al Sacks and John Dawson) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 4, Folder 2, and also preserved in the Papers of Henry M. Hart, Jr., Box 3, Folder 6)

²⁹ Letter from Henry Hart, Professor of Law, Harvard Law Sch., to Lon Fuller, Professor of Law, Harvard Law Sch., 3 (Nov. 5, 1957) (with copies to Al Sacks and John Dawson) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 4, Folder 2, and also preserved in the Papers of Henry M. Hart, Jr., Box 3, Folder 6).

³⁰ Eskridge and Frickey, 2048.

³¹ White, *The Evolution of Reasoned Elaboration*, 287-88.

³² Hart, *Discretion*, 10. H.L.A. Hart’s notion that discretionary decision-making can evolve for the better also resonates, on a less systematic level, with Henry Hart’s notion of “the maturing of collective thought.” See White, *The Evolution of Reasoned Elaboration*, 287-88.

inevitable in some cases, no matter how sound the process, how experienced the judge, or how mature the legal system.

In light of these points of similarity, the Hart-Hart debate turned out not to be much of a debate at all. The two Harts expressed considerable agreement about the necessity of indeterminacy in the legal system and the responsibilities of officials charged with its resolution.

There were, of course, also lasting differences. Despite the meeting of the minds about the obligations of legal decision-makers, Henry Hart was primarily concerned with law's institutional realization and skeptical of the value of H.L.A. Hart's linguistic philosophy. Yet eventually, perhaps grudgingly, Henry Hart came to recognize some virtue in analyzing the linguistic and conceptual nature of discretion – even highlighting the importance of such an analysis in *The Legal Process* materials themselves. The editors asked in the preface to the “tentative edition” presented in 1958: “What, if any, are the differences between the discretion of a court and the discretion of legislators? Or of the discretion of administrative officials in various kinds of contexts? Or the discretion of private persons? What, anyway, do we mean by ‘discretion’?”³³ Although the editors did not explicitly attribute this line of thought to H.L.A. Hart, the influence of his analysis of discretion is clear.³⁴

Continuing his initial interest in his namesake's thinking, Henry Hart watched H.L.A. Hart's career closely in the years after they first met. In 1965, four years after H.L.A. Hart wrote *The Concept of Law* and after several exchanges with Fuller, Henry Hart wrote a lengthy memo to Fuller analyzing H.L.A. Hart's jurisprudence. “I myself am disposed to ... define law openly (in substance if not in the same words) as ‘the enterprise of subjecting men to the governance of rules in such a way as to realize, as

³³ Hart and Sacks, *The Legal Process*, cxxxviii.

³⁴ Sebok notes that H.L.A. Hart made one explicit appearance in *The Legal Process*, when the editors discussed his “definition of duty.” (Henry) Hart and Sacks, *The Legal Process*, 128-9 n 5, cited in Sebok, *Legal Positivism in American Jurisprudence*, 169 n 232.

well as may be, the benefits of social living,”³⁵ Henry Hart wrote, in contrast to H.L.A. Hart’s definition of law as a system of rules identified by a rule of recognition. Indeed, for Henry Hart, law was a dynamic social *enterprise*, not a static system of rules. Henry Hart understood law as a “purposive activity” inextricably linked to the values it sought to realize and the ends it aimed to achieve. He believed that legal analysis that ignored those ends, in the process expelling value from the province of jurisprudence, necessarily ignored some of law’s most significant characteristics.³⁶ The most fundamental difference between the Harts, therefore, was that Henry Hart despised legal positivism. He “was tremendously against positivism,” H.L.A. Hart recalled. “And while he thought one or two things I’d done were good,” – presumably, the analysis of discretion chief among them – he “felt I was tragically misleading.”³⁷

Three days after Henry Hart’s presentation, H.L.A. Hart was on a plane to San Francisco – the trip he had mentioned to his children a few days earlier -- his thoughts far from legal philosophy. While he was in the air, he wrote another jocular letter to his family, again reiterating his awe at American technology and geography:

“1pm EST Saturday Nov 23, 20,000 ft above DES MOINES IOWA

³⁵ Memo from Henry Hart to Lon Fuller, February 9, 1965, “Some Notes on H.L.A.H’s Review,” 3 (on file in the Harvard Law School Library) (analyzing H.L.A. Hart’s review of Fuller’s *The Morality of Law*, almost to the point of obsession). Although Henry Hart clearly took Fuller’s side in the (H.L.A.) Hart-Fuller exchange, Henry Hart recognized some weaknesses in Fuller’s position.

³⁶ While the process theorists believed that legal theory needed to reflect law’s status as a “purposive activity,” they expected the legal process itself to be as value *neutral* as possible, providing a guide for social cooperation for citizens regardless of their substantive value preferences. According to one scholar, a professor connected with the process school “joked that the essence of his philosophy was summed up by the Fats Waller song ‘It Ain’t Whatcha Do, It’s the Way Thatcha Do It.’” See Geoffrey Kabaservice, *The Guardians*, 110 (2004). Further, for (Henry) Hart and Sacks, “the fundamental purpose of society, to the extent possible, [was] to ‘maximize the total satisfactions of valid human wants,’” (Barzun, 14, quoting Hart and Sacks, 104.), which bespoke a utilitarian – not perfectionist -- aim in law (as well as a singular faith in the power of technocratic government). The legal process, for (Henry) Hart and Sacks, served to de-centralize value choices, further reflecting the liberalism of the Cold War era. Further, the “principle of institutional settlement” associated legal validity with institutional provenance, not substantive outcome – linking (Henry) Hart and Sacks with the positivist sources thesis. Yet from a theoretical perspective, law, the tool society used to further its goals, was unintelligible except in light of its fundamental objectives, Hayekian and somewhat utilitarian as they may be.

³⁷ Sugarman Interview, 280.

I am flying across America from Boston to S. Francisco. They've just served lunch _ cocktails (enormous whiskies): the earth below is vividly white
Lakes Erie + Michigan are long past: I see the R. Missouri like a worm ... + what with 20,000 ft + too little oxygen _ the air-hostesses + whiskey + now not caring about lectures ahead – I am really VERY VERY DRUNK.”³⁸

Hart excitedly scribbled on the back of the airmail envelope at the end of the flight: “SEEN THE PACIFIC!” When he returned to Harvard the following Monday, however, in time to teach his class, it was back to work, and back to the Legal Philosophy Discussion Group.

B. “My Rival” – Julius Stone on Discretion

In the wake of the Hart-Hart debate – a debate of methodology, but not really of substance – the Legal Philosophy Discussion Group was firmly established as one of the major intellectual hubs of the Harvard Law School. When it came to legal philosophy, and the link between theory and practice in legal studies, the group was *the* place to be, the center of American, and, in light of its participants, Anglo-American legal thought. After Thanksgiving, the group continued exploring the philosophical and practical meanings of discretion – their work clearly informed by the contribution of the two Harts, and by the basic analytical framework sketched by H.L.A. Hart in the group's first paper.

On December 11, 1956, a few weeks before the Fall semester ended, Julius Stone, an English-born legal philosopher then working at the University of Sydney and the third wheel of the triumvirate of visiting professors (the others being H.L.A. Hart and Herbert Wechsler³⁹), delivered a paper that even more directly brought Hart's analytical jurisprudence and the key themes of the Process School into contact. Although Stone is a less significant figure in jurisprudential history – neither a powerful philosopher like H.L.A. Hart, nor an original analyst of law in practice like Henry Hart, nor a combination

³⁸ Letter from H.L.A. Hart to his Family, November 23, 1956. (On File with the Library of New College, Oxford).

³⁹ Another figure, Samuel Shuman, was in a more junior position and reflected on “Harvard's Jurisprudence Year” in the *Harvard Law Record* and in the book he wrote based on his work that year. See Samuel Shuman, *Legal Positivism: Its Scope and Limitations* (1963).

of the two like Lon Fuller – the paper he delivered sheds light on the basic problems on which members of discussion group were focused, and reveals the growing significance to the group of H.L.A. Hart’s initial analysis of discretion. Entitled “Openness and Concealment in Judicial Discretion in Relation to ‘Reasoned’ Elaboration’ of Grounds,”⁴⁰ Stone’s paper – which survives only in outline form -- explicitly made reference to Process School buzzwords like “reasoned elaboration,” attempted to situate the group’s discussions in the larger context of responses to legal realism, and pursued the theme of discretion’s relationship with the rule of law. Like the rest of the Group, Stone understood Hart’s paper as a contribution to the main projects of the Process School. Hart’s themes were the natural themes with which to continue discussion.

As soon as the year had started, Stone and Hart, exact contemporaries as undergraduates at Oxford though they did not know each other as students, did not hit it off. Nicola Lacey described their frosty relationship:

“With new acquaintances, his [Hart’s] assessments of character were immediate, sharp, and occasionally pungent. But one person, to whom he returned constantly in his diary, troubled him. This was Julius Stone. On first acquaintance Herbert described ‘My “rival” Stone’ as ‘genial on the surface and – I suspect – underneath’; ‘the chops no longer felt on the shoulder I gather’. But this assessment wavered, as he wondered how far Stone’s attitude to him was coloured by their different attitudes to their Jewish origins and by their diametrically opposed intellectual styles. Herbert felt ambivalent about Stone. He disliked his self-publicizing manner (announcements of Stone’s and Hart’s impending arrival at Harvard and student interviews with them in the Record are revealing: Stone’s were long and self-aggrandizing; Herbert’s were concise, diffident, and wry)’ shied away from his and his wife’s strong association with religious Judaism and with Zionism (‘she’s insane about Jewish family life which I said we didn’t have’); felt that his work was ‘poor and cloudy and full of enormous unanalyzed ideas’ and spoilt by its ‘enormous length’; and concluded that ‘I don’t ultimately trust him’; He’s odiously smooth: rather a vulture beneath the skin.’ Still, he wondered if he was being fair to Stone, and felt more than a tinge of discomfort about the way Stone had been treated by English universities in general and by Oxford in particular. Despite his extensive publication record at

⁴⁰ Hart would certainly have taken a certain pleasure in the length and obscurity of Stone’s title, in marked contrast to his own pithy “Discretion.”

a time when research in law schools was still at a low level, Stone had left England for New Zealand because he was unable to secure a permanent post.”⁴¹

But personal relations aside, and despite their different approaches to the study of law, Stone’s paper revealed a clear intellectual debt to Hart, further pursuing the relationship between a conceptual understanding of discretion and discretion’s proper function in the worldly legal system. Stone’s notes for his talk suggest that he framed the basic “problem of discretion” the same way H.L.A. Hart did: what is it, and how should it fit in with our legal system? Stone introduced his discussion by citing Hart’s central distinction between Express or Avowed and Tacit or Concealed Discretion⁴² -- a distinction Stone considered of great importance – before mentioning the importance of this analysis to our conceptual understanding of the rule of law, raising the psychological question (first brought up by Paul Freund) that Hart had claimed was unnecessary, and situating his remarks in the context of the “realist ‘exposure’ of the judicial process,” something he said posed for the group “some important unfinished business.” In other words, Stone believed – from an outsider’s perspective – that the Process generation needed to respond *more* fully to the Realists’ demonstration that reason and legal deduction often play little role in the judicial process, formulating a synthetic abstract *and* functional theory that would take stock of the fact of indeterminacy while providing a positive guide to its resolution. Such a theory was required for the conceptual integrity of the rule of law.

Continuing this theme, the relationship between discretion and the rule of law became the focus of the remainder of Stone’s talk. To Stone, like to Henry Hart (and H.L.A. Hart in his paper), the ideal of the rule of law required that indeterminacy be resolved according to a process of “reasoned elaboration,” a term Stone attributed to Henry Hart but an idea he attributed to Justice Felix Frankfurter, whom Stone quoted: “‘Law is an enveloping and permeating habituation of behavior reflecting the counsels of

⁴¹ Lacey, 189-90.

⁴² Memorandum from Julius Stone to the Legal Philosophy Discussion Group, “Openness and Concealment in Judicial Discretion in Relation to ‘Reasoned Elaboration’ of Grounds, Points for Discussion, December 11, 1956.” (On File with the Harvard Law School Library, Fuller Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart Papers, Box 35, Folder 8.).

reason on the part of those entrusted with power in reconciling the pressures of conflicting interests.’ Cf. What Henry Hart calls the duty and role of ‘reasoned elaboration.’”⁴³

For Stone – who, like H.L.A. Hart, was temperamentally more interested in law in general than the American constitutional system -- reasoned elaboration was called for in *all* legal systems, a requirement of legal systems as such, a feature of *general* jurisprudence, as opposed merely to the laws of any one nation.

Stone mused about reasoned elaboration’s function in common law and civil law jurisdictions, concluding that it was necessary in both varieties of legal system.⁴⁴ A tempting position was to hold that reasoned elaboration was unnecessary in a European-style civil law system, or in any hypothetical code law scenario, where legislatures or other law giving bodies spelled out most of the law, and judges were by and large much less powerful and basically not engaged in interpretation and the application of precedent (the dynamic duo of common law adjudication and the locus of much legal indeterminacy). On this point, Stone followed H.L.A. Hart: *all* attempts to regulate by prospective rules necessarily result in some zones of indeterminacy, because our ability to regulate the future is handicapped. Stone considered the view “that the code provision is decisive, as a barrier to reasoned elaboration” an “illusion.” Stone’s reasoning took a twist when he suggested that the necessity of reasoned elaboration was part of the reason code law systems could live up to the rule of law at all, asserting that “barrier[s] to reasoned elaboration” constituted a “brake on ‘the rule of law’ in a wider sense.” Stone seemed to agree with Hart that it was the possibility of rational discretion – reasoned elaboration – that made the rule of law possible at all, even in code law systems that made every attempt to regulate entirely by dispositive prospective rules.

⁴³ Memorandum from Julius Stone to the Legal Philosophy Discussion Group, “Openness and Concealment in Judicial Discretion in Relation to ‘Reasoned Elaboration’ of Grounds, Points for Discussion, December 11, 1956.” (On File with the Harvard Law School Library, Fuller Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart Papers, Box 35, Folder 8.).

⁴⁴ This point was clearly connected to the group’s fascination with Soviet law, and the broad mission of finding a legal theory that would condemn the horrors of the Soviet regime.

During Stone's session, the group was zeroing in on an idea they would pursue in the Spring during a session led by the political philosopher Carl Friedrich: reasoned elaboration was a central component of political legitimacy and applicable to all legal officials in all legal systems, not just a craft for federal judges in the American constitutional system. The philosophical questions of general jurisprudence loomed large – and these questions spurred Lon Fuller to compose an oblique, but revealing response to *Discretion*, to which we now turn.

Part III: The Pre-Hart-Fuller Debate Hart Fuller Debate

Chapter 6. The Pre-Hart-Fuller Debate Hart Fuller Debate: Part I

Early that Winter, while Henry Hart, Julius Stone, and many other members of the group were pursuing in their own thinking the aspects of H.L.A. Hart's *Discretion* that lay the farthest from pure legal philosophy – institutional arrangements, different types of discretion, means of constraining free choice, and so on – the most philosophically minded American in the group was puzzling over matters of much more abstract general jurisprudence. To Lon Fuller -- the most original jurisprudential thinker of the legal process generation -- Hart's *Discretion* represented not just a theory of judicial decision-making, but, more abstractly, the re-birth of the fact-value distinction. In his pre-War writings, Fuller had tried to bury the fact-value distinction by means of an interpretation of the importance of *purpose* to the law – something the realist movement largely ignored. For Fuller, law's purposive nature made preposterous the idea that facts and values could be held apart in legal analysis. In the context of American Legal Thought, at least, Fuller largely succeeded in convincing his colleagues that attention to purpose, and therefore a fact-value merger, were indispensable to jurisprudence.¹ As the Process School developed its "purposive theory of law" under the strong influence of Fuller, the notion that facts and values were intertwined lay at the core of their project, for reasons that we have seen.

Hart's very different take on the fact-value distinction, implicitly revealed in *Discretion*, pushed Fuller to clarify his thinking and more precisely reject Hart's implicit stance. Fuller replied first in *Human Purpose and Natural Law*, a somewhat overlooked paper which he delivered at a conference in December of 1956, immediately in the aftermath of *Discretion*, and then, a few months later, in a unpublished (and long

¹ Lon L. Fuller, *Law in Quest of Itself* (1940).

undiscovered) essay which he circulated to the Legal Philosophy Discussion Group in the Spring of 1957, discussed and analyzed for the first time since then in Chapter 7 of this dissertation. *Discretion* read in the context of these two documents from Fuller, provoked a pre-Hart-Fuller Debate Hart-Fuller Debate – a crucial backdrop to the famous debate that eventually emerged in published form. In other words, while *Discretion* provoked a short-lived Hart-Hart debate, in some sense it *launched* the legendary Hart-Fuller debate, the quarrel over the conceptual relationship between law and morality that remains a cornerstone of jurisprudence today. Although the direct impetus for the written Hart-Fuller exchange was Hart’s Holmes Lecture in April – at which Fuller paced “back and forth at the back of the lecture hall like a hungry lion” and left “half way through the question session”² – the Legal Philosophy Discussion Group, and the discussion surrounding *Discretion*, likely provided Hart’s first point of direct academic engagement with Fuller, who listened carefully, unaware that he would one day be remembered as one of Hart’s most famous interlocutors.³

A. Hart’s Analysis of Purpose and the Fact-Value Distinction in *Discretion*

From today’s perspective, we know that Fuller understood purpose as a core component of law in two connected ways, each informing his anti-positivism. First, law’s purposive character was part of law’s definition: law *was* a “purposive activity,” and a legal theory that ignored law’s purposive character was as inaccurate as any other reductively externalist description of purposive human conduct.⁴ Second, legal reasoning and adjudication required an attempt to give effect to the specific purposes underpinning the laws at issue.⁵ This view conflicted with Hart’s in *Discretion*. Hart had taken a

² Lacey, 197.

³ For an account of Fuller’s legal theory before his encounter with Hart, see Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller*, 25-48 (2012).

⁴ For examples on this point see Lon L. Fuller, *Human Purpose and Natural Law*, 53 *The Journal of Philosophy* 697, 698 (1956), the essay Fuller wrote shortly after Hart’s *Discretion*, discussed at length in this Chapter.

⁵ See generally Lon L. Fuller, *Positivism and Fidelity to Law: A Response to Professor Hart*, 71 *Harv. Law. Rev.* 630 (1958). See also Sebok, *Reading The Legal Process*, 1575 (explaining how (Henry) Hart and Sacks adopted Fuller’s theory of adjudication); but for a different view see Brian Leiter, *Positivism, Realism, Formalism*, *Columbia Law Review*, 1157 (explaining that “the

nuanced, split position on this issue -- a position he did not make as clear in later work. In Hart's view, purpose was indeed a part of legal reasoning, but not fundamentally relevant to what made law *law*.⁶ Hart agreed with Fuller's epistemic claim that adjudication and legal reasoning involved purposive analysis. But he rejected Fuller's ontological claim that law's purposive character and the goals law pursued were part of law's *definition* -- part of what distinguished law from other forms of social ordering.⁷

1. Purpose in Legal Reasoning

In *Discretion*, Hart suggested that discretionary decision-makers were required to analyze and weigh the law's perhaps unclear, perhaps conflicting general aims -- the potential vagueness of which was itself the source of much indeterminacy in law (owing to the Relative Indeterminacy of Aim) -- and reformulate those aims so they could apply more clearly to the case at hand, producing "pro tanto" determinacy.

Hart's example of a judge applying the standard of due care in civil negligence,⁸ a case in which the Relative Ignorance of Fact and the Relative Indeterminacy of Aim colluded to create indeterminacy, illustrated how Hart understood purposive analysis fitting into discretion. Hart observed that the due care standard indeed had purposes, easily stated at a general level:

Legal Process theory of adjudication as 'reasoned elaboration' involves an essentially anti-positivist view of law, because it makes morality a criterion of legality by its emphasis on "purposive" interpretation").

⁶ See also H.L.A. Hart, *The Morality of Law* by Lon L. Fuller, 78 Harv. Law Rev. 1295, 1286 (1965) (book review) (discussion Hart's view of the role of purpose in legal analysis).

⁷ There are of course numerous theoretical positions legal positivists might adopt on the question of purpose in law, and numerous complicating questions philosophers might ask. *Discretion* did not take up this issue as a problem in need of direct, careful explication. Hart's essay did, however, have the effect of sketching a position that clarifies his basic response to Fuller. It also helps to reveal the dilemmas that led him to endorse "soft positivism" decades later, once the distinction between hard and soft positivism had been introduced. But note that Hart took the role of law's most fundamental purposes seriously in *The Concept of Law*, with his defense of the idea that all legal systems must contain a "minimum content of natural law" in order to facilitate the basic purpose of human survival. Hart, *The Concept of Law*, 193-200.

⁸ Hart, *Discretion*, 13. This example and accompanying explanation appears almost verbatim in *The Concept of Law*. See Hart, *The Concept of Law*, 132-33.

“What we are striving for in the application of standards of reasonable care is (1) to insure that precautions will be taken which will avert substantial harm yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests.”⁹

But he pointed out that these aims prove vague and indeterminate when applied to specific, unforeseen cases. In application, the discretionary process required the judge to “weigh and choose between or make some compromise between competing interests and thus render more determinate our initial aim.”¹⁰ Put this way, Hart saw discretion as a process of rationally reformulating and contextualizing general aims so that they could more determinatively apply to specific cases. In the case of the due care standard, “our aim of securing people against harm is indeterminate till we put it in conjunction or test it against possibilities which only experience will bring before us: when it does then we have to face a decision which will when made render our aim *pro tanto* determinate.”¹¹ Once the aim was so rendered, the judge could combine it with other relevant factors, which, all together, could have the cumulative effect of making the case itself “*pro tanto* determinate” and therefore resolved, though not perfectly conclusively.¹²

⁹ Hart, *Discretion*, 13.

¹⁰ Hart, *Discretion*, 13.

¹¹ Hart, *Discretion*, 13.

¹² It is worth noting that even though Hart’s illustration of legal reasoning was restricted to indeterminate cases (mainly those cases with vague or conflicting purposes), *Discretion* contained inklings of the idea that purposive analysis was part of legal reasoning *even in core cases*. As we have seen, in the Holmes Lecture, Hart attributed legal indeterminacy to *linguistic* indeterminacy. A rule proved indeterminate in application because of the inherent vagueness of the words with which the rule was expressed. But in *Discretion*, Hart did not discuss the indeterminacy of language; he attributed legal indeterminacy to the “handicaps” on prospective lawmaking (something he mentioned again in *The Concept of Law*) – among them the “Relative Indeterminacy of Aim.” This account of indeterminacy had two implications. First, and most obviously, *unclear* aims and goals can be a source of *indeterminacy* in cases where the law does not apply clearly, and discretion becomes necessary. Second, and less obviously, *clear* aims and goals can be a source of *determinacy* in cases where the law does apply clearly. Purpose was part of what made easy cases easy, just as it was part of what made hard cases hard. Fuller, however, understood Hart as endorsing purposive analysis only in the penumbra. Fuller wrote, summarizing Hart’s theory: “When the object in question (say, a tricycle) falls within this penumbral area, the judge is forced to assume a more creative role. He must now undertake, for the first time, an interpretation of the rule in the light of its purpose or aim. Having in mind what was sought by the regulation concerning parks, ought it to be considered as barring tricycles?” Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 662. For a discussion on this point see Brian Tamanaha, *Beyond the Formalist-Realist Divide*, 168-69, noting that Hart foresaw purpose as relevant only in indeterminate cases, while Fuller argued that purpose always enters

2. Purpose in Legal Theory

Although Hart clearly envisioned purpose factoring into legal reasoning, he seemed to reject the claim that purpose was relevant to law's fundamental definition. For that matter, he seemed to reject the claim that purpose could be relevant to *anything's* fundamental definition.

Near the start of *Discretion*, Hart noted that “very often... the question ‘What is X?’ and the question ‘For what purposes do we in fact use X?’ must be considered together. This is obviously the case where the expression in question, X, like the word knife turns out on investigation to refer to some instrument designed for some purpose.”¹³ With terms like “knife,” Hart observed, “what the thing is used for actually enters in to the meaning of the expression.”¹⁴

Hart's key observation, though, was that it is impossible to determine *ex ante* whether purpose is an important component of a term's meaning. Whether something had essential, latent purposes could only be discovered *after* an initial, purpose- and

the picture. In a later work, in 1983, Hart revisited this point, stating explicitly that purpose could be relevant to “what it is that makes clear cases clear.” See Hart, *Essays in Jurisprudence and Philosophy*, 8, noted in Tamanaha, *Beyond the Formalist Realist Divide*, 169 note 59. While this may have been a concession in light of the Holmes Lecture, *Discretion* may suggest that this was part of Hart's position all along, though clearly not fully worked out. Hart confessed that he put too much weight in the Holmes Lecture on the indeterminacy of legal language, and that he ignored the role purpose plays in clarifying purely linguistic indeterminacy: “the obvious or agreed purpose of a rule may be used to render determinate a rule whose application may be left open by the conventions of language.” In other words, Hart did envision purposive analysis in the core; in fact, purpose was part of what designated these cases as core cases, though they may have appeared penumbral when viewed from a purely linguistic perspective. It would be a mistake to infer from this observation that Hart envisioned a semantic hierarchy in which purpose could enter the analysis only if language was indeterminate: Hart also said that “the obvious or agreed purpose of a rule... may serve to show that words in the context of a legal rule may have a meaning different from that which they have in other contexts,” suggesting that purpose and language contribute mutually to the meaning of legal rules in core cases. Importantly, Hart reiterated that purposes were not always “obvious or agreed” upon – there were always genuinely *indeterminate* cases with genuinely *unclear* purposes. Hart, *Essays in Jurisprudence and Philosophy*, 8.

¹³ Hart, *Discretion*, 3.

¹⁴ Hart, *Discretion*, 3.

value-free linguistic analysis has taken place: “Whether this [i.e. purpose being a component of meaning] is the case or not cannot be settled in advance of inquiring what the standard use of the term in question is.”¹⁵ Hart seemed to accept – *ex post* -- that law was indeed a purpose-laden endeavor (like a knife), but he rejected the claim that law’s purposive character was part of law’s definition.

This analysis reflected Hart’s deeper philosophical approach to definition. In his Inaugural Lecture in 1952, he had rejected the genus-species approach to definition (on which purpose could be an element of definition: of sharp objects, knives are those designed and used for cutting, and so on) in favor of an approach rooted in ordinary language usage.¹⁶ In the words of *Discretion*, definition only involved determining “what the standard use of the term in question is.”¹⁷ Accordingly, the philosophical determination of what something *is* did not involve analysis of what it is *for*; that was a secondary question to be answered after a definition had been formulated. The law was no exception.

In *Discretion*, Hart lamented that confusion on this point muddled philosophical discussion, observing that attempts at definition sometimes became forums for debates about what the thing being “defined” *ought* to be like. “An example of this situation is I think discussion of what the State is,” Hart wrote. “There is little disagreement that the State is in fact an organization of persons living on a territory under a certain type of legal system: the real dispute is more as to what form the state should take consistent with these primary features and what we want the State to do for us.”¹⁸ Hart further believed that any helpful discussion of “what form the state should take” or “what we want the

¹⁵ Hart, *Discretion*, 3.

¹⁶ Hart, *Definition and Theory in Jurisprudence*, 21-48.

¹⁷ Hart, *Discretion*, 3.

¹⁸ Hart, *Discretion*, 3. On this point, see Fuller’s apparent response in *Human Purpose and Natural Law*, written shortly after *Discretion*, where he discusses questions like “What is Art?” “It is said,” Fuller wrote, that phrasing questions in that way “invites a confusion of fact and value and serves generally as a cover for a fraudulent intent to pass off the subjective opinion of the author about what art ought to be for a description of what it is in fact, -- as if it were possible to describe a major area of human striving without participating in that striving and as if that participation could be otherwise than creative!” Fuller, *Human Purpose and Natural Law*, 704.

state to do for us” (or indeed what role discretion should play in the legal system) could proceed only after an analytical definition based on linguistic usage had been formulated.

As Hart understood it, therefore, his account of legal reasoning in *Discretion* did not commit him to an anti-positivist position. The separation of epistemology from ontology gave him a way to accept that legal reasoning required the appeal to value-laden factors, and at the same time maintain that legal theory, the bird’s-eye philosophical account of the whole legal system, could be entirely value-neutral and positivistic. Thus *Discretion* did not cede ground to Hart’s American colleagues in the broader dispute over the fact-value distinction. The essay revealed Hart to be a purposivist *and* a positivist; he remained firm that legal reasoning and legal theory were different things. Just as Hart had admonished the realists for being too quick to leap from the fact of judicial choice to the prediction theory of law, he found fault with Fuller for being too quick to leap from the fact of purposive legal reasoning to the conceptual integration of law and morality.

The compatibility of Hart’s embrace of purposive analysis in discretion with his firm separation of fact from value on a definitional level was a theme to which Hart returned without much detail in further exchanges with Fuller. In his Holmes Lecture, Hart cited the “rightness of deciding cases by reference to social purposes”¹⁹ but focused more closely on explaining how Fuller’s *claim* that legal reasoning required reference to purpose did not entail a logical connection between law and morality.²⁰ In a later round of the debate, Hart would again deny that the identification of law as a “purposive activity” proved a necessary connection between law and morality, this time making the slightly different argument that “the notions of purposive activity and morality... were two notions that it is vital to hold apart.” Poisoning is a purposive activity, Hart famously observed (presumably one any young hostess should avoid -- unless, in her discretion, desperate times called for desperate measures) but the principles guiding good poisoning are not *moral* principles in any sense of the word; they are merely principles of efficacy.²¹

¹⁹ Hart, *Positivism and the Separation of Law and Morals*, 612.

²⁰ Hart, *Positivism and the Separation of Law and Morals*, 612.

²¹ Hart, *The Morality of Law by Lon L. Fuller*, 78 Harv. Law Rev. 1285-6, 1286 (1965) (book review).

Hart did not make much headway with Fuller on the limits of purpose's role in legal theory. Fuller remained obsessed with purpose – and the association between purpose and morality -- his whole career. This difference became something of a sticking point between the two men, one they were not shy to joke about in later years. The jokes, however, only reiterated the basic difference: Hart believed purpose was relevant, but only to a point. In his review of Fuller's book *The Morality of Law*, Hart wrote:

“The author has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man.... The inspiration is so considerable that I would not wish him to terminate his longstanding union with this *idée maitresse*. But I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many readers will feel the drop in temperature; but they will be amply compensated by an increase in light.”²²

The remark amused Fuller, who wrote privately to Hart:

“All I can say of Miss Purpose is that the Old Girl still looks good to me. One of her enduring charms is that she is a very complex creature indeed, subject to unpredictable moods of surrender and withdrawal. I believe deeply in her without pretending that I really understand her. So the high romance of which you complain will probably continue despite your thoughtful warning that our liaison promises trouble.”²³

B. Fuller's First Responses

In the weeks after Hart's *Discretion*, however, Fuller was freshly trying to figure out how Hart's analysis related to his own purposivism. The clarity we now enjoy had yet to arise. In the fall of 1956, the question of how to understand the role of purpose in law – and the related question of how to understand law's “purposiveness” of law, either at the epistemic level of legal reasoning, or at the ontological level of legal theory –

²² Hart, *The Morality of Law* by Lon L. Fuller, 1296.

²³ Letter from Lon L. Fuller, Professor of Law, Harvard Law School, to H.L.A. Hart, Professor of Jurisprudence, University of Oxford (February 3, 1963) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

became a significant concern for Fuller, and the rest of the Legal Philosophy Study Group, writing and thinking in the aftermath of *Discretion*, and, for the first time, in Hart's immediate vicinity.

Shortly after Hart circulated his *Discretion* paper, Fuller circulated to the group a draft of an essay that would eventually be called *Human Purpose and Natural Law*.²⁴ This was, on some points, a direct rebuttal to certain parts of Hart's *Discretion* paper. Fuller was working on the draft, which he would present at a conference of the Eastern Division of the American Philosophical Association at the end of December. It was eventually published in the *Journal of Legal Philosophy*, and reprinted the next year in the *Natural Law Forum*, provoking a response from noted American philosopher of science, Ernest Nagel, who was sympathetic to Hart's positivism. Seen through a historical lens, *Discretion* and *Human Purpose and Natural Law* comprise the pre-Hart-Fuller Debate Hart Fuller Debate.

Human Purpose and Natural Law is not a well-known essay in the context of Fuller's other, more famous works. It is brief, not particularly lucid, and written for speech rather than print. In historical context, however, it is deeply significant for our purposes: it represents Fuller's first response to Hart's *Discretion*, and as such, the first retort in the Hart-Fuller debate slowly creeping toward its more famous boiling point. The essay represented yet another attempt by Fuller to link the concept of purposivism with natural law theory. This was a linkage he had set out to establish in his earlier work, most notably in *Law in Quest of Itself* in 1940. There, Fuller's basic idea had been that the law was a dynamic, evolving, constantly changing system seeking to vindicate certain basic human goods, a system in which citizens and officials continuously re-evaluate the specific ends they seek, in tandem with evaluating the best means to achieve them. To Fuller, the law is dynamic and purposive, not static and inert; *is* and *ought* were intimately connected – and the methods of the legal theorist must reflect it. In 1940, the

²⁴ We know that Fuller circulated *Human Purpose and Natural Law* in draft form to the group because his "Reply to Critics," discussed in Chapter 7, makes reference to circulating an essay in draft and states that the essay he had circulated discussed the "collaborative articulation of shared purposes" – pointing clearly to *Human Purpose and Natural Law*.

only available tradition that took seriously the integration of is and ought in legal analysis was natural law theory, and accordingly Fuller called for a revival of it -- with extremely significant modifications.²⁵ In *Human Purpose and Natural Law*, Fuller pursued the linkage between law's purposiveness and natural law theory further, this time directly in the wake of Hart's new positivism, which did not exist as a possible theoretical opponent when Fuller wrote *Law in Quest of Itself*. It was a linkage that was prone to generating problems and objections, especially from Hart, who defended value-neutral legal *theory* (as opposed to legal reasoning) and would point out that purposes can be immoral and that purposive conduct is not the same thing as moral conduct. Hart is not explicitly named in *Human Purpose and Natural Law*, but his thinking, fresh in Fuller's mind, is evident throughout.

Human Purpose and Natural Law represented Fuller's first direct critique of Hart's analytical approach to *definition*. As we have seen, Hart tried to distance himself from law's purposiveness by accepting only purposive legal reasoning, not purposive legal theory, and by arguing that the principles of good philosophical definition precluded purpose from being an essential component of law's -- or *anything's* -- definition. In *Human Purpose and Natural Law*, Fuller gave reasons to believe that Hart's linguistic philosophy in fact misunderstood the basic nature of language itself -- with the strong implication being that definition based on linguistics alone was deeply insufficient. The essay also represented, importantly, Fuller's response to Hart's arguments in *Discretion* about the relationship between purposive analysis and legal theory. In particular, Fuller hazarded a response to Hart's arguments that the separation of legal reasoning from legal theory was a legitimate response to the position that the necessity of purposive interpretation entailed some form of natural law theory. Fuller also provided a response to Hart's argument that purpose can never be a legitimate part of definition, because purposiveness is a property that can be identified only after a value neutral definition had taken place.

²⁵ See Fuller, *Law in Quest of Itself* (1940).

Human Purpose and Natural Law redoubled Fuller's commitment to the position that there could be no legitimate definition of law that did not take account of its purposive character. Law was purposive inherently. And crucially, Fuller's draft pursued the argument that law's purposiveness was essential to law's nature, therefore motivating a revival of natural law theory in modified form. The tone of *Human Purpose and Natural Law* – sometimes defiant, sometimes defensive -- suggests that Hart's arguments had perplexed Fuller and inspired in him clear self-doubts. Although the essay was not Fuller's clearest work, it is important for what it reveals about the way the Hart-Fuller debate, and the internal deliberations of the Legal Philosophy Discussion Group, were unfolding in the very early stages. Fuller's argument in *Human Purpose and Natural Law* was abstract – and therefore resists the sort of sharp analytical characterization that was possible for Hart's *Discretion*. But the relevance to the ongoing disputes about positivism, purposivism, interpretation, and theory is clear. Fuller's thesis was that “when we accept the full consequences that flow from a view which treats human action as goal-directed, the relationship between fact and value assumes an aspect entirely different from that implied in the alleged ‘truism’ that from what *is* nothing whatever follows as to what *ought* to be.”²⁶ A careful analysis of Fuller's essay reveals the core of his thinking.

1. Scientific Description of Human Behavior Requires Purposive Analysis

The first part of Fuller's argument was purpose is an essential component of human behavior; without understanding the purposes people seek, *scientific knowledge* of human behavior is unattainable. Fuller provided a vivid illustration of the idea that the simple task of describing what people are doing (supposedly a factual endeavor) requires an understanding of purpose with an allegory. Fuller sketched a situation with exaggerated externalism of perspective:

“I see at a distance a boy who holds in his hand a small, gray, roundish object. He seems to be contemplating this object intently. After a period of hesitation, he places the object carefully between his palms and repeatedly presses on it. He

²⁶ Fuller, *Human Purpose and Natural Law*, 697

then relaxes his grip, holds the object loosely in his left hand, and begins to look about him on the ground. He apparently finds what he wants, for he bends over and picks up a stick. This he uses for a while to prod or push against the object. He then throws the stick away and bends over to strike the object several times against a rock. Shortly he gives up this activity and walks about as if undecided what to do next. Suddenly he begins to gather sticks together, arranges them on the ground in a pile, lights a match to them, places the object in the fire, and then stands off in an attitude of expectancy.”²⁷

Fuller’s point with this example was to show that a purely “externalist” description of human behavior often conceals as much as it reveals. For “it is obvious that something happens to this account, a sudden accretion of meaning occurs, when we learn that the boy was throughout trying to open a clam.”²⁸ This “accretion of meaning” was not limited to interpretive understanding; for Fuller, purposiveness extended to the realm of *scientific fact*. We are only able, Fuller claimed, to “control and predict” the boy’s actions if we are aware of the purposive nature of his behavior.²⁹ By extension, we are only able to “control and predict” human events, including law, in light of the purposes and aims of the people participating in them. Scientific knowledge of human affairs – knowledge that allows us to “control and predict” – required purposive analysis.

In making this observation, Fuller hoped to debunk Hart’s implicit claim that purposiveness was an incidental property that could be observed in human behavior, but not fundamentally part of definition or ontology. It was, in this sense, a direct rejoinder to Hart’s observation that a definition is based on the ordinary meaning of words, and that if, on reflection, something turns out to be purposive, then that is indeed an interesting observation but not part of the definition, or fundamental ontology, of the thing in question. Fuller quietly suggested that Hart’s position was antediluvian, and that his own approach was the philosophy fit for the contemporary world: “A former age would have said quite simply that this clue of purpose was necessary to ‘understand’ what was

²⁷ Fuller, *Human Purpose and Natural Law*, 697-8.

²⁸ Fuller, *Human Purpose and Natural Law*, 698.

²⁹ It is worth noting at this point that Fuller seems to be anticipating a hermeneutic turn in legal theory – something that would find its way into Hart’s later work, and the work of many scholars since. See Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 Southern Methodist University Law Review, 167 (1999).

happening”³⁰ – but not to define it at the most fundamental level. For Fuller, the role of purpose went much deeper. Gesturing back implicitly to the Langdellian concept of law as science, Fuller’s clear implication was that Hart treated the law as if it were an aspect of the natural world – a plant, a chemical interaction, a physical phenomenon – rather than a *human* endeavor, something that required new forms of analysis to understand fully, or even to understand truly scientifically.

2. The Importance of Purposive Analysis Requires a Fact-Value Merger

For Fuller, therefore, purposiveness was essential to human behavior, part of its meaning, and part of its fundamental definitional ontology. The second part of Fuller’s argument was that given this, there could be no meaningful separation of fact from value in the analysis of human conduct, because the fundamental status of purpose in human behavior entailed a merger of fact and value. “In any interpretation of events which treats what is observed as purposive, fact and value merge,” Fuller wrote. “In such a case the view that value is something foreign to a purely factual account – something projected by the observed on the thing observed – simply will not stand scrutiny.”³¹ Fuller pointed out that “when we are dealing with purposive action projected through time, the structure that we observe, recall, and report lies not in any instantaneous state of affairs, but in a course of happening, which can be understood only if we participate in a process of evaluation by which the bad is rejected and the good is retained.”³² Fuller seemed to think that purposiveness required a fact-value merger for at least three distinguishable reasons.

- First, purposive human behavior is not static; it is dynamic. The static-dynamic distinction has had a plethora of meanings in legal theory, but to Fuller, it was a simple observation that led to what he saw as an obvious conclusion: the normal fact-value relationship, which was forged in the context of the scientific observation of *states* of affairs, requires scrutiny when applied to dynamic human behavior.

³⁰ Fuller, *Human Purpose and Natural Law*, 698.

³¹ Fuller, *Human Purpose and Natural Law*, 698

³² Fuller, *Human Purpose and Natural Law*, 699

- Second, components of purposive behavior become locally good or bad *vis a vis* the overall purpose: what would otherwise be purely factual properties become value laden as a result of being part of a system oriented around a purpose. An adequate description cannot ignore the idea that there are better ways to open clams than others, and therefore cannot ignore evaluation: “I know that this is not a ‘good’ way to open clams; judged in the light of the boy’s purpose it lacks ‘value’.”³³
- Third, when human beings engage in dynamic, purposive behavior, they themselves *understand* some actions to be good, and others bad, *vis a vis* their purpose. This means that the unfolding of the event presupposes that the participants understand it in value laden terms; if they did not, the process would have unfolded quite differently, without the same internal orientation. The internal guiding *telos*, therefore, was an essential component of a *scientific* understanding of human behavior.

To illustrate the peril of describing or providing a factual account of human behavior without an understanding of fundamental aims, Fuller contrasted the description of the clam-opener with a second example:

“If I look over the shoulder of a mathematician working on a problem beyond my comprehension, I cannot predict or control what he will do, nor will I be able to give more than a trivial account of what I have observed. In such a case, as in that of the boy and the clam, the ‘fact’ of the event can be understood only by one sufficiently capable of evaluation to know what is happening when a good thing is embraced or a bad one rejected.”³⁴

Like Fuller’s hypothetical clam opener, this example was clearly allegorical. Fuller’s clear implication was that *law* was an instance of purposive human behavior, and that legal analysis would get nowhere without a fact-value integration. Therefore, a

³³ Fuller, *Human Purpose and Natural Law*, 698

³⁴ Fuller, *Human Purpose and Natural Law*, 699.

description of law that ignored purpose as a component of fundamental ontology and insisted on a separation of fact from value – i.e. Hart’s definitional legal positivism – was similar to a description of the mathematician’s marks on the wall that ignored the problem the mathematician set out to solve. To Fuller, the legal positivist was like a person who stared at hieroglyphics without realizing that the marks aimed to communicate something – that they had more meaning than a two-dimensional, pictorial account could convey. Fuller wanted the legal theorist to read, not stare.

3. How Does *Morality* Become Relevant? Fuller’s Magic Mountain Part I

Importantly, Fuller did not seem at this point to be making any strong claim that the purposive nature of clam opening or mathematics suggested that these were valuable or moral activities -- good thing to do all things considered. At this point in his argument, Fuller’s claim was restricted to the observation that *when* a purpose is pursued, we inherently attribute value to component actions in light of whether they further or restrain the achievement of the purpose, and that the participants in purposive activity themselves understand their actions as having value in this respect. Purposiveness, therefore, suggested a self-contained, “inner” morality.

Nevertheless, Fuller did make a fascinating argument – almost a cosmological argument – to suggest that law’s purposiveness entailed a much stronger connection between law and morality. This argument pushed beyond the mere claim that facts and values must be integrated, and pursued the stronger claim that *morality itself* is part of law.

Fuller’s argument on this point had to do with *shifting* purposes.³⁵ “Shall we treat the shift from one purpose to another as a kind of miracle, neither requiring nor permitting any participation by the observer in the evaluation that produced the shift,” Fuller asked? Or shall we say that shifting between purposes indicates that the actors are

³⁵ Here Fuller had in mind only the process by which individual actors adjust the goals they pursue. In a broader sense, this point may relate to Fuller’s earlier (and vaguely defined) concept of the dynamism of legal life, but that connection is not the crux of Fuller’s argument.

pursuing some sort of higher purpose or value, which in turn is essential to the description of the behavior in question? Fuller's clear implication was that the latter was a superior approach. Fuller's point was this: the fact that participants change the *immediate* purpose they pursue within an identifiable course of behavior indicates that the behavior in question is guided by higher purposes. Those higher purposes, again, can change in light of higher purposes still, and so on and so forth, until the purposes being pursued are in fact the most general purposes of harmonious social living and the good life -- genuine *value* criteria not tethered to any particular "end in view."³⁶

Fuller failed to sketch this argument in much detail, but we can reconstruct his thought. Imagine a complex form of purposive human behavior – say, the law. When we zero in on any small aspect of behavior in a legal system, it is possible to discern particular purposes that citizens and officials pursue. But the actors engaged in the law frequently shift their purposes. When they do so, they do so in light of higher order purposes or goals. In turn, these higher order purposes can shift in light of even higher purposes.³⁷ The process is reiterated continuously until it becomes apparent that there are master goals or master aims anchoring the entire enterprise of law. These are the purposes of law in the most general sense, and, given their position at the end of the purpose chain, they seem to merge with genuine morality. Therefore, morality is an essential component of law, something without the light of which any description of law is inadequate: black and white, two dimensional, like the description of mathematical equations without an understanding of the mathematical problem. "Any single human purpose," Fuller wrote, "—whether expressed in actions or words – is an incomplete thing when severed from the total system of which it forms a part. The meaning of any

³⁶ Fuller attributed the notion of the "end in view" to Dewey, again reflecting the pragmatist influence on his thinking. For an in-depth discussion of Fuller's jurisprudence in the perspective of philosophical pragmatism, see Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 Harvard Law Review 433 (1978).

³⁷ This point was importantly different from Ronald Dworkin's more recent claim that law actually is a branch of morality, though it has tendencies in the same direction. Fuller's point was more modest: the fact that we can purposively change the purposes we seek indicates the inexorable presence and operation of purposes of ultimate value, which must be moral purposes.

given purpose is always controlled by latent purposes in intersection with it,” and, presumably, also the broader purposes it serves.³⁸

4. Anticipating Hart’s Poisoning Objection

Fuller’s quasi-cosmological argument for a merger of law and morality – a stronger claim that the mere merger of fact and value in legal analysis -- anticipated what would become one of Hart’s strongest objections to his theory: the objection that “value” identifications within a purposive enterprise merely serve to identify the best *means* of achieving the purpose – not anything to do with “ultimate value” or genuine morality. “That there are good and bad ways of opening clams leaves untouched the question whether opening clams is itself an activity entitled to be called good,”³⁹ Fuller admitted. How, then, can one really say that purposive analysis entails genuine value theory, as opposed to mere evaluations of efficacy? This objection would return in later stages of the Hart-Fuller debate, when Hart argued that there was nothing intrinsically *moral* about Fuller’s alleged “inner morality” of law. Hart famously sketched an “inner morality of poisoning” – principles of good poisoning – to illustrate the idea that just because certain things can be assigned value *vis a vis* a certain purpose, those values do not necessarily apply beyond the task at hand, and do not necessarily have any moral worth of their own. Good poisoners use the right sort of poison; bad poisoners mis-mix their concoctions; good poisoners apply the correct dosage; bad poisoners apply too little or too much; good poisoners disguise the favor of their poisons; bad poisoners do not; and so forth. None of these “value assignments” – good or bad -- are *really* value assignments, evoking moral claims in a broader sense; they have to do merely with *efficacy*. To broaden the objection, law was a human technology capable of pursuing immoral ends just as much as moral ones, and though we can certainly establish criteria to evaluate whether law is serving the ends it pursues well or badly, those criteria are not *moral* in any sense of the word. To Hart, Fuller’s observation that the description of a course of behavior requires internal value assessments in no way proved that morality entered the analysis. Further,

³⁸ Fuller, *Human Purpose and Natural Law*, 700.

³⁹ Fuller, *Human Purpose and Natural Law*, 669.

the fact-value distinction could be saved, because it was possible for a value-neutral philosophy to describe the value judgments of individuals without implicitly endorsing those judgments. As Hart would come to express, the fact-value distinction and legal positivism could be saved, even though law may indeed be a “purposive activity.”⁴⁰

5. Fuller’s View of Law

Human Purpose and Natural Law reveals that in the fall of 1956 at the very start of the Hart-Fuller debate, Fuller had in mind a striking, perhaps anemic, yet certainly revealing reply to this objection. The legal philosopher must start with individual participants, see the law through his or her eyes, and then climb a kind of purposive Magic Mountain, ultimately converging on true morality, whose status an essential component of the law could be seen clearly from the summit.

Fuller’s defense of the role of morality in legal analysis in *Human Purpose and Natural Law* was completely different from more common formulations of “natural law.” Fuller’s point was decidedly not that consistency with morality was a criterion of legal validity, nor was his point that an unjust law is no law at all. Fuller’s point was more modest: the application of the fact-value dichotomy to human affairs, and therefore law, was deeply troubling and misleading. Because human behavior was inherently oriented around purposes – at all levels of specificity, from the smallest objectives to the broadest, most moral aim of living a good life – and because purposive behavior was a strange beast in which fact and value merge, human conduct was not the kind of thing for which one could provide an adequate descriptive theory within a methodological paradigm committed to a sharp is-ought divide. A theory of purposive human behavior that firmly separated facts and values was only as good – and just as bad – as the account of the mathematician without reference to the mathematical problem he was trying to solve, as an account of hieroglyphics without reference to their communicative goal, an analysis of

⁴⁰ For these arguments see H.L.A. Hart, *The Morality of Law by Lon L. Fuller*, 78 Harv. Law Rev. 1295, 1286 (1965) (book review).

the clam digger from a myopically externalist point of view. Since law is a species of purposive activity legal theory committed to the fact value distinction was deeply flawed.

Fuller's broadest point seems to have been that purposive human behavior is so complex and organic a thing that the standards of scientific epistemology, passed down to us through the English empirical tradition and reappearing finally in the form of linguistic philosophy, are too rigid to account for it faithfully. In Aristotle's terms, Hart's analytic method demanded too much precision from an inherently rough subject matter.

To be more specific, the key to Fuller's rejection of the positivist outlook – and, in the next section, a major component of his vision for legal theory -- lay in the notion of *interaction*. Interaction was a key concept in Fuller's understanding of human behavior: interaction between means and ends, between facts and values, between sovereign and subject.⁴¹ The basic problem with positivism was that it ignored the interactive character of its subject matter.

To illustrate, Fuller departed from the language of facts and values and switched to the language of means and ends. How would a positivist understand the relationship between means and ends, he asked? He characterized two strands of thinking – which Hart and the other fact-value separators would agree to – and aimed to draw a provocative conclusion from their apparent conflict. “On the one hand,” Fuller noted, “it seems clear that the selection of an apt means for the realization of a given end is an activity engaging man's reasoning faculties and his capacity for accurate analysis and observation.”⁴² In other words, means were like purely descriptive facts. On the other hand, Fuller observed that “this activity must have a terminal point and... the end ultimately pursued cannot be determined by analysis or observation, but must in some manner or other be projected upon events.”⁴³ Put differently, ends were like values, not

⁴¹ Kristen Rundle explores this sovereign-subject reciprocity dimension to Fuller's thought in her book *Forms Liberate*. See e.g. Rundle, *Forms Liberate; Reclaiming the Jurisprudence of Lon L. Fuller*, 2, 7, 10, 38.

⁴² Fuller, *Human Purpose and Natural Law*, 701.

⁴³ Fuller, *Human Purpose and Natural Law*, 701.

discernable from the facts alone. A conventional way of understanding the relationship between means and ends would be to say that means and ends would be set in “tandem fashion,” and people could select ends according to one form of practical reasoning and then select the means to pursue those ends according to another form. On this conventional account, practical reason was divided in two. For Fuller, this was deeply misleading. “For when we are confronted with the necessity of making an actual decision about a course of action, means and ends no longer arrange themselves in tandem fashion, but move in circles of interaction.”⁴⁴

C. A Positive Agenda: The Collaborative Articulation of Shared Purposes and Interaction Between Means and Ends, Facts and Values

Given the inherently complex, organic nature of human conduct – including law – how should legal theorists move forward? What did Fuller envision in place of a scientific, analytic, value-neutral understanding of law? Could he maintain his rationalism and chart an affirmative course for legal theory? Fuller did not presume to have solved the problem of facts and values in legal analysis, or in any analysis of human behavior – he merely claimed to have problematized the separationist account (proposed, essentially, in Hart’s comments on definition in *Discretion*) by suggesting that the relationship between facts and values was much more complicated than the positivists or empiricists – or indeed legal realists – would have us think. This modest conclusion was not, however, the end of the story. The next part of his essay addressed the question: what now? “I believe the issue we now confront,” Fuller wrote, “is not that of solving the problem, but of deciding how we should comport ourselves in the absence of a solution.”⁴⁵

Fuller identified two possible theoretical courses to take, and then proposed a modified course of his own. One possible response to the difficulty of precisely characterizing the relationship between facts and values was to abandon ship, to stop

⁴⁴ Fuller, *Human Purpose and Natural Law*, 701.

⁴⁵ Fuller, *Human Purpose and Natural Law*, 702.

searching for a philosophical account of the murky relationship between them, and to focus on developing technical approaches to the selection of means, while conceding that ends must be selected by fiat. On this approach, “until we have selected an end by some fiat of the will, any discussion of means is therefore futile.”⁴⁶ This approach was unacceptable to Fuller, because it simply abandoned the project of increased understanding of human behavior – and it implicitly accepted Hart’s rigid fact-value distinction.

A second possible response was murkier, yet more promising. He described it this way: “Push our understanding as far as it will take us into the obscure area where means and ends interact; let us seek collectively to discover as much agreement in this area as the nature of the case permits.”⁴⁷ If we do that, Fuller believed, and if we honestly pursue a philosophical account of how means and ends interact – and how we can understand the law as a purposive activity in such a context – we would discover that society deliberates upon and crafts ends and means mutually. Accepting a theoretical impasse, what we should really study was this social deliberative process: *how* does society select its ends and means, given that they are arranged not in “tandem fashion” but in “circles of interaction”? We will discover, in Fuller’s words, “the reality of a process that may be called the collaborative articulation of shared purposes.”⁴⁸ Law, on this account, was basically a *conversation* among citizens, representatives, courts, lawyers, professors, ethicists, and so forth, from which emerges law, a dynamic, organic creature that seeks ends and employs means that society as a whole deliberated upon and “conversed” about together. It was precisely because law is a purposive activity whose purposes and means we must decide and deliberate over together that there could be no firm distinction between value-laden ends and factual, technocratic means. In order to make sense of this new object of study, legal philosophy must integrate facts and values, reflecting the organic nature of subject matter. To do otherwise would be to ignore the “collaborative articulation of shared purposes” – the animating soul of the law, precisely the thing to which a positivist would be blind.

⁴⁶ Fuller, *Human Purpose and Natural Law*, 702.

⁴⁷ Fuller, *Human Purpose and Natural Law*, 702.

⁴⁸ Fuller, *Human Purpose and Natural Law*, 702.

1. The “Conversation” That Produces Purposive Law

“Conversation” was Fuller’s key analogy. “In the affairs of daily life,” Fuller wrote – taking a cue from Hart, who deployed examples from daily life in support of *his* broader philosophical points – “we all know from personal experience that in moments of crisis consultation with a friend will often help us to understand what we really want. It does not make much difference whether our advisor tells us, in effect, ‘Look carefully to your means’ or ‘Consider carefully your end.’ The effect of the advice is in either case to initiate a process of reflection and consultation that may change our whole understanding of ourselves.”⁴⁹ It is not difficult to extrapolate Fuller’s broader point that an adequate understanding of the legal system involves some appreciation of how it responds to dilemmas, charts courses, and evolves – all of which involve junctures where ends and means factor mutually into deliberation.

Fuller’s analysis on this point resonated strongly with John Rawls’s idea of “reflective equilibrium” – the idea that the proper way of making ethical choices or undertaking moral reasoning is to seek a synthesis of the practical, factual reality of the situation confronted and the ethical principles guiding our actions, each informing the other. Rawls had introduced the idea of reflective equilibrium in 1951, just a few yards away in Harvard’s philosophy department,⁵⁰ and it is entirely possible that Fuller may have been influenced by it, although there is little paper trail to illuminate their relationship. (Interestingly, Hart and Rawls shared a lively correspondence, perhaps owing to their stature and relatively compatible analytic outlooks.⁵¹ The two likely met

⁴⁹ Fuller, *Human Purpose and Natural Law*, 703.

⁵⁰ John Rawls, *Outline of a Decision Procedure for Ethics*, 60 *The Philosophical Review* 177 (1951).

⁵¹ Lacey reports that Hart and Rawls enjoyed long bike rides through the countryside and “real talk” and bonded over their shared liberalism that extended beyond political philosophy and into welfarist politics. Lacey, 193.

at Harvard in 1956-57, but it was not until later that their intellectual relationship reached its climax with Hart's commentary on Rawls's *A Theory of Justice*.⁵²)

The kind of conversation between friends in crisis was, of course, a metaphor for the kind of *social* "conversation" that generates *law*.

"In the history of the common law we have an example which teaches how a social institution may derive its integrity and vitality from the same spirit of consultation as that which animates the discussion of two friends sharing a problem together. The common law is not the work of any one judge, but of many, collaborating through time. In the course of its history, the implementation of its rules has been improved and refined. At the same time, the rules themselves have often been revised to make possible an effective implementation of them. What the court said in a former case is always subject to reinterpretation as new situations arise. The scope of the precedent is determined not only in the light of the end-in-view of pursued by the court that decided it, but in the light of the ends then out of view because not stirred into active consciousness by the facts of the case being decided."⁵³

When Fuller declared that law is a purposive activity, in other words, he envisioned the law as a sort of ongoing organism that we consciously orient simultaneously toward the needs of the day and toward the values and more fundamental aims underlying the broader enterprise -- an equilibrium between constitutional consistency and dynamism in the face of present problems, an equilibrium between fundamental values and current needs. The purposes of law are many and complex, and sometimes conflicting – but everything that takes place within a legal order is oriented to those purposes, complex though they may be, seeking an equilibrium between the purposes of the legal system as an organic, trans-personal whole existing over time, and the requirements of the day, the current "end in view." For Fuller, citizens and officials had to act for the moment, and, at the same time, act for all time.

⁵² H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 University of Chicago Law Review 554 (1973).

⁵³ Fuller, *Human Purpose and Natural Law*, 703

This view partly resonated with an idea Henry Hart would express in his essay “The Time Chart of the Justices”⁵⁴: the idea that the law may approach a kind of rational ideal with time and experience, that there was a teleology to the evolution of a legal system. But Fuller seemed to have envisioned a *perpetual* “collaborative elaboration of shared purposes” as citizens constantly strived to formulate the ends they sought and the means to pursue them in a never-ending, integrated, trans-personal conversation. In such a cross-generational, multi institutional conversation, means and ends were indeed organized “in circles of interaction.”⁵⁵ It is also very much worth noting that Fuller’s discussion clearly anticipates Dworkin’s idea that institutional history could reveal principles or aims deserving of weight in decision-making. Fuller’s approach here was to illustrate what kind of “conversation” produces law, and to use that illustration to show that the strict separation of means and ends, of facts and values, is not possible in legal analysis – but still, the resonance is strong.

2. Direct Rebuttal to Hart’s Theory of Language and Definition in *Discretion*

At this stage in his argument, Fuller used his insight into the means-ends relationship to hazard a critique of Hart’s theory of language and of definition that he had set out in *Discretion*. Fuller was not a fan of linguistic analysis in general, but his point in *Human Purpose and Natural Law* was that *even if* language is the key to legal analysis, Hart misunderstood language in directly relevant ways.

Earlier in his essay, Fuller had taken a preliminary swipe at Hart’s form of linguistic philosophy by suggesting that the grammar of language inclines us, misleadingly, to understand means and ends “in tandem fashion” rather than in an interactive relationship. “Part of the trouble lies with language,” Fuller said. “The forms of language, particularly that of subject, verb, and predicate, are well suited to describe action unilaterally projected, but are an awkward instrument for dealing with

⁵⁴ Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 *Harvard Law Review* 84 (1959); See also discussion in White, *The Evolution of Reasoned Elaboration*,

⁵⁵ Fuller, *Human Purpose and Natural Law*, 701.

interaction.”⁵⁶ A philosophical methodology that started with linguistic analysis, Fuller implied, would almost be doomed to ignore the role of purpose in human behavior, and therefore the inherent untenability of a fact-value distinction in human affairs. In fact, Fuller was skeptical of the ability of *any* method to adequately characterize human conduct, in light of its inherent blurring of the fact value distinction. “The means-ends problem is simply an outcropping of the deeper mystery of life itself”⁵⁷ and therefore resistant to adequate characterization, Fuller mused in a passage that would have particularly irked Hart, whose commitment to clear expression often conflicted with Fuller’s more free-wheeling style.⁵⁸

Fuller’s rejection of Hart’s approach to language went further. Hart had argued that philosophical definitions should be based on the ordinary usage of the terms used to denote the thing being defined. So the task of defining “state” was about determining what we use the word “state” to denote, mapping it all out, and then describing the semantic situation, including a core and penumbra, with maximum precision. Fuller, in reply, seemed to argue that language itself is poorly suited to the study of purposive human behavior – the strong implication being that linguistic definitions in Hart’s style were simply destined to mislead:

“What I have called the collaborative articulation of shared purposes is also illustrated, I believe, on a much homelier plane, familiar to everyone. I refer to the problem of giving an adequate definition for everyday words. In modern discussions of semantics it is a commonplace to assert that the lexicographer is merely an observer and recorder of usage.”⁵⁹

Hart’s basic assumptions about linguistic philosophy seemed to presuppose that it was possible to have a purely factual account of usage – that is, that ordinary usage could be characterized in a value-neutral fashion. But Fuller minced no words: “This is nonsense,” he continued:

⁵⁶ Fuller, *Human Purpose and Natural Law*, 701.

⁵⁷ Fuller, *Human Purpose and Natural Law*, 701.

⁵⁸ See Letter from H.L.A. Hart to Morton White, cited above. (“Fuller has responded at great length and obscurity...”)

⁵⁹ Fuller, *Human Purpose and Natural Law*, 703.

“We all know that developing a good definition for a familiar words is hard intellectual labor. If one will take a common word like ‘stove’ or ‘money’ and compare his own offhand definition with that given in a good dictionary, he may learn, to be sure, that usages exist which he overlooked or which were unfamiliar to him. But what he will chiefly discover is how miserably his own definition failed to articulate clearly the purposive core of the word, which he ‘knew’ as well as anyone, but was unable on short notice to bring to adequate formulation. A good lexicographer not only knows more about usage than you and I, but his skill in analysis may enable him to predict, more successfully than we could, how we ourselves will use the word in context we have no yet confronted.”⁶⁰

Fuller’s description is perplexing. On one hand, Fuller seems to be channeling Hart in a surprisingly direct way. Fuller’s musings about the difficulty of defining words, especially his comment that it takes a great deal of “hard intellectual labor” to bring into clear consciousness what we already, intuitively, know by virtue of our ability to use the word, is classically Hartian and in tune with the basic project of linguistic philosophy. Just a few weeks before, Hart had said in *Discretion* that for any term, “with its mastery for the purposes of everyday life [there is] a fundamental unclarity about the principles which govern our agreed usage. The position is parallel to a person who knows his way around town by rote by could not draw a map of it or the crude case where we can say that I can recognize an elephant but I could not define the term elephant for you. It seems to me to be vital to make explicit the characteristic features present in the agreed cases of discretion and this can be done only by some kind of reflective analysis of our actual usage of that term.”⁶¹ Further, Fuller used the language of the “core” to describe the most significant part of a term’s meaning, presumably borrowing the semantic map from his English colleague.

But on the other hand, departing from Hart, Fuller held that the core meaning of many terms can and will be purposive. With “hard intellectual labor” we can uncover and see clearly a *purposive core* of meaning, the most essential component of the word’s meaning, inherently bonded to the *telos* of thing being defined. Here, Fuller’s concept of

⁶⁰ Fuller, *Human Purpose and Natural Law*, 703.

⁶¹ See Hart, *Discretion*, 1.

definition is throughgoingly Aristotelian – and in the final analysis, it is final causes that count.

This view conflicted sharply with Hart's. In *Discretion*, Hart had used the example of the "state" to illustrate what happens when definition goes wrong and facts and values are not kept as rigidly separate as they should be. Although there is often much disagreement about "What is a State?", "there is little disagreement that the State is in fact an organization of persons living on a territory under a certain type of legal system," Hart wrote. "The real dispute is more as to what form the state should take consistent with these primary features and what we want the State to do for us." In Hart's view, it was deeply misleading to disguise an argument about what the state should be as a definition of the term "state," with the suggestion that anything not conforming to the normative ideal fails to be classified as a state as a matter of definition.

Hart's suggestion on this point must have provoked Fuller, for *Human Purpose and Natural Law* included a nearly direct rebuttal. Fuller discussed "the scorn that generally greets essays carrying such titles as, 'What is Art?'":

"Of course much that is pretentious and empty appears under such titles, but the modern rejection does not rest on the quality of the offerings, being grounded rather on principle. It is said that any such title invites a confusion of fact and value and serves generally as a cover for a fraudulent intent to pass off the subjective opinion of the author about what art ought to be for a description of what it is in fact, --- as if it were possible to describe a major area of human striving without participation in that striving and as if that participation could be otherwise than creative! If the objection is more radically phrased so that it could not be removed by changing the title to read, 'What I thought Art Ought to Be,' then what is really being rejected is the reality of what I have called the collaborative articulation of shared purposes."⁶²

It is hard to imagine a more direct rebuttal to Hart's position – or one so clearly inspired by Hart's *Discretion* paper. For Fuller, description of purposive human conduct involved *participation in the striving* – something, at the end of the day, that could never be value neutral. To take Hart's example, it was precisely because the state is a purposive thing

⁶² Fuller, *Human Purpose and Natural Law*, 704.

that its description as “an organization of persons living on a territory under a certain type of legal system” was inadequate; the definition ignored the “purposive core” of the term. Of course, Hart rejected the notion that the core meaning of terms could be purposive in nature; he held that whether a term denoted something purposive – like a knife, on his example – could only be determined *after* a value neutral, purely factual definition based on ordinary language usage had taken place. While this was a key component of Hart’s separation of legal reasoning from legal theory, Fuller seems to have disputed it as a matter of linguistic, not just legal, philosophy.

3. Collaborative Articulation and the Forms of Social Order: Fuller’s Agenda Part I

In Fuller’s mind, the legal theorists of his time had failed “to carry on the work of former generations in analyzing and discussing what may be called the forms of social order. I use that term broadly to include rules, procedures, and institutions – all the ways, in short, in which the relations of human beings to one another are subjected to formal ordering, whether by consent, habit, or command.”⁶³

Fuller’s vision for legal philosophy placed the “collaborative articulation of shared purposes” at the center of the agenda. It was of central importance to Fuller’s understanding of the law; it was a feature of human society that made necessary the integration of fact and value, and an important contributor of the dynamic, organic character of the law. Fuller envisioned theorists who took the “collaborative articulation of shared purposes” seriously tackling issues of a broad, institutional variety – studying the social contexts in which the collaborative articulation takes place, and investigating what principles underlie such a process. In other words, studying the “collaborative articulation of shared purposes” – the conversation that produces law – would lead to a robust understanding of the forms of social order. The “collaborative articulation of shared purposes” produced the forms of social order, and then, reciprocally, the forms of social order influenced the ongoing “collaborative articulation of shared purposes.”

⁶³ Fuller, *Human Purpose and Natural Law*, 704.

This new road for legal theory – illuminating the forms of social order by means of the collaborative articulation of shared purposes – made legal theory, for all the reasons Fuller had furnished in objection to positivism, a *moral* enterprise. Fuller provided two vivid reasons for why his new vision for legal theory included morality.⁶⁴ First, Fuller believed that *social orderings, including law, were ends themselves*: social orderings and the collaborative articulation of shared purposes “make us what we are.”⁶⁵ In another classically Aristotelian position, Fuller believed that the human good was partly indexed to social context. The consequence, for Fuller, was that if human beings are ends in themselves, then forms of social order must also be ends in themselves.

The second way Fuller thought the study of social order and the collaborative articulation of shared purposes was a study of morality would become famous: “Any form of social order,” he wrote, “contains, as it were, its own internal morality. Thus we may judge football by an external standard and say, ‘Football is a good game,’ but we may also judge it by standards drawn from its own internal requirements and say, ‘Football will become impossible if this sort of thing is allowed to go on.’ We may appraise adjudication as a means of settling disputes and compare it with alternative methods of accomplishing the same object. We may also analyze its intrinsic demands and recognize that any attempt to combine the functions of judge and mediator represents a dangerous undertaking.”⁶⁶ The next year, Fuller would categorize the “inner morality of law” as a direct reply to Hart’s Holmes Lecture, but in this essay, it is clear that Fuller has the idea already in mind as an agenda to be worked out and furthered in the year to come.⁶⁷

⁶⁴ Fuller, *Human Purpose and Natural Law*, 704.

⁶⁵ Fuller, *Human Purpose and Natural Law*, 704.

⁶⁶ Fuller, *Human Purpose and Natural Law*, 704.

⁶⁷ At this time, Fuller was working on what would become one of his most famous essays, *The Forms and Limits of Adjudication*. In *The Forms and Limits of Adjudication*, among other things, Fuller described adjudication as a form of social order according to much the same method he sketches here, describing an inner morality of adjudication that is relevant to adjudication’s definition (a “purposive core”) and using the notion of adjudication as an example to demonstrate of the fact-value merger in legal analysis. Fuller circulated *The Forms and Limits of Adjudication* the next year to his friends on the faculty, though he was working on it this year.

4. The Revival of Natural Law Theory: Fuller's Agenda Part II

Along the way, Fuller made a striking, and telling observation which received almost no defense or argument: of all the schools of thought in jurisprudence, it was natural law theory that had fared best in respecting the “collaborative articulation of shared purposes.” “Through the centuries,” Fuller wrote, “it has been – in spite of all of its extravagances and dogmatisms – the school of natural law that has kept alive faith in that process”⁶⁸ – the process according to which citizens, officials, institutions, and other participants engage in an interactive “conversation” to formulate their ends together, achieving an equilibrium between shared values, institutional history, pressing demands, and divergent opinions.

At this point, Fuller's argument began to take the fundamental process-inspired approach to multi-institutional government and translate it into modified natural law theory – to Fuller the only philosophical account that carried with it the spirit of law as a purposive human activity aiming toward worthy ends. Legal positivism and its cousin legal realism fell woefully short on this measure, as did almost every other theory of law. But Fuller recognized that natural law theory came with the heavy encumbrance of its own religious history, theoretical extravagance in strong forms, and a tinge of illiberalism. Just as Hart was battling the connotations of “positivism,” Fuller came up against the connotations of “natural law.” Fuller proposed, therefore, to revive a *modified* version of natural law theory – a form that focused on the “internal morality” of social ordering and law, and analyzed the ways in which social ordering can be thought of as an end or a value in itself, rather than just a social fact or a means to some other end. Though Natural Law theory had a checkered past, for Fuller, it represented a way forward.

The most basic problem with positivism, for Fuller, was that it excluded from legal theory the most significant aspect of human behavior – its purpose driven, value-laden character. Law simply was not the sort of phenomenon that a philosophy rooted in

⁶⁸ Fuller, *Human Purpose and Natural Law*, 702

a sharp separation of fact from value could even begin to describe. Social ordering rooted in a collaborative articulation of shared purposes was the sort of things in which facts and values, means and ends, past, present, and future interacted freely. Many generations in the past, Fuller observed, had profitably studied the forms of social order, and, he wrote, “It is difficult to see how the interrupted work of these generations can be resumed until we have reacquired some measure of sympathy for the essential aims of the school of natural law.”⁶⁹

Human Purpose and Natural Law was not the most beautiful expression of his ideas, nor the most profound, nor the most perfect with respect to language, but was Fuller’s first direct response to Hart’s positivism – and set the tone for the more polished responses he would offer later in the year, and beyond. The themes he set out: the centrality of purpose, the fact-value merger in legal analysis, and the internal morality of law would all return. This was just the *pre*-Hart-Fuller debate Hart-Fuller debate. And it was not over.

⁶⁹ Fuller, *Human Purpose and Natural Law*, 705.

Chapter 7. Answering Bodenheimer's Challenge

A. Hart's Year of Wonders - Continued

That fall, Lacey wrote, H.L.A. Hart, “worked and played ferociously hard. Life was a welter of lunches, dinners, trips to nearby towns and countryside... Fresh from post-war rationing in Britain, he was amazed by the amount and quality of food in America, as well as by the whiskey-drinking which was an integral part of practically every social occasion. And he was disarmed by the geniality of American hospitality and by the informality of many of the social events.”¹ For example, a letter home reported a “big stand up buffet supper” at Henry Hart’s house. H.L.A. Hart described Henry Hart as a “large, handsome Californian” and confessed that the party had included “too much whiskey for me.”² Curiously, Hart reported that the party had been ruined by the arrival of an unnamed Federal Judge, in whose presence the otherwise genial professors seemed to stiffen. But more generally, Hart “admired and enjoyed the energy, generosity, and enthusiasm of Americans, the significant numbers of Jewish people in academic life... and the sense of involvement in public affairs at the Law Schools.” Despite the public spirit of American law schools, including Harvard, Hart did find some of the school’s traditions bizarre, including the “‘hugely elaborate mock trials’ which combined ‘all the worst sillinesses and snobberies of Oxford.’”³ He commented to his wife about the “sad thing” it was to console the “unsuccessful candidates for Rhodes Scholarships... I hadn’t

¹ Lacey, 189.

² Letter from H.L.A. Hart to Jenifer Hart, October 9, 1956 (On File with the Library of New College, Oxford).

³ Lacey, 188.

realized how much of a promised land Oxford is to them. They practically weep at the prospect having failed.”⁴

On an intellectual level, while Fuller was huddled in his office bumping up against the outdated connotations of “Natural Law,” Hart was still trying to navigate Harvard’s halls branded with a scarlet “P” – “P” for Positivist. Among Hart’s main projects in the fall of 1956 after *Discretion* was to defend his form of analytical jurisprudence from the suite of charges – theoretical but also educational -- that Bodenheimer had leveled against it the year before. Bodenheimer’s criticism of Hart’s Inaugural Lecture, which we have seen was deeply influential to Hart’s intellectual trajectory, had appeared in the *University of Pennsylvania Law Review* in 1955 with a footnote stating that Hart would reply in a later issue. Hart, in the event, delayed his response and ultimately composed his reply from his office at Harvard in the months following *Discretion*. Hart’s response, “Analytical Jurisprudence at Mid-Century: A Reply to Professor Bodenheimer,”⁵ was an article of many firsts: it was the first article in which Hart undertook a sustained, explicit criticism of American jurisprudence. It was also, in several different ways, Hart’s first article with a distinctly American tone, reflecting Hart’s deepening connection to American legal debates about law’s social function and the reform of the legal curriculum. But most important, it is Hart’s first full-scale defense of analytical jurisprudence as a distinct legal philosophical form. If *Discretion* was an example, the reply to Bodenheimer was a defense. Some of the methodological points Hart made in *Discretion* he would repeat in the reply to Bodenheimer – but to a different audience. The reply remains one of Hart’s most fertile yet least studied texts.

While Hart found Bodenheimer’s critique stimulating and provocative, he nonetheless thought Bodenheimer’s article made poor arguments and misrepresented his position. A self-deprecating Hart acknowledged that his Inaugural lecture might have had a foreign ring – “my exposition of my own views must have been very inept (or

⁴ Letter from H.L.A. Hart to Jenifer Hart, January 5, 1957 (On File with the Library of New College, Oxford).

⁵ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*.

perhaps just ill-adapted for export to the United States)”⁶ – but he nevertheless resolved to defend it. Writing for an American audience in the *University of Pennsylvania Law Review*, rather than speaking to an assemblage of Oxford dons, Hart set out to explain the value of analytical jurisprudence in terms that would resonate with an American audience most comfortable with contextual legal studies and sociological approaches, and deeply divided over the structure and substance of legal education.⁷

B. Hart’s Reply to Bodenheimer

In the introduction to his reply, Hart mentioned something distinctive. He wrote: “I do indeed consider analytical jurisprudence, if pursued with the appropriate methods, to be an important subject capable of making an important contribution to at least one aim which I think I must have in common with Professor Bodenheimer: namely, the increase of our understanding of the character of law as a means of social control.”⁸ That last phrase, “law as a means of *social* control,” is particularly significant.⁹ Hart was suggesting that the analytic method could shed light not just on concepts in the abstract – on the definition of “right” or “corporate personality” or “law” writ-large – but on *social reality* as well. Hart was arguing that analytical jurisprudence, based on worldly linguistic analysis that looks to the actual function of language as a social phenomenon, can help us describe and understand how law actually works.

From the start, Hart marked old-fashioned analytical jurisprudence, looking only to define abstractions or to police the boundaries of legal taxonomy, as too narrow. Hart’s new form – at this stage still in its adolescence – would bring the analytic method

⁶ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 953.

⁷ The structure and substance of legal education has been a topic of truly unstoppable debate in the history of American legal thought. After Langdell introduced the case method at Harvard in the 1870s, several generations of scholars sought to upend it in favor of a more sociological or fact-based approach. Beyond the realist movement, education has been a corner stone of Legal Process (a movement oriented in some ways around teaching materials), Critical Legal Studies, Law and Economics, historical movements, and many other movements.

⁸ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 953.

⁹ Emphasis added.

to bear on the elucidation of lived experience as well as of concepts and terms. It is what Hart had in mind five years later, in 1961, when he would call *The Concept of Law* a work of analytical jurisprudence and “an essay in descriptive sociology.”¹⁰ Hart’s new emphasis on analytical jurisprudence as a method for understanding law as realized in society partly reflected his American audience, which was predisposed to prefer legal theories with a sociological flavor. But Hart’s belief in the power of the analytic method to clarify reality ran deep – a theme that would reappear constantly in his later work. This particular stance was a clear continuation of the approach Hart had taken in *Discretion*: the analytic method illuminated law’s empirical reality as well as its conceptual form.

If Hart thought the analytic method was useful to the elucidation of law in the world, he further argued that training in philosophical analysis was beneficial to legal education. Hart said at the start of his essay that he would explain not only “how analytical jurisprudence properly pursued can advance our understanding of the law” but also “what I conceive its function in a legal education to be.”¹¹ Hart’s emphasis on the educational function of analytical jurisprudence comported with his criticism of the American intellectual scene as being philosophically sloppy, careless with distinctions, and imprecise. If law students learned linguistic philosophy, perhaps American jurisprudence would find a way to express its insights more rigorously. In his BBC broadcast describing his impressions of the United States, Hart reflected on the importance of precision:

There is in America I think a wholly different attitude to precision of language, to the nuances that language can convey, and to verbal accuracy. To many Americans, we appear to be fussing about the letter and often using the letter to kill the spirit. We stand on the brink, wondering about the meanings of words, while they wish to plunge in and get the drift of whole paragraphs, or some large sense of general purpose, without bothering too much about the precise meaning of what is said.¹²

¹⁰ Hart, *The Concept of Law*, vi.

¹¹ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 953.

¹² Hart, *A View of America*, The Listener (1958).

Further, Hart suggested that American law would be better practised if American lawyers had training in philosophy or philosophy of law, where they would learn to make careful distinctions, carry arguments through with sound logic, and pay closer attention to language. Hart later said that he wished all law students – students in Britain, too – were required to take a basic course in formal logic and general philosophy. “I certainly think that the study of philosophy is of great importance not only for academic jurists but for those who intend to practice law,” he said.¹³

The study of philosophy in conjunction with some other subject and especially in conjunction with study of law, fosters clarity of thought and expression and develops analytical and critical skills which may be freely transferred to other disciplines. Philosophical study sharpens the powers of argument on any topic. So I would wish to see included in the course of study required for qualification both as a practicing lawyer and as a teacher, a short course of modern elementary symbolic logic and a somewhat longer course on the basic issues of moral and political philosophy.¹⁴

In Hart’s view, Bodenheimer would have benefited tremendously from such a course. For Bodenheimer exemplified the American tendency to ignore important distinctions and favor “practicality” over philosophical rigor – things that Hart saw as complementing each other rather than prompting a zero-sum trade-off.

Thus when Hart turned to Bodenheimer’s substantive arguments, he pulled no punches. An obviously annoyed Hart started by identifying several occasions where Bodenheimer outright misquoted or misparaphrased him -- “Professor Bodenheimer’s picture of my activities is novel and entertaining, though scarcely flattering; but I must hasten to assure him and my readers that the sober truth is very different”¹⁵ – before

¹³ H.L.A. Hart, Draft of Interview for *Doxa*, 1989. (H.L.A. Hart Papers, Box 2, Folder 14, On File with the Library of New College, Oxford.) q 2.

¹⁴ H.L.A. Hart, Draft of Interview for *Doxa*, 1989. (H.L.A. Hart Papers, Box 2, Folder 14, On File with the Library of New College, Oxford.), q 2.

¹⁵ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 953.

resolving to “relegate these points to a footnote”¹⁶ and devote the majority of his reply to Bodenheimer’s fallacious philosophical arguments rather than his uncharitable scholarship. A major problem with Bodenheimer’s attack was that it ignored important conceptual distinctions: “Professor Bodenheimer either cannot distinguish or thinks it of no importance to distinguish between, on the one hand, *law* and *legal concepts* and, on the other, *theories* of or about law, and *definitions* of legal concepts.”¹⁷ What Hart was getting at was that jurisprudence – philosophical inquiry about the general nature of law – was different in kind from doctrinal theories about what the law is or should be about any specific topic. Indeed, it resonated with the sharp divide between legal reasoning and legal theory that he had employed in *Discretion*. While a judge may need to determine the meaning of particular legal provisions, and apply them to specific cases, the analytical jurist is interested in higher-order ideas like “law” as a whole, “rights,” and so on. This was a simple distinction in Hart’s view, and in ignoring it, Hart said that Bodenheimer “makes me look *sillier* than I hope I am, by treating the observations which I make about legal *theories* and about the character of definitions of legal concepts as if these observations had been made about *law* and *legal concepts* themselves.”¹⁸ Hart’s uncharacteristic use of italics indicated his particular irritation with Bodenheimer’s straw man tactics.

Although Hart had jabbed at Bodenheimer’s clumsy philosophical skills and defended the analytic method from the charges that it was disconnected from reality and useless to education, he had yet to respond to Bodenheimer’s deeper concern: that within Hart’s analytical jurisprudence floated the gnarly specter of Langdell. In America, as we have seen, the term “analytical jurisprudence” conjured up visions of old-fashioned legal formalism, “mechanical jurisprudence,” and of the laissez faire economics enforced by

¹⁶ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 954.

¹⁷ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 954. Italics original.

¹⁸ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 954.

the *Lochner* court.¹⁹ These associations were not good for analytical jurisprudence's reputation, for while Realism's era had largely come and gone by the mid-1950s, the suspicion of Classical Legal Thought had not. It was in this context that Hart's defense of analytical jurisprudence was the most revealing. He explained how analytical jurisprudence, as a philosophical method, had nothing necessarily to do with the vices of Classical Legal Thought. First, analytical jurisprudence, as a philosophical method, could easily be separated from the view that judges decide cases mechanically and deductively, and did not entail a commitment to law's autonomy – the claim that law does not need to engage with other social sciences. Finally, analytical jurisprudence did not have to be married to the social-Darwinist worldview of laissez faire classical liberalism.

In Hart's view, Bodenheimer's belief that analytical jurisprudence was connected to mechanical jurisprudence and the autonomy of law rested, not surprisingly, on ignorance of a conceptual distinction. "Nothing less than this confusion between theories of law on the one hand and law on the other... could have led Professor Bodenheimer to say that I do not advocate 'going outside the boundaries of pure legal reasoning' and to ascribe to me the quite fantastic view that 'law is a self-contained science which does not need the assistance of other social disciplines for its proper functioning.'"²⁰ Hart meant two different things when he affirmed, contra-Langdell, that law "need[s] the assistance of other social disciplines for its proper functioning."

The first – constituting a rejection of "mechanical jurisprudence" – had to do with legal reasoning by judges. Hart believed that the body of law on the books often failed to determine unique answers to legal questions. Judges, therefore, in order to reach conclusions at all, had to infuse the law with information from without. In stating his view, he reinforces his debt to the Realists, in spite of his disagreement with other aspects of their philosophy, noting: "I had indeed already said in 'Definition and Theory in

¹⁹ See generally Sebok, *Misunderstanding Positivism* and Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*

²⁰ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 957.

Jurisprudence' that we had learnt to our profit from the theories of the American Realists how small a part deduction from predetermined premises plays in the judicial process."²¹ Bodenheimer, Hart thought,

has indeed some excuse (though no justification) for identifying analytical jurisprudence with the absurd view that law in its proper functioning needs no recourse to other disciplines and that "correct" legal decisions can be simply deduced by strictly logical means from purely legal premises; for this is in fact a misunderstanding of analytical jurisprudence which has long been common on the continent of Europe. It rests on the assumption that analytical jurisprudence could only have any place if judicial decisions were strictly deduced from purely legal premises and if all that courts needed, having found the facts, was the capacity for formal logical reasoning from predetermined premises. Proceeding from this mistaken assumption, it is then argued that anyone who thinks analytical jurisprudence important must take this illusory view of the judicial process.²²

To Hart, the notion that judicial reasoning can be deductive and mechanical had a bizarre, newfangled ring. He insisted that even Austin, his forefather in analytical jurisprudence, rejected the mechanical theory of judicial decision-making. "In fact neither the classical analysts like Austin nor contemporary analysts have ever held this absurd view of the functioning of law. Austin, who may rank as the principal proponent of the view that an autonomous subject of analytical jurisprudence – to be distinguished from sociological and other types of inquiries concerning law – was worth pursuing, himself clearly recognized that judges made law though they often pretended to find it, and he was prepared to say that they made law sometimes very much better than the official legislator did."²³ And although he thought Realism reflected America's peculiar judicial politics, Hart claimed to have recognized the futility of "mechanical jurisprudence" even as an Englishman: "Perhaps I need hardly to insist that even in England, even in Oxford, we have come around to the view that law "for its proper

²¹ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 955.

²² Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 956.

²³ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 956.

functioning” – which I suppose means if the decisions rendered by courts are to be satisfactory and intelligent – needs recourse to other disciplines than law.”²⁴

Like Bodenheimer and his ilk, and despite their suspicion of his work, Hart believed that the indeterminacy of legal reasoning was built into the very fabric of law itself. He believed that any legal rule has a “core” set of obvious applications and a “penumbra,” a grey area where the rule could mean one thing or another. Legal language, by nature “open textured,” was therefore frequently ambiguous. But contra-the Realists, who saw legal indeterminacy as an extrinsic fact about judicial behavior – if one looked at how judges actually ruled, it was clear that their decisions were not entirely rule-governed²⁵ – Hart saw the omnipresence of some indeterminacy as an analytical truth about the nature of law. As he had stated very clearly in *Discretion*, law was sometimes vague *in principle*.

It is significant that the idea of the open texture of legal language and the vagueness of legal rules, which together form a significant part of Hart’s contribution to legal philosophy, first found expression in his reply to Bodenheimer. In *Discretion*, Hart had defended the necessity of indeterminacy by appealing to the Relative Ignorance of Fact and the Relative Indeterminacy of Aim – not by appealing to the inherent vagueness of legal language. But by the time he penned the reply to Bodenheimer, he had revised his thinking about the sources of indeterminacy, though not revised his view that indeterminacy was unavoidable. The defense of indeterminacy by reference to language would reappear in the Holmes Lecture, without the handicaps on prospective lawmaking, and all three arguments for indeterminacy – the Relative Ignorance of Fact, the Relative Indeterminacy of Aim, and the inherent vagueness of legal language – would appear all together in *The Concept of Law*. These three defenses of indeterminacy, however, all

²⁴ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 955.

²⁵ Not governed by the legal rules, that is; other rules could play a part, and in many cases do, according to some realists. See Frederick Schauer, Introduction to *The Theory of Rules* by Karl Llewellyn, (Chicago: University of Chicago Press, 2011).

seemed to emerge from Hart's attempt to reply to Bodenheimer and distinguish analytical jurisprudence from formalism.

This was one instance of a broader trend: many of Hart's most enduring philosophical positions took shape as he separated the analytic method from legal formalism and the functional teachings of realism from realism's skeptical philosophical foundation. The web of connotations in America put Hart on the prodigal defensive: in defending his early ideas from what he perceived as a misreading, he made philosophical progress.

The second thing Hart meant when he affirmed that law "need[s] the assistance of other social disciplines for its proper functioning"²⁶ had to do with legal scholarship and legal education. Despite the perceived antagonism of analytical jurisprudence and interdisciplinary scholarship and education in America, Hart indeed did believe that the legal curriculum would be improved if it were opened to subjects and questions that were not strictly speaking legal. After all, among Hart's own intellectual (and institutional) achievements at that time was the integration of philosophy and law – an interdisciplinary endeavor. To be sure, Hart was skeptical of sociological and economic analyses of law, but he did believe that philosophy should be added to the legal curriculum in much the same way that an American realist might suggest adding empirical social science. In fact, Hart believed that philosophy had much *more* to add to a legal education than social science, a view that would have seemed as old-fashioned in America as it did common-sensical in Oxford.

"Since Professor Bodenheimer has misunderstood me, let me here assert emphatically that I certainly do not hold this view [that law needs no recourse to other disciplines]: yet I combine it with the view that the time the student can afford to spend on jurisprudence is likely to be better spent on the close and careful analysis of fundamental legal notions and those lying on the boundary of a legal system than in assimilating what he can of other social disciplines."²⁷

²⁶ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 956.

²⁷ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 955.

His preference for philosophy over sociology did not take away from the interdisciplinarity of his basic educational vision, which, modified only slightly, mirrored the Realist's pedagogical agenda. But why philosophy?

C. Linguistic Philosophy and Liberalism

If the goal of legal scholarship, as Hart suggested, was to understand law “as a means of *social* control,”²⁸ then is it not odd to make *philosophy*, rather than the social sciences, the centerpiece of the agenda? Hart thought the answer was no. But understanding why reveals something important about the linguistic turn in analytic philosophy. Hart believed that linguistic philosophy was all about social reality, something to which previous chapters in the analytic tradition had been blind. Linguistic philosophy's core insight was that the best way to understanding concepts was not to contemplate them in the abstract, but to study the function of the words associated with those concepts in real utterances, in real linguistic context. Hart, like the other linguistic philosophers, appreciated ambiguity. It was the ambiguities of natural language, and the blurriness of some of the core concepts that structure our world, that made philosophy worth pursuing. If logical positivism was the philosophy of clarification through the definition of ideas in the abstract, linguistic philosophy was the philosophy of subtle understanding through the embrace of ambiguity. Read in that light, it does not seem a surprise that Hart would link analytical jurisprudence with an enhanced understanding of the ambiguities of law and legal reasoning. “It is plain,” he wrote, “that one of the results of analytical jurisprudence itself has been and is increasingly the demonstration of the “open texture” or vagueness of the periphery of the concepts used in the daily life of the law and the many ways in which rules of law involving such concepts fail to determine uniquely decisions in particular cases. Shortly put, this means that it is confusion and indeed false to assert the identity of analytical jurisprudence with “conceptualism” or “mechanical” jurisprudence or (to use Professor Bodenheimer's words) with the view

²⁸ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 953.

that “law is a self-contained science which does not need assistance of other social disciplines for its proper functioning.”²⁹ That is precisely it: Hart considered philosophy, brought to life by the linguistic method, in a significant way a social discipline; he considered linguistic philosophy, properly carried out, a guide to social reality. This point, which helps to explain how J.L. Austin’s intellectual offspring have included theoretical approaches as distinct as modern analytic epistemology and critical gender theory,³⁰ will play a prominent role in the next chapter, for the connection between dispassionate analysis and political liberalism ran to the core of Hart’s intellectual personality.

It is worth making a broader point at this stage about the political meanings of philosophical methodologies. Just as in America, anything involving the word “analytical” would immediately be associated with the excessive classical liberalism and Social Darwinism of the Gilded Age, so too in post-War Britain, analytic philosophy was *at times* considered politically conservative.³¹ One risks overemphasizing this point, but it is worth noting that in the United Kingdom, the conservatism of the method was partly attributable to the institutional elitism of Oxford.³² Analytical philosophy was seen to be the province of the wealthy, upper-Crust intelligenia, the petty interest of those who could afford to count the angels on the head of the proverbial pin – in a way, the last hurrah of an aristocracy that had suffered one blow too many.³³ Connected to this was the perceived irrelevance of the problems to which analytical philosophy addressed itself.

²⁹ Hart, *Analytical Jurisprudence in mid-Twentieth Century: A Reply to Professor Bodenheimer*, 957.

³⁰ Judith Butler, for instance, makes use of J.L. Austin’s notion that language can be performative throughout her work, and cites Austin, among others, as a forerunner. See Judith Butler, *Excitable Speech: A Politics of the Performative* (1997). For an example of secondary scholarship on this point, see A. McKinlay, *Performativity: From J.L. Austin to Judith Butler* in P. Armstrong & G. Lightfoot (eds), *‘The Leading Journal in the Field’: Destabilizing Authority in the Social Sciences of Management* (2011).

³¹ See generally Ved Mehta, *Fly and the Fly-Bottle* (1963); Ernest Gellner, *Words and Things* (1959).

³² Jonathan Ree points out that there were about three times as many philosophers in Oxford as in Cambridge, at the time, and only a handful elsewhere, which contributed to deeply elitist, classist overtones to Oxford philosophy. See Jonathan Ree, *English Philosophy in the Fifties, Radical Philosophy*, 1993.

³³ Mehta, *Fly and the Fly-Bottle*.

Ernest Gellner's controversial 1959 book *Words and Things* lambasted Oxford philosophy for being, among other things, hopelessly out of touch with real social problems, inwardly focused, and obsessively distracted by academic politics. The controversy surrounding the publication of the book, documented by Ved Mehta in the pages of the *New Yorker* (again highlighting the trans-Atlantic character of post-War intellectual life) and subsequently published as a single volume, *Fly and the Fly-Bottle*, reflected the widely held view that Oxford philosophy was out of touch with real people and unconcerned with real problems, an old-fashioned echo chamber that deserved no hearing in the age of post-War social reform. In a nation building a broad welfare system, a National Health Service, and national pension schemes, linguistic philosophy seemed academic in the worst sense of the word: it was not a philosophy that could feed the hungry, or clothe them, or finance the elderly, or shelter the poor, or cure the sick.

Hart, however, was both a staunch follower of the analytic method *and* a proud social democrat.³⁴ The deep connection of these two seemingly disparate commitments was a persistent theme in his work; at the core of Hart's philosophy was an inextricable connection between analytic philosophy and political liberalism. The first point of connection involved the belief that reason, rigorously pursued, leads to liberal outcomes, and that analytic philosophy, as a manifestation of reason, ought to be considered liberal. The second point of connection, as we have seen, was that Hart considered analytical philosophy done right – that is, analytical philosophy with a linguistic flavor – a better guide to social reality than the conventionally “left-wing” disciplines like sociology or institutionalist economics (institutionalist as opposed to classical economics). For Hart, it was linguistic philosophy's focus on usage and the social function of language that redeemed it; it was a *social* philosophy in a way that logical positivism never could be.

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Hart departed snowy Boston and returned to England at the end of the Fall semester to spend Christmas with his family. “I found a wonderful plane which leaves

³⁴ See for example H.L.A. Hart, *Law, Liberty, and Morality* (1963).

here in the afternoon and arrives at London Airport at half past seven in the morning. I don't expect you to meet me then but it will certainly be nice to be home."³⁵ Hart's paternal warmth concealed the fact that he was a changed man: a bullish, confident analytical jurist and now, also a respected American law professor, who knew he could hold his own with the potentates, no matter how sharp their disagreements. The story of H.L.A. Hart at Harvard, however, and the story of his spectacular intellectual growth, is only half over.

³⁵ H.L.A. Hart to his Family, November 19, 1956, cited above.

Chapter 8. The Pre-Hart-Fuller Debate Hart-Fuller Debate: Part 2

Jan 1957 (50 this year!). Seen off at Gloucester Green... by Jen and children: -- a wrench but in some ways exciting to come back to the fizz and stimulus of the term. Especially as Oxford was for the fortnight in some ways depressing -- I felt ill and tired continuously...¹

Hart's diary on his return to Harvard in January captured the stimulations and intensity of America, and the extent of its contrast with Oxford. As soon as he arrived in Cambridge for the spring semester, the intellectual fervor returned.

Shortly after Hart returned from his Christmas holiday, he received a startling – and exciting – communication from Erwin Griswold, the dean of Harvard Law School. Dean Griswold formally invited Hart “to deliver the prestigious annual Oliver Wendell Holmes lecture. The invitation included a fee of \$1,000—an enormous sum, equivalent to about \$6,500 today.”² Hart expressed hesitation in a letter to his wife the same afternoon: “But it’s too grand – audience of judges ... But 1000\$ is tempting; I have a few days to decide.”³ In the end, though, Hart “was deeply flattered (as well as delighted by the financial aspect) and accepted at once,”⁴ recognizing that the Holmes Lecture provided an opportunity to make an enduring contribution to jurisprudence on both sides of the Atlantic. “After toying with a number of possible topics—sovereignty, the roots of a legal system—he settled in the end on ... developing a frontal defense of analytical jurisprudence and of legal positivism. The lecture, as he later recalled, ‘was, and was

¹ Lacey, 204.

² Lacey, 196.

³ Letter from H.L.A. Hart to Jenifer Hart, January 5, 1957 (On File with the Library of New College, Oxford).

⁴ Lacey, 196.

intended to be provocative’.”⁵ This theme built on his work from the fall semester, and represented a continuation of his quest to situate and demystify his thinking in American legal discourse, further answering the assault on his style of jurisprudence that had beset him as soon as he arrived in the United States. Although Hart had earned the respect of his colleagues in the Legal Philosophy Discussion Group, he had yet to deliver a major public lecture to the law school, and had yet to clarify his philosophy to an audience beyond the group of his immediate faculty colleagues. The Holmes Lecture was simultaneously a continuation and deepening of his methodological stance in *Discretion*, a more formal reply to Bodenheimer, a very public, but oblique, intervention into American judicial politics, and a re-statement of legal positivism in the English tradition. If ever there were a truly trans-Atlantic moment in legal intellectual history, Hart’s Holmes Lecture was it.

While Hart’s Holmes Lecture would become the first public shot in the Hart-Fuller debate, the *pre*-Hart Fuller Debate Hart Fuller debate was reaching a boiling point in the Legal Philosophy Discussion Group as Hart was collecting his thoughts for the lecture. Just weeks before, Fuller had presented *Human Purpose and Natural Law*, responding to the positions Hart had taken in *Discretion*, and Hart and other professors had begun to challenge Fuller’s assertion that a revival of natural law theory was in order, even in a modified form, wondering whether it might be better to further a truly process theoretic approach to law, which eschewed universalist moral commands in favor of careful institutional analysis and, though accepting a fact-value fusion, pursuing plausible neutrality on questions of fundamental morality. Although Fuller was an integral part of the process movement, he believed any interactional, dynamic concept of law required a truly moral grounding. And he pressed forward in the face of criticism.

A. Fuller’s “Reply to Critics”⁶

⁵ Lacey, 196.

⁶ Note that the essay discussed in this section is not the same as Fuller’s famous, published “Reply to Critics” that accompanies his later book *The Morality of Law*. This chapter discusses an unpublished essay that has never received scholarly analysis.

Although Fuller did not make a formal presentation to the Legal Philosophy Study Group in the fall (he left that to the two Harts and Julius Stone), the essay he circulated, a draft of *Human Purpose and Natural Law*, provoked significant controversy, largely amounting to a restatement of some of Hart's views implied in *Discretion* and elements of Hart's separationist methodological commitments (which is not surprising, given that Fuller's paper was itself a reply to Hart's), but also pushing the positivist agenda further.

In *Human Purpose and Natural Law*, Fuller had argued, basically, that although there was no controversy about the positivist approach to description of inanimate, external objects in the physical world -- these we could fully describe, scientifically and accurately, without implicating values or evaluation in any form -- it was impossible to provide an accurate, scientific description of purposive human conduct without delving into value theory: purposive human behavior is the sort of thing one must evaluate in order to describe.

Fuller explained that "several who have read my paper have criticized it in oral discussions with me" -- and he set out to draft a reply.⁷ In the reply, Fuller reiterated his basic position, which was that purposive human behavior is not the sort of thing that lends itself to a philosophical analysis in which facts and values are kept separate. But Fuller also pushed beyond *Human Purpose and Natural Law*, illuminating his thinking on the pitfalls of positivism, the dangers of moral relativism, the best interpretation of David Hume, and more. This section provides a detailed analysis of Fuller's "Reply to Critics." The sustained treatment of Fuller's reply is warranted for two reasons. First,

⁷ Fuller circulated his "Reply to Critics" sometime in the Spring of 1957, commenting on the controversy he provoked by circulating a previous unnamed essay. The content of the "Reply to Critics" makes clear that the previous essay in question was *Human Purpose and Natural Law*: Fuller mentions that the previous essay discussed the "collaborative articulation of shared purposes," which Fuller discussed at length in *Human Purpose and Natural Law*. What is more, *Human Purpose and Natural Law* was the essay Fuller was drafting the previous Fall partly in reply to Hart's *Discretion*, and the "Reply to Critics" discusses objections to Fuller's position that may well have come from Hart. Lon L. Fuller, *Jurisprudence 1956-57, Appendix to the Special Supplement, A Reply to Critics (undated)* (On File in the Harvard Law School Library, Paul Freund Papers, Box 55 Folder 5). Hereafter cited as Fuller, "Reply to Critics." Note that this memorandum is not signed; it is verified as Fuller's own work by virtue of first person references to Fuller's own previous essay and unmistakable writing style and thematic concern.

the essay has never before seen the light of day in scholarship; Fuller circulated it privately, never published it, and Fuller researchers have never stumbled across it, because it is preserved only in the archive of Paul Freund – consistently the most meticulous record keeper of the Legal Philosophy Discussion Group. Fuller’s decision not to publish it likely reflected his obsession with the question of purpose and the fact value merger – and the intensity of his desire to defend his project against Hart’s immediate challenges. It is important to read the “Reply to Critics” carefully, however, because it reveals Fuller’s thinking on subjects that never made it into his published writings, and sketches a comprehensive view of legal theory that fails to emerge with such force in later works. Fuller’s own perfectionism meant that many of his deepest insights remained obscure in the published corpus. Second, the essay reveals a great deal about how Hart’s and Fuller’s positions were unfolding in response to one another – before the Hart-Fuller debate “officially” began.

1. Vicarious vs. Direct Evaluation

As Fuller understood it, the major objection to the arguments in *Human Purpose and Natural Law* was simple, yet eluded clear expression. It was an objection lodged against his argument that the value-laden nature of purposive conduct entails a merger of fact and value. His objectors proposed a distinction between “vicarious” and “direct” evaluation. “As I understand the chief point made against my thesis,” Fuller wrote, it “is that even though it may be necessary to evaluate (vicariously) in order to recognize a certain kind of fact (a course of purposive human action) this does not prove there is not a difference between recognizing a fact and engaging in an evaluation.”⁸ Fuller illustrated the objection with a “homely illustration.”

“It may be necessary to wear snowshoes in order to walk on newly fallen deep snow, but this does not mean that wearing snowshoes and walking on snow are the same thing. Perceiving another’s purpose, and deciding what my own purposes ought to be, are two different activities. The first directs itself toward discovering what is, toward recognizing a datum that imposes itself on the mind. This activity achieves its ideal when the mind bends itself compliantly to receive

⁸ Fuller, “Reply to Critics,” 1.

the pattern of something outside itself. In the second activity, the mind, or the organism as a whole, projects its own pattern upon reality. Thus, it is said, we are confronted with a distinction of such fundamental importance that a disregard of it can bring nothing but confusion.”⁹

In other words, the objection to Fuller’s position was that designing a bird’s eye view philosophical account of a legal system – something that requires observing and describing the behavior of people in the system – indeed requires us to understand *as the participants would* the choices that they make, the values they pursue, and the purposes they hope to achieve (a process of “vicarious evaluation”), but it does not require us to *evaluate* those choices, values, and purposes *for ourselves* (in a process of “direct evaluation”). This mapped directly on to Hart’s distinction between purposive legal reasoning – something that participants in the legal system often do, as a matter of fact – and value-laden legal theory. For Hart, it was entirely possible to accept that citizens and officials in the legal system undertake legal reasoning in a purposive fashion and themselves understand the law as aiming toward certain purposes, while at the same time remaining committed to a sharp distinction between fact and value at the bird’s-eye philosophical level. If there was any evaluation required, as Fuller paraphrased Hart’s position, it was only vicarious evaluation – understanding the system as the participants understood it – *not* direct evaluation. Fuller understood his objectors to hold that genuine “evaluation is something very different from recognizing a process of evaluation which we can recognize adequately only by participating vicariously in it.”¹⁰ Although Fuller rejected the idea that there could be any “fundamental distinction... between vicarious evaluation and direct evaluation”, he accepted such a distinction for the sake of argument: “Let us provisionally accept the distinction between observer and decider and inquire with more particularity what happens when we “observe” (recognize, discover, interpret, come to understand) purposive behavior by human beings.”¹¹

2. Internal vs. External Perspectives in Legal Theory: The Early Clash

⁹ Fuller, “Reply to Critics,” 1.

¹⁰ Fuller, “Reply to Critics,” 2.

¹¹ Fuller, “Reply to Critics,” 2.

This component of the early debate between Hart and Fuller is exceptionally important for Hart's intellectual development, for this is likely when Hart started to develop his theory of the "internal point of view." While many legal theorists before Hart and Fuller held that legal theory must take seriously the perspective of the participants within the legal system, Fuller deployed the concept in defense of a fact-value united purposive brand of legal theory: legal theory, if it is adequately to characterize purposive human behavior, must itself take purposes seriously. Hart, responding to this, accepted the significance of the "internal point of view," yet maintained that it did not entail a merger of fact and value at the level of bird's eye philosophical description. In *The Concept of Law*, Hart would defend in detail the idea that legal theory must take a hermeneutic turn, reflecting the perspective of the participants – riffing off of Fuller's defense of a natural law revival, yet spinning it in defense of modified positivism. Indeed, this would come to be the core of Hart's mature critique of legal realism: it was realism's externalist reductionism that blinded it to the perspective of actual participants in the legal system, who understood the law to be a normative guide for their own action, rather than just a series of sanctions. Holmes's "Bad Man" had become, in Hart's philosophy, a sort of "Good Man." For Hart, the internal point of view would become a way of explaining how the law can have normative force for citizens and officials without implying that there was a moral obligation to follow the law because it was the law; the hermeneutic turn provided a middle road between Realism and Natural Law. This point is one that Fuller would have agreed with almost entirely, as his "Reply to Critics" shows. The core of Hart's dispute with Fuller at this point concerned purely the fact-value distinction in general legal theory – in other words, the theoretical *consequences* of taking an inner perspective seriously.

In fact, as Fuller characterized the opposition to *Human Purpose and Natural Law*, he even had in mind what several of Hart's students, most notably Joseph Raz, would later come to call "*detached* normative statements," or the "detached internal point of view" – a mainstay of jurisprudence for the last several decades.¹² For Fuller,

¹² See Joseph Raz, *The Concept of a Legal System* (1980). See also Kevin Toh, *Raz on Detachment, Acceptance, and Describability*, 27 *Oxford Journal of Legal Studies* 403 (2007).

detached normative statements were ubiquitous in discussion of purposive behavior. Here was Fuller's example: "Suppose I see a man trying to shoot another with a pistol I know to be unloaded. Perceiving what is being attempted in this case, I can say, 'Judged in light of this man's end-in-view, this is bad; he won't be able to kill the other man without a bullet.' I can say this without projecting my own wishes onto the situation, and even though I disapprove heartily of the attempted killing."¹³ This is strikingly similar to the notion of a detached normative statement that would become commonplace in later jurisprudence, by which, for example, an atheist may tell an observant Jew "you should not work the Sabbath" without endorsing the practice himself. In Fuller's phrasing, "If I see lightening repeatedly strike on all sides of a tower without hitting it, I might say, 'That's too bad,' but in doing so I would be registering my own disappointment at not seeing the tower hit by lightening; I would certainly not imply, except by obvious metaphor, that the lightening had missed its mark." Fuller put the point most clearly when he wrote, "The recognition that A is trying to kill B carries with it no implications as to whether the attempted act as a whole is good or bad."¹⁴

3. Positivism Re-Rejected

Fuller recognized that this "way of stating the semantic situation"¹⁵ offered special advantages for Hart – the possibility of detached normative statements offered a way for a bird's eye philosophical account of purposive human behavior to retain a veneer of value neutrality while at the same time, seemingly describing the purposive nature of the legal behavior sufficiently.

Pursuing this line of argument, Fuller turned explicitly to legal positivism, developing a newer critique of it based on the relationship between "vicarious" and "direct" evaluation. While positivism was now Fuller's explicit focus, the topic had received mostly implicit, though clear, treatment in *Human Purpose and Natural Law*, and, interestingly, had in fact largely left implicit in Hart's *Discretion* paper and *all of*

¹³ Fuller, "Reply to Critics," 2.

¹⁴ Fuller, "Reply to Critics," 2.

¹⁵ This phrase is from Hart's defense of the core-penumbral distinction in *Discretion*.

Hart's work before this point.¹⁶ Fuller's position was that the distinction between vicarious and direct evaluation could not save legal positivism.

Fuller's key point, as it had been in *Human Purpose and Natural Law*, was that recognizing the complexities of purposive human behavior requires a rejection of the positivist outlook. In the Reply to Critics, Fuller took positivism to be the view that asserts "a distinction between two activities: (1) recognizing a state of fact, and (2) forming those attitudes of praise or blame that shape our conduct and enter into our decision of what we ought to do."¹⁷ One possibility was that the positivist approach could respect this distinction between facts and values, and at the same time capture the reality of purposive behavior, by relying on the distinction between vicarious and direct evaluation. Vicarious evaluation provided a way to account for certain aspects of purposive behavior without requiring a fact-value merger.

But for Fuller, this distinction would not be enough to save positivism. As Fuller saw it, the positivist aimed to provide a value neutral description of human affairs, but, in quest of such a description, was inevitably forced to undertake direct, rather than merely vicarious evaluation. "If we... concede," Fuller wrote, "that to recognize certain kinds of facts, we must participate in a process of evaluation, and that our recognition becomes increasingly effective as our vicarious participation approaches the form of direct participation, then we end with the conclusion" that in order to describe, we must evaluate directly.¹⁸ For Fuller, the positivist project was self-defeating – it failed on its own terms. The attempt to provide a purely factual description of purposive human conduct will end in failure, because such conduct can only adequately be described if we participate – not just vicariously, but nearly directly – in evaluations of the means and ends of the participants in the conduct in question.

¹⁶ On the very few occasions when Hart mentioned positivism before 1956, he used it to refer to Logical Positivism; after 1956, he embraces the term to denote his new jurisprudential approach and uses it frequently, as discussed below.

¹⁷ Fuller, "Reply to Critics," 3.

¹⁸ Fuller, "Reply to Critics," 3. Fuller wrote: "then we end with the conclusion that cognition achieves its goal most successfully when it is aided by something that is by definition not cognition."

Although Fuller's criticism of positivism was here directed to positivism as a broad form of social philosophy, legal positivism was clearly the issue-du-jour. The application was obvious: law was a purposive human activity, and therefore exactly the sort of thing for which any adequate "description" would have to merge facts and values.

Hart's version of the "internal point of view" in *The Concept of Law* would ultimately be his response to Fuller's criticism on this point – borrowing, almost entirely, Fuller's explanation of what a positivist *might* say in response to the claim that positivism cannot adequately characterize the experience of participating in a legal system. Indeed, as a matter of intellectual history, it may have been Fuller who offered this philosophical party-trick to analytical positivism.¹⁹ But if Hart would take this idea and use it as a way of making positivism more sensitive to experience, Fuller took it as a way of moving natural law theory toward less demanding terrain, endorsing an inner morality rather than external moral criteria for legal validity. The two thinkers agreed on the importance of inner perspectives, but disagreed about the place of such a methodological commitment within the framework of legal philosophy.

4. Fuller's Magic Mountain: Part II

As we have seen, Fuller did not think that the distinction between "vicarious" and "direct" evaluation could save positivism – or any theory of human behavior committed to a fact value distinction. But now, Fuller suggested that the distinction between vicarious and direct evaluation, even if it did provide resources for positivism, was a fatuous distinction. He explicitly stated a few paragraphs later: "We cannot solve our

¹⁹ This is of course partly speculative – but only partly. My point is that the pre-Hart-Fuller Debate Hart-Fuller Debate should inform our understanding of the intellectual history of Hart's mature philosophy. That he was engaging with Fuller on this subject must be part of the story, and must complement existing interpretations of the origins of the internal point of view. See also Scott Shapiro, *What is the Internal Point of View?* 75 *Fordham Law Review* 1157 (2006); Dennis Patterson, *Explicating the Internal Point of View*, 52 *Southern Methodist University Law Review* (2006).

problem by replying on a distinction between direct and vicarious evaluation.”²⁰ A philosophical account of purposive human behavior, one that would do justice to the “collaborative articulation of shared purposes,” in the final analysis required direct evaluation – and thus a value-laden bird’s eye view philosophy, probably owing to the pull of Fuller’s purposive “Magic Mountain” on which each purpose and goal existed in the context of higher purposes and goals, and so on, until every purpose being pursued is ultimately derivative from, or at least related to, the ultimate moral goals of human life.

Calling back to his example of the man about to fire an unloaded gun, Fuller commented: “It is essential to see that the simplicity of this [vicarious/direct distinction] account is obtained at a cost,” Fuller wrote. “That cost is the abstraction of ‘a purpose’ (killing a man) from its total context in the mind (and the glands, if you will) of the man with the gun. Now this abstraction is for many purposes not only legitimate, but indispensable for effective communication. But we should not be misled into thinking that an account made possible by this abstraction does justice to the whole process of interpreting or understanding purposive behavior.”²¹ In other words, Fuller thought that the “detachment account” of purposive conduct was *reductive* – just as reductive as positivism and realism, a criticism long associated with Fuller’s early attacks of realism in the 1940s. The genuine phenomenon in question was too complex to be adequately characterized in a manner that reduced purposive action to psychological and biological facts about the states of the people undertaking such purposive action. Purpose, for Fuller, seemed to inhere not just in the minds of agents, but also in systems that in turn shaped individual conduct. Fuller stressed the importance of a broader account of how purpose enters into human action – something reductivist accounts, realism and positivism included, could never explain.

Indeed, Fuller turned next to broader purposive systems, suggesting that we learn more when we move beyond individual psychological facts. “It is fairly clear that my capacity to understand what I observe, and my ability to predict what will happen next,

²⁰ Fuller, “Reply to Critics,” 3.

²¹ Fuller, “Reply to Critics,” 2.

will be increased as I go behind the immediate “end-in-view” and participate vicariously in the *whole* process-forming process going on inside the man with the gun.”²² Fuller remained focused on the importance of purpose to *scientific* explanation, emphasizing that we must pay special attention to purposes (and therefore merge facts and values) if we are going to “understand” and “predict” human behavior – again, virtues of the soberest of scientific analyses that would have appealed to philosophers in the English empiricist tradition, like Hart.

“The more intimately I can in imagination move into his skin, the more adequate or ‘true’ will be my interpretation of what is happening. I will then understand not only what is happening when he adopts some measure for the achievement of ‘his purpose’, but I will also understand what is happening when he moves from ‘one purpose’ to another. I may, for example, be able to predict that if the intended victim will say the words, ‘Rosy has never loved anyone but you,’ the man with the gun will drop his weapon and break into tears.”²³

Fuller seemed to be making two distinct arguments here. The first, less important argument, had to do with the limits of vicarious evaluation in terms of the intimacy with which observers can identify with the ends of the people being described. To understand purposive human behavior fully, it was necessary not just to envision the aims and purposes of the participants “vicariously,” but rather “intimately” to “move into” their “skin” – something Fuller did not spell out fully, but was clearly intended to be significantly more demanding.

Fuller’s more important argument was a reiteration of his picture of the purposive Magic Mountain. While vicarious evaluation might be sufficient in a world of single purposes easily defined, vicarious evaluation would not be able to capture what happens when people select new purposes and pursue new ends. *That* would require a vicarious evaluation of the higher-order aims that guide the selection of a new immediate purpose, and the aims of a higher order still, and so on and so forth, until the legal theorist is confronted with genuine morality, pure and simply, transcending the distinction between vicarious and direct evaluation. Fuller continued:

²² Fuller, “Reply to Critics,” 2. Emphasis added.

²³ Fuller, “Reply to Critics,” 3

“The extent to which the notion of the ‘end-in-view’ simplifies reality is shown by the fact that it is largely a matter of linguistic convenience whether we treat any particular reorientation in human behavior as the adoption of a new purpose, or as the adoption of a new means for achieving an old purpose. If we make the ‘ultimate’ purpose something like Bentham’s ‘happiness,’ then everything else becomes a means, and there is no such thing as a shift from one purpose to another, but only a shift from one means to another.”²⁴

It is noteworthy that with this argument, Fuller built upon Hart’s analysis of the Relative Indeterminacy of Aim – accepting Hart’s argument that in many human situations, there are not neatly aligned purposes set out for consideration, but instead a “grand matrix”²⁵ in which multiple purposes at different levels of abstraction interact with each other, perhaps oriented around a “master goal,” perhaps not. The multitude of relevant purposes was one of the sources of legal indeterminacy in Hart’s analysis – and the very same thing was one of the motivations for a fact-value merger in Fuller’s.

5. Fuller’s Appeal to David Hume

For Fuller, facts and values merged in the study of purposive human behavior because that merger was necessary to provide *scientific* knowledge of such behavior. Having made his own argument to that effect, Fuller turned to authority, seeking to establish that no lesser a positivist and empiricist than David Hume had in fact endorsed a position compatible with the one Fuller set out to defend, even though Hume was perhaps the figure most associated with the fact-value distinction. Fuller argued that in adopting his interactive approach to fact and value, and taking seriously the concept of evaluation, “we shall only be returning to the method adopted by the man who started the whole modern controversy about fact and value. David Hume’s analysis of the problem does not proceed from some axiomatic assertion about the intrinsic Non-Is-ness of Ought, nor from any logical compulsion to keep fact and value distinct in order to ‘think straight.’”²⁶

²⁴ Fuller, “Reply to Critics,” 3.

²⁵ This is again Hart’s phrase from *Discretion*.

²⁶ Fuller, “Reply to Critics,” 4.

That justification for a fact-value separation belonged to Hart, not Hume. Hume, like Fuller, began his approach “with an examination of the psychology of decision.”²⁷

Fuller’s key point was that Hume’s division of facts and values did not grow out of service to any ideal of “clarity” or in response to inherently incompatible features of facts and values that rendered them different kinds of things. Instead, Hume’s division of facts and values was predicated on a faulty theory of *human psychology*. And since Hume’s commitment to the fact-value distinction was rooted in a psychological theory, not based on an argument about objective ontology, Hume’s distinction could be modified or called into question if his psychology was shown to be oversimplified – which Fuller believed it was.

Here is Fuller’s account of Hume’s fact-value distinction. It is worth quoting at length because this manuscript has never before been analyzed, and Fuller rarely (or never) in other writings discussed Hume, one of Hart’s chief philosophical forefathers:

“In Hume’s psychology the human mind has two “faculties.” These are “reason” and “sentiment.” Reason can recognize two kinds of objects: matters of fact (“the ceiling is green”) and relations (“the longest side of a triangle is opposite the widest angle”). Now when we are deciding whether to express praise or blame of some action, or how we should conduct ourselves, we do consider matters of fact and relations; reason is implicated. But if we examine closely any concrete decision about what is good and what is bad, we shall find that when the mind has exhausted all the facts and all the relations that might be thought to be relevant, a decision still does not follow. For such a decision to be reached, then, the second faculty, “sentiment,” must intervene.”²⁸

“If Hume’s analysis had stopped at this point, the precise roles of reason and sentiment in moral decisions would have remained obscure. Hume assumed that in the selection of an apt means for the achievement of an end, the faculty demanded was reason, not sentiment. Sentiment endured only when the end itself was in question. Had Hume thought of means and ends as moving in circles of interaction, he would have had difficulty in saying just how sentiment intervenes and where it breaks into the circle. Sentiment would have been, not the master of

²⁷ Fuller, “Reply to Critics,” 4.

²⁸ Fuller, “Reply to Critics,” 4.

reason, but a kind of helpmate aiding reason in undefined ways at undefined junctures.”²⁹

“The uncertainty Hume avoided by making a further assumption of psychology, the assumption, namely, that in the process of decision means and ends arrange themselves, not in circles, but in tandem fashion. With this picture before his mind, Hume saw the intervention of sentiment as decisive and controlling, for it was sentiment that dictated the selection of the prime end upon which everything else depended. Sentiment held the whip hand, then, and reason was reduced to the role of a compliant servant.”³⁰

The problem with this theory, as Fuller understood it, was that it rested on a flawed understanding of how human cognition works:

“These conclusions of Hume’s are as bad, or as good, as the psychological assumptions on which they are based. I submit that the division of mental activities into “faculties,” reason and sentiment, is a gross oversimplification of what is in fact complex and remains to this day obscure. I submit that it is also a simplification, if not a complete falsification, to assume that in the process of decision means and ends arrange themselves in tandem fashion.”³¹

The thrust of Fuller’s observation was twofold. First, if Hume’s psychology was wrong, then there was no real “Humean” justification for a fact-value distinction. While Hart seemed to justify his commitment to the fact-value distinction on a theory of what it took to “think straight,” Hume (as Fuller read him) rested it on a psychological division of labor between reason and sentiment.

Second, if Fuller could provide a different account of the psychology of decision making, he could provide a genuinely Humean justification for a fact-value integration – thereby recruiting the founder of modern empiricist epistemology to his side of the debate.

6. Deciding *Oughts*: The Collaborative Articulation of Shared Purposes Revisited

²⁹ Fuller, “Reply to Critics,” 4.

³⁰ Fuller, “Reply to Critics,” 4.

³¹ Fuller, “Reply to Critics,” 4.

Fuller did not really sketch a new theory of human psychology beyond his assertions that such a psychology would have to recognize that means and ends orient themselves in “circles” rather than in parallel “tandem fashion.” But this observation, basically a psychological one, did pave Fuller’s road to another significant point. Much of Fuller’s argument so far had been designed to establish that in order to describe what *is*, we must delve into the realm of *ought*. Positivism, he argued, failed as a theory of description: it did a poor job describing what is. At this point in his argument, however, Fuller suggested that positivism *also* failed to describe how society decides upon ends and values. Positivism got *ought* wrong too.

As Fuller had established very briefly in *Human Purpose and Natural Law*, society deliberates on means and ends, facts and values, in one grand process that he called the “collaborative articulation of shared purposes.” In *Human Purpose and Natural Law*, Fuller had suggested that by ignoring this process, positivism could not describe facts and means, as those were part of a broader, more organic whole. Now, in the Reply to Critics, Fuller made the complimentary argument: that by failing to take account of the “collaborative articulation of shared purposes,” positivism also erred in its description of how society formulates ends and values. For Fuller, we did not decide upon values and ends in an isolation, whether by fiat or by a process of cold moral logic. Instead, we decide upon ends and values in organic collaboration with decisions about facts and means.

To illustrate, Fuller provided to his colleagues what seems like a bizarre chart³² – but which, on reflection, is deeply revealing of his criticisms of the positivist outlook. This was Fuller’s best attempt to characterize positivism:

³² Fuller, “Reply to Critics,” 5.

Object of decision	Location of this object	Human faculty controlling decision	Attitude appropriate to decision	Effect of collaborative effort
1. What exists or subsists	“external” to observer	Reason or cognition	Receptive	Advances solution
2. What ought to be	“internal” to observer	Emotion or sentiment	Projective	useless

Fuller believed there was no “particular controversy” about the first line in the chart, the line describing our approach to the study of physical objects in the world. Positivists and anti-positivists could agree that reason and cognition were the appropriate tools to use to describe objects that exist externally to the observer, that the senses are “receptive” to these objects, and that if we work together – as the scientific community does -- we can come to a greater understanding of the physical world. This line summarizes Fuller’s genuinely positivist approach to natural science. What Hume classified as “facts and relations” are “‘external’ to us in the sense that they are waiting for us to examine them, and we can return to them repeatedly in an effort to understand them better. In seeking to understand them we employ the higher mental faculties, reason or cognition, aided of course by the senses. Our attitude is appropriately receptive; we stand ready to bend our minds to a reality that imposes itself on us. This whole undertaking is not only facilitated by collaborative effort, but in its higher reaches, say, in science, would be impossible without collaboration.”³³

But when it came to the description of what *ought* to be, Fuller held that the positivist picture was deeply flawed for two reasons. First, it failed to account for the collaborative articulation of shared purposes; second, it failed to account for how people decide upon purposes and aims even in the simplest of instances on a *psychological* level. “The extreme positivist position,” Fuller wrote, “asserts that any process of decision

³³ Fuller, “Reply to Critics,” 5.

directed toward determining what ought to be involves the projection of something within ourselves upon external reality, a projection controlled ultimately not by reason, but by emotion.”³⁴ According to this formulation, “decisions about what ought to be cannot be advanced by collaborative effort or discussion. If they are dictated by emotion, discussion is useless; emotion is by definition something removed from the effect of reason. If these decisions are controlled by socially conditioned attitudes, it is true that such attitudes may be reconditioned and redirected by talk, but such talk, being essentially manipulative, can hardly be called ‘discussion.’”³⁵

This comment reveals Fuller’s abiding belief in the ability of citizens to deliberate rationally together, express values, select objectives, refine aims, argue about means, and implement policies – all in one “conversation,” something difficult to describe in detail, but a conversation that is the source of law. Positivism forecloses the possibility of the “collaborative articulation of shared purposes” by presenting a theory of psychology that is inconsistent with discussion about what matters most. A theory implying that “the process of deciding in what direction our purposes ought to be bent” could not “be advanced by discussion” would “[carry] serious implications for the management of the lives of all of us, affecting profoundly the allocation of our time and energies”³⁶ – presumably in a very bad way, eliminating the very foundations of democracy of any kind. Ironically, it was Fuller’s classic mid-century “faith in reason” and his belief that rational discourse could solve social problems that conflicted most with the fact-value separation that Hart thought was required to clear communication and “thinking straight.” Indeed, among their most basic clashes resulted from their differing visions for what “rationality” required. For Fuller, *positivism’s implicit psychology ruled out the possibility that we can rationally converse about questions of value or about our shared fate*. And that, he held, was a terrifying, illiberal prospect that undercut the core of self-government.

7. Cultural Relativism

³⁴ Fuller, “Reply to Critics,” 5

³⁵ Fuller, “Reply to Critics,” 6.

³⁶ Fuller, “Reply to Critics,” 6

Fuller noted that *Human Purpose and Natural Law*, and his attention to the collaborative articulation of shared purposes, had provoked from the group a form of cultural relativist criticism. This criticism would not have come from Hart, whose faith in the freedom of human reason surpassed even Fuller's. Although Fuller is murky in his characterization of the criticism, the criticism seemed to be something like this: the "collaborative articulation of shared purposes" *is* something that one can describe, explain, and predict in a purely value-neutral, factual manner – that is, with a positivist theory – because the discussion and discovery of our true ends is, for better or worse, predestined by our cultural context. On this account, what takes place in the "collaborative articulation of shared purposes" is not a process of genuine evaluation, careful weighing of alternatives, and choice -- employing *free* human reason – but instead an elaboration and consolidation of culturally implanted "desires." "Discovering what we really want" – the ultimate end of the "collaborative articulation of shared purposes" – was a form of discovery ultimately "directed... toward a cultural pattern common to all members of a given society."³⁷ This process, so described, *does* seem to lend itself to a value-neutral explanation. Such an explanation would be complicated, to be sure: the social theorist would have to study the desires, motivations, ends, and reasoning-patterns implicit in the *weltanschauung*, but, once accounted for, these could add up to a truly positivist explanation of Fuller's "collaborative articulation of shared purposes," given that that such collaborative articulation did not involve the intervention of genuinely free human reason untethered to cultural inheritance. On this view, morality and value-analysis, necessary components of the "collaborative articulation," were themselves reduced to cultural fact – preserving the fact-value distinction at the cost of the genuine freedom of the mind.

Fuller was most certainly not a cultural relativist – indeed, in his mind, positivism and realism were partly relativist theories of law, and precisely that was their flaw.³⁸

³⁷ Fuller, "Reply to Critics," 6.

³⁸ See for example Fuller, *Law in Quest of Itself* (1940).

Fuller saw this relativist critique of the fact-value fusion in the “collaborative articulation of shared purposes” as deeply flawed. He suggested that:

“this seems to me to demand of cultural relativism an explanatory power in excess of its already strained capacities. If we assume, as is generally the case, that the ‘cultural matrix’ implants in the individual simple ‘attitudes,’ and that these attitudes shape his conceptions of right and wrong, we are already sufficiently deep in difficulties. How can an attitude be ‘simple’ when it has to answer to a complex and fluctuating reality? How does an ‘attitude’ discern the common core shared by a series of apparently disparate events? And since attitudes demonstrably change, what brings about this change? These questions are hard enough to answer. But when cultural relativism is made to assert that the special deposit in the psyche of an individual is made to a thing so complex that its meaning can only be extracted by contemplation and prolonged introspection,” then more must be taking place than a mere elaboration of culturally “implant[ed]” “attitudes.”³⁹

“Certainly,” Fuller wrote, “the notion of ‘discovering’ by reflection what you ‘really want’ is about as foreign to the usual forms of cultural relativism as any idea could be.”⁴⁰

What is important about Fuller’s discussion of relativism is its confirmation of his faith in reason. Fuller believed that reasoning – and *collaborative* reasoning – was part of the human good, part of what human beings did together in organized society to make decisions about their shared future. This is yet another sense in which Fuller’s thought is deeply Aristotelian: he believed that man was a political, as well as a rational, animal and that rational deliberation in the public sphere, a process that presupposes the genuine freedom of the rational mind, is part of the basis of a free society. These were features of societies under law to which legal theory must give voice.

In some ways, Fuller’s concept of the collaborative articulation of shared purposes anticipates the notion of deliberative democracy – the strand of democratic theory that emphasizes the process of collective decision-making and takes seriously the idea that the legitimacy of collective decisions is partly a function of the rational deliberative process among citizens that led to them. In some ways, process theory jibed

³⁹ Fuller, “Reply to Critics,” 7

⁴⁰ Fuller, “Reply to Critics,” 7.

more with the Schumpeterian notion of “mass” democracy – with a focus on national institutions, markets, and decision-makers held in check by institutional designs – than with the deliberative theories of democracy, focusing on collective decision-making from the ground up.⁴¹ But Fuller’s understanding of law’s “conversational” origins reveals a distinctly deliberativist theme to his more abstract, yet still process-theoretic view. We will see later that Hart, too, understood deliberation as a central part of democracy – but that discussion, and what it reveals about the Hart-Fuller debate, must wait until the final chapter.

8. Natural Law and Moral Responsibility

Concluding his “Reply to Critics,” Fuller acknowledged the suspicion with which many of his colleagues thought of “natural law.” After all, in the 1950s, “natural law” was associated with the “conceptualism” of formalist jurisprudence, with doctrinal Christianity, and with a line of Thomist thought consigned to the margins of jurisprudence, then long outdated, though in recent decades revived in the work of Hart’s student John Finnis.⁴² To the process generation, natural law and positivism were *both* outcasts – both gesturing back to an unattractive past, and both dogmatic in a way that would not sit well in an age of technocracy and “reasonable solutions.” Fuller’s suggestion, in *Human Purpose and Natural Law*, that the purposive nature of human conduct demanded a revival of natural law theory in modified form was an unpopular proposition – not because of any disagreement about the nature of purposive behavior, but because of the political and philosophical baggage attached to the term “natural law.”

In his “Reply to Critics,” however, Fuller characterized the resistance to “natural law” partly in terms of moral freedom and moral responsibility. “One of the chief causes

⁴¹ For an introductory discussion of the contrast between these two concepts of democracy, see Richard Posner, *Law, Pragmatism, and Democracy* 130-58 (2003).

⁴² See generally John Finnis, *Natural Law and Natural Rights*, (2nd ed. with same pagination and a Postscript, 2011); John Finnis, “Natural Law: The Classical Tradition,” in Coleman, Jules and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002); John Finnis, “Natural Law Theory: Its Past and Its Present,” *Routledge Companion to Philosophy of Law* (2011).

for the emotional reaction felt by many against anything smacking of natural law centers in the word ‘discovery.’ To say a man can ‘discover,’ and especially to say that he can be helped to ‘discover,’ what he ought to do, or ought to be, seems to take man out of his active role, to discharge him from his position as captain of his soul and master of his fate.”⁴³ Classical natural law theory was, in this regard, a cousin of moral realism: it held, implicitly at times, that there were correct moral facts in the world awaiting discovery; we had, accordingly, no real role in shaping what was morally true, hence the criticism that natural law theory in some respect denied us intellectual or moral agency. Indeed, Fuller wrote, “Karl Popper asserts that the whole concept of natural law is a fiction invented by man in order to shift from himself responsibility for his moral decisions.”⁴⁴

“But surely this is a false appearance,” Fuller continued, “arising from the fact that ‘discovery’ *normally* implies the recognition of some external reality completely outside ourselves and to which, after discovery, we must accommodate ourselves.”⁴⁵ But just as purposive human action is the sort of thing that resists positivist description, purposive human action is the sort of thing that resists this objection to a natural law approach. When we study purposive human action, on Fuller’s view, we are really studying ourselves, our own true nature, and the grammar of the uniquely human activities in which we participate. Indeed, “when a man discovers his own true nature, the discoverer and the thing discovered are one and the same, or at least parts of the same thing in interaction. If the reality that a man discovers in his own nature imposes itself on him, he can console himself with the reflection that the intruder on his comfort is at least a life-long acquaintance.”⁴⁶

Fuller continued by saying that “there can be no such thing as responsibility for a moral decision, as distinguished from responsibility for meeting the demands of such a

⁴³ Fuller, “Reply to Critics,” 7.

⁴⁴ Fuller, “Reply to Critics,” 7.

⁴⁵ Fuller, “Reply to Critics,” 7 (emphasis added).

⁴⁶ Fuller, “Reply to Critics,” 7.

decision once it is reached” *without* “some concept of natural law.”⁴⁷ Without such a concept, we would never be able to measure our moral choices – and yes, Fuller did believe we make moral choices – against some standard, never able to know whether, as individuals or as a society, we were doing well or badly with respect to some higher standard. “Surely the notion of responsibility with any standard for measuring it is a monstrosity,” Fuller wrote, “recalling all the horrors of Kafka’s ‘The Trial.’”⁴⁸

With this, Fuller anticipated what would become perhaps the defining theme of his debate with Hart – whether a positivist or natural law approach best-equipped society to resist tyranny. Ironically, as we will see, Hart would claim that the *separation* of law and morality was the only way to provide an external standard by which legal systems could be judged – and held responsible. But in this “Reply to Critics,” Fuller begins to engage with ideas at the intersection of natural law and moral responsibility, which would remain a lasting theme, and spurred Hart’s thinking on the same topic.

B. The Significance of Fuller’s “Reply to Critics”

Fuller’s “Reply to Critics” is significant, and worthy of our attention, for what it reveals about Fuller’s thinking in the run up to Hart’s Holmes Lecture, the lecture that would launch the “official” Hart-Fuller debate. The “Reply to Critics” shows that in the winter, 1956-57, Fuller began to formulate his modified natural law agenda in direct response to Hart’s stimulus, and in tandem with the Process School’s institutional agenda, pressing beyond the theory Fuller had expressed in *The Law in Quest of Itself*. Fuller’s most basic anti-positivist position was that purposive human behavior is not the kind of thing that can be adequately studied or described by a method that requires a fact-value separation. To describe, one must understand, and to understand, one must evaluate. Hart, in turn, would adopt a modified version of Fuller’s basic insight into his later work, dubbing it “the internal point of view” – likely drawing on a variety of other philosophical resources in addition to what he learned from Fuller in formulating his

⁴⁷ Fuller, “Reply to Critics,” 7.

⁴⁸ Fuller, “Reply to Critics,” 7.

view. Yet Fuller's anti-positivism was also based on the possibility of a "collaborative articulation of shared purposes" – the society-wide "conversation" in which we decide questions of ultimate importance, and questions of common strategy, and a process in which facts and values and means and ends intermingle freely in "circles." For Fuller, this "collaborative articulation" was among the most important things that any legal philosophy needed to characterize correctly, for it was, at the most fundamental level, the source of law, and the process that underpins all forms of social order, and, more specifically, the process that set a society free and enabled self-government. There was a strong sense in which Fuller believed that the "collaborative articulation of shared purposes" was precisely what it was that distinguished liberal democracy, in which the collaborative articulation aspired to be robust and open, from totalitarianism, in which collaborative articulation was expressly, and violently, stifled.

And it was precisely this crucial component of a free society that positivism failed to account for – both because the collaborative articulation was a purposive endeavor, and purpose was the one strange thing that eluded the fact-value distinction, and also because positivism seemed to presuppose a psychological theory that foreclosed the possibility of *reasoned* debate, discussion, disagreement, the very things that composed the conversation in which we, as a society, decided "what we really want," seeking something resembling a reflective equilibrium of ends and means, facts and values, statuses and fates.

In the end, the "Reply to Critics" reveals that Fuller's anti-positivism was based on two beliefs: First, the belief that purposive human behavior, of which law was a part, could not be adequately characterized by any epistemic method that insisted on a fact-value separation. Second, a faith in reason: the belief that human beings are capable of exercising radically free moral imaginations, deliberating together, and crafting strategies and aims for a shared future. Positivism was unable to account for how such a process could come about, and also unable to provide any standards for the evaluation of such pursuits. While this final point may seem like the most obvious, it was not Fuller's only point. The important thing to notice is that Fuller's anti-positivism was based in very

abstract political and philosophical considerations, and was not, primarily, a legal or jurisprudential position. Fuller was opposed to positivisms of all kinds when applied to social theory, just as Hart subscribed to positivisms of all kinds in epistemology. Yet legal positivism, as a subset of social positivism, was particularly troubling because law was among the most purposive of human endeavors and because law, more than any other system of social institutions or form of social order, was most intimately connected to the “collaborative articulation of shared purposes.” Law was the tool we used to achieve our ends, and the embodiment of those ends themselves; there could be no separation of fact and value in the *study* of law, and there was no separation of fact and value in law itself.

When we read “Positivism and Fidelity to Law: A Reply to Professor Hart,” Fuller’s first major published contribution to the Hart-Fuller debate, we would be tempted to believe that his anti-positivism was rooted in a theory of purposive legal reasoning. In fact, his anti-positivism was rooted in much deeper considerations about the nature of purposive behavior and the possibilities for rational agency in a free society. Indeed, it is entirely plausible that Fuller agreed with Hart that there could be a separation of legal reasoning and legal theory, and that it was philosophically consistent for Hart to accept purposive interpretation while rejection purposive legal theory. After all, for Fuller, the main point was that legal theory *must* be value-laden for much more fundamental reasons. The pre Hart-Fuller Debate Hart-Fuller debate reveals as much about Hart’s and Fuller’s positions as anything in the published scripts – perhaps more.

Chapter 9. Reformulating Positivism

As Hart and Fuller were beginning to form and solidify the positions that would make them famous, they remained active participants in the Legal Philosophy Discussion Group, which was pursuing more practical considerations, yet considerations still rooted in philosophy. Jack Dawson opened the new semester with a presentation on January 15. Dawson circulated a lengthy excerpt from Hademann's "The Flight into the General Clauses," translated from German, which specifically address the question of discretion in Hitler's Reich, and invited the group to consider their analyses in an unforgiving political context.¹ Through the remainder of the Spring Semester, the group began to pursue the consequences of H.L.A. Hart's distinction between the attempt to govern by prospective rules and the attempt to govern by the delegation of discretion. Under what circumstances was it better to govern by rules, accepting that some discretion was inevitable, and under what circumstances was it better to delegate discretionary power to officials in the future, more closely connected to the action requiring regulation?

A. Rule versus Discretion in Law

Herbert Wechsler – a visiting professor from Columbia and Henry Hart's co-author on *Federal Courts in the Federal System* -- led the next discussion, in which he focused on discretion in criminal law. Wechsler was at that time drafting the Model Penal Code as part of his responsibilities with the American Law Institute. For Wechsler, H.L.A. Hart's distinction between spheres of law governed (or attempted to be governed) by determinate rules and the express delegation of discretion was particularly pressing: in

¹ Memorandum to The Legal Philosophy Discussion Group, (On File in the Harvard Law School Library, Freund papers, Box 155, Folder 5/6).

the Model Penal Code, he had to decide how much discretion to confer to different officials in the criminal process. “At the risk of dealing with a philosophical problem in too practical a context,” Wechsler wrote to the group in advance of the meeting, “I propose to put before you some specific situations in which the task of mediating between rule and discretion has appeared to me particularly challenging or has evoked responses that are of interest in themselves.”² Among the six examples Wechsler mentioned are situations that sound strikingly familiar today: “How far should the legislature accept the tendency to grand courts and correctional authorities blanket discretion in the sentencing and treatment of offenders, subject only to the barest outside limits like maximum terms of imprisonment?” Wechsler apologized to the group for his single-minded focus on the Model Penal Code, but sincerely wanted his colleagues’ help defending the Code from criticism: “I hope you will not feel imposed upon if I solicit your advice upon such issues as the ones that I have stated.”³ Wechsler circulated a draft of a portion of the Code that occupied him most at that time, noting especially that he was “now engaged in the defense of these submissions, at least those dealing with the sentencing and treatment of offenders, against vigorous attack which argues mainly that they would unduly limit the discretion of the courts and the administrative organs of correction. Like the proverbial lawyer who has a case, I find it hard to think or talk about anything else.”⁴

Wechsler and H.L.A. Hart developed a particularly strong intellectual and collegial relationship. As Lacey noted, Wechsler “happened to know and admire [Hart’s] and Jenifer’s old friend Francis Graham-Harrison.” Hart found Wechsler “an ‘interesting though rather gloomy character’, ‘dark and rather tough but alive’. Wechsler, whose marriage had recently broken down, had just turned down the top job in criminal law at

² Memorandum from Herbert Wechsler to the Legal Philosophy Discussion Group, “Rule and Discretion in the Criminal Law: Some Problems for the Draftsman of a Code.” (On File in the Harvard Law School Library, Freund Papers, Box 155, Folder 5/6.)

³ Memorandum from Herbert Wechsler to the Legal Philosophy Discussion Group, “Rule and Discretion in the Criminal Law: Some Problems for the Draftsman of a Code.” (On File in the Harvard Law School Library, Freund Papers, Box 155, Folder 5/6.)

⁴ Memorandum from Herbert Wechsler to the Legal Philosophy Discussion Group, “Rule and Discretion in the Criminal Law: Some Problems for the Draftsman of a Code.” (On File in the Harvard Law School Library, Freund Papers, Box 155, Folder 5/6.)

Harvard because he was ‘too wedded to politics friends etc in New York’. ‘Like all the good criminal lawyers, here,’ [Hart] reported to Jenifer, ‘[he] is an active penologist much concerned with sentencing, parole boards, policy.’”⁵ Wechsler’s intense interest in criminal law, and his work on the Model Penal Code, seized Hart’s immediate interest. The two “had long debates about criminal responsibility, punishment, and – most important in terms of influence on [Hart’s] own work – causation.” Lacey noted that Hart “had a high estimation of the ‘civilized and progressive’ Wechsler and, though ultimately unpersuaded, was intrigued by his rigorously utilitarian and policy-oriented approach. Over the course of the year, these regular exchanges, as well as his reading of the vast American literature on proximate cause, convinced him ... to take more seriously the ‘policy approach’ – in other words, the argument that legal rules and decisions about causation are ultimately to be explained in terms of judges’ and legislators’ concerns with policy issues such as law’s economic impact.” Hart recalled decades later that he felt compelled significantly to revise a book project he was completing with Tony Honore, *Causation in the Law*⁶, in light of examples he discovered in the Harvard basement. “We must rewrite this thing,” Hart told Honore.⁷ Indeed, “as a direct result of [Hart’s] encounter with Wechsler, the final version of *Causation in the Law* was reconstructed in terms of a debate with the policy approach.”⁸

After the discussion of the Model Penal Code led by Wechsler, the group reconvened for a discussion of anti-trust laws. The group’s meeting on February 26th took a similar approach interrogating the benefits of prospective rules or discretionary delegation, this time in anti-trust. “Don Turner and Kingman Brewster will do the talking, with interruptions from Dave Cavers and Al Sacks, assisted by the chorus,”⁹ the organizers announced. Turner and Brewster would pursue a similar theme to Wechsler, by investigating the consequences of attempting to govern by rules or attempting to

⁵ Lacey 187, quoting from Hart’s letters.

⁶ H.L.A. Hart and Tony Honore, *Causation in the Law* (1959).

⁷ Brock-Harrison interview.

⁸ Lacey, 188.

⁹ Memorandum to the Legal Philosophy Discussion Group announcing the Next Meeting of Tuesday, February 27th, 1957. (On File in the Harvard Law School Library, Freund Papers, Folder 155, Box 5/6.).

delegate discretion in a specific area of law. H.L.A. Hart's initial, philosophical distinction controlled, conceptually at least, the group's agenda once again. Brewster and Turner circulated two documents in advance of their presentation: an article from the *American Economic Review* "suggest[ing] why existing legal instruments and procedures are likely to be inadequate to the problem of economic concentration,"¹⁰ and a "Proposed Antitrust Statute," which the speakers billed as "a suggested approach to the problem of coping with market power which currently seems beyond the reach of law."¹¹

B. Synthetic Faith in Reason: *Authority* as Reasoned Elaboration

Fuller and Hart were interested in the way regulators should craft their regulations, and how the analysis of discretion could influence the law in practice. Hart in particular was deeply engaged with criminal law and criminal responsibility. But their major concerns were with jurisprudential themes that bumped up against political, not just legal philosophy. These broader considerations returned to the Legal Philosophy Discussion Group at the next meeting. On March 19th, after two meetings discussing how H.L.A. Hart's distinction between government by rules and by discretion applied to criminal law and to anti-trust, the group turned to a more abstract philosophical question – how discretion related to *authority* – in discussion led by government professor and Carl Friedrich,¹² a German-born political philosopher and émigré who became one of the world's leading scholars of totalitarianism and a thinker of lasting fame. Friedrich's analysis provided a brilliantly structured, synthetic defense of the connection between rationality in legal reasoning and much broader concepts of political legitimacy. Besides

¹⁰ See Memorandum to the Legal Philosophy Discussion Group announcing the Next Meeting of Tuesday, February 27th, 1957. (On File in the Harvard Law School Library, Freund Papers, Folder 155, Box 5/6.)

¹¹ See "Proposed Antitrust Statute (For the Legal Philosophy Discussion Group)" accompanying Memorandum to the Legal Philosophy Discussion Group announcing the Next Meeting of Tuesday, February 27th, 1957. (On File in the Harvard Law School Library, Freund Papers, Folder 155, Box 5/6.)

¹² See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155, Folder 5/6. Also preserved in the Henry Hart papers, Box 35, Folder 7/8.)

Hart's *Discretion*, Friedrich's "Authority and Discretion" was the year's most significant contribution.

"Discretion has by now become fairly well circumscribed, as both definitions and applications in practice have been explored," Friedrich wrote to the group in advance of his presentation. "But how does it fit into the broader framework of legal philosophy?"¹³ Specifically, what is the relationship between discretion and authority? Friedrich argued: "It has been generally observed that discretion is closely tied to authority, that is to say we are willing to grant discretion roughly in proportion to the degree to which we are prepared to accept authority. The greater the authority a person commands, the greater the leeway of discretion ordinarily allowed him. But this undoubted relationship between authority and discretion raises the issue of what is to be understood by authority."¹⁴ Friedrich reviewed possible definitions to the question "what is authority," perhaps employing a form of definition that appealed to H.L.A. Hart, perhaps not, before proposing five different answers to the question, "why should I obey X?" Just as H.L.A. Hart had proposed to define discretion in law by turning to examples in everyday life, Friedrich looked to examples of authority in non-legal contexts, bringing the philosophy of Theodor Adorno to bear on "the case of parental authority and the role of reason therein."¹⁵

For Friedrich, there was an important difference between authority and "power." Specifically, he seemed to understand authority as power *communicated* in a particular way. "It should be recognized," he wrote, "that one important aspect of authority is to be

¹³ See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart papers, Box 35 Folder 7/8.)

¹⁴ See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart papers, Box 35 Folder 7/8.)

¹⁵ See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart papers, Box 35 Folder 7/8.)

found in the field of communication,” whereas power was a rawer, less communicative form of control.¹⁶

Pushing this point further, Friedrich delivered his most significant insight: *Authority was power guided and constrained by reasoned elaboration*. Friedrich proposed to define authority “as the ‘potentiality of reasoned elaboration’ when referring to communications – and therefore as the ‘capacity for reasoned elaboration’ when referring to persons.”¹⁷ In other words, what gave people, officials, or institutions authority – defined in contrast with power – was the capacity for reasoned elaboration. In this formulation, reasoned elaboration was not just a normative requirement on courts derived from their institutional competence: it was precisely what it was that gave courts *authority*, as opposed to raw power.

This line of thinking expressed a nugget of thought that was precisely in line with process theory and resonant with the views of H.L.A. Hart in *Discretion*. Hart, Fuller, and the process theorists, for the most part, all believed in a central analogy: What reasoned elaboration was to arbitrary whim, legitimate authority was to power. If power could be exercised by arbitrary whim, authority could only be exercised in a process of reasoned elaboration. What is particularly significant about Friedrich’s discussion is that it reveals how the process theorists, though they had developed the notion of reasoned elaboration as a guide for judicial reasoning, were generalizing their insights, deploying the concept of reasoned elaboration to help to account for the nature of political legitimacy itself. This was, in fact, a natural continuation from Hart’s *Discretion* paper, where Hart had demanded a form of reasoned elaboration for all decision-makers in the legal process, not just judges. It was reasoned elaboration that made all of these decisions *authoritative*, rather than merely rooted in power and arbitrary whim.

¹⁶ See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart papers, Box 35 Folder 7/8.)

¹⁷ See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart papers, Box 35 Folder 7/8.)

Friedrich discussed how authority and power function in totalitarian societies, and then argued that the obligation of reasoned elaboration was what set constitutional societies apart from the totalitarian nightmare. This line of inquiry lay at the core of Friedrich's long-term research agenda. In Friedrich's words, "Authority interpreted as the capacity for reasoned elaboration provides the clue to the role of discretion in constitutional societies (governments according to law)." After discussing several other issues, Friedrich defended "the universal significance of authority (and hence of discretion) for all societal processes."¹⁸

Friedrich's analysis set forth, in elegant terms, the nature of the process theorist's faith in reason – something Fuller had defended so eloquently in his "Reply to Critics." Almost everyone in the Legal Philosophy Discussion Group believed, to some extent, that the integrity of decision-making processes was what anchored the concept of justice – and what had been denigrated so destructively in totalitarian societies. Friedrich pointed out that the concept of legitimate authority and reasoned elaboration stand in a relationship of mutual entailment – they are part and parcel of the same political-philosophical insight. H.L.A. Hart would likely have agreed with this claim too, though he would be quick to point out that the distinction between authority, as a concept infused with normative standards, and power was one that it was essential to maintain – it was exactly parallel to his distinction between discretion and whim.

Louis Jaffe presented the year's final paper on April 23, 1957, focusing on "current dilemmas" in "bureaucratic discretion," continuing, after Friedrich's philosophical hiatus, the task of applying what the group had learned about discretion to the application of law in particular institutional settings – criminal courts, anti-trust agencies, and now, bureaucracies. Although Jaffe's presentation concluded the formal meetings of the Legal Philosophy Discussion Group for the year, the action was far from over. For one week later, H.L.A. Hart delivered his Holmes Lecture, a watershed moment in the history of legal theory and a blockbuster on the Harvard Campus.

¹⁸ See Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart papers, Box 35 Folder 7/8.)

C. Hart's Holmes Lecture: Positivism as the Separation of Law and Morals

Dean Griswold had invited Hart to deliver the Holmes Lecture in January, just after he returned after Christmas for the Spring semester. “Immediately after accepting” Dean Griswold’s invitation, Lacey reported, Hart had “suffered the deepest in a series of intellectual panics which had haunted him throughout the year. As he contemplated his long list of teaching, writing, and speaking commitments between January and April... he became increasingly anxious about whether he could deliver something of adequate quality, and prevaricated about whether he should pull out of the commitment before it was too late.”¹⁹ Hart’s decision to take on the central themes of his time at Harvard only “added to his feeling of vulnerability and exposure. He tried out versions of the lecture at no fewer than four other venues (Richmond, Swarthmore, Illinois, and Vassar) and was deeply depressed when the Vassar talk, only a fortnight before the Holmes date, went badly. As 30 April approached, [Hart] spent tens of hours revising and polishing the lecture, convinced that he would be unable to hit the right tone for its expectant and intellectually diverse audience.”²⁰ At the beginning of the year, when Hart delivered *Discretion* to a smaller group of just faculty, he had a better sense of what to expect, but in the very public Holmes Lecture, there were no such assurances. Hart had learned enough to know, however, that he had been tasked with defending and re-defining legal positivism in light of everything his audience – falsely, he hoped to show – expected.

Hart’s title, “Positivism and the Separation of Law and Morals” was in itself exceptionally fraught. In his response to Bodenheimer, Hart sought to separate analytical jurisprudence from formalism, and to explain how his method of analysis did not commit him to the conservatism of the *ancien regime* from which American legal thought had so long ago turned away. In fact Hart considered analytical jurisprudence an inherently liberal philosophy – far from being the doyen of elitist ignorance, it was the true philosophy of social reality. “Analytical jurisprudence,” Hart tried to show, was nothing

¹⁹ Lacey, 196.

²⁰ Lacey, 196.

like? his new colleagues had thought. But that was only half the battle, because to Hart's American colleagues, "Positivism" was a more ghoulish term still. And it was a term that Americans seemed obsessed with applying to Hart. "The word 'positivist' had a tremendously evil ring," Hart recalled. "I remember hearing somebody say, 'You know he's a positivist, but he's quite a nice man.'"²¹

Ironically, Bodenheimer accused Hart of being a "radical positivist" while making a point with which Hart would partly, though not entirely, have agreed – the point that "The law inevitably intersects with ethics, economics, social policy and other factors considered "extraneous" by the radical positivist."²² Hart must have wondered what to make of the charge, for he had never before used the word "positivist" to describe himself. The phrase "legal positivism" or "legal positivist" never appears in his Inaugural lecture, in "Philosophy of Law and Jurisprudence in Britain (1945-52)," or in *any* of his early essays or reviews. He mentioned the "positive law" once, in 1949, in "The Ascription of Responsibility and Rights," but only to clarify that he was talking about enacted law instead of natural law in a separate discussion: he was not referring to a jurisprudential theory.²³ Moreover, in post-War Oxford, "positivism" would have referred to "Logical Positivism" – the form of analytical philosophy that the linguistic approach was reacting against. Simply put, while Hart identified strongly as a linguistic philosopher and an analytical jurist, "legal positivism" was not yet part of his core theoretical worldview. But as he responded to criticisms leveled against him by scholars skeptical of his analytical method and struggled to situate his ideas in the context of American jurisprudence, he developed a new formulation of legal positivism that he could stand by and defend.

1. An Intellectual History of "Legal Positivism"

²¹ Sugarman interview, 279.

²² Bodenheimer, *Analytical Jurisprudence and the Limits of its Usefulness*, 1083.

²³ H.L.A. Hart, "The Ascription of Responsibility and Rights," 49 *Proceedings of the Aristotelian Society*, New Series, 188 (1948 - 1949).

“Positivism,” without a doubt, is a word that has meant many things in many times in many contexts, particularly when applied to law, and the history of this term is one of which Hart was intensely aware. To Jeremy Bentham, “legal positivism” referred to the theory that law was not divinely ordained or magically discovered or justified by some mystical logic, but at root a human construction.²⁴ Understanding that the law is what we make of it – not a popular idea in an era where the notion of God Given Rights was gradually replacing the Divine Right of Kings – would pave the way for increased justice, careful legislation, and, above all, holistic, egalitarian, and utilitarian reform of the legal system. Positivism was a liberal philosophy. Bentham directed his attack at William Blackstone, who in the magisterial *Commentaries on the Laws of England* had merely provided an un-philosophical *apologia* for the grotesquely unjust seventeenth century status quo (according to Bentham). Bentham believed that the philosophy of legal positivism – direct, realistic, honest, and clear – could cleanse from jurisprudence the obfuscations and fictions that he thought served to justify an outdated distribution of political power and unjustifiable policies regarding the franchise, criminal punishment, and the constitution.²⁵ Bentham intended to “pluck the mask of mystery from the face of jurisprudence” – and, once the law was brought fully into the light, to subject it to the scrutiny it deserved.²⁶ Clarity, and by extension philosophy that was analytical, had a liberal ideological function.

The term “Positivism” was a chameleon, however, for Bentham’s student John Austin, who became the leading proponent of legal positivism in the nineteenth century, was in the first decades of that century becoming a political conservative.²⁷ For Austin, legal positivism was not a radical idea; it was less tethered to political reform and primarily concerned, instead, with identifying the sources and authority of law. As one professor put it, Austin’s major accomplishment was the “deradicalization of Bentham.”²⁸ The important jurisprudential differences between the two ended there, however. Austin,

²⁴ Hart, *Essays in Jurisprudence and Philosophy*, 57.

²⁵ Hart, *Bentham and the United States of America*, 145.

²⁶ Hart, *Essays in Jurisprudence and Philosophy*, 49.

²⁷ Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 557.

²⁸ Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 558.

like Bentham, considered law a human construction; for Austin, “legal positivism” still meant the view that law was based entirely on social fact, and that the authority of law came from its coercive power: a law was a system of orders backed by threats of punishment for non-compliers. Austin rejected “natural law,” “divine law,” or “natural rights,” and defined law only in terms of its social provenance. A corollary to this “sources thesis” was the notion that the identification of law and the evaluation of it are two separate things: whether a law exists and whether it is appropriate or right or just are two separate questions. As Austin famously put it, “the existence of a law is one thing, its merit or demerit is another.”²⁹ While the separation of law and morals – the definition of positivism that would make Hart famous – was implied in Bentham’s and Austin’s philosophy, it is not the touchstone: the “classical” positivists were more concerned with sources of law than with conceptual distinctions, although both thought that conflating law and morality was a hallmark of careless thinking.³⁰ For much of the nineteenth century, Austin’s positivism reigned supreme in the realm of jurisprudence, and obtained a conservative ideological hue, serving not to inspire radical reform but to explain how the law came to be the way it was and why the present institutional arrangement was justified.³¹ For Bentham, the identification of law had to be separated from the evaluation of law in order to encourage resistance to injustice. Yet for Austin, the two had to be separated in order to breathe new life into the genuine source of law’s authority, its sovereign enactment.

In the United States, “positivism” retained the conservative undertones of Austin – but had picked up a great deal more ideological baggage in the century or so since. Like “analytical jurisprudence,” “positivism” was associated with the legal formalism of Langdell and the laissez faire economics of the American court system in the nineteenth century.³² This is partly because Langdell had been influenced by Austin (Austin

²⁹ John Austin, *The Province of Jurisprudence Determined* 157 (1832). (W.E. Rumble, Ed. Cambridge: Cambridge University Press, 1995.)

³⁰ See generally, Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*; and Sebok, *Misunderstanding Positivism*.

³¹ Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 557-62.

³² See generally Duxbury, *Patterns of American Jurisprudence*; Sebok, *Misunderstanding Positivism*, 2057.

influenced everybody: he was in Stefan Collini's words "one of the great shadowy figures of nineteenth century intellectual history"³³), and partly because the formalist style of legal analysis popularized by Langdell and carried through the education system and the courts resonated strongly with the "sources thesis." The job of the lawyer was to reconcile enacted legal authorities into a coherent plan, recognizing that the authority of law rested ultimately on its sovereign enactment, a social fact. Of course, Langdell was not a clone of Austin and not a run-of-the-mill classical positivist by any means; in many ways Langdell was a visionary legal reformer who transformed legal analysis forever. But by the 1950s, the term "positivism" was intimately interlinked with Langdell's formalism, the old-fashioned philosophy so out of favor in the twentieth century, so conservative – the enemy of social reform.

Yet by the 1950s, "positivism" had negative connotations in other ways too, ways particularly relevant to post-War liberalism. "Positivism," simply put, was associated with "relativism" – the seemingly nihilistic philosophy that justified, apparently, the horrors of Nazi Germany and the USSR.³⁴ Accepting that law was a function of social fact relativized law to social context: law would be different in one society from another, and the validity of the law would depend not on overarching concepts of justice or right, but instead on social facts within the context in which it arises.³⁵ How, if positivism was correct, could one distinguish between the liberal regime of America and the grotesque oppression of the Soviet Union? This was a question fresh in people's minds in 1956 in the aftermath of the Nuremberg Trials and in the wake of a high profile "defection" of a philosophical sort: Gustav Radbruch's defection from legal positivism to the natural law camp. Radbruch was a prominent German legal theorist in the interwar period who like most Germans staunchly defended a version of legal positivism (although the tradition of British positivism and Continental positivism have important differences, those differences would probably have been lost on most American legal scholars in the 1950s

³³ Stefan Collini, Introduction to "John Stuart Mill," *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education* (1825).

³⁴ Sebok, *Misunderstanding Positivism*, 2060.

³⁵ See for example Friedrich A. Hayek, *The Constitution of Liberty* (1960). 236-47; Leo Strauss, *Natural Right and History* (1953).

who took a strong but amateur interest in European intellectual history).³⁶ After the War, Radbruch famously renounced his positivist view, suggesting that positivism had been complicit with the Nazi regime and that positivism was the intellectual partner of tyranny.³⁷ Radbruch's new position dealt another blow to the reputation of positivism in America, a nation constructing a Cold War identity around the notion of resistance to political oppression. Further, Radbruch's story highlights another reason for positivism's sting: it was associated with Europe, specifically, with German speaking Europe. Logical positivism, which was also linked with the term, had its origins in Vienna, and the most famous legal positivist alive before being eclipsed by Hart was Hans Kelsen, an Austrian. Legal positivism was seen as un-American because of its Continental provenance, if nothing else, and evil because of its nihilistic overtones and because of its connection, however tenuous, with Hitler. For precisely this reason, positivism was linked with realism – the theory that the process generation was trying to replace.

Hart confronted these connotations of positivism as soon as Bodenheimer launched his attack against Hart's inaugural lecture. But through his year at Harvard, interacting with Fuller and the members of the Legal Philosophy Discussion Group, Hart's desire to wrench positivism from its theoretical baggage only grew. Hart was specifically perturbed by Fuller's criticism in his "Reply to Critics" that positivism was somehow the enemy of democracy and democratic deliberation. How, Hart wondered, could he explain clearly that positivism was a truly liberal philosophy? Hart resolved to explain how legal positivism could be a liberal, Benthamite idea once again – one that actually furthered the cause of political freedom.

2. Positivism as the Separation of Law and Morals

The ghosts of the American tradition were everywhere (the lecture was physically delivered in Langdell Hall), and his live audience, though they "instantly recognized" that

³⁶ Hart, *Essays in Jurisprudence and Philosophy*, 72-73; Nicola Lacey, *Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 1070.

³⁷ See for a detailed discussion of Radbruch's views Stanley Paulsen, *Radbruch on Unjust Laws: Competing Earlier and Later Views?* 15 Oxford Journal of Legal Studies 489 (1995).

they were witnessing “an important moment in the development of legal theory,” were not predisposed to favor Hart’s positions.³⁸ His new formulation of legal positivism, however, reflected the concerns of his American colleagues directly: the lecture was a frontal attack on the ideological associations positivism had acquired in America. Rejecting positivism’s association with formalism, Hart argued that the two were completely different theories and explained how one could be a positivist without being a formalist. Rejecting positivism’s association with the worst of realism, and Nazi and Soviet tyranny, Hart argued that the conceptual separation of law and morality was in fact among the lynchpins of liberalism. Like *Discretion* and his reply to Bodenheimer, the Holmes Lecture embodied the clash of Hart’s clear-headed analytic methodology with the sometimes unrigorous, chaotic, gnarly history of American legal thought.

In the context of legal positivism’s own history, Hart’s lecture indeed endorsed positivism -- but in a new form. He defined positivism in terms of the separation of law and morals, whereas in previous manifestations, positivism had primarily been a theory of law’s social provenance and a theory of legal obligation, and less a theory of law and morality, although that was part of the classical account.³⁹

The Holmes Lecture became one of the most important lectures in the history of legal philosophy, most famous for being Hart’s first shot in the published Hart-Fuller debate. As we have seen, the Holmes Lecture grew out of a year of intense engagement with Fuller’s ideas. It has been a persistent mistake of historians of jurisprudence to treat the Holmes Lecture as the *beginning* of the debate. In many ways, it was the climax. The Holmes Lecture did, however, represent the high point of Hart’s early engagement with American legal thought. Indeed, what is significant as a matter of intellectual history is not the Holmes Lecture’s fame, but the particular context in which it was

³⁸ Lacey, 197.

³⁹ An obvious but important point: It is worth noting here that Hart meant something abstract when he said that law and morals were conceptually distinct. This “separation thesis” was a philosophical position stating that there was no necessary link between law and morality: whether a law existed was one question, whether it was just was another. Importantly, the “separation thesis” was not the view that private immorality should go unpunished in the criminal law, although that was a position to which Hart also famously subscribed and would express in the 1960s in a series of debates with Lord Devlin. See Hart, *Law, Liberty, and Morality*.

delivered and the particular intellectual and political intervention by which Hart intended it, building on his work at Harvard over the course of the previous year.

Hart opened his lecture by acknowledging the political meaning of “positivism,” bemoaning that the word had become a catch-all term to describe everything bad. “The now pejorative name ‘Legal Positivism’,” Hart wrote, “like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins.”⁴⁰ Hart had in mind positivism’s association with the Langdellian era in American legal thought, with Nazi Germany and the Soviet Union, with European intellectualism in general, and with relativism, the philosophy so anathema to scholars seeking to justify American liberalism in the context of ideological alternatives. But one problem that particularly irked Hart was that deployers of “positivism” as a pejorative word often failed to see that the theory, in its classical form, was really three different theories housed under the same word. Again, American legal scholars misunderstood the theory because they ignored conceptual distinctions. Bentham and Austin, Hart wrote,

combined with their insistence on the separation of law and morals two other equally famous but distinct doctrines. One was the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies, though of course it could not supplant them. The other doctrine was the famous imperative theory of law – that law is essentially a command.⁴¹

Hart may have led with Austin’s insistence on the separation of law and morals, part of Austin’s theory but not the centerpiece, to obscure the fact that his new formulation represented a significant departure from the theory’s classical manifestation, but in any event, Hart identified these three doctrines of classical positivism in order to pull them apart: “These three doctrines constitute the utilitarian tradition in jurisprudence,” he wrote, “yet they are distinct doctrines.”⁴² Hart would maintain the separation of law and

⁴⁰ Hart, *Essays in Jurisprudence and Philosophy*, 50.

⁴¹ Hart, *Essays in Jurisprudence and Philosophy*, 57.

⁴² Hart, *Essays in Jurisprudence and Philosophy*, 57.

morals while rejecting important parts of the sources thesis and the command thesis, classical positivism's true bogeymen.

It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it is wrong to conceive of law as essentially a command. One source of great confusion in the criticism of the separation of law and morals was the belief that the falsity of any one of these three doctrines in the utilitarian tradition showed the other two to be false; what was worse was the failure to see that there were three quite separate doctrines. The indiscriminate use of the label 'positivism' to designate ambiguously each one of these three separate doctrines... has perhaps confused the issue more than any other single factor.⁴³

Following the path Hart had laid in his response to Bodenheimer, Hart used the Holmes Lecture to explain how he was a positivist without endorsing the outdated theory of "mechanical jurisprudence," fixing his gaze directly on a principal American worry. Ironically, his explanation started out with praise for legal realism. Hart thought the realists were pursuing a Benthamite project:

They opened men's eyes to what actually goes on when courts decide cases, and the contrast they drew between the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation was illuminating; for in spite of some exaggeration the Realists made us acutely conscious of one cardinal feature of human language and human thought, emphasis on which is vital not only for the understanding of law but in areas of philosophy far beyond the confines of jurisprudence.⁴⁴

This "cardinal feature" was something Hart had adumbrated in the reply to Bodenheimer: the "open texture of language." Any word, and by extension, any legal rule has a "core" meaning and a variety of "penumbral" applications.

Hart's example would become "the most famous hypothetical in the common law world,"⁴⁵ but it was not the first time Hart had used it: he asked his standing room only

⁴³ Hart, *Essays in Jurisprudence and Philosophy*, 57.

⁴⁴ Hart, *Essays in Jurisprudence and Philosophy*, 63.

⁴⁵ Frederick Schauer, "A Critical Guide to Vehicles in the Park," 83 *New York University Law Review* 1109 (2008), 1109.

audience in Langdell Hall to imagine a rule forbidding vehicles in a public park – the very same example he had rehearsed with the Legal Philosophy Discussion Group months before in *Discretion*. The rule clearly forbade the driving of a normal car into the park. But it is less clear whether it applied, say, to the mounting of a decommissioned tank as part of a war memorial. And what about bicycles? Hart's point this time around was that *language* is inherently vague – and if we accept that, as any careful analytical jurist should, then we cannot accept legal formalism, with its insistence that the judicial process is purely deductive and mechanical.

If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone.⁴⁶

The Relative Ignorance of Fact and the Relative Indeterminacy of Aim had disappeared from Hart's analysis of indeterminacy by the time he delivered the Holmes Lecture. Although they reappeared in *The Concept of Law*, it is notable that for the major public expression of his ideas, he located the source of indeterminacy in legal language, rather than in the handicaps on prospective lawmaking. Reiterating aspects of *Discretion* and his reply to Bodenheimer, Hart pressed further to say that American scholars were wrong to dismiss the separation of law and morals because the judicial function was not mechanistic. The tendency to draw that inference rested on faulty logic and a failure to recognize that the different threads of classical positivism could be disentangled.

Then Hart turned to the question of purposivism – among the most important parts of his debate with Fuller, and a core component of his analysis in *Discretion*. But this time, Hart gave the topic minimal treatment. Scholars were wrong to dismiss the separation of law and morals because of the importance of understanding law in the light of its social purposes, as a matter of education and scholarship or judicial decision-making. “How does... the rightness of deciding cases by reference to social purposes

⁴⁶ Hart, *Essays in Jurisprudence and Philosophy*, 64.

show,” Hart asked, “that the utilitarian insistence on the distinction between what the law is and what it ought to be is wrong?”⁴⁷ Hart’s relative silence on the nature of legal reasoning in the Holmes Lecture is striking in light of *Discretion*, for reasons we have explored elsewhere. It is important to realize, in addition, that Hart’s main agenda in the Holmes Lecture was not to describe the process of legal reasoning but instead to separate positivism from its unappealing connotations. And that he continued when he turned to the question of Nazi Law.

Hart’s second objective was to defend positivism from the charge that it was the theoretical partner of political evil – a view dramatically endorsed by Radbruch, the ex-positivist. Again Hart turned to history: if he could show that the founders of legal positivism were not frightening tyrants, he would be on his way to showing how positivism itself did not belong in the ash heap of history. Throughout, Hart referred to Bentham and Austin as “utilitarians” rather than just “positivists” to reinforce the genuinely liberal character of their enterprise, something Americans would appreciate, he thought, if they paid more attention to the actual texts. He described the history of utilitarianism on the way to a defense of positivism’s liberal character:

At the close of the eighteenth century and the beginning of the nineteenth the most earnest thinkers in England about legal and social problems and the architects of great reforms were the great Utilitarians. Two of them, 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.⁴⁸

Further, Hart demonstrated that Bentham and Austin endorsed almost everything American Cold War liberals cherished. “They stood firmly... for all the principles of liberalism in law and government,” Hart explained:

No one has ever combined, with such even minded sanity as the Utilitarians, the passion for reform with respect for law together with due recognition of the need to control the abuse of power even when power is in the hands of reformers. One by one in Bentham’s works you can identify... all the principles for the defense of

⁴⁷ Hart, *Essays in Jurisprudence and Philosophy*, 68.

⁴⁸ Hart, *Essays in Jurisprudence and Philosophy*, 51.

which the terminology of natural law has in our day been received. Here are liberty of speech, and of press, the right of association, the need that laws be published and made widely known before they are enforced, that there should be no criminal liability without fault, and the importance of the principle of legality, *nulla poena sine lege*.⁴⁹

Having shown as a historical matter that Bentham and Austin pursued a liberal political project, Hart argued that their philosophy itself, as it has existed through the centuries, had a distinctly liberal ethos. Bentham and Austin insisted on the conceptual separation of law and morality because such a separation helped to prevent the greatest political evils from visiting society; positivism encouraged resistance to injustice. Only if we are able to ask two separate questions – one, what is the law? Two, should it be obeyed?” – will liberty be secured.⁵⁰ There is in Hart’s position the very same thought: “an implication that things will turn out better, in terms of resistance to tyranny, if citizens understand that there are always two separate questions to be confronted: first, is this a valid rule of law? Second, should it be obeyed?”⁵¹ It was that view that informed his answer to Radbruch, the jurist who “himself shared the ‘positivist’ doctrine until the Nazi tyranny, but... was converted by this experience and so his appeal to other men to discard the doctrine of the separation of law and morals has the special poignancy of a recantation.”⁵² Radbruch had “concluded from the ease with which the Nazi regime had exploited subservience to mere law – expressed, as he thought, in the ‘positivist’ slogan ‘law as law’ ... -- and from the failure of the German legal profession to protest against the enormities which they were required to perpetuate in the name of law, that ‘positivism’ (meaning here the insistence on the separation of law as it is from law as it ought to be) had powerfully contributed to the horrors.”⁵³

Hart’s tone at this point became reverent: how, he asked, was positivism to respond to “the testimony of those who have descended into Hell, and, like Ulysses or

⁴⁹ Hart, *Essays in Jurisprudence and Philosophy*, 51.

⁵⁰ Hart, *Essays in Jurisprudence and Philosophy*, 53.

⁵¹ Lacey, 199.

⁵² Hart, *Essays in Jurisprudence and Philosophy*, 72.

⁵³ Hart, *Essays in Jurisprudence and Philosophy*, 74.

Dante, brought back a message for human beings”⁵⁴ “Only in this case the Hell was not beneath or beyond earth, but on it; it was a Hell created on earth by men for other men.”⁵⁵ But his response held firm: the utilitarian separation of law and morals would strengthen the freedom of society and encourage resistance to tyranny. It was an argument with special purchase in the United States, where nonviolent civil disobedience formed the backbone of the accelerating Civil Rights Movement. It was also an argument that spoke directly to Fuller, who in *Human Purpose and Natural Law* and his “Reply to Critics” had suggested that positivism, by ignoring the “collaborative articulation of shared purposes,” was unable to account for what made democracies free. Hart’s position was that the “collaborative articulation of shared purposes,” as Fuller called it, would work better, more clearly, and produce a freer people, if the participants in it understood that facts and values, laws and morals, means and ends, were in fact different things requiring careful philosophical separation. He agreed with Fuller in the power and necessity of democratic deliberation, but believed their common faith, rightly conceived, led to a very different theoretical position.

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H.L.A. Hart’s year at Harvard had reached its crescendo just as it was coming to an end. Joel Feinberg remembered the spectacle of the Holmes Lecture in a letter to Hart just before his death:

We formed a caravan of cars and drove up to Cambridge, Mass. to hear your magnificent Holmes Lecture on “Positivism and the Separation of Law and Morals.” I had met Lon Fuller before, and recognized him as he paced back and forth at the back of the lecture hall like a hungry lion. Halfway through the discussion period he left for good – presumably to start his own reply. And the rest, as they say, “is history.”⁵⁶

Indeed, the Holmes Lecture *was* a revolutionary contribution to legal philosophy. As Hart defended himself from various American misunderstandings and assumptions, he

⁵⁴ Hart, *Essays in Jurisprudence and Philosophy*, 72.

⁵⁵ Hart, *Essays in Jurisprudence and Philosophy*, 72.

⁵⁶ Letter from Joel Feinberg to H.L.A. Hart, 21 July 1991. (On File at New College, Oxford.)

imagined a new way of thinking about legal positivism. Hart's positivism, based on the separation of law and morals, therefore reflected the reconciliation of a clash between his analytic methodology and the ideological functions of legal philosophy in America. As he struggled to define his jurisprudential views in American context and defend them against American criticism, he consolidated and advanced his intellectual identity. He was a linguistic philosopher and an analytical jurist – and he had finally become a legal positivist. The theory of liberal legal positivism he articulated in the Holmes Lecture, though, would have been hard for his American colleagues to imagine beforehand. And it remained surprising even after.

It is crucial to remember, though, that the Holmes Lecture was one stop in Hart's much larger American intellectual journey. His courses, his participation in the Legal Philosophy Discussion Group, his lost essay *Discretion*, his minor debate with Henry Hart, his reply to Bodenheimer, his discussions with Wechsler, his preliminary skirmish with Fuller, and his continuing reflection on how his own positivism furthered the cause of political liberalism had all shaped Hart's thought as he approached the lectern. His American odyssey had made Hart into the philosophical giant we remember today.

American judicial politics, however, were changing fast – and it is to that context that we must look to understand the fate of Hart's ideas in America.

Part IV: A Tale of Three Holmes Lectures: The Decline of Process Theory and the Reception of Hart's Positivism

Chapter 10: Hart and Hand

H.L.A. Hart returned to Oxford at the height of his powers, resumed his duties as Professor of Jurisprudence, and for the next decade enjoyed his intellectual “golden age” – making distinct contributions to criminal law theory, to the political debate surrounding the decriminalization of homosexuality, and, of course, to general jurisprudence. The influence of the Legal Process School was never far from Hart's thinking, and was obvious in the examination questions Hart presented to Oxford law students upon his return home. Although Hart may not have written the questions personally, his position as Professor of Jurisprudence made him responsible for curricular changes. Students sitting their examinations in 1959 were asked “What part does reasoning by analogy play in the judicial process?”¹, inviting a discussion of the constraints on judicial decision-making. They were also invited to “Distinguish legislative, judicial, and administrative functions. Ought they to be separated?”², a prompt reflecting the Process School's obsession with institutional competence.

Controversy and drama aside, Hart's Holmes Lecture was intended as a contribution to legal philosophy – that is, to the descriptive understanding of legal systems at an abstract, conceptual level. Although Hart firmly believed his philosophical methodology had liberal overtones, he did not devise his general jurisprudence as a normative political intervention. He realized that American legal philosophy, by contrast,

¹ Oxford University Honour School of Jurisprudence, 1959 Trinity Term Examination Paper q.8 (on file with the Bodleian Law Library, University of Oxford).

² 1959 Trinity Term Examination Paper, q.13 (on file with the Bodleian Law Library, University of Oxford).

was always intertwined with political agendas -- Langdellianism was connected to laissez faire economics, social Darwinism, and the Gilded Age elite; Realism was the philosophy of progressive reform; Process theory was the philosophy of the post-New Deal administrative state and the birth of Cold War liberalism – and Hart made a special effort to keep philosophy and politics separate.

But his Holmes Lecture failed to transcend the most significant debate in American legal philosophy in the late 1950s: the debate over how to justify the role of the United States Supreme Court in the context of other political institutions as it took an increasingly active role in social policy. However it was intended, “Positivism and the Separation of Law and Morals” was received in a fraught *political* context – where Hart was understood, partially, as making a political statement he did not intend to make (though there is reason to believe he would not have disapproved entirely of how his views were taken). Although Hart intended his philosophy only as a descriptive account of how law works and as a liberal defense of the separation thesis, it nevertheless took on political significance – political significance in the raging debate about the foundations of judicial review. Although providing a justification for judicial review had been a key part of process theory, and American legal thought for a century, the foundations of judicial review became the subject of unprecedented controversy the year *after* Hart returned to England – the year of the Holmes Lecture’s written publication. To see how, exactly, Hart’s Holmes Lecture was received in print, we must revisit the way in which school desegregation and *Brown vs Board of Education* influenced both the fate of the Legal Process School and the reception of Hart’s analytical jurisprudence.

A. *Brown* and Process Theory

Soon after it was decided, in 1954, the landmark decision *Brown vs. Board of Education* had launched a sharp debate over the foundations of judicial review. In Laura Kalman’s words, “Brown starkly posed the counter-majoritarian difficulty, the question of legitimating judicial review in a democracy.”³ Not surprisingly, the debate over

³ Kalman, *The Strange Career of Legal Liberalism*, 5.

desegregation, and the counter-majoritarian difficulty it posed, made deep inroads into legal theory, revealing the shortcomings of process theory and shattering the foundations of the post-War consensus that had sustained process theory's golden age. According to Michael Dorf,

“[Henry] Hart and Sacks assumed that the sorts of conflict that law was needed to resolve would occur principally along economic lines: management versus labor, producer versus consumer, and so forth. When new lines of conflict emerged – most prominently in the form of the Civil Rights movement and successor rights movements – it became clear that deference to one or another existing institutional settlement would pit substantive justice against the idea of a circumscribed judicial role. Issues of racial equality had, of course, been central to the entire American experience, but it was not until the Warren Court that the vindication of the fundamental rights of citizens (other than property rights) came to be understood as a basic function of courts.”⁴

As Akhil Amar explained, “*Brown* called into question every central tenet of the legal process theory embodied in the first edition of *Federal Courts in the Federal System*,” a classic process school textbook co-authored by Henry Hart and Herbert Wechsler the year before the *Brown* decision.⁵ In Eskridge and Frickey's words, “The prominence of civil rights on the nation's public law agenda unraveled the intellectual consensus achieved during World War II, and hence undermined important conceptual foundations of *The Legal Process*” -- the notion that even though citizens might harbor deep disagreements about questions of value, they might nevertheless agree about *how to decide* what to do in national politics.⁶

By 1958, the most pressing political problem facing the process theorists – by far -- was the counter-majoritarian difficulty, surpassing the original concerns of the pre-War period and the immediate post-War decade. Although the process theorists had started their careers as part of the pre-War intellectual project of “figure[ing] out how complex government could be lawlike and legitimate,”⁷ by 1958 political circumstances had

⁴ Dorf, *Legal Indeterminacy and Institutional Design*, 930-31.

⁵ Amar, *Law Story*, 702.

⁶ Eskridge and Frickey, *The Making of the Legal Process*, 2049.

⁷ Eskridge and Frickey, 2041.

diverted their attention to the days' more pressing political drama: justifying, understanding, or simply making some sense of *Brown*. Legal indeterminacy delegitimized the activism of the Warren Court, and the simple solution that indeterminacy was a fact of life, but an acceptable one given the demands of reasoned elaboration, began to break down when the court began to shoulder more of a political burden. As Laura Kalman put it, the process theorists' new agenda quickly became finding a way to reject *Lochner* and retain *Brown*.⁸

Safely ensconced in Oxford, Hart began the process of preparing his Holmes Lecture for publication with the debate over judicial review picking up steam. Hart's lecture editing proved uncongenial: he found the editorial style of the *Harvard Law Review* lacking in professionalism and deference. "A spot of trouble!," he wrote to Fuller in December, 1957. "The L. Rev boys have mutilated my article by making major excissions [sic] of what they think is irrelevant or fanciful. They have made a ghastly mess of it and of the references to Bentham and I have written to say they must not publish under my name with these cuts, which often destroy the precise nuance. I took great care and much trouble over what they have coolly cut out."⁹ Hart apologized to Fuller for being so insistent – "so sorry," he wrote, "but it is important to me to get precisely what I said printed" – but firmly expressed horror that the Review editors should take such liberties with his carefully crafted argument. Lacey recalls that Hart spent dozens of hours polishing his Holmes Lecture to perfection, and even more time turning it into an article. He was, therefore, shocked: "Such an interference into an author's draft is unthinkable here [in England] and I am astonished that so gross and insensitive a thing would be possible at Harvard. I have told if they will undertake to restore the listed cuts I will get down to the unwelcome task of patching it up all over again. But meanwhile I will not return the proof."¹⁰ Fuller, in solidarity with his intellectual opponent, took it upon himself to undo the damage – in a breach of normal

⁸ See generally Kalman, *The Strange Career of Legal Liberalism*.

⁹ Letter from H.L.A. Hart to Lon Fuller, December 13, 1957 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

¹⁰ Letter from H.L.A. Hart to Lon Fuller, December 13, 1957 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

protocol that signaled the beginning of warm relations between the two men. “After receiving your letter I went over to the Review and found the President busily engaged in restoring your article to its original form,” Fuller wrote. “I am sorry for what they did, though I have to confess that this sort of thing comes close to being standard practice with articles written by American authors. Being near at hand I could save my baby from mayhem. Had I dreamed they would take such liberties with your text, I would have stood over them.”¹¹ Fuller’s intervention is perhaps more notable given the luminaries that the Review’s editors would become: between 1956 and 1959, the Editorial Board included Ronald Dworkin, Arthur Miller, Richard Arnold, Ruth Bader Ginsburg, and Antonin Scalia.

Hart was happy enough with the final version when it appeared in February of 1958, along with Fuller’s “baby,” which Fuller had managed to save from “mayhem.” Fuller had taken great care with his reply. Lacey observed that in the aftermath of Hart’s Holmes Lecture, “Fuller clearly felt that he deserved, as it were, a right of reply. A few days later, Herbert recorded that ‘L. Fuller sweating [sic] opposite me [in the Faculty Club] announced he was going to comment ... in HLR. I felt I ought to show signs of appreciation and apprehensiveness but I didn’t.’¹²

Fuller’s response pursued themes he had developed earlier in his career, and earlier in the year with the Legal Philosophy Discussion group, elaborating a position based on the idea that there are certain nontrivial procedural tenets that law must adhere to in order to be valid.¹³ These principles, sometimes called the principles of legality or of the rule of law, including among others the requirements that laws be general and non-retroactive, amounted to what Fuller had already called an “inner morality of law,”¹⁴ and, by extension, provided grounds to reject positivism’s insistence that law and morality had no necessary link. Fuller also made an attempt to moderate Hart’s contention about the

¹¹ Letter from Lon Fuller to H.L.A. Hart, December 17, 1957. (On File in the Harvard Law School Library, Fuller Papers Box 3, Folder 14)

¹² Lacey, 198.

¹³ Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *Harvard Law Review* 630 (1958).

¹⁴ Fuller, *Positivism and Fidelity to Law*, 650.

indeterminacy of legal rules in the penumbra, suggesting that purposive analysis can provide a principled way of restoring order to what could otherwise be chaotic.¹⁵ The Process School ethos is palpable in Fuller's reply on many levels: he insisted on a fact-value fusion, and argued that the purposive interpretation of the law had the potential to restore *some* measure of determinacy to the judicial process, providing a constraint on judicial discretion sufficient to save the judiciary from *some* charges of counter-majoritarianism.

Although Fuller couched his reply in the language of general jurisprudence, he was beginning to map a post-process-theoretic justification for the Warren Court's new approach to constitutional adjudication, albeit an anemic, ultimately unsatisfactory one. Fuller extended the Process understanding of law as a dynamic, purposive enterprise into the post-Brown political world, suggesting in not as many words that the purposes underlying the constitution's clauses could, in many ways, be consistent with a more active judicial role. While Hart's contribution to the debate was more abstract, Fuller kept returning it to the mechanics of judicial reasoning – responding, perhaps, more to Hart's *Discretion* paper than to his actual Holmes Lecture – reflecting Fuller's broader, life-long jurisprudential mission: expressing law's status as purposive human behavior, and defining a methodology for legal theory in light of the fact-value distinction's inapplicability to purposive endeavors. In the process, Fuller made a start on the philosophical foundations of a more active judiciary, in pursuit of fundamental liberties – the “goals,” if you will, of democratic government.

Hart's Holmes Lecture and Fuller's reply were finally published in the *Harvard Law Review* in February, 1958. The law school was abuzz with analytical jurisprudence, questions of the separability of law and morality, the relevance of purposive legal reasoning to legal completeness, and, given all this, the question of how to interpret the constitution in wake of *Brown*. This fervor must have pleased Hart immensely, given his desire to import the ways of the analytic mind to America's more pragmatic shores. Indeed, February 1958 was a month that turned out to be a watershed – and hotly

¹⁵ Fuller, *Positivism and Fidelity to Law*, 661-669.

controversial -- month in American jurisprudential discourse, as the Hart-Fuller debate went out to the world to great fanfare -- fanfare that can only be understood in the context of another “bombshell”¹⁶ event the same month.

B. Learned Hand’s Holmes Lecture: The Realists’ Challenge Strikes Back

February, 1958, also marked another momentous event in American jurisprudential history: Judge Learned Hand’s Holmes Lectures – Hand’s three-night installment in the series the year after Hart’s – in which he eviscerated the foundations of the theory of judicial review in the wake of the Warren Court’s increasingly activist role in politics.

In the words of Gerald Gunther, Hand’s biographer, “Extraordinary excitement was in the air on the Harvard campus on the cool, moonlit evenings of February 4, 5, and 5, 1958. Harvard Law School’s parking lots filled rapidly with cars carrying the audience for a series of lectures. The scheduled speaker was Learned Hand, ‘the most revered of living American judges,’ as *The New York Times* called him. The large number of students, faculty, and alumni emanated anticipation as they entered Austin Hall for the Oliver Wendell Holmes Lectures (funded by a bequest in the will of Holmes), which brought distinguished invitees to the law school from time to time.”¹⁷ Hart, who had given the Holmes Lecture just the year before, would have envied Hand’s stamina for a man of eighty-seven – but he might have been intimidated by the size of Hand’s audience and the frenzied ambience of his arrival.

“Hand had been graduated from Harvard Law School more than sixty years earlier, but part of him had never left Cambridge. Amid the competing attractions of the campus, Harvard Law School authorities were at first uncertain whether a sufficiently large audience would appear for the Holmes Lectures, even though the series was the school’s most distinguished and the 1958 speaker its most eminent living alumnus. But as a last minute precaution, the law school installed loudspeakers in two large classrooms to accommodate an overflow crowd. These

¹⁶ William M. Wiecek, *The Birth of the Modern Constitution*, in *The Oliver Wendell Holmes Devise* 59 (2006).

¹⁷ Gerald Gunther, *Learned Hand: The Man and the Judge* 563 (1997).

arrangements proved necessary: on each of the three evenings of Hand's engagement, every seat in Austin Hall's large Court Room was taken by 7:30pm for the 8:00pm lecture. Outside the building, the scene reminded one observed 'of the entrance to a big theater where a hit was playing.'"¹⁸

Hand's subject was not abstract jurisprudence, but painfully concrete constitutional law – and the most political charged aspect of it, at that. The lectures launched a full-throttled attack on the theoretical foundations of judicial review. Courts, Hand argued, had neither the competence nor the legitimate authority to overturn the will of duly enacted majoritarian statutes as part of an attempt to vindicate the principles embedded in open-ended clauses of the Constitution. “Hand attacked the propriety of the Supreme Court acting as a ‘third legislative chamber,’ and behaving in the manner of lawmakers by second-guessing the merits of legislative choices via constitutional adjudication. For the Warren Court, the achievement of social justice through invocation of the Bill of Rights and the Fourteenth Amendment was well on its way to being the justices’ central preoccupation, especially for the Chief Justice and Justices Hugo Black, William O. Douglas, and William Brennan, Jr. Hand, by contrast, questioned the desirability of judicial activism and preached an extreme version of judicial self-restraint.”

Hart and Hand would later find genealogical relation in the person of Ronald Dworkin – Hart's student and Hand's clerk -- but in 1958, the two were united in a theoretical-political frenzy. Students, professors, commentators and politicians were reading Hart's elegant call for positivist jurisprudence just as they were reeling from Hand's startling rejection of judicial review. Members of Hand's audience who picked up a copy of the *Harvard Law Review* as they left Hand's lectures would have found Hart's “Positivism and the Separation of Law and Morals” on the cover. The two Holmes Lectures came out, as it were, together – in the middle of a battle for the soul of American democracy.

The story of the reception of Hand's Holmes Lecture is familiar and many times told – but of crucial importance to the intellectual history, and fate, of legal process *and*

¹⁸ Gunther, 563.

legal positivism in America. “On the day after Hand’s last lecture,” Gunther noted, “Alistair Cooke observed in the *Manchester Guardian* that the Holmes Lectures would ‘flutter the gowns’ of the Supreme Court justices, for Hand had challenged the activist jurisprudence that had become ‘chic,’ and Cooke also predicted that Hand’s words would ‘set off bonfires in Dixie’ and make the judge ‘the latest idol of the South.’ Cooke’s shrewd guesses soon proved accurate.”¹⁹

“Hand’s assault on Brown was shocking to all his listeners,” another historian wrote -- “all the more so because it seemed to provide legitimation from the most respectable authority for the contemporary ‘Impeach Earl Warren’ campaign being waged on billboards across the south by White Citizens Councils and the John Birch Society, and for the concurrent effort in Congress to discipline the Court by pruning its jurisdiction in retaliation for the waning of the Justices’ support for McCarthyism.”²⁰ Gunther reported that:

“When the book version of the Holmes Lectures came off the press – *The Bill of Rights* was published by the Harvard University Press at the end of February – opponents of the Supreme Court quickly moved to embrace it. David Lawrence, editor of U.S. News & World Report and a widely syndicated conservative columnist, took the lead. In his magazine and his newspaper columns, Lawrence focused on Hand’s criticisms of the segregation decision and his charge that the Court had set itself up as a “third legislative chamber.” He praised the judge for rendering “a great service to contemporary understanding of the true limits of the Supreme Court’s powers” – limits, he urged, that Congress should strengthen ‘lest we fall victim to absolutism in our own institutions.’ A few days later, he applauded Hand, ‘known as a liberal,’ for stripping away the Supreme Court’s pretensions, and pleaded that Congress not ‘abdicate its functions by inaction.’ Southern editorial writers quickly jumped on the bandwagon, cheering especially Hand’s criticisms of *Brown*.”²¹

If H.L.A. Hart had not met Hand personally the year before, he had clearly become acquainted with his writings. In his diary in May of 1957, Hart wrote: “Read Learned Hand’s collected essays; fine liberal old man: sort of a cultured positivist.

¹⁹ Gunther, 563.

²⁰ William M. Wiecek, *The Birth of the Modern Constitution*, in *The Oliver Wendell Holmes Devise* 458 (2006).

²¹ Gunther, 568.

Describes the virtues of a judge.”²² Hart felt an intellectual affinity toward the great American judge. Hart identified Hand as a “cultured” “liberal,” two words Hart would have used to describe himself, and specifically identified him with legal positivism. As it happened, Hart’s 1957 Holmes Lecture was understood in American intellectual and legal circles as the target of Fuller’s reply, yes, but *also*, at least partly, as a *counterpart* to Hand’s “shocking” 1958 Holmes Lecture.

C. Hart and Hand

Responses to the Hart-Fuller exchange poured in – in academic journals, but, more revealingly, also in a flurry of letters to Hart and Fuller themselves. In the months after the Hart-Fuller exchange appeared in the *Harvard Law Review*, a number of prominent figures in the American intellectual scene registered their opinions on the debate.

Some prominent intellectuals assessed the debate in relatively politically neutral, philosophical terms. The responses of these intellectuals suggest that Fuller’s argument was better appreciated, and that Hart’s defense of positivism made little headway in American circles. They still seemed to believe that positivism was as ugly as before, and they imbued Fuller’s position with a special pro-American, anti-relativist resonance. Leo Strauss, perhaps the greatest anti-relativist of the twentieth century, who had published *Natural Right and History* just three years before Hart’s visit, wrote to congratulate Fuller on carrying the day: “It is a long time since have read a contemporary debate of such a high level of clarity, seriousness and relevance. I fully agree with your praise of Hart’s essay but it is only fair to add that your argument is superior to his.” Strauss also praised Fuller’s “clear and forceful analysis of the German situation under the Nazis,”²³ suggesting that Hart’s account of Nazi tyranny was unsatisfactory and that some union of morality and law was necessary to forestall a second Holocaust. Hart fared somewhat

²² Letter from H.L.A. Hart to Jenifer Hart, May 14, 1957 (On File in the Library of New College, Oxford, Hart Papers, Box 3, Folder 20.).

²³ Letter from Leo Strauss to Lon Fuller, March 19 1958 (On File at the Harvard Law School Library, Fuller Papers, Box 3, Folder 15.)

better with Friedrich Hayek, another towering midcentury “conservative” based at the University of Chicago and the author of *The Road to Serfdom*, whose work had been a constant background presence in the Legal Philosophy Discussion Group. Hayek recognized that Hart had introduced a revolutionary new formulation of legal positivism, one that accepted the indeterminacy of judicial reasoning and based on the separation of law and morality rather than the command theory of law. Yet rather than admitting that positivism might not be so bad, as Hart hoped, Hayek described Hart’s work as “in most regards one of the most effective *criticisms* of legal positivism,” referring to his deft departure from the classical formulation.²⁴

Other commentators, though, understood the Hart-Fuller exchange as part of its immediate theoretical context: the crisis of judicial review. The most provocative response in this regard came from Felix Frankfurter, the pugnacious Associate Justice of the U.S. Supreme Court and towering figure in the history of the Harvard Law School. Frankfurter was very much aware of Hart – presumably they had met during one of Frankfurter’s prolonged stays at Oxford earlier in his career.²⁵ Although it is clear that their relationship was frosty at best -- Hart went so far as to refer to Frankfurter as a “chattering monkey”²⁶ – their intellectual temperaments were closer than one might expect despite Frankfurter’s apparently irksome demeanor. Like Hart, Frankfurter was famous for being a left-wing social democrat. But once he took his seat on the Supreme Court, Frankfurter counseled severe restraint and adopted a more conservative philosophy of judicial decision-making. Frankfurter believed that the appropriate forum for the resolution of genuinely political problems was open democracy, not the courts. (In a telling example, he once warned the Court against entering “the political thicket.”²⁷) Like Hart, Frankfurter shared the political aspirations of the realist movement, but rejected many of its theoretical foundations. Frankfurter and Hart both led efforts to

²⁴ A. M. Honore, Draft of “Herbert Lionel Adolphus Hart” (On File in the Library of New College, Oxford, H.L.A. Hart Papers, Box 2 Folder 15) (emphasis added).

²⁵ Lacey, 171. See also Isaiah Berlin, “Felix Frankfurter at Oxford,” in *Personal Impressions*, Princeton: Princeton University Press (2001) 112-120.

²⁶ Letter from H.L.A. Hart to Jenifer Hart, May 14, 1957. (On File in the Library of New College, Oxford, H.L.A. Hart Papers, Box 3, Folder 20.)

²⁷ 369 U.S. 186 (1962). Frankfurter, J., dissenting.

reform the curriculum at their respective institutions – Frankfurter at Harvard and Hart at Oxford. And importantly, both were Jewish – something that was the source of some ambivalence for both men as they reached the pinnacle of an academic profession that was, for all the famous Jewish law professors and judges, still the province of the W.A.S.P. elite.

Frankfurter was a generation older than Lon Fuller, and though the two were colleagues from Harvard, their active correspondence in the late 1950s has the tone of teacher and student. Yet in their correspondence about the Hart-Fuller exchange, Frankfurter seemed to agree more with Hart’s side. Although he never endorsed Hart’s position directly, Frankfurter equivocated when asked about Fuller’s views. “I look eagerly forward to the exchange between Hart and yourself,” Frankfurter wrote, expressing his hesitation with Fuller’s position graciously, like a good teacher: “Whether I agree or not with the specific views you express from time to time is far less important than that I find your thoughts ‘congenial,’ in that they stimulate and make me rethink mine.”²⁸ In the very same letter, Frankfurter commented on *Hand’s* more recent Holmes Lecture – which, along with the Hart-Fuller exchange, was the issue of the day. Frankfurter endorsed Hand’s theory of the precarious nature of judicial review:

“I am very glad indeed to hear that the Hand Lectures were, as a performance, a great success, because, after all, it is the work of a man of eighty-six, for whom the preparation of the Lectures hung like an albatross around his neck for some years. I wonder how you would phrase Hand’s “main thesis.” If it is more narrow than a bias in favor of a restrictive view for the Supreme Court’s intervention into what inevitably are so largely issues that permit, under the guise of large generalizing phrasing, individual preferences, it would be for me a source of deep regret to be assured that it finds “little acceptance” – among the Faculty. All I can say is that if those who reject that main thesis had only a fraction of the experience that I have had here during the nearly twenty years on the Court – and I might say that Holmes and Brandeis and Cardozo had before me – I do not believe that they would reject it.”²⁹

²⁸ Letter from Felix Frankfurter to Lon Fuller, February 13, 1958 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4.)

²⁹ Letter from Felix Frankfurter to Lon Fuller, February 13, 1958 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4.)

Fuller's letter back to Frankfurter a week later, responding to Frankfurter's endorsement of Hand's philosophy of restraint, included a telling accusation: Fuller accused Hand of *positivism*: "In general" Fuller wrote, "his attack on the problem was one that might be called 'positivistic.'" Specifically, Fuller interpreted Hand's Holmes Lecture as a retrograde return to the "positivist" notion that legal indeterminacy can only be resolved by undemocratic arbitrary choice – the very idea that the process theorists, including the members of the Legal Philosophy Discussion Group, had argued against. Fuller took Hand to believe that indeterminacy was to be filled with raw choice, because the law could provide no values or principles or purposes with which to guide decision. "It seemed not to recognize that men may create a structure of government that contains implicit requirements and limitations, many of which were not, and could not have been, present to the minds of the creators."³⁰ This, for Fuller, was a quintessentially positivist position.

Fuller's condemnation of Hand's position as positivistic suggests that Hart had failed to make any headway with Fuller on the question of legal reasoning. *Discretion* revealed that Hart's position on judicial decision-making was not far from Fuller's: judges should undertake purposive analysis when resolving indeterminate cases, seeking a resolution that was faithful to the values in the legal system. Their difference concerned the *consequences* of such a view to general legal theory.

In further letters, Frankfurter damned Fuller's position with faint praise. To start with, Frankfurter put off reading the Hart-Fuller debate for months: "The immediate pressure of Court work has compelled me to postpone reading Hart's paper and yours, but I look forward to doing so before long," he wrote to Fuller in February of 1958.³¹ Frankfurter finally got around to it in April, at which point he again withheld his approval of Fuller's position in a masterpiece of veiled criticism: "I have now read the exchange

³⁰ Letter from Lon Fuller to Felix Frankfurter, February 24, 1958. (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

³¹ Letter from Felix Frankfurter to Lon Fuller, February 28, 1958 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

between you and Hart, but only once and hurriedly. Yours particularly calls for closer attention and I have laid it aside for a careful rereading during the summer vacation. Not that I shall have any comments worthy of communication. The more so because the issues call for the give-and-take and the expansiveness of talk, with a view to exploring one another's ultimate agreement and disagreement."³²

In short, Fuller opposed Hart and Hand for exactly the same reason: in his mind, they were both legal positivists. Both held theories that were incapable of giving voice to the underlying values and purposes of statutes, constitutional provisions, and the legal order as a whole – the very purposes and values that, in the constitutional sphere, required judicial review for their realization. From this equation, Hart, like Hand, emerged as a kind of conservative detractor from the Warren Court. Hart, of course, approved of this perceived association with Hand, and thought of the old judge as a wise positivist.

The affinity Hart felt for Hand was somewhat in keeping with the views he had expressed in *Discretion* – the idea that the law was always partly indeterminate, no matter how refined our discretion may become – although Hand took the necessity of indeterminacy many steps further in arguing for a tightly circumscribed judicial role. Hart's position, though, was less politically charged: for Hart's view was simply that we need to face up to the fact of indeterminacy and take seriously the integrity of the process that resolves it. Discretion presented advantages, not problems. Moreover, Hart would have approached the political question of judges, as opposed to the theoretical question about discretion, from an English Labour perspective – according to which judges by and large represented a Tory old guard, while legislatures represented the forums of progress. Judicial review just was not a political problem in England; parliamentary sovereignty eliminated the possibility of a strong judicial role in politics. Years earlier, Hart had suggested that this differing alignment had contributed to the rise of American realism, and the obsessive judge-centeredness of American politics.

³² Letter from Felix Frankfurter to Lon Fuller, April 1, 1958. (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

But to those who heard Hand and read Hart in the same moment, it looked as if Hart was sympathetic to the idea that judges should refrain from engaging in higher-law seeking value theory, sympathetic to the idea that open-ended clauses in the constitution could not yield answers strong enough to justify overturning legislative enactments. Hart did not make his actual view on this issue clear in the Holmes Lecture. In later years, when he returned to the topic, he repeatedly bemoaned American legal thought's obsession with the judicial process, but again never took a firm position on debates in American constitutional politics – opining only on the consequences of political demands on the path of American legal philosophy.³³ But in 1958, the web of political associations, as potent for the reception of Hart's ideas as for the formation of them³⁴, clearly placed his positivism on one side of the ongoing debate, despite the underlying liberalism of Hart's position. It did not seem like too much of an extension to suggest that Hart understood the Warren Court's intervention in politics as a sort of natural law idea – counter-majoritarian judicial review was justified because it served to vindicate some sort of “higher law,” perhaps written in the sky, perhaps written in the constitution, that required direct moral analysis to discover. Indeed, it is a shame that the ideas in *Discretion* did not reappear in the Holmes Lecture – the ideas from Hart's first essay in America would have dispelled the idea that his view was so closely related to Hand's. If he had said *something* in the Holmes Lecture about the conditions for justified judicial decision-making, his positivism would have looked a great deal more benign. But as it was written, and in the moment it was received, Hart's Holmes Lecture looked like a theoretical counterpart to Hand. Hart's analytical positivism and objection to Fuller placed him firmly on one side of a legal philosophical culture war of the 1950s over the limits of the judicial role, in the company of perceived conservatives like Hand and Frankfurter.

³³ See Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, discussed below.

³⁴ See Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Bodenheimer*, discussed above.

This position was precarious for Hart, because he believed in and emphasized passionately the liberalism of his positivism: while his legal theory was descriptive, he had a political argument as well as a philosophical argument for the separation of law and morals. But ultimately he was in truly liberal company: Frankfurter and Hand shared with Hart a profoundly left-wing social perspective, and understood judicial restraint as a component of a liberal society, one in which people deliberate actively and make decisions according to their own reason. On judicial matters, however, Hart found himself in the company of relative conservatives. And given the way Hart understood the lay of the American jurisprudential land, he almost certainly saw this association coming.³⁵ In American context, there was no other ground for Hart to stand on given the increasingly natural law flavor of defenses of Warren Court activism.

D. The Theoretical Dilemma of Legal Process: Legal Process 2.0

Following Hand's lecture, a very basic dilemma confronted the Legal Process School. Some scholars wanted to improve the theory of reasoned elaboration, and begin a more committed search for criteria for judicial objectivity, identifying factors that could legitimate a more active judicial role in securing the most fundamental civil rights for citizens. Other scholars focused more on Supreme Court critique, arguing that the Court's remit should fall back into the more modest position the process theorists had envisioned all along. The modern, much misunderstood rift between "judicial activism" and "judicial restraint" had taken shape as the process theorists attempted to move forward after the inadequacy of reasoned elaboration had been forcibly displayed.

On the one hand, theorists could agree with Hand and join the chorus preaching judicial restraint, furthering with a conservative hue process theory's emphasis on institutional competence and a weak understanding of reasoned elaboration. On the other hand, theorists could respond to Hand by seeking rational justification for judicial review, furthering the process agenda of identifying criteria for legitimate decision-making.

³⁵ See Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 957.

Within this option were three distinguishable positions, which are perhaps clearest in the terms of *Brown* and *Lochner*: theorists could either identify criteria for judicial legitimacy strong enough to justify both *Brown* and *Lochner*, identify criteria that ruled out both *Brown* and *Lochner*, or identify criteria that could perform the most elusive feat: justify *Brown* and reject *Lochner* in one fell swoop.

Frankfurter and Hand, believing in a relatively narrow role for the judiciary, preferred the former option; in classic process theoretic fashion, they preferred to leave major political questions to elected officials rather than unelected judges. Fuller, on the other hand, believed that the judges' highest calling was to enforce the "inner morality" of law, and to vindicate the purposes of statutes something that often necessitated judicial intervention into "otherwise political matters"³⁶ – also a classic process theoretic position. Although Fuller was not clear about his ambitions *vis a vis* the countermajoritarian difficulty, he clearly fell into the latter camp.

In the decades to come, the same basic rift would deepen. On one hand, some professors sought to push beyond the main precepts of process theory, though still remaining very much in its debt, in order to legitimate *Brown* – whether by developing a philosophical defense of "right answers" (Ronald Dworkin), paying special attention to political participation (John Hart Ely), attaching special normative weight to law's factual application and the enhancement of practical consequences (Law and X movements: Law and Society, Law and Economics, and so on), or embracing the concept that the Court is indeed what Hand called a 'third legislative chamber' (Critical Legal Studies). Another camp sought to retain the basic scheme of process theory, and turn away from judicial intervention for fear that the liberal activism of the Warren Court was not ultimately sustainable: it was not the sort of thing judges could do well, and it was the sort of activity that would erode the prestige and perceived objectivity of courts, disrupting the institutional balance that had served America so well. Judges should rule only when there was a clear answer. Importantly, they should steer clear of the "penumbral" areas

³⁶ Letter from Felix Frankfurter to Lon Fuller, February 13, 1958. (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

surrounding legal rules, leaving these decisions to politically elected institutions with different institutional roles. Felix Frankfurter was a famous exponent of this brand of process thinking -- a committed social democrat in politics, a founder of the American Civil Liberties Union, and a New Deal protégé of Franklin D. Roosevelt, yet a defender of a strong theory of judicial restraint when he took his seat on the Supreme Court. This more conservative derivative of process theory would receive prominent expression in the work of one of Frankfurter's clerks with the publication in 1962 of *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* by Alexander Bickel.³⁷

The contours of the philosophical future were far from obvious in 1958, however, as professors, students, reporters, and lawyers from the general public walked out of Hand's "choking" Holmes Lectures as the Hart-Fuller debate hit the presses, setting off a philosophical-political frenzy linking analytical jurisprudence with American constitutional politics. The plot thickened the next year, however, when Harvard Law School, recognizing the momentous importance of Hand's controversial Holmes Lecture, invited Herbert Wechsler, one of H.L.A. Hart's Harvard friends and a towering constitutional lawyer, to deliver a rebuttal. "Whatever its author's views might have been on calmer reflection, the 1958 Holmes Lectures were a bombshell, and Harvard hastened to invite the eminent constitutional authority Herbert Wechsler... to deliver what was anticipated to be, in effect, a rebuttal or at least an effort to justify judicial review."³⁸ Wechsler set out to defend judicial review from Hand's criticism, but, in the lecture that is now the among most cited law articles ever,³⁹ he ultimately did so by rejecting *Lochner* and *Brown* -- not the defense for which the liberal legal establishment had hoped.

³⁷ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). See generally Duxbury, *Patterns of American Jurisprudence*, ch. 4; John Hart Ely, *Democracy and Distrust*. Cambridge: Harvard University Press, 1980.

³⁸ Wiecek, 458.

³⁹ As of 2012, Wechsler's article, discussed below, ranks fourth on the all-time citations list. See Fred Shapiro, *The Most-Cited Law Review Articles of All Time*, 110 Michigan Law Review 1483 (2012).

Chapter 11: Neutral Principles: Process Theory and Constitutional Law

A. Herbert Wechsler to the Rescue?

On May 6, 1958, just months after the frenzy surrounding H.L.A. Hart's "Positivism and the Separation of Law and Morals," Fuller's reply, and Learned Hand's Holmes Lectures, Dean Griswold wrote to Herbert Wechsler to invite him to give the Holmes Lectures the next year¹ – the third Holmes Lecture in a row bound to be of unparalleled significance. Wechsler, a professor at Columbia University, was a pivotal figure in the process movement. As a visiting professor at Harvard in 1956-7, he had formulated the main ideas that he would present in his Holmes Lecture in collaboration with Henry Hart, Lon Fuller, and H.L.A. Hart, with whom he developed a close professional and personal relationship. The two bonded over their interest in the criminal law and criminal law reform, and also over their analysis of the judicial role, commonalities of which are revealed by a comparison of Hart's *Discretion* and Wechsler's lecture. This chapter analyzes Wechsler's response to Hand's challenge – which, as we shall see, further illustrates the context in which Hart's ideas landed in the United States, and helps to build up to an analysis of the fate of Hart's liberal positivism in American legal thought.

Wechsler had been a member of the Legal Philosophy Discussion Group with Henry Hart, Albert Sacks, Paul Freund, Lon Fuller, and H.L.A. Hart, and therefore immersed for the whole year in the main artery of the Process School. Just as it had been for H.L.A. Hart, it was, for Wechsler, a year of momentous intellectual development. It

¹ Letter from Erwin Griswold to Herbert Wechsler, May 6, 1958. (On File in the Columbia University Library, Wechsler Papers).

was in this context that he developed most of the ideas that would find their way into his Holmes Lecture.² Specifically, Wechsler had honed his constitutional law thinking while he was a visiting professor at Harvard in 1956-57. As we have seen, Wechsler had given a talk to the Legal Philosophy Discussion Group, mainly about the way his Model Penal Code aimed to balance discretion with clear rules. But criminal law was only part of Wechsler's focus that year: importantly, that was the year he brought classic process school ideas to bear on the study of *constitutional* law, something that the other process theorists did not fully attempt. (Henry) Hart and Sacks were primarily interested in statutory interpretation and the actions of administrative agencies, not in the interpretation of the Constitution, though that, of course, was the most politically vexing aspect of legal scholarship and legal theory. In an Oral History, Wechsler reflected back on his Harvard experience:

"I hadn't been teaching constitutional law at Columbia, but in 1956 I went up to Harvard as a Visiting Professor. The invitation to teach constitutional law at Harvard led into a more extensive commitment pedagogically than I had had up to then. I'd been teaching federal courts, not constitutional law. That year at Harvard, working in constitutional law, was a challenging experience that set my mind along the lines that the neutral principles paper later developed. I found myself developing the neutral principles idea as a pedagogical instrument for pushing students into subjecting their own immediate reactions of approval or disapproval of the results of a particular decision to a more searching type of criterion of evaluation. And I found this effective as a pedagogical instrument, pushing students into a degree of rethinking-exactly what a pedagogical effort ought to achieve."³

After he returned to Columbia, Wechsler worked primarily on criminal law matters when he was invited to give the Holmes Lecture, but he was never out of touch with Henry Hart – his old co-author on *Federal Courts in a Federal System* -- who kept him apprised of his and Sacks's continued efforts on *The Legal Process*. Henry Hart sent Wechsler a mimeographed copy of the 1958 "Tentative Edition" of *The Legal Process* in January 1958, the month before Learned Hand's "bombshell" and the Hart-Fuller exchange would go public. Wechsler thanked Henry Hart for the copy, and,

² Eskridge and Frickey, 2048.

³ *Selections from the Oral History of Herbert Wechsler*, 93 COLUMBIA LAW REVIEW 854, 925-26.

though noting that he was hard at work on criminal law matters, also said that he “could not resist the temptation to browse for an hour and I am delighted to see what immense progress you have made.”⁴ Wechsler, though, thought that the structure of *The Legal Process* was slightly convoluted, and suggested to Hart that he consider “simplify[ing] further than an analytical table of contents. This is difficult to do I know.”⁵

In fact, Wechsler was, that very year, teaching a seminar from *Federal Courts in a Federal System* – an oversubscribed seminar, with at least one student who would attain great fame: Ruth Bader Ginsburg. Justice Ginsburg’s recollection of Wechsler provides fascinating insight into his intellectual agenda when Griswold invited him to give the Holmes Lectures – an agenda linking his time at Harvard with work on the home front at Columbia, as well as a palpable sense of the enduring significance of the legal theory of the 1950s. Justice Ginsburg reflected on her experience as Wechsler’s Harvard student:

“Herbert Wechsler was twice my teacher. When he visited Harvard Law School in the fall of 1956, I was assigned to his Criminal Law course. He seemed to me then, and ever after, a true Olympian, at once awesome and inspiring. During that semester, Dean Erwin N. Griswold invited the nine women in the first year class of some 500 to his home for dinner. The good dean arranged a faculty escort for each of us. Mine was Herbert Wechsler. It was a challenge I could scarcely meet. How could a lowly first year student dare to make small talk with one who combined the power and mien of the Greek gods Zeus and Apollo?”

And then, on her experience as Wechsler’s Columbia student:

“I transferred to Columbia for my third year and there gained entry to the hugely oversubscribed seminar Professors Herbert Wechsler and Gerald Gunther [Hand’s biographer] team taught on *Federal Courts and the Federal System*. The book for that extraordinary course, by Henry M. Hart Jr. and Herbert Wechsler, was the most engaging text assigned in my law school years. Kept up by former students of those giant thinkers, and now in its fourth edition, *Hart & Wechsler* remains within arm’s reach, available as an aid or stimulant as I deal with the Court’s heavy work.”

⁴ Letter from Herbert Wechsler to Henry Hart, January 28, 1958. (On File in the Harvard Law School Library, Henry Hart Papers).

⁵ Letter from Herbert Wechsler to Henry Hart, January 28, 1958. (On File in the Harvard Law School Library, Henry Hart Papers).

“In the years I was enrolled in Professor Wechsler's classes, he was engaged in a decade-long project to frame the American Law Institute's Model Penal Code. Confronting state criminal laws in disarray, he completed in 1962 a rational, well-organized Code that has guided state legislatures in reshaping their statutes. Revised to conditions, the Code continues to promote general order and consistency in the criminal laws of the several states.”⁶

When he received Dean Griswold's invitation, therefore, Wechsler was torn between two different intellectual projects – the criminal law on one hand, constitutional law on the other. Wechsler accepted Dean Griswold's invitation enthusiastically, adding, “I know of no nomination that I deem a higher honor,”⁷ but he had not decided which of these strands in his current trajectory he would pursue in the lecture. “I am divided in my mind whether to use this opportunity to ventilate some of the issues on sentencing and correction that we have been facing on the Model Penal Code or to address myself to constitutional law, with special reference to the decisions of the last few years that seem to me inadequately reasoned.”⁸ Wechsler was concerned that lectures on criminal law would fail to generate significant interest, and he was worried that lectures on constitutional law would generate *too much* interest – and, in the event, serve merely as an “anti-climax to the Hand lectures.”⁹ Griswold, however, was not neutral – he wanted Wechsler to deliver a rebuttal to Hand, the defense of judicial review that process theory desperately needed to stay afloat. “Personally, I would much prefer to have you discuss the constitutional questions,” Griswold wrote to Wechsler two days later. “I think that they would be of more general interest. I do not see that they would be in any sense an anti-climax to the Holmes Lectures of this year.” Griswold noted that Wechsler would be approaching the question from an academic perspective – and a process theoretic one – while Hand was approaching it as a judge: “You would approach the matter from an entirely different point of view, and would be dealing with specific and relatively recent

⁶ Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUMBIA LAW REVIEW 1359, 1359 (2000).

⁷ Letter from Herbert Wechsler to Erwin Griswold, May 12, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁸ Wechsler to Griswold, May 12, 1958.

⁹ Letter from Herbert Wechsler to Erwin Griswold, May 12, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers).

decisions. Although the decision is entirely yours, I would be glad if you picked the Constitutional field.”¹⁰

Wechsler reflected back on the invitation years later, and recalled that although he was preoccupied with the Model Penal Code at the same time, he kept up his interest in constitutional law back at Columbia, and kept in touch with his colleagues at Harvard, enough that by the time Griswold needed a Holmes Lecturer to respond to Hand, Wechsler was the obvious choice. “I did enough talking along this line in my teaching at Harvard and also in chewing the rag with colleagues on the faculty, so that after I came back to Columbia, when there came a time when they were good enough to ask me to fill a vacancy in the annual Holmes Lectureship, it was perfectly clear that what they wanted me to do was to put up or shut up on this line that I had been following pedagogically and disputatiously, going back to 1956-1957,”¹¹ Wechsler reflected. “I thought it was a good thing that I should accept the challenge to try to put it on paper, which I had not done at all. So I agreed to do it and went to work.”¹²

It is worth mentioning that Hand and Wechsler had been discussing the issue of judicial review since at least 1955, when Hand began to formulate the thoughts for the Holmes Lectures he would deliver three years later. A middle-aged Wechsler and an elderly Hand met on Saturday, April 2, 1955,¹³ when they discussed, among other things, the foundations of judicial review in the wake of *Brown*, and nearly a century of Court interventions to protect property rights. After the meeting, Wechsler wrote to Hand to continue their discussion, enclosing excerpts from James Madison’s *Federalist Papers*

¹⁰ Letter from Erwin Griswold to Herbert Wechsler, May 14, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers).

¹¹ *Selections from the Oral History of Herbert Wechsler*, 93 COLUMBIA LAW REVIEW 854, 925-26.

¹² *Selections from the Oral History of Herbert Wechsler*, 93 COLUMBIA LAW REVIEW 854, 925-26.

¹³ Hand’s letter of April 6, 1955, a Wednesday, mentions that they met “Last Saturday.” The previous Saturday was April 2. See Letter from Learned Hand to Herbert Wechsler, April 6, 1955 (On File in the Columbia University Library, Herbert Wechsler Papers)

supporting his side of the dispute,¹⁴ in an apparent attempt to convince Hand that the constitution's structure demanded judicial review, regardless of the theoretical problems it posed. Hand replied the next day, thanking Wechsler, but collegially rebuffing his attempt to persuade: "I am too old to be converted to the idea that the function of the Court, as it has been exercised during the last eighty years, is desirable in a democratic society. There is nothing like nailing your colors to the mast and going down with the band playing."¹⁵ Hand encouraged Wechsler to pursue his instincts, however – a gesture of titanic significance to Wechsler, who, like many constitutional theorists of his generation, idolized Hand. "I very much enjoyed our meeting last Saturday and hope that it will only be one of a good many others. 'Carry on'!"¹⁶ Wechsler's deferential response – their relationship was always one of "Judge Hand" and "Herb" – continued the joke, in a manner that would prove strikingly prophetic: "No one will look forward more eagerly than I to reading your lectures on the Court. I shall do so moreover fully prepared to expect that it will be my vessel rather than yours that goes down, though I hope it, too, may founder with the band playing."¹⁷

Three years later, preparing for his own Holmes Lecture in response to Hand's, Wechsler was hoping to send Hand's ship down while keeping his afloat. Wechsler discussed the lecture with Henry Hart, and together they settled on a title, "Towards Neutral Principles of Constitutional Law." Wechsler asked Dean Griswold if that phrasing was "too enigmatic," and, assured that it was not, went to work.¹⁸

B. Wechsler's Holmes Lecture I: Saving Judicial Review

¹⁴ See Letter from Herbert Wechsler to Learned Hand, April 5, 1955. (On File in the Columbia University Library, Herbert Wechsler Papers).

¹⁵ Letter from Learned Hand to Herbert Wechsler, April 6, 1955. (On File in the Columbia University Library, Herbert Wechsler Papers).

¹⁶ Letter from Learned Hand to Herbert Wechsler, April 6, 1955. (On File in the Columbia University Library, Herbert Wechsler Papers).

¹⁷ Letter from Herbert Wechsler to Learned Hand, April 15, 1955. (On File in the Columbia University Library, Herbert Wechsler Papers).

¹⁸ See letter from Herbert Wechsler to Erwin Griswold, October 10, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers) (Discussing Wechsler's consultation with Henry Hart).

On April 7, 1959, Wechsler took the podium at Harvard Law School with a monumental burden. Process theory was about to be tested – and its fate in the face of Hand’s challenge rested on Wechsler’s shoulders. Did process theory have the resources to respond to Hand’s critique? Was it able to justify or legitimate judicial review against such a forceful, “shocking” argument? Could process theorists be legal liberals?, or would they be faced with an unwelcome choice: either adopt the philosophy of judicial restraint espoused by Hand, conceding that much judicial review itself is illegitimate – and reject *Brown* --, or reject the tenants of process theory and break new philosophical ground? Wechsler’s participation in the Legal Philosophy Discussion Group had left him “thoroughly attuned to Legal Process and the ideas it engendered”; he was “the ideal person to elaborate and extend Legal Process ideas and to deploy them in the debate with Hand.”¹⁹ But it was unclear how Wechsler and the Process School’s ideas would fare. In the event, most of the 1956-57 Legal Philosophy Discussion Group, with the exception of H.L.A. Hart back in England, attended the lecture, fully recognizing that if Wechsler failed in his task, it would be game-set-and-match against the ideas they had spent several decades formulating. When Wechsler arrived in Cambridge, he stayed at Henry Hart’s home, discussed the lecture with him, and, afterwards, joined many of the members of the Legal Philosophy Discussion Group for a debriefing dinner at Hart’s house.²⁰ How did Wechsler shoulder his extraordinary burden?

It is difficult to overemphasize the importance of understanding clearly what Wechsler *in fact* argued in his Holmes Lecture, as the lecture has been much misunderstood. Wechsler’s lecture represented a process theoretic reconstruction of constitutional judicial review in the wake of Hand’s argument that judicial review was in most cases illegitimate. Wechsler’s answer to Hand paralleled, in the constitutional context, process theory’s basic response to realism in other legal contexts: to Wechsler, judicial review was justified if the method of legal reasoning deployed in the decision lived up to standards of rationality, neutrality, and institutional appropriateness, among

¹⁹ Wiecek, 458.

²⁰ Letter from Livingston Hall, Acting Dean, Harvard Law School, to Herbert Wechsler, February 16, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers) (discussing logistic arrangements for the Holmes Lecture).

others. He set out to justify judicial review by sketching a theory of sound constitutional reasoning.

The main theme of Wechsler's lecture, therefore, was that judicial review *is* justified under many circumstances. "Let me begin," Wechsler said, "by stating that I have not the slightest doubt respecting the legitimacy of judicial review, whether the action called in question in a case which otherwise is proper for adjudication is legislative or executive, federal or state. I must address myself to this because the question was so seriously mooted by Judge Hand; and though he answered it in favor of the courts' assumption of the power of review, his answer has overtones quite different from those of the answer I would give."²¹

First, Wechsler argued that there was no legitimate basis for the Court to *avoid* the responsibility of constitutional adjudication: it was the job of the Supreme Court to decide whether federal statutes were or were not constitutional. Wechsler suggested that the Court did not really have the discretion not to intervene if there was a dispute as to a statute's constitutionality: "The only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern, the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene." Reiterating an observation H.L.A. Hart had made in *Discretion*,²² Wechsler noted that the Court does have a discretionary docket, but pointed out that the relevant factors for the disposition of such discretion are different than the factors for decisions on actual constitutional merits: "The Supreme Court does have a discretion, to be sure, to grant or to deny review of

²¹ Wechsler, *Toward Neutral Principles of Constitutional Law*, 9.

²² See H.L.A. Hart's discussion of different forms of discretion that can be exercised by Courts – i.e. "Tacit or Concealed Discretion" in the form of interpretation in hard cases, but "Express and Avowed Discretion" in the form of selecting cases for a discretionary docket. Hart, *Discretion*, 2-3.

judgments of the lower courts in situations in which the jurisdictional statute permits certiorari but does not provide for an appeal. I need not say that this is an entirely different matter.”²³

Wechsler turned next to the meat of his argument: what are the criteria for legitimate, truly lawful constitutional decisions? He phrased his question this way:

“If courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution, when a case is properly before them in the sense I have attempted to describe, you will not doubt the relevancy and importance of demanding what, if any, are the standards to be followed in interpretation. Are there, indeed, any criteria that both the Supreme Court and those who undertake to praise or to condemn its judgments are morally and intellectually obligated to support?”²⁴

Wechsler’s answer would be in striking harmony with – and a product of the direct influence of – the Legal Philosophy Discussion Group’s discussions in 1956-57: he put the question as one of distinguishing arbitrary choice from reasoned decision. To identify criteria for legitimate constitutional decisions, Wechsler said, “I revert then to the problem of criteria as it arises for both courts and critics - by which I mean criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will.”²⁵ H.L.A. Hart’s distinction between arbitrary choice and reasoned discretion had reappeared – this time in one of the most famous articles in American legal history.

The crucial inquiry, accordingly, was to define a style of legal reasoning appropriate for constitutional adjudication. Wechsler’s first point was that a mere analysis of results is not enough: results-oriented Court criticism was a throwback to the Realist conception of adjudication as whim, which Wechsler, H.L.A. Hart, and the rest of the Process Theorists wanted strongly to reject. “The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to

²³ Wechsler, *Toward Neutral Principles of Constitutional Law*, 9.

²⁴ Wechsler, *Toward Neutral Principles of Constitutional Law*, 11.

²⁵ Wechsler, *Toward Neutral Principles of Constitutional Law*, 11.

regard them, as ambivalently he so often does, as courts of law.”²⁶ Just as H.L.A. Hart had started by distinguishing discretion from whim, Wechsler started by distinguishing legitimate constitutional reasoning from the mere achievement of desirable results. There needed to be a principled basis for decision-making – not an appeal to outcomes.

The answer, for Wechsler, was a form of reasoned elaboration translated into the constitutional realm: “I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved,” Wechsler continued. “To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?”²⁷ It was particularly necessary to bring this form of constitutional reasoned elaboration to bear on Supreme Court decisions, Wechsler continued, because of the increasingly politicized nature of the decisions the Court was called upon to make. Palpably echoing the language of H.L.A. Hart’s *Discretion*, Wechsler noted that “We need it more particularly now respecting constitutional interpretation, since it has become a commonplace to grant what many for so long denied: that courts in constitutional determinations face issues that are inescapably ‘political’ . . . in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone.”²⁸ H.L.A. Hart had argued that discretion became necessary when judges were forced to reconcile values in conflict with one another; now Wechsler was arguing that reasoned decision-making was precisely what could legitimate the adjudication of disputes in a society with markedly different, conflicting value preferences. The position betrayed the same extraordinary faith in reason: while we may

²⁶ Wechsler, *Toward Neutral Principles of Constitutional Law*, 12.

²⁷ Wechsler, *Toward Neutral Principles of Constitutional Law*, 15.

²⁸ Wechsler, *Toward Neutral Principles of Constitutional Law*, 15. See portion of Hart’s *Discretion* talking about competing values in a “grand matrix.”

all disagree on substantive values, on courses for the American future, we may nonetheless be able to find common ground in the field of rationality, and therefore, be able to resolve, and move beyond, our differences by ensuring that decision-making in the legal process conformed to the reason that all citizens shared. (Wechsler's theory, like Fuller's collaborative articulation of shared purposes, anticipated the notion of deliberative democracy on this point.)

As a result, Supreme Court decisions that rested on truly neutral principles – principles rationally deserving of universal assent, or, in H.L.A. Hart's phrase, principles "deserving of rational [and therefore universal] approval" – *could* legitimately mediate questions posing seemingly irreconcilable value conflicts. Courts, Wechsler argued, "are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are - or are obliged to be - entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."²⁹

Further, the role of the legal academy, and Court critics, in Wechsler's model, was to evaluate the court's *reasoning* – not its results. "The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed. The critic's role ... is the sustained, disinterested, merciless examination of the reasons that the courts advance, measured by standards of the kind I have attempted to describe." Wechsler's conclusion again echoes H.L.A. Hart's concept of the *justification* of discretionary decisions. For Hart, discretionary decisions were justified, and evaluated, on the basis of the reasoning that produced them; for Wechsler, exactly the same thing was true of the Supreme Court's decisions.

²⁹ Wechsler, *Toward Neutral Principles of Constitutional Law*, 19.

By this stage in his lecture, Wechsler, and therefore process theory, had developed a theory for constitutional adjudication that justified and constrained judicial review: a theory of reasoned elaboration brought to bear on the interpretation of the Constitution. Although Hand's Holmes lectures the previous year had been a "bombshell" – Wechsler had translated the Legal Process ethos to form a reply, "beating the dead horse of Legal Realism yet again,"³⁰ providing a spirited defense of the neutrality of reason and its power to unite a value-pluralistic society, drawing on the insights of H.L.A. Hart and other members of the Legal Philosophy Discussion Group.

C. Wechsler's Holmes Lecture II – Turning to *Brown*

But then Wechsler turned to *Brown* – and "dropped *his* bombshell. *Brown I* failed to meet his requirement for grounding in neutral principles."³¹ Wechsler discussed several other cases first, criticizing their reasoning rather than their holdings, before reaching the question of school desegregation. "Lastly," he said, "I come to the school decision, which for one of my persuasion stirs the deepest conflict I experience in testing the thesis I propose. Yet I would surely be engaged in playing Hamlet without Hamlet if I did not try to state the problems that appear to me to be involved."³² After listing a number of problems he *might* have brought up, he stated the core of his objection. In line with the first part of his lecture, Wechsler objected to Brown's reasoning, not to its result: "The problem inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned."³³ The superficially sociological reasoning in the opinion did not satisfy Wechsler's criteria for legitimate judicial decision-making. Was there a truly neutral basis for Brown, Wechsler asked rhetorically? "I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases."³⁴

³⁰ Wiecek, 458.

³¹ Wiecek, 458.

³² Wechsler, *Toward Neutral Principles of Constitutional Law*, 31

³³ Wechsler, *Toward Neutral Principles of Constitutional Law*, 32.

³⁴ Wechsler, *Toward Neutral Principles of Constitutional Law*, 34.

In the 1959 Holmes Lecture, therefore, Wechsler had outlined a majestic justification for judicial review in the wake of Hand's excoriation of the entire judicial enterprise. But Wechsler had failed "spectacular[ly]" to "find a persuasive rationale for *Brown*" in light of the commitments of the Legal Process School.³⁵ Wechsler had saved judicial review, but only by biting the truly monumental bullet of rejecting Brown. Surely *that* was playing Hamlet without the prince.

D. The Reception of *Neutral Principles*

Hart's 1957 Holmes Lecture, Hand's 1958 Holmes Lectures, and now Wechsler's 1959 Holmes Lecture had each served as lightening rods for scholarly and popular controversy – intellectual drama that sprung from the collision of legal philosophy and the law itself, fallible, chaotic, and rough. But Wechsler's lecture provoked a particular frenzy. The *Harvard Law Review*, not surprisingly, immediately requested publication rights. "It seems to me," the President of the *Review* wrote to Wechsler on April 10th, "that it might well be handled as was Professor Hart's piece on law and morals, ... which was also a Holmes Lecture and is one of the most popular articles the *Review* has run in recent times."³⁶ Keenly remembering H.L.A. Hart's conniption fit at student edits, the President assured Wechsler that "We are not disturbed that your paper is in speech, rather than article, form. I think it can be adapted without major editing and without losing the flavor it had as an address."³⁷

The *Harvard Law Review*, however, was not the only publication racing to report on the lecture. In the event, Wechsler's full lecture was not disseminated in the *Review* until well after an overwhelming wave of reporting in the popular press – twisted reporting that unfairly excerpted the lecture to create the impression that the main thrust of Wechsler's lecture had been an attack on Brown rather than a defense of judicial

³⁵ Wiecek, 458.

³⁶ Letter from John D. French, President, Harvard Law Review, to Herbert Wechsler, April 10, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

³⁷ French to Wechsler, April 10, 1959.

review. The frenzy of news coverage focused almost entirely on his treatment of *Brown*, and not at all on his defense of “neutral” judicial review.

David Lawrence, the very same *U.S. News and World Report* editor and “widely syndicated” conservative journalist who the year before had lauded Hand “for rendering ‘a great service to contemporary understanding of the true limits of the Supreme Court’s powers’”³⁸ immediately made Wechsler’s lecture his momentary cause célèbre: another highly respected legal figure criticizing *Brown*, another admired voice to bring to bear against civil rights. “Supreme Court Rulings Criticized” (importantly not “Judicial Review Justified on ‘Principled’ Basis”) was Lawrence’s headline in the *Washington Post*: “Columbia’s Prof. Wechsler Questions Grounds for Desegregation Decisions.”³⁹ Lawrence tried to twist Wechsler’s lecture into a defense of anti-*Brown* sentiment among people who thought of themselves as “liberals.”⁴⁰ “The myth is widespread that anyone who criticizes the decisions of the Supreme Court of the United States is either a ‘segregationist’ or is trying to ‘undermine’ our judicial system,” Lawrence wrote.⁴¹ His idea was that if *Wechsler* can criticize *Brown*, so can anyone, even the most “liberal” of citizens. Lawrence noted in passing that Wechsler himself favored integration as a matter of personal opinion, but spent the entire column defending the claim that Wechsler’s lecture had “questioned very sharply the grounds upon which the Supreme Court had decided the famous ‘desegregation’ cases in 1954.”⁴² The rest of the column featured lengthy quotations from Wechsler drawn entirely from the final portion of his lecture where he indeed did criticize *Brown*.⁴³ Although Lawrence let Wechsler speak for himself, Lawrence failed to represent the main academic aim of the lecture. What

³⁸ Wiecek, 458.

³⁹ David Lawrence, “Supreme Court Rulings Criticized: Columbia’s Prof. Wechsler Question Grounds for Desegregation Decisions,” *The Washington Post*, April 8, 1959. (Clippings on file in the Columbia University Library, Herbert Wechsler Papers). Wechsler meticulously saved all of his clippings from news stories about his Holmes Lecture.

⁴⁰ David Lawrence, “Supreme Court Rulings Criticized: Columbia’s Prof. Wechsler Question Grounds for Desegregation Decisions,” *The Washington Post*, April 8, 1959.

⁴¹ David Lawrence, “Supreme Court Rulings Criticized: Columbia’s Prof. Wechsler Question Grounds for Desegregation Decisions,” *The Washington Post*, April 8, 1959.

⁴² David Lawrence, “Supreme Court Rulings Criticized: Columbia’s Prof. Wechsler Question Grounds for Desegregation Decisions,” *The Washington Post*, April 8, 1959.

⁴³ David Lawrence, “Supreme Court Rulings Criticized: Columbia’s Prof. Wechsler Question Grounds for Desegregation Decisions,” *The Washington Post*, April 8, 1959.

Wechsler had intended as a liberal defense of judicial review had morphed, overnight, into a conservative rejection of *Brown*.

In his home publication, *US News and World Report*, Lawrence excerpted extensively from Wechsler's lecture, again noting at the outset that Wechsler personally favored school integration, yet quoting exclusively from only the portions of the lecture devoted to the criticism of *Brown*. The *U.S. News and World Report* response had nothing to do with Wechsler's response to Hand, and everything to do with Wechsler's criticism of *Brown*. The headline? "Columbia Law Professor, Who Favors Integration, Says Supreme Court Decision is Based on Questionable Grounds."⁴⁴ Once again, Wechsler's pedigree as a northern liberal only made the misinterpretation of the core portion of his lecture all the more forceful.

Anthony Lewis of *The New York Times* fared much better in his coverage of the lecture, writing in headline: "Law Expert Puts Principles First: Wechsler Appeals to Court and Critics Not to Focus on the Results of Cases," though still, and fairly, quoting extensively from the latter portions of Wechsler's lecture, notably the portion where Wechsler claimed that "the Southern white pays far more heavily for segregation than the Negro."⁴⁵ But *this*, the more accurate account of the lecture, only appeared as something of a correction to an earlier, "botched"⁴⁶ account. Lewis's first story "never got around to the affirmation of judicial review."⁴⁷ Only after Wechsler pointed out several important passages did Lewis, and *The New York Times*, adjust the emphasis of the article to reflect Wechsler's main intentions.

Wechsler later said that he chose *Brown* as his target partly because it was controversial and salient in light of Hand's lecture the previous year, but also because he

⁴⁴ "A New Line in the Segregation Controversy," *U.S. News and World Report*, April 27, 1959, p94. (Providing a selective excerpt from Wechsler's lecture under his name).

⁴⁵ Anthony Lewis, "Law Expert Puts Principles First," *The New York Times*, April 8, 1959.

⁴⁶ Letter from Anthony Lewis to Herbert Wechsler, April 9, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁴⁷ Letter from Anthony Lewis to Herbert Wechsler, April 9, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

agreed with the result: if Wechsler could attack the *reasoning* of a case whose *result* he approved, he could demonstrate the selflessness, and thereby the philosophical integrity, of his philosophical position. Wechsler hoped that his critique of *Brown* in particular would eliminate the impression that his new theory of judicial review in fact concealed a political agenda, a theory of judicial review according to which cases he agreed with came out justified, and cases he disagreed with came out unjustified. “The results in the three lines of cases you criticized in that article are probably results that you would agree with,” an interviewer put to Wechsler in 1993. Wechsler’s response? “Exactly. That’s why I picked them.” He elaborated: “It seemed more powerful, more persuasive, and morally preferable to exhibit the tension between results and bases, in terms of situations where I liked the result, but felt a moral obligation to question the grounds than to take the easy cases where I disliked the result and undertook to question the grounds. Indeed, one of the elements of rhetorical effectiveness in the piece was precisely that I persuaded people that I liked the results and still felt it important to question the grounds.”⁴⁸ The niceties of this argumentative pose, however, were not simply lost on most non-academic observers – the choice of *Brown* catapulted his lecture into the land of conservative resistance to the Warren Court. While Wechsler had criticized *Brown*, the results of which he personally favored, in order to enhance the credibility of his defense of judicial review, his personal belief in school integration served, ironically, only to enhance the credibility of his attack on *Brown*.

Unlike the popular press, most legal academics understood the importance of Wechsler’s lecture, though there was, of course, considerable controversy surrounding it. It immediately became a sensation – provoking some sharp disagreement, but also considerable admiration. A pair of professors at UCLA wrote to Wechsler shortly after publication that “Your Holmes Lecture created more discussions around these parts than any subject either of us can remember.”⁴⁹ Livingston Hall, writing to congratulate Wechsler formally on behalf of the Harvard Faculty, added: “As time passes, our

⁴⁸ *Selections from the Oral History of Herbert Wechsler*, 927.

⁴⁹ Letter from Addison Mueller and Murray L. Schwartz to Herbert Wechsler, Sept 2, 1960. (On File in the Columbia University Library, Herbert Wechsler Papers.)

conviction here that your address was a real work of scholarship and a great contribution to American constitutional law has merely become more fixed in our minds.”⁵⁰

Learned Hand, to whose views Wechsler’s lecture was responding, wrote back with an air of professorial resignation. “If you had in fact agreed with my point of view about the Bill of Rights you would have been in a minority of about one or two... Ordinarily, this would disturb me more than it in fact does because, as George Santayana once put it, ‘I find that as time goes on I am less concerned than I used to be about my fate as a thinker.’”⁵¹ Felix Frankfurter, who shared with both Hand and Wechsler a commitment to judicial restraint, wrote to Wechsler to congratulate him on his lecture. “Your Holmes Lecture was a truly important discussion of the Supreme Court’s ‘judicial process’ -- its ‘oughts’ and light on its ‘is,’” Frankfurter wrote, expressing withering dissatisfaction with the activism of his brethren. “I deeply agree with the measure of your thought. I envy your freedom in expressing it.”⁵²

From the left, a particularly moving letter to Wechsler came from Charles Black – a towering liberal constitutional scholar and an intellectual hero of the civil rights movement, notable for his subsequent *defense* of Brown – who wrote to congratulate Wechsler “on a classic job.” Although Black voiced disagreement with Wechsler’s treatment of the race cases, he mainly admired Wechsler’s attempt to save judicial review in the first part of the lecture, praising it as “a wonderfully clear and concise step toward rehabilitation of judicial review as a legitimate institution. As a matter of fact, only chronology saves me from embarrassment with respect to this part; by a striking coincidence, on the very day on which the lecture was given I delivered to the Macmillan Company the manuscript of a book in which many of the same points are made. As it stands, I rejoice at noting the coincidence of thoughts; I could only wish my expression of

⁵⁰ Letter from Livingston Hall, Acting Dean, Harvard Law School, to Wechsler, April 17, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers.)

⁵¹ Letter from Learned Hand to Herbert Wechsler, April 17, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers.)

⁵² Letter from Felix Frankfurter to Herbert Wechsler, February 12, 1962. (On File in the Columbia University Library, Herbert Wechsler Papers.)

them were as classic. (The coincidence, I think, is attributable to the fact that we were both answering Hand, though I did not name him in this connection.)”⁵³

Black recognized that Wechsler was trying to formulate a philosophical theory of adjudication that would answer their common post-Realist, post-*Brown* intellectual historical position – the precariousness of which had only increased after Hand’s somewhat *realist* rejection of *Brown*. The lecture, Black wrote, “deal[s] with a problem that is at the center of things today – not only as to constitutional law but as to all law. I have put it to myself in more general terms: ‘What form can be taken by the concept of “decision according to law”, in the light of the new insights into the indeterminacy of legal doctrine and the consequent functioning of courts, in some sense, as organs of policy?’” For Black, like for many other liberal scholars, the problem was intense, and personal – and not fully reconciled in his own mind. “I am just beginning to face up to this,” Black wrote. “It is the step one must take after ‘legal realism’ and linguistic criticism of law, unless one wants to give up on the notion of law altogether, or else to lead a double life of cynicism and cant.”⁵⁴ Tellingly, Black put realism and “linguistic criticism” on the same side of the ravine, presumably believing that the inability of Hart’s linguistic analysis to produce determinacy left it on the realist side of the divide over judicial review. While Wechsler had heard, and learned much from, Hart’s *Discretion* paper, Black had not. He did not realize that the new form of “linguistic criticism” had actually offered an *answer* to the challenge of legal realism – perhaps an answer that could not provide an adequate response to Hand, but an answer nonetheless. Black did, however, believe that philosophy and jurisprudence was necessary to constitutional law – and expressed a creed that would have been welcome in the Legal Philosophy Discussion Group three years earlier: “In the notion of ‘neutrality’ of course, part of the answer must be sought; the search seems to me one of immense intricacy. I think it unavoidably has to

⁵³ Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁵⁴ Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

lead into general jurisprudence and even philosophy, but your statement of constitutional application is immensely stimulating.”⁵⁵

For Black, like for the process theorists, the quest for legitimate decision-making involved the search for rational, though perhaps not uniquely correct, answers. The search, for Black, was made necessary by the ubiquity of legal indeterminacy: “The fact that a constitutional decision involves a choice and a ranking of interests creates an agonizing problem in the application of the concept of neutrality to the particular decision. Nor can one look either for absolute semantic clarity or for rigorous logical compulsiveness in the rationale of constitutional any more than any other legal decision.”⁵⁶ Yet Black expressed some hope as he continued: “Some inconsistency does not in my mind decisively rule out judicial neutrality; a legal principle, like Hooke’s law in application to a particular spring, may have a legitimate application until stretched too far.”⁵⁷

Only after expressing profound sympathy with Wechsler’s intellectual project and the dangers of their common intellectual-historical terrain did Black turn, briefly, to *Brown* – and then, he only reiterated the integrity of Wechsler’s agenda. “You won’t be surprised that I broadly disagree” with the specific criticism of the race cases, Black wrote. “But I do so on the issues pretty much as you see them; I think decently neutral constitutional principles can sustain the Segregation Cases, not merely that the result is so good that legality doesn’t matter.” In fact, Black *admired* Wechsler for his criticism of *Brown*: “I want to say, finally, that it seems to me altogether healthy that a northern scholar of your eminence and unimpeachable loyalty to anti-racism should have solemnly and publically expressed dissatisfaction with *Brown*. The kind of polite unanimity we have seen could not rest on universal reasoned conviction; that is impossible to any great constitutional decision. It can only rest on a feeling that one mustn’t rock the boat – an

⁵⁵ Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁵⁶ Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁵⁷ Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

attitude anathematic to a sound conception of the public duty of those who enjoy the privileges of learning and thought. I think (though I feel, with better reason, a trepidation analogous to the one you confess regarding disagreement with Learned Hand) that the boat has a low center of gravity. But it is only by testing it that we will know.”⁵⁸

“In tone and content,” Black’s letter to Wechsler was “considerably more forgiving” than the published rejoinder Black produced the next year in the *Yale Law Journal*. In “The Lawfulness of the Segregation Decisions,” Black firmly rejected Wechsler’s position in “Neutral Principles” and offered a broad-based defense of *Brown*. Black’s argument in his article was, however, a turn away from process theory. Part of Black’s argument was that anyone with real, factual knowledge of the conditions of Jim Crow would plainly see that separate was not, and could never be, equal. This style of legal reasoning – orienting legal reasoning toward a sober assessment of lived experience in parts of the country where the constitution’s promises were poorly realized, if realized at all, represented a break from the legal process tradition, portending a shift to styles of legal theory that focused on, and located justice in, the improvement of social reality rather than the integrity of the legal process.⁵⁹ That said, although Black and Wechsler ultimately found themselves on opposite sides of an ever growing rift – pitting Wechsler’s “conservative” view of judicial restraint against Black’s robust legal liberalism – Black’s letter testifies to an enduring friendship and respect between them. Black later told Michael Dorf that his “disagreement” with Wechsler was “a minor hiccup in a long mutually respectful relationship.”⁶⁰ In a later paper, Wechsler even conceded that Black might have been right about *Brown*.⁶¹

As a final note, intended in jest, Black told Wechsler that he hoped “some Southern group will invite you to speak somewhere, in the expectation that they are going to get aid and comfort! If that happens, please send me a copy of the speech; I shall

⁵⁸ Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁵⁹ I am grateful to Mike Dorf for these and related observations.

⁶⁰ Email to the Author from Michael Dorf, August 10, 2013.

⁶¹ Email to the Author from Michael Dorf, August 10, 2013.

preserve it in a flame-proof safe.”⁶² Black’s remark proved prophetic, in a rather sad way: while northern professors largely understood the true spirit of Wechsler’s Holmes Lecture, and while the public reaction, perhaps understandably, was politicized to the point of perversion, some white Southerners *did* take Wechsler’s lecture as a full affirmation of a segregationist vision, much to Wechsler’s dismay. If Hand’s voice had been added to the “Impeach Earl Warren Campaign,” so had Wechsler’s.

Many white southerners – some of them white supremacists – became aware of Wechsler’s Holmes Lecture from the *U.S. News and World Report* excerpt – the excerpt that focused exclusively on Wechsler’s criticism of *Brown* – and wrote letters of support to Wechsler, preaching to him as if he were a member of their choir. Every provocative professor receives fan-mail and hate-mail from people with whom he or she would prefer not to associate, but the letters to Wechsler are striking on a level that defies characterization: Wechsler received a barrage of chilling letters from southern racists, thanking him for defending their retrograde vision of utopia. Some of the comments are almost too offensive to reproduce, but the sentiment they expressed is an important aspect of our jurisprudential history and serves as a reminder that legal philosophy, though abstract, is never far from real justice or real injustice. Wechsler kept these letters – perhaps out of frustration that his article had been misinterpreted, perhaps out of warped amusement, or perhaps as a reminder that the liberal social project his lecture had been attempting to serve was far from over.

One writer from Lagrange, Georgia, praised Wechsler’s defense of the freedom to assemble (along racial lines), and expressed his belief that “any School District in Georgia, or of any other State, that is forced by the court decree to integrate its public schools against the will of the majority of citizens of that District have legal ground for a counter-suit based on the fact that the decision abridges privileges or immunities of citizens of the United States.”⁶³ Another letter suggested that in addition to legal

⁶² Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

⁶³ Letter from Grady Fowler to Herbert Wechsler, April 26, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

analysis, Wechsler might also draw on a fundamentalist Christianity, anti-Semitism, and a brand of anti-communism common to the McCarthy era in his writing (a bizarre fusion indeed from today's perspective, yet imaginable on the far right in the 1950s): "Race-mixers have forgotten salvation and are running madly after twisted social philosophy and communism. Christ is abandoned, and God, and the Bible, and Heaven!" one writer penned to Wechsler, enclosing a page long list of Bible passages for Wechsler to consult. "As your search proceeds through the Bible (not the new Jew version of the Bible) check on the following references for yourself --." ⁶⁴ Yet another writer informed Wechsler – a sympathetic ear, he must have expected -- that "Since Earl Warren, President Eisenhower's appointee, has been Chief Justice, the Court has decided thirty out of thirty-nine cases in favor of the position taken by the communists." ⁶⁵

Another letter, far from praising Wechsler as a southern hero, berated him for saying that "the Southern white pays far more heavily for segregation than the Negro" with a tone of bating mockery. The writer, from Shreveport, Louisiana, noted that he had read the excerpts from Wechsler's lecture in the *US News and World Report* before telling Wechsler:

"you stated, 'I think, and I hope not without foundation, that the Southern white pays far more heavily for segregation than the Negro, not only in the sense of guilt that he must carry, but also in the benefits he is denied.' Will you please explain 1. My guilt, 2. The benefits I am denied? I have forty-two (42) families of Negroes on my plantation consisting of 2800 acres of River Land in the state of Louisiana. I also would like to know if you have employed Negroes to work for you? What personal contact with the Negro and not the educated class? Will you be so kind to enlighten me, and also to let me correct my guilt, and loss of benefits I am denied?" ⁶⁶

⁶⁴ See Memorandum, "White People Must Vote Together in a Bloc" (undated) (On File in the Columbia University Library, Herbert Wechsler Papers.)

⁶⁵ Letter from R. F. Hicker to Herbert Wechsler, May 17, 1959 (attaching a clipping highlighting the word "communist" repeatedly) (On File in the Columbia University Library, Herbert Wechsler Papers.)

⁶⁶ Letter from D.H. Waller to Herbert Wechsler, April 28, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers.)

Astonishingly, Wechsler wrote a patient reply to this writer, firmly rejecting the premises of his remarks and embracing diversity in education. “The statement in my lecture that you quoted has to do with the association of whites and negroes in the schools,” Wechsler responded. “It reflects my conviction, based on my experience in a mixed public school, that there are benefits to both groups in such an association.”⁶⁷

Harvard Law School Professor Donald Turner, one of Wechsler’s colleagues from the Legal Philosophy Discussion Group in 1956-57, leapt to Wechsler’s defense in Atlanta, where Turner discussed the lecture with Ralph McGill, the sympathetic, liberal editor of the *Atlanta Constitution*, and tried to rebut, Turner told Wechsler, “the use to which your Holmes Lecture has been put by Southern die-hards, and by such as David Lawrence,” the reporter largely responsible for the lecture’s misconstruction. Turner recommended that Wechsler send copies of the lecture to McGill, who could help to set the record straight.⁶⁸ Wechsler gratefully accepted Turner’s invitation to contact McGill, to whom he wrote, “Needless to say, I am sorry if what I said enhances the difficulty faced by people like yourself, who stand so valiantly for sanity and decency.” Wechsler enthusiastically sent McGill a copy of the Holmes Lecture, with the hope that future confusion could be avoided: “You will find, I think, that some of the quotation, accurate as it may be, does not convey the full thrust of what I tried to say.” But Wechsler stopped short of being effusively apologetic: “It is, however, of the utmost importance, as I am sure you would agree, that considerations of sympathy should not silence those of us whose job it is to maintain a systematic critique of the decisions of the Court.”⁶⁹

Turner’s efforts, however, could only delay the unfortunate result of Wechsler’s Holmes Lecture. The truly process theoretic answer to Hand became too mired in allegations of racism to constitute a sustained response to Hand’s challenge. The sad truth was that Legal Process had failed its greatest test. Wechsler was unable to find a

⁶⁷ Letter from Herbert Wechsler to D.H. Waller, May 18, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers.)

⁶⁸ Letter from Donald Turner to Herbert Wechsler, May 13, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers.)

⁶⁹ Letter from Herbert Wechsler to Ralph McGill, May 15, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers.)

way to justify judicial review and save *Brown* in the wake of Hand's neo-realist critique – and the solution he did provide was immediately tarred as an endorsement of things Wechsler never intended. It would take a new generation of constitutional theorists – and a new generation of legal philosophers – to answer the Hand's neo-realist challenge in a way that would justify *Brown*. The stories of these subsequent constitutional movements deserve careful telling, and that task falls to others.

Conclusion: H. L. A. Hart's America

A. The America Hart Saw

Hart's year in the United States took him all across the country, exposing him to the extraordinary diversity of the American continent and the American people – staggering in contrast to the homogeneity of his native England. “During the course of the year,” Lacey wrote, “he gave lectures at the Universities of California at Berkeley, Seattle, Duke, North Carolina, Richmond, Chicago, Northwestern, Wisconsin, Princeton (‘a demure English Shaftesbury’ which ‘tries to look like an English University but in fact succeeds only in looking like an English Public School’), Illinois at Champaign-Urbana, Pennsylvania, Yale, and New York and at Vassar and Swarthmore Colleges.”¹

Hart was immediately struck by the “refreshing lack of class snobbery in America,”² observing in a letter to his wife that “life here makes one thing how very badly ‘public’ school... education may in fact be operating in England. Apart from the snobberies and class divisions, perpetuations of class accents and manners being bad per se it must mean that people are recruited to jobs, in businesses and professions, v. often by irrelevant criteria. Great lawyers here have accents equivalent to Cockney: they just could not be great barristers at home.”³

Hart appreciated the “significant numbers of Jewish people in academic life,” something he “frequently noted in his diaries.” And, on an even more personal note, he witnessed, with almost tragic detachment, the possibility for an open gay life, the life that

¹ Lacey, 193.

² Lacey, 193

³ Lacey, 193.

seemed impossible to him in England. “In New York just before his final departure he spent an evening watching – and being made ‘to *feel* and *think*’ by – Brecht’s *Threepenny Opera* at a small Greenwich Village theatre, followed by dinner at a ‘pansy’ restaurant on Christopher Street – an experience which opened up a vista of how his own life might have been had he grown up in a similarly tolerant, diverse environment.”⁴

Hart also became acquainted, at least a little bit, with life in the South, his reflections on which reflect his social conscience but also the insensitivity of the era. “On one trip to the South,” Lacey wrote, “he was entertained to lunch by a ‘bullying Teutonic figure’ before escaping to the next engagement with another colleague and his ‘curious dark sad thin-lipped wife’ in their ‘pretty wooden house... in a wood’, and on to another dinner at which entertainments included, to his surprised amusement, a game of charades.”⁵

Although Hart noticed and commented on the ways in which the United States was a more open, egalitarian society than England, he still found some aspects of American life disturbing. He was unimpressed with the relative status of women. In the BBC Broadcast where he discussed his participation in the Legal Philosophy Discussion Group, Hart also said that: “The position of women seemed to me to be unemancipated in many ways as compared with contemporary life in England. I do not know how many women doctors there are in America, but I had the impression that one came across them very rarely. Even in the coeducational colleges the number of women on the staff appeared to be disproportionately small. Women once out of college seem largely still confined to the domestic rolls. An early marriage among other things keeps them out of circulation in the professions to a degree which is completely different from this country.”⁶

Along with the continued subjection of women, Hart “found many of the cities alarming,” Lacey wrote: “Chicago, which reminded him of ‘Dickensian London’, he

⁴ Lacey, 194.

⁵ Lacey, 193.

⁶ Hart, *A View of America*, The Listener (1958).

described as ‘satanic’, with its ‘evil slums and broken down ill-lit houses and pubs: gaunt machinery protruding into the sky: pathetic negroes – tough looking police and sinister prowlers all around... There’s a great deal of tortured, ruined country, streams, canals weaving in through the slums and skyscrapers’.”⁷ When it came to crime, “he was also shocked by Chicago’s annual murder rate, which was twice that of England and Wales.”⁸ And the political system, he thought, fared badly on issues of welfare and social justice: “He was intrigued by the lack of any serious, principled difference of policy between Republican and Democratic parties; found ‘grim’ the lack of a public health care system; and was repelled by what he saw as the occasional vulgarity of displays of wealth.”⁹

B. The America Hart Missed

Still, these negative impressions pale in comparison to Hart’s enthusiasm for American life, and American democracy, making his relative ignorance of America’s deepest social and political problems all the more striking. Owen Fiss provided a vivid description of the America Hart may not have seen – illustrating the lost promise of the New Deal, the facts of life President Lyndon B. Johnson’s Great Society program sought to ease, and, in law, and, fatefully, the reality that confronted Chief Justice Earl Warren.¹⁰

“In the 1950s, America was not a pretty sight. Jim Crow reigned supreme. Blacks were systematically disenfranchised and excluded from juries. State fostered religious practices, like school prayer, were pervasive. Legislatures were grossly gerrymandered and malapportioned. McCarthyism stifled radical dissent, and the jurisdiction of the censor over matters considered obscene or libelous had no constitutional limits. The heavy hand of the law threatened those who publically provided information and advice concerning contraceptives, thereby imperiling the most intimate of human relationships. The states virtually had a free hand in the administration of justice. Trials often proceeded without trial or jury. Convictions were allowed to stand even though they turned on illegally seized evidence or statements extracted from the accused under coercive circumstances. There were no rules limiting the imposition of the death penalty. These practices victimized the poor and disadvantaged, as did the welfare system, which was

⁷ Lacey, 194.

⁸ Lacey, 194.

⁹ Lacey, 194.

¹⁰ See also generally Morton Horowitz, *The Warren Court and the Pursuit of Justice* (1999).

administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and the like.”¹¹

In the face of *this* America, judicial politics took a turn -- as the Supreme Court in the Warren Court era began to see legal problems as *moral* problems and the constitution as the embodiment of the fundamental ethical values of the American polity. Professor Fiss wrote: “there was something distinctive and special about the Warren Court, almost a new beginning. Brown itself undertook the most challenging of all constitutional tasks, making good on the nation's promise of racial equality. Even more importantly, that case embodied both a conception of law and a set of commitments that evolved into a broad-based program of constitutional reform. The Court saw the Bill of Rights and the Civil War Amendments as the embodiment of our highest ideals and soon made them the standard for judging the established order.”¹²

In other words, Hart was observing the American system just as the courts began to use *moral* language to answer the nation's social problems, with appeals to noble ideals of “liberty,” “due process,” and fundamental rights – values and principles that everyone, including Hart, should have been proud to see vindicated, yet things that Hart's utilitarian forerunners, chiefly Bentham, would have considered “nonsense upon stilts,” the stuff of unmodified natural law that would not withstand careful philosophical scrutiny.

During Hart's visit and thereafter, American law was taking on a distinctly natural law flavor. If the nation's problems were to be solved by courts, and courts deployed moral analysis in order to vindicate fundamental rights, the inevitable result was a perceived integration of law and morality – or rather, more pointedly, the perception that the integration of law and morality served the cause of justice. The Warren Court's activism rested on the theoretical assumption that law and morality were interwoven together—that increased moral knowledge could enhance legal knowledge. American

¹¹ Owen Fiss, *A Life Lived Twice*, 100 Yale Law Journal 1117, 1118 (1991).

¹² Fiss, *A Life Lived Twice*, 100 Yale Law Journal 1117, 1118 (1991).

constitutional law during and after the Warren Court required a legal theory that justified the *actual illegality* of the regimes of the past – their legal invalidity in light of some higher standard.

Such a standard might well be legal in nature. To be clear, Hart would have been the first to point out that there was not a *necessary* relationship between a rights-oriented jurisprudence and anti-positivism. In fact, at the end of his life in the *Postscript to The Concept of Law*, Hart would endorse a form of “soft positivism” which invited the argument that the American constitution itself encodes higher, moral norms, and requires judges to interpret and apply those requirements in their decisions according to an evolving process.¹³

But the fact remained that in 1958, Hart sent his Holmes Lecture off into a world in which liberalism relied on a natural law philosophy, a world in which fundamental rights, relying upon the philosophical integration of law and morals, had become the engine of the social reform he cared so deeply about. Thus Hart’s liberal legal positivism, even in his modified formulation, came to represent resistance to Warren Court legal liberalism. Hart’s moral argument in the Holmes Lecture that a sharp separation between law and morality would further the cause of political freedom did not sit well in the political context of post-*Brown* America, where court-driven progressive change relied on the idea that moral injustice was wrong *in law*. Hart’s formulation of Nazi law as law but bad law did not sit well with lawyers, professors, and judges who wanted to say that outdated, immoral court decisions were legally, not just morally, wrong. When it became popular to argue that the constitution must be interpreted by giving voice to its fundamental, enduring values by which we can establish the illegality of past regimes and right historical wrongs, Hart’s conception of a liberal, utilitarian critique of the law, requiring that moral standards remain extra-legal, seemed profoundly at odds with the pursuit of social justice. By 1958, Hart, for all his *political* liberalism, was looking like a kind of *legal* conservative, in the company of Learned Hand and Herbert Wechsler – an unlikely, but from one perspective inevitable trio.

¹³ See generally Hart, “Postscript” to *The Concept of Law*.

General jurisprudence aside, Hart's relative silence on legal reasoning in the Holmes Lecture (and the same deficiency in *The Concept of Law*), paired with his single-minded focus on the indeterminacy of legal language and the core-penumbra distinction, created a warped impression of his understanding of judicial decision-making. "It may seem from what I wrote in" in the Holmes Lecture, Hart clarified later, resentfully, "that I thought that judges, when they reach a point at which the existing settled law fails to determine a conclusion either way, simply push aside their law-books and start to legislate de novo for the case in hand without further reference to the law. In fact this has never been my view."¹⁴ Hart's real view, disclosed in *Discretion*, was close to the view of Wechsler and (Henry) Hart and Sacks and firmly in tune with the Legal Process School's emphasis on decisions constrained by reason and institutional-historical fit. The Holmes Lecture, however, in the fraught context of its reception, looked like the philosophical counterpart to Hand's "positivistic"¹⁵ excoriation of judicial review: The notion that judges "legislate de novo" in penumbral cases, without constraint or principled justification, challenged the legality of judicial review itself – a function limited almost by definition to the hardest of hard cases.

If *Discretion* – Hart's first American essay -- had been published alongside "Positivism and the Separation of Law and Morals" commentators would have understood that his view was closer to Wechsler's in "Neutral Principles" than to Hand's in "The Bill of Rights." Hart's moderate, process theoretic understanding of the judicial function, what legitimates it, and how to critique it, would have been part of his legacy from the start. It may even have been clear that Hart's thinking in *Discretion* influenced Wechsler, one of Hart's closest Harvard friends, directly.

Yet this clarification would not have rescued Hartian positivism from its anti-Warren Court associations. *Wechsler's* view had itself come to represent resistance to the Warren Court, and at the basic level, Hart's view that conceptual separation of law and

¹⁴ Hart, *Essays in Jurisprudence and Philosophy*, 6-7.

¹⁵ Letter from Lon Fuller to Felix Frankfurter, cited above.

morality furthered political liberalism clashed with American legal culture in the 1950s, increasingly eager to justify the Supreme Court's role in creating a more perfect union in the language of rights and justice. In light of the social transformations of the 1950s and 1960s, and the rights-oriented judicial engine of those transformations, the liberalism of Hart's positivism – either his famous general jurisprudence or his largely unknown view of legal reasoning -- would have seemed detached from reality, even naïve.

C. Hedge Rows and the Concepts of Liberty

Hart was no conservative, but he did hold a certain view about what makes societies, particularly American society, truly liberal – a perspective that placed less emphasis on judges and more emphasis on open, truly rational democratic deliberation, resonating again with process theory. Hart seemed to believe that American democracy, unlike democracy in Britain, was structured around open discourse and lively legislative activity, not around rights and freedoms enforced by a distant judiciary. This was a somewhat ironic view, given the strong libertarianism of American political history, and what many take to be the libertarian character of American life, especially in contrast with Europe. Indeed, *despite* the normally libertarian leanings of Hart's liberalism¹⁶, he formed a somewhat communitarian vision of American politics.¹⁷

At first Hart adumbrated his vision with the tone of a cultural anthropologist engrossed in the banal. In his BBC Broadcast, Hart – as much a latter day Tocqueville as a latter day Bentham – took special note of the dearth of hedges in Cambridge, Massachusetts. He suggested that American life took place in the open, transparently, with little time for obfuscation or, notably, privacy. “If you look at the admirable frame houses, of which so many charming and interesting variations have been made, you are puzzled by the absence of some feature which is difficult at first to identify,” Hart reported. “What is it – you ask yourself - that is missing here? It is, of course, the

¹⁶ Lacey, 195; Hart, *Law, Liberty, and Morality*. Importantly, however, Hart was no Nozick: he was a libertarian to the extent that he argued fiercely against the legal enforcement of morals and fashioned himself as a successor to Mill, but a welfarist in economic policy.

¹⁷ Lacey interprets the *Listener* piece similarly. See PAGE.

hedges. The houses are mostly not divided either from each other or from the road by the fences and hedges familiar in England. You see at once that privacy, as an ideal, makes almost no appearance.”¹⁸ Hart’s observation about the absence of privacy from American life serves as a reminder of how much has changed since 1957, before the “right to privacy,” for decades now a staple of American constitutional politics and the foundation of *Roe v Wade*, had become a focus of legal and constitutional life.

Furthering this line of thinking Hart described the American barbeque: “These delightful meals taken in the open, when the meat is broiled over charcoal, often take place between the houses and in the lane in the full view of passers-by.”¹⁹ *Everything* in America was done in the open, Hart thought; just like the guiding ethos of analytic philosophy, America was transparent, “in the full view of passers by,” un-obsured. Privacy, a quintessentially British good, was absent: “The notion of privacy, of departure from what other people do, the capacity to keep back and withhold, play little part, except in the case of a few who might be regarded in many areas of American life as eccentric or suspect.”²⁰ In that last remark, Hart was almost certainly referring to gay people, for whom the 1950s were not the time of sunny openness they were for members of the majority. But Hart, nonetheless recognized in America some places where the same openness was possible for gays and lesbians -- something unknown to him in Britain.

For Hart, what was significant about the absence of privacy was not hedges or barbeques, but what it revealed about politics and democratic society. “The extraordinary absence of privacy makes one think again about what we and they – the Americans – consider liberty to be,” Hart said in his BBC broadcast:

“For us, surely, liberty is this: that there is a circle round each man, inside which he can do as he pleases, and it is no concern of others; this is the liberty the Englishman has inside his house and garden and behind its hedges. I think that this as an ideal makes little appeal to an enormous number of Americans; I believe you can find what the American means by liberty by looking at the

¹⁸ Hart, *A View of America*.

¹⁹ Hart, *A View of America*.

²⁰ Hart, *A View of America*.

constitution of an American state. In the State of Massachusetts the Constitution provides that any member of the public may introduce a measure into the Legislature and argue for it before committees. And it seems to me that this is what an American means by liberty; the right to take part in what he would call ‘the decision making process.’”²¹

Put differently, Hart thought that American liberty was what Benjamin Constant called the “liberty of the ancients”, what Hart’s friend Isaiah Berlin would call “positive liberty” the next year, and what we might now call “republican liberty.”²² For Hart, English liberty was, by contrast, “negative liberty” or “the liberty of the moderns.”²³ It was not a rigorously defended point. But that Hart thought American liberty was all about political participation perhaps helps to explain how Hart’s political liberalism fit with his process theoretic understanding of the judicial role. If American liberty was about open, vibrant democratic participation, then the most important decisions in society should be made openly, together, in the light of day – not by judges in a closed courtroom.

Hart’s position – envisioning an active citizenry guiding responsive legislatures in a system overseen by basically passive judges -- rested on the belief that democratic processes could reach satisfactory outcomes: that democracy did not require the active intervention of a judiciary to achieve a morally tolerable social order. True to form, Hart envisioned a connection between morally tolerable democratic results and *rational* deliberation.

Democracy could work, Hart seemed to believe, if democratic deliberations were based on principle and not prejudice, on reason and not whim – if *citizens* as well as

²¹ Hart, *A View of America*.

²² As well as what is now referred to as republican liberty, taken up more recently by political theorists and historians like Pettit, Skinner, and Bailyn. See also the discussion in Chapter 5 above about “deliberative democracy.”

²³ Benjamin Constant, “On the Liberty of the Ancients Compared with That of the Moderns,” in *Constant: Political Writings* (Cambridge: Cambridge University Press, 1988). See also Isaiah Berlin, *Two Concepts of Liberty* (1958). Lacey, 195, makes a similar observation: “Though his own genre of liberalism always tended to the libertarian rather than to the republican end of the spectrum – to ‘negative’ rather than ‘positive’, freedom as his friend Berlin would put it – and though his equation of American political culture with positive freedom might be questioned, Herbert was fast becoming a deep admirer of certain aspects of American democracy.”

officials made good on the rational demands of discretion in their political choices. Rational public thought and deliberation contributed to the health of the political process, making less necessary the intervention of an enlightened Court. Like (Henry) Hart and Sacks, H.L.A. Hart seemed to envision an artisan society anchored in reason, where a liberal rule of law arises when different groups of people play well the role the political and legal process assigns to them. Judges and officials resolving indeterminacy must exercise discretion; legislatures must craft rational policies and executives must enforce them in light of rational limitations; citizens must argue rationally, hewing as close as possible to the virtues of the philosophical mind.

For Hart, clarity and reason were political as well as philosophical virtues – virtues with a liberal spirit. All that is ugly in politics, Hart seemed to think, all that is illiberal – intolerance, bigotry, oppression, unfair allocations of resources and power – depended for coherence on irrationality, on poor philosophical thinking, invalid arguments, false premises, and the “mask of mystery” remaining firmly in place. “A man of the Enlightenment,” in Tony Honore’s assessment, Hart’s “mind was firm and clear, unshakably hostile to intellectual muddle *and the political oppression it fosters*.”²⁴ For Hart, democracy -- in which participants express their views with clarity, honesty, and logical rigor, deliberation capable of producing a true meeting of the minds -- was the process by which the right views would win out. Clear, rational thinking would lead to liberal policies; those were the policies that were rationally justified. Accordingly, Hart strongly argued for the philosophical education of lawyers, leaders in democratic deliberation.²⁵

D. Paradoxes in Hart’s America

Hart’s America had a gift for public deliberation. “If you scratch an American you will find a romantic underneath,” Hart said in his BBC Broadcast: “in this sense, that many have a passionate conviction that if you could only throw off the shackles of words

²⁴ Tony Honore, *Herbert Lionel Adolphus Hart*, 84 Proceedings of the British Academy (1993). Emphasis added.

²⁵ See Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Bodenheimer*.

and of legal rules and leave honest men to think out what on the whole was the best thing to do at every juncture of life, you would find both great agreement and the best decision.”²⁶ Maybe, Hart thought, America could be a Benthamite republic where citizens engaged in clear-headed deliberation and made rational decisions to promote the public good, a republic that did not need substantive rights as a crutch for the failures of politics, and a republic where citizens, thinking clearly and analytically, could keep law and morality distinct, understand what is and philosophize about what ought to be, and pursue rational public philosophy more fully to secure the blessings of liberty. America’s exceptionalism, for Hart, lay partly in the open character of its democracy.

Yet Hart’s America also had a limiting flaw. America’s optimistic collaborative decision-making, he thought, inevitably reached the level of morality: “argument soon breaks through to what is believed, apparently, to be at the root of every problem—a moral problem. And, more widespread than I could have believed, was the conviction that just as there lurks at the bottom of the problem a moral question, so there must somewhere be an answer: an answer perhaps for the sage – and he may be in the university – to provide.”²⁷ Partly, this was as it should be: citizens should undertake rational moral analysis together, and then use their moral reflection to hold their government in check – exactly the style of political freedom Hart envisioned in his Holmes Lecture. The possibility of *an* answer raises the problem of pluralism, but on a more immediate level, the ubiquity of moral analysis in American life made unavoidable the contention that legal reasoning was and must be moral reasoning – that beneath the law lurked moral questions, deserving of moral answers. Thus the existence of answers extant “for the sage... to provide” made plausible the view of judges as Guardians, instead of rather mundane legal officials, and threatened to disrupt the rational institutional and social equilibrium Hart had envisioned, dulling the sensibilities of resistance, fostering acquiescence to the judgment of others, chilling citizens’ vigilance. Hart’s message that a certain form of conceptual discipline – of which the separation of law and morals was but one example – furthered the cause of political freedom was, in a

²⁶ Hart, *A View of America*.

²⁷ Hart, *A View of America*.

sense, badly needed in America precisely because the view conflicted with the American zeitgeist.

Thus Hart's America was a paradox -- A nation gifted in rational democratic discourse, yet tempted detrimentally to insert moral analysis into everything, confusing the real issues at stake. A vibrant democracy perhaps slouching into something like what Tocqueville called "democratic tutelage."²⁸ A nation in which Hart's brand of liberal legal positivism was destined to fall on deaf ears. The character of public deliberation in America -- open and vibrant enough partially to exonerate a limited judicial role from allegations of illiberalism -- also inclined America against Hart's brand of legal positivism at an existential level -- for American politics, free and open as it may be, inevitably converged on the language of morality and rights.

Perhaps most ironically, what Hart found so special about American democracy was precisely what Fuller believed doomed Hart's positivism to failure. For Fuller, too, saw democratic "conversation" as a crucial component of a free society. What Fuller called the "collaborative articulation of shared purposes" resonated profoundly with Hart's reflections on what made American democracy distinctive.

Yet the differences between Hart's and Fuller's accounts of this aspect of self-government reveal the very core of their dispute. Fuller believed that no form of deliberation -- and certainly not the deliberation that guides a free society -- could or should ever avoid moral analysis. More strongly, Fuller held that it was precisely the character of the "collaborative articulation of shared purposes" that ruled out Hart's legal positivism. To Fuller, the darkest specter of positivism was that it assumed a theory of psychology, communication, epistemology, and mind that foreclosed the possibility of the "collaborative articulation of shared purposes," the animating feature of a free society, and a process in which facts and values cannot be separated, in which means and ends arrange themselves in interactive circles that drive robust, free social deliberation about what matters most.

²⁸ See Alexis de Tocqueville, *Democracy in America*, Volume 2, Book 4, Chapter 6 (1835).

It was, ironically, Fuller's classic mid-century "faith in reason" and his belief that rational discourse could solve social problems justly and efficiently that conflicted most with the fact-value separation that Hart thought was required to clear communication and "thinking straight." Indeed, their most basic clashes resulted from their differing visions for what "rationality" required. For Fuller, positivism's implicit psychology ruled out the possibility that we can rationally converse about questions of value or about our shared fate. And that, he held, was a terrifying, illiberal prospect that undercut the core of self-government. For Hart, it was the possibility of clear thinking and rational deliberation that made self-government possible in the first place. And that noble goal, for Hart, was furthered by adopting a positivist outlook.

E. Bentham – and America --at Two-Hundred

In 1976, Hart found himself in New York to mark America's bicentennial with a lecture entitled "1776-1976: Law in the Perspective of Philosophy."²⁹ He turned to history to illustrate further the paradoxical relationship between utilitarian positivism and the American republic. "No English lawyer," Hart said, "certainly no English philosopher of law, could forget that [the] year of wonders 1776, which saw the publication of the Declaration of Independence... was also the year of the anonymous publication of Jeremy Bentham's first book, *The Fragment on Government*."³⁰ The American republic was founded on the doctrine of inalienable rights in the very same year that Bentham called those rights "nonsense upon stilts." "In 1776, the year of the American Declaration of Independence, and an *annus mirabilis* in English Letters," Hart wrote in another essay the same year, "Bentham opened an epoch in political and legal theory" by inaugurating the long British tradition of legal positivism.³¹ And "in the same year, 1776, Bentham contributed, again anonymously, to *An Answer to the Declaration of*

²⁹ H.L.A. Hart, *1776-1976: Law in the Perspective of Philosophy*, reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 145.

³⁰ Hart, *Essays in Jurisprudence and Philosophy*, 145.

³¹ H.L.A. Hart, *Bentham and the United States of America*, 19 *Journal of Law and Economics* 547, 547 (1976).

the American Congress, a brief, brusque, and satirical attack on the philosophical preamble to the Declaration and on the doctrines of the natural equality of men and of their unalienable rights.”³²

Bentham, however, at first deeply skeptical of the American republic, in the end became one of the young nation’s greatest admirers. Hart explained:

The story of Bentham’s concern with America is in fact a complex and, in the end, a rather sad one. In it there are two distinct phases: the first was one of antipathy and rejection, both of the legal arguments of the Americans’ case before the break with Britain and of the philosophy of the Declaration of Independence which made the break; the second was a phase of enthusiasm and, in many ways, indiscriminate admiration of America after the Union and of its developing democracy. From 1817 when he first publicly took up the cause of reform of the British Constitution, the injunction, “Look to America” became Bentham’s favourite slogan in urging his own countrymen towards democracy and the full radical program of manhood suffrage, secret ballots, short parliaments, and equal electoral districts.³³

The story of Hart’s concern with America is in some ways not unlike Bentham’s. In fact, it may in the end have been a rather sad one, at least from one perspective. As Hart surveyed the American intellectual landscape years after his own “year of wonders,” he saw a legal world fundamentally transformed by the forces just starting to take root in 1956 – in constitutional law and in political theory, rights ruled. Hart saw a landscape scattered with professors rejecting his greatest ideas, only to conclude that “the epoch which Bentham thus opened is now closing: certainly among American political and legal philosophers utilitarianism is on the defensive, if not on the run.”³⁴

It seems almost inevitable, in this respect, that Hart’s greatest critic would be an American who insisted that positivism was incapable, among other failings, of “taking rights seriously.” Ronald Dworkin was a student of everyone we have encountered in this story -- a student of both Harts, Fuller and Wechsler, and a law clerk to Learned Hand,

³² Hart, *Essays*, 146.

³³ Hart, *Bentham and the United States of America*, 547.

³⁴ Hart, *Bentham and the United States of America*, 547.

and a theorist who would argue for a profound integration of law and morality in pursuit of a unified theory of law that could provide a post-Process answer to the counter-majoritarian difficulty *and* a comprehensive critique of H.L.A. Hart's legal positivism.

F. Between the Nightmare and the Noble Dream

In the 1970s and 1980s, Dworkin developed a theory of judicial decision-making that insisted on the existence of "right answers" in law.³⁵ Dworkin argued that unique right answers exist for *every* legal question, and that those answers are accessible to judges who fully and rightly weigh all relevant considerations – considerations extending all the way to the deepest moral and political foundations of the legal system. In the eyes of Dworkin's mighty Judge Hercules, there was no indeterminacy; in our mortal eyes, therefore, indeterminacy was an illusion. In areas of *perceived* indeterminacy, Dworkin held that judges should select the decision that fits best with the legal system as a whole – fits best with its rules, precedents, principles, and with the underlying moral and political values that make the legal order coherent. There will, he maintained, be exactly one such decision.³⁶

Dworkin's theory contrasted with H.L.A. Hart's at almost every level.³⁷ Dworkin insisted on the integration of law and morality and denied the necessity of legal indeterminacy, insisting on "right answers" emerging from the fusion of fact and value. But late in his life, H.L.A. Hart would identify the right answers thesis as the "sharpest direct conflict" between his work and Dworkin's – a dispute "aris[ing] from my contention that in any legal system there will always be certain legally unregulated cases" where the law is "partly indeterminate or incomplete."³⁸ Throughout the 1980s, Hart grew anxious about the consequences of Dworkin's theories, and struggled to articulate a

³⁵ See generally Ronald Dworkin, *Law's Empire* 45–112 (1986); Ronald Dworkin, *The Model of Rules I*, in *Taking Rights Seriously* 14 (1977); Ronald Dworkin, *The Model of Rules II*, in *Taking Rights Seriously*, 46; Ronald Dworkin, *Hard Cases*, in *Taking Rights Seriously*, 81; Ronald Dworkin, *No Right Answer?*, in *Law, Morality, and Society*, 58.

³⁶ Dworkin, *Law's Empire*, 239–50 (discussing Judge Hercules).

³⁷ Hart, *The Concept of Law*, 261 (citing Ronald Dworkin, *Taking Rights Seriously*, 26 (1977)).

³⁸ Hart, *The Concept of Law*, 272.

reply.³⁹ When Hart did respond in the *Postscript to The Concept of Law*, he returned to positions he first proposed in *Discretion*, at Harvard in 1956, defending the inevitability of indeterminacy and the inextricable demand for discretion.⁴⁰

The *Postscript* rejected the right answers thesis and asserted the necessary role discretion plays in the legal system. In “legally unregulated” cases, Hart wrote, the judge “must exercise his *discretion* and *make* law.”⁴¹ Hart put special emphasis on the word “*discretion*” with italics, but did not say anything more about what discretion was or how it fit into a more comprehensive view of the law. This part of the *Postscript*, seen this way, was an abridged restatement of the *Discretion* paper; the *Postscript* relied on the same ideas but set them out in much less detail. In *Discretion*, Hart unambiguously rejected what would become Dworkin’s position on judicial reasoning, arguing that indeterminacy was inherent and that discretion, and therefore adjudication in hard cases, “necessarily” required a “leap.” To Hart, even the word “right” was a stranger in a strange land when it came to discretionary decisions; the best to hope for was “sound” or “wise.”⁴²

More specifically, *Discretion* foreshadowed – and rejected – Dworkin’s position that indeterminacy could be eliminated – that is, proven to be illusory – if legal reasoning integrated the application of rules with the interpretation of principles, purposes, and other abstract value-laden considerations. In Hart’s illustrations of discretion – the young hostess’s dinner party, for example⁴³ – decision-makers weighed rules, standards, values, principles, and purposes all interconnected in the same “grand matrix.”⁴⁴ In other words, *Discretion* implicitly rejected the rule-principle distinction. Faced with a “grand matrix” of rules, standards, principles, and purposes, a judge must exercise discretion, rooted in and constrained by reason, identify the set of norms of all levels of abstraction that are

³⁹ Lacey, 328-37 (discussing the relationship between Hart and Dworkin).

⁴⁰ Lacey, however, points out that Hart was aware of Dworkin and perhaps even some of his major jurisprudential views in vague form by 1956, when he marked Dworkin’s jurisprudence examinations at Oxford. Lacey, 185-86.

⁴¹ Hart, *The Concept of Law*, 272 (italics original).

⁴² Hart, *Discretion*, 9-10 (discussing the young hostess).

⁴³ See the discussion in Chapter 3 above.

⁴⁴ Hart, *Discretion*, 8.

appropriate to the resolution of the case, and then make a rational “leap.”⁴⁵ The *Postscript*, in direct chronological reply to Dworkin, reiterated this argument, painting a picture of norms of various kinds existing on the same continuum of abstraction, dismissing the implication that rules and principles were fundamentally different or that operating in tandem they could render indeterminacy an illusion.⁴⁶

In truth, Hart’s vision of legal reasoning in the *Discretion* paper was not entirely out of tune with the theory of judicial reasoning in hard cases Dworkin would adopt. In a particularly telling remark, Hart wrote that “where discretion is used in the course of judicial determinations in the attempt to apply rules” – in other words, in judicial interpretation – “the weight of factors such as consistency with other parts of the legal system will be prominent.”⁴⁷ Hart’s attention to “consistency with other parts of the legal system” is similar to Dworkin’s insight that decisions should “fit” with the entirety of the law. Hart, like Dworkin, valued the coherence and internal consistency of the legal system and believed that judges should deploy their craft in pursuit of the law’s integrity. Hart even said that more abstract considerations contribute to considerations deserve “weight” in discretionary decisions – Dworkin’s word exactly.⁴⁸ But Hart was very clear that no perfect combination of rules and principles, properly weighed would ever render indeterminacy an illusion. Hart’s judge and Judge Hercules both appeal to principles “deserving of rational approval,” and both search for decisions that cohere with the integrity of the whole legal system.⁴⁹ But sooner or later, they part ways, as Hart’s judge takes the inevitable “leap” and makes a rational choice. Discretion, Hart argued, even “after we have done all we can to secure the optimum condition for its exercise,” was a

⁴⁵ Hart, *Discretion*, 15.

⁴⁶ Hart, *The Concept of Law*, 262.

⁴⁷ Hart, *Discretion*, 15. “...whereas they may be at their minimum in cases of Avowed Discretion exercised by, say, a rate-fixing body.”

⁴⁸ Hart, *Discretion*, 9.

⁴⁹ In this way, *Discretion* helps to illustrate the differences between Judge Hercules and the *real* Judge “Herbert,” the name Dworkin gave “playfully (and in many people’s view, disrespectfully)” to the metaphorical Judge Hercules’s “less ambitious judicial colleague.” See Lacey, 331.

form of choice – choice significantly constrained by reason and institutional role, but choice all the same.⁵⁰

Dworkin's interpretation of Hart – in essence, an uncharitable caricature – was flawed. Dworkin did not realize that Hart shared (Henry) Hart and Sacks's basic perspective on the limitations of the judicial role, a classically process theoretic understanding that did not posit the existence of arbitrary judicial choice in penumbral cases, but instead defended the appropriateness of reasoned, constrained decisions, as this thesis has demonstrated. Hart's vision was one that was indeed entirely opposed to the existence of "unique right answers" in hard cases, but Hart firmly rejected the idea that the only other option was to endorse Hand's view that judicial review was usually unjustified. But Dworkin, writing after Hand, Wechsler, and the rise of a number of post-process philosophies, addressed a world in which H.L.A. Hart's and (Henry) Hart and Sacks's theory of adjudication was long outdated.

Hart thought that departures in American thought from (Henry) Hart and Sacks's moderate process paradigm followed a pattern. In 1977, Hart would observe that American legal thought had always oscillated between two equally wrong extremes. He called them "The Nightmare and the Noble Dream." Hart rejected the "Nightmare" – the Realist story of unconstrained judicial choice that experienced a kind of post-Process restoration with the rise of Critical Legal Studies – as much as he denied that the "Noble Dream," the search for unique right answers in a field not capable of their production, could ever come true. Hart's analysis of discretion, charting a middle road between the "Nightmare and the Noble Dream," arose in the context of the one American jurisprudential movement that resisted the temptation of these two peculiar extremes: legal process.

As Hart saw it, the prospect of perfect legal certainty had bewitched Dworkin – "the noblest dreamer of them all," Hart wrote, "if he and Shakespeare will permit me to

⁵⁰ Hart, *Discretion*, 15.

say so”⁵¹ – and sent him on an inherently unattainable quest to identify criteria for judicial objectivity. Hart was not so much bewitched, as bothered and bewildered.⁵² He understood the Noble Dream’s appeal to American legal thinkers, who “worrie[d]”⁵³ that the discretion of the unelected was fundamentally anti-democratic. He realized that the existence of unique right answers in law could provide an iron-clad justification for judicial review – the elusive solution to the “counter-majoritarian difficulty,” the problem Alexander Bickel would make famous six years after Hart’s year at Harvard.⁵⁴ But Hart’s project was not to solve the problems of American democracy, and, as he saw it, philosophy was not the servant of politics. Hart aimed to understand law in the abstract – its structure, its coherence, its modes of thought – in the clearest light. It was, from one angle, a more modest project, but for Hart it was the most fundamental task of legal philosophy.

Still, Hart’s *Discretion* was a product of a certain historical moment – a moment when Hart came into intense contact with the anxieties of the legal process generation. In fact, from one perspective, *Discretion* was the closest Hart ever got to formulating his own solution to Bickel’s problem. But it would be a mistake to put too much faith in this reading. In a pointed sense, Hart’s was a pre-*Brown* theory of judicial discretion composed in a post-*Brown* world. Hart did not attempt to state the precise conditions under which courts could rightly overturn the commands of electoral majorities; he failed to spell out exactly how courts should reconcile values in direct conflict; he did not say enough about what “rationality” really meant, or the precise way in which it constrained decision-making; he did not say clearly how limited a role he envisioned courts playing in American political life.

Perhaps the most enduring lesson of *Discretion* is that the pursuit of legal certainty was not in Hart’s blood, and never had been. *Discretion* was Hart’s answer to

⁵¹ Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*.

⁵² In the words of a third Hart...

⁵³ Hart, *Discretion*, 3.

⁵⁴ In the “Postscript,” Hart observed that the “familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases.” “How seriously,” he asked rhetorically, “is this to be taken?” See Hart, *The Concept of Law*, 274.

America's obsessive fear that discretion and the rule of law were natural antagonists in need of some form of theoretical intercession. As Hart saw it, discretion was deeply implicit in the concept of the rule of law. It was the possibility of discretion, in contrast to arbitrary whim, that allowed our regulation of the future to be lawlike, given our inherent inability to look forward in time with perfect clarity. In sketching a vision for how discretion could reconcile legal indeterminacy with the rule of law, "Discretion" represented a significant, distinctive achievement in legal theory. If Dworkin's quest was to eliminate discretion, Hart's quest was to perfect it – by improving our understanding of discretionary decision-making and what enhances its quality, and by demanding that judges live up to the rational standards implicit in the concept of discretion itself. If Dworkin saw discretion as an abdication of the judicial responsibility to reason all the way to the right answer, Hart saw it as the first line of defense against a regime of lawless whim. To Hart, discretion and the rule of law were inseparable, in fact rationally conjoined – and Judge Hercules was less a Noble Dream than a deceptive myth. It was precisely "because we are men, not gods" that discretion made possible a government of laws, not men.

G. A Forgotten Form of Liberalism

It is time to sum up. This dissertation has told one story of the American experience of H.L.A. Hart and H.L.A. Hart's ideas. In the early 1950s, Hart and the process theorists found themselves on similar intellectual trajectories. Both sought a middle road between formalism and realism, and both put their faith in reason – a vague yet potentially redemptive ideal -- as the way forward. Hart believed that legal officials, facing decisions in the sphere of indeterminacy, should exercise a form of decision-making similar to what the Process School called "reasoned elaboration." And in line with process thinking, Hart tentatively solved the problem of legal indeterminacy by sketching a theory of legal reasoning. When he first arrived in the United States, Hart developed a theory of discretion and set it out in an essay that has never before been analyzed in secondary scholarship. *Discretion* is deeply revealing about Hart's intellectual world in 1956 and the path of the philosophy of law since. The story of the

Legal Philosophy Discussion Group reveals that H.L.A. Hart and Henry Hart shared a common understanding of how choice in law could be constrained, despite their differing approaches to legal scholarship. *Discretion* clarifies the Hart-Fuller debate by showing that Hart endorsed purposive analysis in legal reasoning, while rejecting any purpose- or value-oriented conception of law itself. And the essay illuminates Hart's rejection of the "right answers thesis," demonstrating that much of his response to Dworkin in the *Postscript* had in fact been formulated at Harvard in 1956.

As the year progressed, Hart would continue to develop his ideas in close collaboration with members of the Legal Process School. With Fuller he shared a debate that has gone entirely overlooked, dwarfed by the more famous, published exchange after Hart's departure. Hart's Holmes Lecture delivered an optimistic picture of liberal legal positivism – and a vision of a dynamic democracy that *he thought* was deeply resonant with life in the United States. But despite Hart's liberalism, his positivism was never able to escape the stain of politics. Hart's ideas were received in an uncompromising political context, in the middle of the fateful debate over the role of the judge in American life, and the role of Courts in righting the wrongs of history and making good on America's founding promises – moral promises – in law. The result was that Hart's legal liberalism never took route in America—in fact, it was doomed to take on a conservative hue. Indeed, the form of liberal legal positivism that he envisioned ultimately went the way of the Legal Process School. As the sun set on the legal process paradigm in the 1960s and 1970s, following Hand's challenge and the "botched" reception of Wechsler's Holmes Lecture, many of the most enduring critiques leveled against (Henry) Hart and Sacks⁵⁵ could have been directed to H.L.A. Hart too, to his theory of discretion and indeed to his account of law as a whole: the non-neutrality of reason, the irreconcilability of conflicting values in a pluralistic society, the inadequacy of existing institutional settlements to render justice to people excluded from the formation of those settlements, the bare legal process's blindness to history, and more.

⁵⁵ See for example Duncan Kennedy, *Utopian Rationalism in American Legal Thought* (unpublished yet highly influential manuscript, on file with Author).

Yet Hart left us with a vision of legal and political liberalism that ought not to be forgotten. In tandem with the Legal Process School -- Henry Hart, Lon Fuller, Herbert Wechsler, and many others -- Hart pursued a philosophy that described law's institutional manifestation, however inadequately,⁵⁶ as well as its conceptual form; a philosophy that took law seriously from the perspective of good faith citizens and officials; a philosophy that justified, constrained, and made sense of courts in a post-Realist world; a philosophy that accepted the constraining power of rationality; a philosophy that subjected the power of the state in all its forms to the demands of the Enlightened mind; a philosophy that honored "the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings."⁵⁷ America was at once Hart's incubator and Hart's purgatory. It was the collision of his analytical mindset with the chaotic contours of American legal thought that produced many of his greatest insights. America was destabilizing, but in righting himself, Hart found his voice and at last envisioned the intellectual trajectory we now celebrate. Yet it was also America's political culture that doomed Hart's ideas to the margins of American legal thinking, defending, in vain for the moment though not for the ages, a positivist outlook in the face of the growing momentum of fundamental rights.

This dissertation has told a trans-national story of ideas in America: a defining juncture in the history of jurisprudence, the intellectual growth of a great philosopher, the rise and fall of a forgotten form of liberalism. Whether, long after the decline of the process synthesis, American jurisprudence finds its future in progress or return, H.L.A. Hart's American philosophy has much to teach us -- his reconciliation of legal indeterminacy with the rule of law, his defense of the analytic method, his comprehensive liberal legal positivism, and his vision for American democracy. Similarly, the enhanced appreciation of Lon Fuller's evolving jurisprudence that new archival materials afford, and the context of the Legal Philosophy Discussion Group and the intensity of Harvard's

⁵⁶ The failure to extend this form of analysis represents, in Lacey's mind, the unfulfilled promise of *Discretion*. See Nicola Lacey, *The Path Not Taken*, 127 Harvard Law Review (2013) forthcoming.

⁵⁷ Hart, *Essays in Jurisprudence and Philosophy*, 72.

campus in 1956-57 and the intensity of American judicial politics in the years after bring the history of jurisprudence, and the stakes of that history, into sharp relief.

The nature of Hart's achievements, however, – and the achievements of his American colleagues -- would easily be overlooked without a thorough reconstruction of their intellectual, historical, and political circumstance, a task that calls for the application of the methods of intellectual history to the study of the philosophy of law. The evidence assembled in this thesis demonstrates that, no matter one's views on the separation of law and morals, the separation of intellectual history and legal philosophy must end.

Selected Bibliography

Note: This dissertation is based in large measure on archival research. I did research in the collections at the University of Oxford, New College, Harvard Law School, Columbia Law School, and The University of Chicago Law School. In the bibliography that follows, I have tried to recreate the list of materials that form the foundation for this dissertation, but it is impossible to overstate the value of sifting through archival collections meticulously – to collect source material of the kind listed below, but also to generate insights into the subject that elude clear demarcation.

A. Primary Sources

1. Published Writings of H.L.A. Hart

Hart, H.L.A., “The Ascription of Responsibility and Rights,” 49 *Proceedings of the Aristotelian Society*, New Series, 188 (1948 - 1949).

Hart, H.L.A., *A Logician’s Fairytale*, 60 *The Philosophical Review* (Apr., 1951).

Hart, H. L. A., *Philosophy of Law and Jurisprudence in Britain (1945–1952)*, 2 *Am. J. Comp. L.* 355 (1953)

Hart, H.L.A., *Definition and Theory in Jurisprudence*, 70 *LAW Q. REV.* 37 (1954).

Hart, H. L. A. *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 *University of Pennsylvania Law Review* 956 (1957).

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

Hart, H. L. A. *A View of America*, *The Listener* 89 (1958).

Hart, H.L.A., and Tony Honore, *Causation in the Law* (1959).

Hart, H.L.A., *The Concept of Law* (originally published 1961), Oxford: Oxford University Press, 2nd Ed., (1994).

Hart, H.L.A., *Law, Liberty, and Morality* (1963).

Hart, H.L.A. The Morality of Law *by Lon L. Fuller*, 78 Harv. Law Rev. 1295 (1965) (book review).

Hart, H.L.A. *Rawls on Liberty and Its Priority*, 40 University of Chicago Law Review 554 (1973).

Hart, H.L.A., 1776-1976: *Law in the Perspective of Philosophy*, reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*.

Hart, H.L.A. *Bentham and the United States of America*, 19 *Journal of Law and Economics* 547 (1976).

Hart, H.L.A. *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream* 11 Ga. L. Rev. 969 (1977).

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

Sugarman, David, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 *Journal of Law and Society* 267 (2005).

2. Unpublished Materials by H.L.A. Hart

Memorandum from H.L.A. Hart to members of the Legal Philosophy Discussion Group (November 19, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7, also preserved in the Paul Freund Papers, Box 155, Folder 5); See also accompanying essay, H.L.A. Hart, "Discretion" (November 19, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7). Referred to as *Discretion*.

Hart, H.L.A. Draft of Interview for *Doxa*, 1989. (H.L.A. Hart Papers, Box 2, Folder 14, On File with the Library of New College, Oxford).

Unpublished Interview of Hart by Michael Brock and Brian Harrison, 19 May 1988. (On File with the Library of New College, Oxford, H.L.A. Hart Papers, Box 2, Folder 14).

3. Published Primary Sources

Austin, J. L., *Philosophical Papers*, Oxford (1961).

Austin, John, *The Province of Jurisprudence Determined* 157 (1832). (W.E. Rumble, Ed. Cambridge: Cambridge University Press, 1995.)

Baker v. Carr, 369 U.S. 186 (1962).

Berlin, Isaiah, "Felix Frankfurter at Oxford," in *Personal Impressions*, Princeton: Princeton University Press (2001) 112-120.

Bickel, Alexander, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

Bodenheimer, Edgar, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. Pa. Law Rev. 1080 (1956).

Fuller, Lon L., *Law in Quest of Itself* (1940);

Fuller, Lon L. *The Forms and Limits of Adjudication*, 92 Harvard Law Review 353.

Fuller, Lon L. *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harv. Law Rev. 630 (1958).

Fuller, Lon L. *Human Purpose and Natural Law*, 53 *The Journal of Philosophy* 697, 698 (1956)

Gellner, Ernest, *Words and Things* (1959).

Hand, Learned, *The Bill of Rights* (1958).

Hart, Henry M. Jr., *Holmes's Positivism: An Addendum*, 64 Harvard Law Review 929 (1951).

Hart, Henry M., Jr., *Foreword: The Time Chart of the Justices*, 73 Harvard Law Review 84 (1959).

Hart, Henry M, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 166 (William N. Eskridge and Phillip Frickey eds., 1994) (1994); Eskridge and Frickey, 2042.

Hayek, Friedrich A., *The Constitution of Liberty* (1960). 236-47.

Honore, Tony, *Herbert Lionel Adolphus Hart*, 84 *Proceedings of the British Academy* (1993). Emphasis added.

Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *The Yale Law Journal* 710 (1917).

Holmes, Oliver Wendell, *The Path of the Law*, reprinted in 110 *Harvard Law Review* 991 (1997).

Holmes, Oliver Wendell, *The Common Law* (1881).

Lawrence, David, "Supreme Court Rulings Criticized: Columbia's Prof. Wechsler Question Grounds for Desegregation Decisions," *The Washington Post*, April 8, 1959. (Clippings on file in the Columbia University Library, Herbert Wechsler Papers).

"A New Line in the Segregation Controversy," *U.S. News and World Report*, April 27, 1959, p94. (Providing a selective excerpt from Wechsler's lecture under his name).

Levi, Edward, *An Introduction to Legal Reasoning* (1948).

Lewis, Anthony, "Law Expert Puts Principles First," *The New York Times*, April 8, 1959.

Berlin, Isaiah, *Two Concepts of Liberty* (1958)

Lochner v. New York, 198 U.S. 45 (1905).

Rawls, John *Outline of a Decision Procedure for Ethics*, 60 *The Philosophical Review* 177 (1951).

Sacks, Albert M., *The Supreme Court 1953 Term – Foreword*, 68 *Harvard Law Review* 96, (1954).

Shuman, Samuel, *Harvard's Jurisprudence Year*, *Harvard Law Record*, 8 (1956).

Shuman, Samuel, *Legal Positivism: Its Scope and Limitations* (1963).

Strauss, Leo, *Natural Right and History* (1953).

Tocqueville, Alexis de, *Democracy in America* (1835).

Wechsler, Herbert, *Toward Neutral Principles of Constitutional Law*, 73 *Harvard Law Review* 1 (1959).

Selections from the Oral History of Herbert Wechsler, 93 *Columbia Law Review* 854, 925-26.

Hessel E. Yntema, 10 *University of Michigan Law School's Law Quadrangle Notes*, (Spring 1966).

Yntema, Hessel, "The American Journal of Comparative Law: A New Magazine for Lawyers," *American Bar Association Journal* 131 (1952).

4. Archival Materials (Memoranda and Unpublished Documents)

Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

List of Addresses of the Participants in the First Conference on Legal and Political Philosophy, Arden House, October 31-November 3 1952 (undated) (on file at the Harvard Law School Library, Fuller Papers, Box 3, Folder 5).

Program for the First Conference on Legal and Political Philosophy (on file at the Harvard Law School Library, Fuller Papers Box 3, Folder 5.)

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1949.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1950.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1951.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1952.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1953.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1954.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1955.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1956.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1958.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1959.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, "Jurisprudence" papers, Trinity Term 1960.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, “Jurisprudence” papers, Trinity Term 1961.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, “Jurisprudence” papers, Trinity Term 1962.

Oxford University Examination Papers, Second Public Examination, Honour School of Jurisprudence, “Jurisprudence” papers, Trinity Term 1963.

Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to the “Law School Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Law Faculty” (October 3, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law School, to “the Members of the Legal Philosophy Discussion Group” (October 8, 1956) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7).

Memorandum from Lon L. Fuller, Professor of Law, Harvard Law School, to “Present and Former Members of the Legal Philosophy Discussion Group” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 8).

“Outline of Paper on Discretion” (undated) (on file with the Harvard Law School Library, Henry Hart Papers, Box 35, Folder 7) (this document is Henry Hart’s annotated copy of H.L.A. Hart’s handout).

Notes of Henry M. Hart, Jr., Professor of Law, Harvard Law Sch., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7).

Memo from Henry Hart to Lon Fuller, February 9, 1965, “Some Notes on H.L.A.H’s Review,” 3 (on file in the Harvard Law School Library) (analyzing H.L.A. Hart’s review of Fuller’s *The Morality of Law*, almost to the point of obsession).

Letter from H.L.A. Hart to his Family, November 23, 1956. (On File with the Library of New College, Oxford).

Memorandum from Julius Stone to the Legal Philosophy Discussion Group, “Openness and Concealment in Judicial Discretion in Relation to ‘Reasoned

Elaboration' of Grounds, Points for Discussion, December 11, 1956." (On File with the Harvard Law School Library, Fuller Papers, Box 155 Folder 5/6. Also preserved in the Henry Hart Papers, Box 35, Folder 8.).

Fuller, Lon L. *Jurisprudence 1956-57, Appendix to the Special Supplement, A Reply to Critics (undated)* (On File in the Harvard Law School Library, Paul Freund Papers, Box 55 Folder 5).

Memorandum to The Legal Philosophy Discussion Group, (On File in the Harvard Law School Library, Freund papers, Box 155, Folder 5/6).

Memorandum from Herbert Wechsler to the Legal Philosophy Discussion Group, "Rule and Discretion in the Criminal Law: Some Problems for the Draftsman of a Code." (On File in the Harvard Law School Library, Freund Papers, Box 155, Folder 5/6.)

Memorandum to the Legal Philosophy Discussion Group announcing the Next Meeting of Tuesday, February 27th, 1957. (On File in the Harvard Law School Library, Freund Papers, Folder 155, Box 5/6.).

Memorandum to the Legal Philosophy Discussion Group announcing the next meeting on March 19th. (On File in the Harvard Law School Library, Freund Papers, Box 155, Folder 5/6. Also preserved in the Henry Hart papers, Box 35, Folder 7/8).

Memorandum, "White People Must Vote Together in a Bloc" (undated) (On File in the Columbia University Library, Herbert Wechsler Papers).

Honore, Tony, Draft of "Herbert Lionel Adolphus Hart" in Hart Papers, New College, Oxford. Box 2:15. Published as A. M. Honore, "Herbert Lionel Adolphus Hart 1907-1992" in *Proceedings of the British Academy* 84 (1993).

5. Correspondence (Arranged chronologically to provide a sense of the density of the intellectual networks)

Letter from Charles W. Eliot to Henry S. Pritchett, *Correspondence of Charles W. Eliot*, Small Manuscript Collection (On File at the Harvard Law School Library).

Letter from Marcus Dick to H.L.A. Hart, 8 March 1952. Hart Papers, New College, Oxford. (On File in the Library of New College, Oxford, Box 3, Folder 24).

Letter from Learned Hand to Herbert Wechsler, April 6, 1955 (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Herbert Wechsler to Learned Hand, April 5, 1955. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Herbert Wechsler to Learned Hand, April 15, 1955. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from H.L.A. Hart to Jenifer Hart, September 14, 1956. (On File with the Library of New College, Oxford).

Letter from H.L.A. Hart to Jenifer Hart, October 9, 1956 (On File with the Library of New College, Oxford).

Letter from H.L.A. Hart to his Family, November 19, 1956. (On File with the Library of New College, Oxford).

Letter from H. L. A. Hart to Jenifer Hart (Nov. 4, 1956) (on file with the Library of New College, Oxford).

Letter from H.L.A. Hart to Jenifer Hart, January 5, 1957 (On File with the Library of New College, Oxford).

Letter from H.L.A. Hart to Jenifer Hart, May 14, 1957 (On File in the Library of New College, Oxford, Hart Papers, Box 3, Folder 20).

Letter from Henry Hart, Professor of Law, Harvard Law Sch., to Lon Fuller, Professor of Law, Harvard Law Sch., 3 (Nov. 5, 1957) (with copies to Al Sacks and John Dawson) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 4, Folder 2, and also preserved in the Papers of Henry M. Hart, Jr., Box 3, Folder 6) (referring to "Herbert Hart" and his contribution to their discussions on adjudication).

Letter from H.L.A. Hart to Lon Fuller, December 13, 1957 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

Letter from Lon Fuller to H.L.A. Hart, December 17, 1957. (On File in the Harvard Law School Library, Fuller Papers Box 3, Folder 14).

Letter from H.L.A. Hart to Morton White, December 18, 1957 (on file with the Library of New College, Oxford).

Letter from Herbert Wechsler to Henry Hart, January 28, 1958. (On File in the Harvard Law School Library, Henry Hart Papers).

Letter from Felix Frankfurter to Lon Fuller, February 13, 1958 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

Letter from Lon Fuller to Felix Frankfurter, February 24, 1958. (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

Letter from Felix Frankfurter to Lon Fuller, February 28, 1958 (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

Letter from Leo Strauss to Lon Fuller, March 19 1958 (On File at the Harvard Law School Library, Fuller Papers, Box 3, Folder 15).

Letter from Felix Frankfurter to Lon Fuller, April 1, 1958 (on file with the Harvard Law School Library, Fuller Papers Box 3, Folder 15).

Letter from Felix Frankfurter to Lon Fuller, April 1, 1958. (On File in the Harvard Law School Library, Fuller Papers, Box 3, Folder 4).

Letter from Erwin Griswold to Herbert Wechsler, May 6, 1958. (On File in the Columbia University Library, Wechsler Papers).

Letter from Herbert Wechsler to Erwin Griswold, May 12, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Erwin Griswold to Herbert Wechsler, May 14, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Herbert Wechsler to Erwin Griswold, October 10, 1958. (On File in the Columbia University Library, Herbert Wechsler Papers)

Letter from Livingston Hall, Acting Dean, Harvard Law School, to Herbert Wechsler, February 16, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Anthony Lewis to Herbert Wechsler, April 9, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Livingston Hall, Acting Dean, Harvard Law School, to Wechsler, April 17, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Learned Hand to Herbert Wechsler, April 17, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from John D. French, President, Harvard Law Review, to Herbert Wechsler, April 10, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Charles Black to Herbert Wechsler, April 22, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Grady Fowler to Herbert Wechsler, April 26, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from D.H. Waller to Herbert Wechsler, April 28, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Donald Turner to Herbert Wechsler, May 13, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Herbert Wechsler to Ralph McGill, May 15, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from R. F. Hicker to Herbert Wechsler, May 17, 1959 (attaching a clipping highlighting the word “communist” repeatedly) (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Herbert Wechsler to D.H. Waller, May 18, 1959. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Addison Mueller and Murray L. Schwartz to Herbert Wechsler, Sept 2, 1960. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Felix Frankfurter to Herbert Wechsler, February 12, 1962. (On File in the Columbia University Library, Herbert Wechsler Papers).

Letter from Lon L. Fuller, Professor of Law, Harvard Law School, to H.L.A. Hart, Professor of Jurisprudence, University of Oxford (February 3, 1963) (on file with the Harvard Law School Library, Fuller Papers, Box 3, Folder 14).

Letter from Joel Feinberg to H.L.A. Hart, 21 July 1991. (On File at New College, Oxford.)

B. Secondary Sources

Amar, Akhil Reed, *Law Story: Hart and Wechsler's the Federal Courts and the Federal System*, 102 Harvard Law Review 668 (book review).

Bobbitt, Philip, *Constitutional Fate*, 56 (1984).

Barzun, Charles, *The Forgotten Foundations of Hart and Sacks*, 99 Va. L. Rev. 1 (2013).

Barzun, Charles L. *The Forgotten Foundations of Hart and Sacks*, 38 (Virginia Public Law and Legal Theory Research Paper No. 2011-44) (2011).

Bayles, Michael D., *Hart's Legal Philosophy* (1992).

Bix, Brian, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 Southern Methodist University Law Review, 167 (1999).

Bolgar, Vera, *The American Journal of Comparative Law 1952-1966*. 15 The American Journal of Comparative Law 24 (1966 - 1967).

Butler, Judith, *Excitable Speech: A Politics of the Performative* (1997).

Calabresi, Guido, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan. L. Rev. 2113, 2123 (2003)

Campbell, Tom, *The Legal Theory of Ethical Positivism* (1996).

Cane, Peter ed., *The Hart-Fuller Debate in the Twenty-First Century* (2010).

Coleman, Jules, ed., *Hart's Postscript* (2001).

Collini, Stefan, Introduction to "John Stuart Mill," *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education* (1825).

Constant, Benjamin, "On the Liberty of the Ancients Compared with That of the Moderns," in *Constant: Political Writings* (Cambridge: Cambridge University Press, 1988).

Dorf, Michael C., *Legal Indeterminacy and Institutional Design*, 78 New York University Law Review 875 (2003).

Duxbury, Neil *English Jurisprudence between Austin and Hart*, 91 *Virginia Law Review*, (2005).

Duxbury, Neil *Patterns of American Jurisprudence* (1995).

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

Dworkin, Ronald, *The Model of Rules I*, in *Taking Rights Seriously* (1977).

Dworkin, Ronald, *The Model of Rules II*, in *Taking Rights Seriously* (1977).

Dworkin, Ronald, *Hard Cases*, in *Taking Rights Seriously* (1977).

Ely, John Hart, *Democracy and Distrust*. Cambridge: Harvard University Press, 1980.

Eskridge, William N. Jr. and Phillip P. Frickey, *The Making of "The Legal Process"*, 107 Harv. Law Rev. 2031, 2047 (1994).

Fallon, Richard H. Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 966 (1994).

Finnis, John, *Natural Law and Natural Rights*, (2nd ed. with same pagination and a Postscript, 2011).

Finnis, John, "Natural Law: The Classical Tradition," in Coleman, Jules and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) .

Finnis, John, "Natural Law Theory: Its Past and Its Present," *Routledge Companion to Philosophy of Law* (2011).

Fiss, Owen, *A Life Lived Twice*, 100 Yale Law Journal 1117 (1991).

Gavison, Ruth ed., *Issues in Contemporary Legal Philosophy: Essays for H.L.A. Hart* (1987).

Gilmore, Grant, *The Ages of American Law*, 68 (1977).

Ginsburg, Ruth Bader, *In Memory of Herbert Wechsler*, 100 Columbia Law Review 1359 (2000).

Gordon, Robert W., *The Case for (And against) Harvard*, 93 Michigan Law Review 1231 (1995).

Grey, Thomas C., *Modern American Legal Thought*, 106 Yale L. J. 493 (1996) (book review).

Gunther, Gerald, *Learned Hand: The Man and the Judge* (1997).

Hacker, P.M.S., and Joseph Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (1977).

Horwitz, Morton J., *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

Horwitz, Morton J., *Why is Anglo-American Jurisprudence Unhistorical?*, 17 *Oxford Journal of Legal Studies* 557 (1997).

- Horwitz, Morton J. "Post-War Legal Thought" in *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 247-269 (1992).
- Horwitz, Morton J., *The Warren Court and the Pursuit of Justice* (1999).
- Kabaservice, Geoffrey, *The Guardians*, 110 (2004).
- Kalman, Laura, *Legal Realism at Yale, 1927-1960*. Chapel Hill: University of North Carolina Press (1986).
- Kalman, Laura, *The Strange Career of Legal Liberalism* (1998).
- Kalman, Laura, *Yale Law School and the Sixties: Revolt and Reverberations* (2005).
- Kennedy, Duncan, *Utopian Rationalism in American Legal Thought* (unpublished yet highly influential manuscript, on file with Author).
- Kennedy, Duncan, *Form and Substance in Private Law Adjudication*, 89 Harvard Law Review 1685 (1976).
- Kennedy, Duncan, *The Rise and Fall of Classical Legal Thought* (2005).
- Kramer, Matthew, Claire Grant, Ben Colburn and Antony Hatzistavrou eds., *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (2008).
- Lacey, Nicola *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004).
- Lacey, Nicola, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 New York University Law Review 1059 (2008).
- Lacey, Nicola, *The Path Not Taken*, 127 Harvard Law Review (2013) (forthcoming).
- Leiter, Brian, *Positivism, Formalism, Realism*, 99 Colum. Law. Rev. 1138 (1999) (book review).
- McKinlay, A., *Performativity: From J.L. Austin to Judith Butler* in P Armstrong & G Lightfoot (eds), *'The Leading Journal in the Field': Destabilizing Authority in the Social Sciences of Management* (2011).
- MacCormick, Neil, *H.L.A. Hart* (1981).
- MacCormick, Neil, *Legal Reasoning and Legal Theory* (1979).

Martin, Michael, *The Legal Philosophy of HLA Hart: A Critical Appraisal* (1987).

Mehta, Ved, *Fly and the Fly-Bottle: Encounters with British Intellectuals* (1963).

Menand, Louis, *The Metaphysical Club: A Story of Ideas in America*. New York: Farrar, Straus, and Giroux (2001).

Paulsen, Stanley, *Radbruch on Unjust Laws: Competing Earlier and Later Views?* 15 Oxford Journal of Legal Studies 489 (1995).

Patterson, Dennis, *Explicating the Internal Point of View*, 52 Southern Methodist University Law Review (2006).

Posner, Richard, *Law, Pragmatism, and Democracy* (2003).

Postema, Gerald, *Legal Philosophy in the Twentieth Century: The Common Law World*, 11 Treatise Legal Phil. Gen. Jurisprudence (2011).

Purcell, Edward A. Jr. *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 The American Historical Review (1969).

Raz, Joseph, *The Concept of a Legal System* (1970).

Raz, Joseph, *Practical Reason and Norms* (1975).

Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (1979).

Ree, Jonathan, *English Philosophy in the Fifties, Radical Philosophy* (1993).

Rundle, Kristen, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (2011).

Schauer, Frederick, Introduction to *The Theory of Rules* by Karl Llewellyn, (Chicago: University of Chicago Press, 2011).

Schauer, Frederick, *A Critical Guide to Vehicles in the Park*, 83 New York University Law Review 1109 (2008).

Sebok, Anthony J., *Misunderstanding Positivism*, 93 Mich. Law Rev. 2054 (1995).

Sebok, Anthony J., *Reading the Legal Process*, 94 Michigan Law Review 1571, 1575 (1996).

Sebok, Anthony J, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 Southern Methodist University Law Review (1999).

Shapiro, Fred, *The Most-Cited Law Review Articles of All Time*, 110 Michigan Law Review 1483 (2012).

Shapiro, Scott, *What is the Internal Point of View?* 75 Fordham Law Review 1157 (2006).

Shapiro, Scott J. *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed* (Public Law And Legal Theory Working Paper Series, Working Paper No. 77, 2007).

Simpson, Brian, *Reflections on the Concept of Law*. Oxford: Oxford University Press (2011).

Skinner, Quentin *Liberty Before Liberalism* (1988).

Skinner, Quentin *Meaning and Understanding in the History of Ideas*, 8 History and Theory 3 (1969).

Star, Leonie, *Julius Stone: An Intellectual Life*, (1992).

Summers, Robert S., *Professor Fuller’s Jurisprudence and America’s Dominant Philosophy of Law*, 92 Harvard Law Review 433 (1978).

Summers, Robert S., *H.L.A. Hart’s The Concept of Law: Estimations, Reflections, and a Personal Memorial*, 45 Journal of Legal Education, 587 (1995).

Tamanaha, Brian Z., *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010).

Toh, Kevin, *Raz on Detachment, Acceptance, and Describability*, 27 Oxford Journal of Legal Studies 403 (2007).

Twining, William, *Karl Llewellyn and the Realist Movement*. London: Weidenfeld and Nicolson (1973).

Waldron, Jeremy, Review of Hart’s *Essays in Jurisprudence and Philosophy*, *Mind* 281 (1985).

Waldron, Jeremy, *Jurisprudence for Hedgehogs* (2013) (forthcoming).

Wellman, Vincent A. *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks* 29 Ariz. L. Rev. 413 (1987).

White, Morton G., *Social Thought in America: The Revolt Against Formalism*. New York: Viking (1949).

White, Morton G., *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, 8 *Journal of the History of Ideas* 131 (1947).

White, G. Edward, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *Virg. Law Rev.* 279 (1973).

Wiecek, William M., *The Birth of the Modern Constitution*, in *The Oliver Wendell Holmes Devise* 59 (2006).