
Fuller's Response to Hart on the Separation of Law and Morals

Philosophy of Law

Fuller on “Penumbral Cases”

Recall Hart’s response to the penumbra objection against his thesis about the separation of law and morals.

As I understand Professor Hart's thesis (if we add some tacit assumptions implied by it, as well as some qualifications he would no doubt wish his readers to supply) a full statement would run something as follows: The task of interpretation is commonly that of determining the meaning of the individual words of a legal rule, like "vehicle" in a rule excluding vehicles from a park. More particularly, the task of interpretation is to determine the range of reference of such a word, or the aggregate of things to which it points. Communication is possible only because words have a "standard instance," or a "core of meaning" that remains relatively constant, whatever the context in which the word may appear. Except in unusual circumstances, it will always be proper to regard a word like "vehicle" as embracing its "standard instance," that is, that aggregate of things it would include in all ordinary contexts, within or without the law. This meaning the word will have in any legal rule, whatever its purpose. In applying the word to its "standard instance," no creative role is assumed by the judge. He is simply applying the law "as it is."

Fuller speaking here...

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In addition to a constant core, however, words also have a penumbra of meaning which, unlike the core, will vary from context to context. 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? When questions of this sort are decided there is at least an "intersection" of "is" and "ought," since the judge, in deciding what the rule "is," does so in the light of his notions of what "it ought to be" in order to carry out its purpose.

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Fuller's reconstruction of Hart's argument:

- ❖ The intersection between law and morals takes place when the judge reasons about "penumbra cases"
- ❖ But since most legal reasoning takes place in the core and not in the penumbra, this intersection is minimal

*Is Fuller's a fair statement of Hart's
idea of the core and the penumbra?*

*Fuller speaking again,
now objecting to Hart...*

An illustration will help to test, not only Professor Hart's theory of the core and the penumbra, but its relevance to the ideal of fidelity to law as well. Let us suppose that in leafing through the statutes, we come upon the following enactment: "It shall be a misdemeanor, punishable by a fine of five dollars, to sleep in any railway station." We have no trouble in perceiving the general nature of the target toward which this statute is aimed. Indeed, we are likely at once to call to mind the picture of a disheveled tramp, spread out in an ungainly fashion on one of the benches of the station, keeping weary passengers on their feet and filling their ears with raucous and alcoholic snores. This vision may fairly be said to represent the "obvious instance" contemplated by the statute, though certainly it is far from being the "standard instance" of the physiological state called "sleep."

Now let us see how this example bears on the ideal of fidelity to law. Suppose I am a judge, and that two men are brought before me for violating this statute. The first is a passenger who was waiting at 3 A.M. for a delayed train. When he was arrested he was sitting upright in an orderly fashion, but was heard by the arresting officer to be gently snoring. The second is a man who had brought a blanket and pillow to the station and had obviously settled himself down for the night. He was arrested, however, before he had a chance to go to sleep. Which of these cases presents the “standard instance” of the word “sleep”? If I disregard that question, and decide to fine the second man and set free the first, have I violated a duty of fidelity to law? Have I violated that duty if I interpret the word “sleep” as used in this statute to mean something like “to spread oneself out on a bench or floor to spend the night, or as if to spend the night”?

With this example, Fuller is suggesting that the distinction between “penumbra” and “core” makes little sense. He thinks every interpretation of the law must rely on the law’s aims and thus must rely on extra-legal —moral?— aspects.

How could Hart respond?

Fuller on Nazi Laws

Recall Hart's response to the objection against his thesis about the separation of law and morals — objection that was based on Nazi laws.

Fuller objecting to Hart's criticism of German courts

Professor Hart castigates the German courts and Radbruch, not so much for what they believed had to be done, but because they failed to see that they were confronted by a moral dilemma of a sort that would have been immediately apparent to Bentham and Austin. By the simple dodge of saying, "When a statute is sufficiently evil it ceases to be law," they ran away from the problem they should have faced.

This criticism is, I believe, without justification. So far as the courts are concerned, matters certainly would not have been helped if, instead of saying, "This is not law," they had said, "This is law but it is so evil we will refuse to apply it." Surely moral confusion reaches its height when a court refuses to apply something it admits to be law, and Professor Hart does not recommend any such "facing of the true issue" by the courts themselves. He would have preferred a retroactive statute. Curiously, this was also the preference of Radbruch.²⁴ But unlike Professor Hart, the German courts and Gustav Radbruch were living participants in a situation of drastic emergency. The informer problem was a pressing one, and if legal institutions were to be rehabilitated in Germany it would not do to allow the people to begin taking the law into their own hands, as might have occurred while the courts were waiting for a statute.

Hart's dilemma interpreted by Fuller

I hope I am not being unjust to Professor Hart when I say that I can find no way of describing the dilemma as he sees it but to use some such words as the following: On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between those two duties.

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Fuller questions Hart's dilemma

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If this is the positivist position, then I have no hesitancy in rejecting it. The "dilemma" it states has the verbal formulation of a problem, but the problem it states makes no sense. It is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves. I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. This obligation seems to be conceived as *sui generis*, wholly unrelated to any of the ordinary, extralegal ends of human life. The fundamental postulate of positivism — that law must be strictly severed from morality — seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations. No mediating principle can measure their respective demands on conscience, for they exist in wholly separate worlds.