

Commentary

In the Park: A Jurisprudential Primer

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WHAT IS A “PARK?” This seemingly simple query begs a simple and straightforward answer. Yet efforts to address it introduce a whole range of difficult issues and challenges. When asked in a judicial context in particular, it raises a further raft of perplexing issues about the nature of language, law, and adjudication. In determining what is to count as a park, lawyers and judges are obliged to confront, if only to ignore or finesse, some of the most recalcitrant problems on the jurisprudential agenda: what is the relation between law and political morality? What is the role of the judge in a constitutional democracy? And what is involved in “fidelity to law”?

In this commentary, I rely on two recent Canadian appellate decisions to demonstrate how even the most prosaic business of judging draws upon and speaks to basic jurisprudential queries. Rather than offer any definitive set of answers to specific cases, a working knowledge of jurisprudential debate can at least illuminate some of the shadowy corners of adjudicative practice and interrogate what is often taken for granted. Moreover, by grappling more seriously with the day-to-day workings of the judicial process, jurisprudential analysis can invigorate itself and cast off its rather aloof and abstract posture. To focus the debate, I will set the two Canadian cases within the famous Hart-Fuller exchange of over fifty years ago, which, for better and for worse, still tends to frame contemporary debate.¹ After exploring the positivist and naturalist approaches to adjudicative responsibilities, I will sketch a more critical approach. The ambition

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1. H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593 [Hart, “Separation of Law and Morals”]; Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630.

throughout is to offer, by way of a primer, a rudimentary bridge between the worlds of legal practice and legal theory.

I. LOOKING FOR A PARK

Under section 161(1)(a) of the *Criminal Code*,² a convicted pedophile can be prohibited from attending a variety of places where persons under the age of fourteen are or might be present. These places include a public park or public swimming area, a daycare centre, a school ground, a playground, or a community centre. The main purpose is obviously to protect young children and to put them out of a pedophile's way. However, this prohibition must be balanced against a person's freedom of movement because even pedophiles are entitled to lead a certain public life as long as they do not commit further crimes. In resolving this tension, it is important to be as clear as possible in determining to what places the prohibition does and does not apply. In a number of cases, the courts have been required to decide the meaning of "public park" under section 161.

In *R. v. Lachapelle*,³ an accused pedophile was subject to a prohibition order when he was apprehended at a carnival by two RCMP officers who were aware of the order. He had attended the carnival with a ninety-two-year-old woman, Margaret Brown, who employed him as her daily help. They were there to have a hamburger and fries for dinner. The travelling carnival was set up on a vacant piece of private land in a large field. The carnival was busy and there were, as expected, many young children in attendance. At trial, Judge Milne held that the field in which the carnival was located was not a "public park" and acquitted the accused. On the Crown's appeal, the British Columbia Supreme Court agreed and upheld the acquittal. In reaching his decision, Justice Butler preferred a limited view of what constituted a "public park." He decided that it did not include land that was being used for recreational use, whether permanently or temporarily, and to which the public had access. Instead, he emphasised that, for property to constitute a "public park" for the purposes of section 161 prohibition orders, it had to be set aside by some authority for use by the public. This meant

2. R.S.C. 1985, c. C-5, s. 161(1)(a).

3. [2008] B.C.J. No. 728 (S.C.) (QL) [*Lachapelle*].

more than simply being accessible to the public. Emphasizing the need for clarity and predictability, Justice Butler concluded,

Prohibition orders issued under s. 161 are a significant limitation on the fundamental liberty of movement of convicted pedophiles. If the words of the section are given their ordinary meaning, the geographical ambit of the prohibition is clear and the offender will know with a high degree of certainty what locations must be avoided. The trial judge gave the words “public park” ... their ordinary meaning and read them appropriately in context. It was not the intention of Parliament to prevent a pedophile from attending at all events involving some element of recreation or play where children may be present. It is the specific location that determines whether or not the offence has been committed, not the nature of the activity occurring at the time. The fact that a travelling carnival with amusement rides is being held on a vacant, private field does not turn that field into a “public park.”⁴

In the recent case of *R. v. Perron*,⁵ another pedophile who was subject to a similar section 161 prohibition was arrested while working in a game booth at the Super Ex, a fair being held on the grounds of Lansdowne Park in Ottawa. The fair comprised the usual mid-way rides, game booths, concert areas, food courts, and a petting zoo. It was accessible to the public for a fee and attracted many young children. Lansdowne Park contains a football stadium, a civic centre with a hockey arena, and several other buildings. While there are trees and grassy areas around the fenced perimeter of the property, there is also an extensive paved area that serves as a parking lot for events. The fair was held on the paved area. At trial, Justice Lise Maisonneuve held that the fair was a “public park” and convicted the accused.

On appeal, the issue was framed in terms of whether a “public park” was exclusively a green space (*e.g.*, lawns, trees, et cetera) set aside for recreational use by the public or was primarily to be defined by its use alone rather than by any of its landscaping features. In his judgment on behalf of the Court of Appeal for Ontario, Justice Stephen Goudge was again mindful of the need for care and clarity in circumscribing the accused person’s freedom of movement. Nevertheless, he needed little persuading that the major identifying characteristic of a

4. *Ibid.* at para. 31.

5. (2010), 97 O.R. (3d) 538 [*Perron*].

“public park” was its recreational purpose, not the particular attributes of its physical geography. Accordingly, noting that the primary use of Lansdowne Park was recreational and that there was at least some greenery, albeit “peripheral,” the fair was considered to be a “public park” and the conviction was upheld. He concluded by noting,

The appellant places significant reliance on *Lachapelle*, where the British Columbia Supreme Court determined that a prohibition order ... did not extend to a vacant private field where a travelling carnival with amusement rides was being held. As I read the decision, the determining factor seems to be that the location was a vacant private field. If so, I agree with the result. If, however, the decision stands for the proposition that the nature of the activities taking place at the location is irrelevant, then respectfully, I disagree with it.⁶

In each of these cases, the judges said little about the interpretive method that they had relied upon to reach their decisions. There were small hints and casual asides, but there was nothing substantial or anything that suggested that they found their task to be particularly difficult or challenging. For the most part, they seemed to proceed on the understandable basis that this was a rather run-of-the-mill exercise in adjudicative decision making that implied or raised no pressing jurisprudential concerns. Yet there is much to be found in and between the lines of these judgments that merits a keener jurisprudential scrutiny and reflection. While this would likely not change the judges’ decisions, it might give them, lawyers, and observers of the judicial process a more nuanced appreciation of how the most apparently prosaic of issues touches upon and resonates with more profound questions of law, language, and interpretation.⁷

II. A PLAIN AND HARTY APPROACH

The celebrated debate that took place between Herbert Hart and Lon Fuller at Harvard Law School on the occasion of Hart’s Holmes Lectures was about much

6. *Ibid.* at para. 21.

7. I have wrestled with these problems at length in my own work. See Allan C. Hutchinson, *It’s All in the Game: A Non-Foundationalist Account of Law and Adjudication* (Durham: Duke University Press, 2000); *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005); and *The Province of Jurisprudence Democratized* (New York: Oxford University Press, 2009) [Hutchinson, *Jurisprudence Democratized*]. I draw on some of those ideas here.

more than judicial interpretation.⁸ Still operating in the institutional shadow and moral stench of the Nazi era, the two antagonists were engaged about the general relation between law and morality. In particular, they joined issue over whether a legal rule or body of rules might lose its designation and force as “law” because its origins, format, or substance made it so morally offensive as to cease to be law. However, in locking jurisprudential horns over that serious issue, they ventured into territory that brought into question the basis and dynamics of judicial interpretation. In particular, they traced out the basic implications of their respective positivist and naturalist stances for less fraught matters of adjudication method and role. This involved a spirited exchange over how to go about determining the meaning of the rather mundane rule that there are to be “no vehicles in the park.” From such humble beginnings, there has developed a whole library of jurisprudential literature around “vehicles,” “parks,” and other related definitional conundrums.⁹ The efforts in *Lachapelle* and *Perron* provide more grist for this particular mill.

The basis of Hart’s revitalized defence of legal positivism is that it is important to keep the analysis of the law as-it-is separate from the law as-it-ought-to-be. It is important that inquiries into the moral merit of a legal rule be distinguished from its status as a legal rule. To ground his thesis, Hart understood that it was necessary to demonstrate that there is a certain “thereness” to law so that its existence is not always reducible to opinion or discretion. It followed from this that adjudicative application of law must in significant part be a matter of descriptive accuracy as

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8. For a fascinating and more personalized contextual account of this debate, see Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (New York: Oxford University Press, 2004).
 9. There is a whole list of discussions about “vehicles in the park.” Among the more illuminating are Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991); Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (Chicago: University of Chicago Press, 2001); Anthony D’Amato, “Can Legislatures Constrain Judicial Interpretation of Statutes?” (1999) 75 Va. L. Rev. 561; William N. Eskridge, Jr., “The Circumstances of Politics and the Application of Statutes” (2000) 100 Colum. L. Rev. 558; Robert E. Keeton, “Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park” (1993) 52 Md. L. Rev. 1192; Andrei Marmor, “No Easy Cases?” (1990) 3 Can. J.L. & Jur. 61 at 65-68; Pierre Schlag, “No Vehicles in the Park” (1999) 3 Seattle U.L. Rev. 381; Frederick Schauer, “A Critical Guide to Vehicles in the Park” (2008) 83 N.Y.U.L. Rev. 1109; and Peter M. Tiersma, “A Message in a Bottle: Text, Autonomy, and Statutory Interpretation” (2001) 76 Tulane L. Rev. 431.

much as prescriptive evaluation. Without a critical mass of settled rules, the very idea that rules control judicial decisions, that there exists an actual body of workable rules, that such rules command authoritative conformity, that judging is something less than legislative policy making, and that there is some meaningful distinction between the law as-it-is and the law as-it-ought-to-be, would be lost.

Of course, Hart had no truck with a mechanical or formalist jurisprudence in which law could be identified and applied in a formulaic or algorithmic way in all cases. Instead, he relied upon an important distinction between the core and penumbra of a rule. The core is those standard or settled instances “in which no doubts are felt about its application.” In the penumbral area of a rule, its application will be sufficiently contestable such that it will demand a certain exercise of evaluative judgment because the situation will “have some features in common with the standard case [but] will lack others or be accompanied by features not present in the standard case.”¹⁰ Whereas the law will be certain and given in the core instances, it will be up-for-grabs and to be settled in the penumbral edges: “the hard core of settled meaning is law in some centrally important sense and ... even if there are borderlines, there must first be lines. If this were not so the notion of rules controlling courts’ decisions would be senseless.”¹¹ Accordingly, by maintaining a general distinction between the core and penumbra, Hart claimed to be able to preserve the vital positivist quality of law as something that can be identified as a matter of fact rather than by resort to moral evaluation. If he was unable to do that, his central claim about law’s existence as a social fact would be severely compromised.

10. Hart, “Separation of Law and Morals,” *supra* note 1 at 607.

11. *Ibid.* at 614. Hart was not entirely consistent about the empirical distribution of these so called easy and hard cases. By 1983, he insisted that the standard resort to rule application occurred “very often” and was the primary device for legitimate adjudication. Although originally written in 1967, these latter words and ideas were republished unchanged in 1983. See *ibid.* at 629; H.L.A. Hart, “Problems of The Philosophy of Law” in H.L.A. Hart, ed., *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 108 [Hart, “The Philosophy of Law”]. In 1961 (unchanged in the 1994 edition), Hart noted that rule application will work “smoothly ... over the great mass of ordinary cases.” See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 164; H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 127-28.

If the judicial task in easy cases (*i.e.*, where the facts fall within the rule's core meaning) is straightforward, Hart did not mean to portray the resolution of hard cases (*i.e.*, where the facts fall outside the rule's core meaning) as being entirely open-ended and discretionary. While he recognized that "the criterion which makes a decision sound in such cases is some concept of what the law ought to be"¹² and that "in the penumbral situation judges must necessarily legislate,"¹³ judges should be concerned with "adapting their decisions to the growing needs of society"¹⁴ by looking to the law's own "aims, purposes and policies."¹⁵ He cavilled at treating the extension of old rules to new cases as judicial legislation, because doing so failed to appreciate the obvious difference between a deliberate act of law making and the incremental development of a rule so as to advance the rule's "continuing and identical purpose, hitherto less specifically apprehended."¹⁶ For Hart, the loss of complete certainty and predictability is the price that has to be paid for the law being flexible enough to handle unanticipated cases in a fair and just manner. The challenge for both the judge and the jurist is to strike an appropriate and manageable balance between the rule-application of clear cases and the rule-production of hard cases, such that systemic certainty is not sacrificed entirely to particularized flexibility. On this issue, Hart was adamant that if clear cases do not comprise the bulk of adjudicated decisions, "we should not attach significance and value to them or think of such decisions as reached through a rational process."¹⁷ For Hart, therefore, the existence of such clear cases was crucial to the basic validity of his entire jurisprudence.

For instance, in grappling with the interpretive challenges of "no vehicles in the park," Hart ran through several permutations of possible facts and likely judicial outcomes. He stated that "plainly this [rule] forbids an automobile, but what about bicycles, roller skates, toy automobiles?" Much of his time was devoted to explaining how we might apply the rule to "bicycles, roller skates, [and] toy automobiles" which are "uncontrolled by linguistic conventions."¹⁸ Yet Hart did

12. Hart, "Separation of Law and Morals," *ibid.* at 608.

13. *Ibid.* at 609.

14. *Ibid.*

15. *Ibid.* at 614.

16. *Ibid.* at 627.

17. Hart, "The Philosophy of Law," *supra* note 11 at 108.

18. Hart, "Separation of Law and Morals," *supra* note 1 at 607, 611.

little to defend his blunt conclusion that the rule “plainly ... forbids” “automobile[s].” He simply asserted that automobiles are vehicles as a matter of fact; they are part of the core’s meaning and comprise one of the rule’s settled meanings. At bottom, his claim seemed to be that “vehicle” simply does include automobiles and to deny that would be absurd or perverse. But what is this plain meaning? Where and how does it come by its plainness? And why does this plain meaning exert such authority over us?

Hart was not clear about the epistemological and ontological nature of his claims about “automobiles” plainly being “vehicles” or the philosophical status of what is meant by something being a matter of fact. Nevertheless, whatever his general stance on such issues, he was in something of a hermeneutical bind. If he claimed that the use of “vehicle” is always and plainly inclusive of “automobiles,” he would have run into the brute historical reality that “vehicle” was a word long before automobiles were in existence; it presumably had some different core and settled meaning. As such, it is simply nonsensical to claim that a word has a plain and core meaning outside of its historical context. However, if Hart conceded the relevance of history, he would have been confronted by the equally brute reality that words receive and change their meaning in light of the particular social conventions and linguistic customs in place; meanings are not fixed, but shift and change with their informing social context. The meaning of “vehicle” has little to do with the word itself, but with the tentatively accepted and continually shifting routines and practices of meaning-giving. In short, there is no context of contexts to authoritatively fix a word’s plain meaning at any particular point in time or place. There will always be simply more or less agreement about the proper context of any word and, therefore, its present plain meaning. Accordingly, the plainness of any meaning is the result of prior agreement, and not the foundation for debate about the extent of that agreement.

In the Canadian challenge of determining the meaning and application of “public park” for the purposes of a section 161 prohibition order, a Hart-inspired judge would presumably first isolate the settled or plain meaning of “public park” and then ascertain whether the facts of either *Lachapelle* or *Perron* did or did not fall within it. If they did, the case would be disposed of without more; if not, the judge would engage in a more creative exercise of reasoning that canvassed the possible purposes, aims, and policies of the statutory rule and then reach a decision that best reflected a balancing of those indicators. This is what the judges in *Lachapelle* and *Perron* claimed to do.

In *Lachapelle*, Justice Butler saw the judge's task as being that of giving the words "public park" "their ordinary meaning" and reading them "appropriately in context."¹⁹ In line with this approach, he decided that a "public park" was "an area that is set aside or designated as a park by some authority."²⁰ Moreover, he went on to add that applying this "ordinary usage"²¹ would "normally be uncontroversial."²² Similarly, in *Perron*, Justice Goudge accepted that his role was to ascertain the "grammatical and ordinary sense" of the words "public park" (as well as harmonizing the sense "with the scheme of the Act, the object of the Act, and the intention of Parliament")²³ and apply it to the facts at hand. Nevertheless, although Justices Butler and Goudge found it easy to state their allotted task of building on and being constrained by the words' plain meaning, they found it much more difficult to follow through with the task in any uncontroversial or simple way: how do you locate the ordinary meaning? What if the plain meaning is itself contested? And what is plain and ordinary about a word's plain and ordinary meaning?

Of course, the problem with this plain and Hart-sanctioned approach is that it seems to beg the whole question that it is intended to answer—it demands some way in which to identify a core instance from a penumbral problem that itself does not confound or implicate the fact/value distinction that the core/penumbra distinction is intended to finesse or obviate. Indeed, in *Perron*, and to a lesser extent in *Lachapelle*, the exchange between the court and the accused's counsel was explicitly centred on determining the ordinary meaning of "public park" "in its regular everyday use."²⁴ However, even though Justices Butler and Goudge were very similarly situated, they chose to employ a different criterion as to what characterised a "park." Whereas Justice Butler thought the plain meaning pivoted around its official designation, Justice Goudge preferred a definition that emphasised its usage. Such a sharp difference does not auger well for the identification of its "plain meaning." As this discussion shows, if Hart's core/penumbra

19. *Lachapelle*, *supra* note 3 at para. 31.

20. *Ibid.* at para. 28.

21. *Ibid.*

22. *Ibid.* at para. 26.

23. *Perron*, *supra* note 5 at para. 12. citing Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87.

24. *Ibid.* at para. 9.

distinction does not have a certain built-in operational efficacy, it will be of little use. The judge will have no place from which to enter or break the circle of interpretive or evaluative choice; he or she will be engaged in a transparently bootstrapping argument. This challenge is exactly what Fuller draws attention to and emphasizes in his rejoinder to Hart; there is no plain and ordinary meaning that is plainly and ordinarily there and available for judicial use without some contestable act of discretionary choice.

III. A FULLER RESPONSE

Fuller's main contribution to the positivism-naturalism debate lies in his insistence that it is neither possible nor desirable to keep the domains of law and morality separate. For him, any legal theory worth its intellectual and political salt must commit itself to ensuring that law and morality do not part company; the Nazi experience should be warning enough about the dangers of allowing such a schism. Yet most commentators have tended to dismiss Fuller's position and declare Hart to be the winner in their seminal debate. Whatever the moral basis of Fuller's claim, it is seen to be simply unconvincing and untenable as an analytical account of law's status as law—bad law is no less law for its badness in form or substance. Whereas Hart's ideas are considered to remain continually relevant, Fuller's approach is considered quaint and only of historical interest.²⁵

Regardless of the fairness or finality of the contemporary disregard about Fuller's questions of law and morality, his critical response to Hart's claims about the interpretive "thereness" of law warrants and repays considerable attention. Fuller rejected Hart's claim that "in applying the word to its 'standard instance,' no creative role is assumed by the judge ... [and] he is simply applying the law 'as it is.'"²⁶ To put it bluntly, Fuller believed that this is so much errant nonsense. For him, it is not that the rule or its constituent words—"vehicles," "in," and "park"—have a fixed meaning, but that our current agreement about what they mean is sufficiently broad and accepted in a particular context that no one is presently prepared to argue that the rule or words might carry a different meaning.

25. There has been a recent revival of interest in Fuller's ideas with the fiftieth anniversary of the Harvard debate. See *e.g.* the varied contributions to Paul Cane, ed., *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010). Whether this revival will blossom into something more lasting is still unclear.

26. Fuller, *supra* note 1 at 662.

In saying this, Fuller was not denying that words have meaning. Rather, he was contending that words do not underwrite agreed meanings, but that our agreements fix and unfix the meaning attributed to words. As contexts shift and change across time, geography, and evaluative commitments, so the meaning given to words will itself shift and change. As Fuller put it,

[i]f in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park, or to save carefree strollers from injury, we know, “without thinking,” that a noisy automobile must be excluded.²⁷

It is this “without thinking” that hides, rather than avoids, the deeper value commitments and choices in play.

The short judgments in *Lachapelle* and *Perron* show that, despite their declared reliance on the supposedly plain and ordinary meaning of “public park,” the judges had no way to establish that meaning in an exclusively factual as opposed to evaluative way; it was a mix-and-match process. For example, in *Perron*, Justice Goudge consulted the *Canadian Oxford Dictionary*, which offers eight definitions of “park.” He concluded summarily that “six are of relevance ... all are specified locations characterized by what goes on there ... [and], for most of the six, it is some form of recreational activity.”²⁸ It is unclear how Justice Goudge’s conclusion explains the inclusion of “industrial park” in his privileged list of six. However, in *Lachapelle*, Justice Butler seems to have arrived at a different conclusion about the plain meaning of “public park”; he emphasized designation over usage. In light of what Justice Goudge said in *Perron*, it is a stretch to conclude that “any member of the public”²⁹ would know that all “areas set aside for indolence and rest of the body and soul”—“Stanley Park, including the aquarium and the zoo area[,] ... the endowment lands at the University of British Columbia[,] ... the Sky Train greenbelt[,] ... the marine parks in the province, waterfront parks[,] ... and all beaches, lakes and rivers in Canada capable of being used by people for bathing”³⁰—were included in the definition of “public park.”

27. *Ibid.* at 662-63.

28. *Perron*, *supra* note 5 at para 15.

29. *Lachapelle*, *supra* note 3 at para. 28.

30. *Ibid.* at para. 27., Butler J. citing Maughan P.C.J. in *R. v. Graf* (1988), 42 C.R.R. 146 at para. 150 (B.C. Prov. Ct.).

In short, the judgments confirm that there is no straightforward or incontestable way to distinguish a Hartian core and penumbra. As Fuller noted, the evaluative work is being done off-stage and “without thinking,”³¹ but it is still being done.

In taking such a stance, Fuller was not subscribing to an anything-goes approach to the execution of judicial responsibility in applying rules. As Hart did in recommending how judges should cope with their role in penumbral areas, Fuller acknowledged that judges are not free everywhere and always to interpret rules as they wish. He called attention to the law’s “structural integrity”³² or “fabric of thought,”³³ which judges must strive to detect and follow in their interpretive exertions. It is the task and responsibility of the judiciary to identify and work with the law’s overall purposive enterprise “so that we may know truly what it is, but it is also something that we inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to make the [law] a coherent, workable whole.”³⁴ As such, the judge’s duty to observe and respect a “fidelity to law not only permits but demands a creative role from the judge, but beyond that structure it does not permit him to go.”³⁵ Accordingly, the crucial difference between Hart and Fuller is that, whereas Hart treats such creative reasoning as exceptional and occasional, Fuller maintains that it goes to the very heart of the regular judicial task. And, of course, too much penumbra and too little core, let alone no core at all, would be fatal for Hart’s positivist insistence on the analytical separation of law and morality.

While Fuller is surely right to reject Hart’s simplistic reliance on core meanings, his own confidence in purposive meaning seems misplaced. As both a philosophical and practical matter, there is little to suggest that it is possible to identify a particular legislative intent that is capable of grounding and authorizing statutory interpretation over time. As a practical matter, even if courts were correct in their assumption that an application of legislative intent would best fulfill their democratic mandate, it is difficult to know how it would be possible to

31. Fuller, *supra* note 1 at 663.

32. *Ibid.* at 670.

33. *Ibid.* at 667.

34. *Ibid.*

35. *Ibid.* at 670. It will be obvious to many that these claims about law’s integrity have been worked up into a full-blown account of adjudication by Ronald Dworkin. See especially Ronald Dworkin, *Law’s Empire* (London: Fontana Press, 1986) [Dworkin, *Law’s Empire*]; Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press, 2006).

locate such intent. The initial step of distinguishing intention from aspiration, expectation, and the like, is probably insurmountable: there is no reason to assume that everything that legislators say is what they mean or intend. Further, the attempt to generate a finding of what a large group of legislators would have wanted over time, after circumstances have changed and in unanticipated disputes, seems destined to be frustrated; the identification of past intentions, particularly of collective entities, remains doggedly resistant to present or determinate interpretation. Legislators very rarely have a specific or exact intention in mind across a range of potential future disputes, so this prompts the most speculative of “what if” investigations: if legislators had thought about or anticipated a problem, which they did not, how would they most likely have answered it? Moreover, if it is not naive to believe that legislatures are filled with reasonable politicians who are engaged in pursuing reasonable goals reasonably and in saying what they mean, it is most definitely wishful to think that they agree on what “reasonable” means.³⁶ As both Justices Butler and Goudge’s judgments in *Lachapelle* and *Perron* clearly show, the fixing of general intent might be easy (*i.e.*, to protect children from pedophiles), but its application to specific situations is far from straightforward. Consequently, the idea that intent can act as a curb on judicial interpretive freedom is unconvincing; it simply replaces one problematic context with another.

For both Hart and Fuller, there is an insufficient acknowledgment of the corrosive effect of time and place on the effort to fix words with plain meaning. The shifting contexts of meaning-creation and meaning-application (and, of course, their bewildering combination across time) defy any uncontroversial judicial method of deciding cases that relieves judges of the considerable burden of choice. While the definition of “public park” for section 161 purposes may not be particularly weighty, it takes little imagination to see how the stakes can be quickly and sizeably raised on more pressing and wide-ranging occasions. As Fuller himself noted, “the matter assumes a very different aspect, however, if our interest lies in the ideal of fidelity to law, for then it may become a matter of

36. For an excellent account of the difficulty of determining the meaning of “no vehicles in the park” by reference to legislative intent, see Paul Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 B.U.L. Rev. 204 at 209-13. For a characteristically accessible and punishing critique of the mistaken intentionalist urge in statutory interpretation, see Neil Brooks, “The Appropriate Role of Courts in Interpreting GST Legislation: Reflections on the Canadian Experience” (2006) 6 Aust. G.S.T. J. 1 at 7-11.

capital importance what position is assigned to the judiciary in the general frame of government."³⁷ Fuller called Hart's semantic bluff, but only managed to let the political cat out of the judicial bag. As I will now explain, there is no way of getting that particular animal back in, once it is out.

IV. A PRAGMATIC INTERVENTION

The central problem for those who choose a Hartian or Fullerian approach is that the value-infused interpretation of law bleeds into the factual identification of law to such an extent that it renders the distinction unworkable; there is no available method or means to identify law as a pre-interpretive matter. The main thrust of the pragmatic stance is a distrust of all claims to have hit upon some supra-contextual truth, some standard of abiding objectivity, or some method by which to filter out reference to contested social and political values. A pragmatic approach insists that there are no bright-line boundaries or essential differences between theory and practice, natural and social science, facts and values, philosophy and conversation, or, of course, law and politics.³⁸ It is not that these categorical distinctions collapse in on each other and have no relevant differences at all, but that such differences are themselves contingent and social because they always arise from and within, directly or indirectly, their historical and political context. From a pragmatic standpoint, legal theory, like law itself, is treated as thoroughly political in scope and substance.

It is not so much that law does not exist (it does as a body of resources) nor that its likely development is entirely unpredictable (it is not a result of the general political leanings of the judiciary). Legal history and practice strongly suggest that it is interpretation all the way down; law is a thoroughly human activity that envelops and infiltrates the legal resources to be interpreted. This constant toing-and-froing between fact and value is so integral to law as to be constitutive of it; it *is* law. Law is not something that exists before or after interpretive work, but

37. Fuller, *supra* note 1 at 634.

38. Pragmatism embraces a wide range of philosophical and political positions. See Louis Menand, ed., *Pragmatism: A Reader* (New York: Vintage Books, 1997). Indeed, it would be entirely un-pragmatic to expect there to be anything else. In legal theory, compare Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003); Roberto Mangabeira Unger, *The Self Awakened: Pragmatism Unbound* (Cambridge: Harvard University Press, 2007).

is constituted by that interpretive activity. While this is most evident in matters of common law adjudication, it is also apparent in all modes of adjudication.³⁹ A marked feature of common law adjudication, whether by way of constitutional or statutory interpretation even, is not so much that a rule is fixed beforehand and then applied to the facts of the case, but that a rule is fixed in light of the outcome that it will bring about in the particular case. There is a constant mediation between rule-fixing and rule-application in the judicial decision-making process such that it becomes illusory to talk about there being two distinct stages as a practical matter. The fact that the final judgment rendered in the case might not reveal this process or that it might work to actively conceal this dynamic process hardly counts against this explanation.

All this by way of stating that the law is always in the process of becoming rather than in a state of being—the law never simply *is*. The very act of interpreting law changes it and, on important occasions, redraws it substantially. The meaning of “park” is protean. Like with most words, its plain meaning shifts over time and context—what was once the core meaning of a park (*e.g.*, the grounds of a stately home) can become a more penumbral feature, and what was once not thought of as a park (*e.g.*, an industrial park or ballpark) can become part of its core meaning. Similarly, although it does not seem a stretch to designate private land as a “public park” for temporary purposes (*e.g.*, the holding of a carnival likely required a public license), it also seems sensible to treat certain public areas as not being a “public park” on occasion (*e.g.*, the holding of a private, by invitation-only event in a part of Lansdowne Park). There is no absolute or even contingent right and wrong, but only continuing and inescapable choice that can be masked, but not wished away. Judicial interpretation as well as its jurisprudential underpinnings are built on shifting sands, not bedrock. *Lachapelle* and *Perron* offer evidence of that.

39. In this regard at least, I completely agree with Dworkin that law is a thoroughly morally-drenched activity that engages the law’s resources as it creates and re-creates them over and across time. Dworkin, *Law’s Empire*, *supra* note 35. However, I completely disagree with Dworkin that this interpretive activity can be done in any constrained, apolitical or distinctively legal way. See Hutchinson, *Jurisprudence Democratized*, *supra* note 7 at 117-35.

Nevertheless, it is a mistake to draw a distinction between those who believe that interpretation is about objective retrieval and those who believe that there is only subjective creation; it is neither one nor the other. Law is not simply created in the interaction between the legal materials and the judge, but is found in the interplay itself; it is the process of interpretation as much as the resources and the product that counts as law. Indeed, law cannot be broken down into its constituent parts without losing its essential dynamism. As such, law is less a thing and more an activity. And, as Fuller would have celebrated and Hart might have conceded, if that is the case, then law is a human activity and inextricably bound up with the contested values and divergent commitments of society.

Law is much more than a collection of rules that individually and inevitably possess a degree of fuzziness and penumbral uncertainty. Taken as a whole, legal doctrine is structurally indeterminate and defies efforts to fix its necessary and precise meaning in particular cases at particular times. Adjudication is better understood as an interpretive activity in which the possibilities of determinacy and indeterminacy are constantly in play and available. It is not that fields of law appear as indeterminate or determinate all the time, but that even the most apparently settled areas of law are always vulnerable to being stabilized or destabilized and thereby reconfigured with sufficient effort by particular jurists at particular times and with varying degrees of success. The law is not simply there in its object-like presence, but is always waiting to be apprehended and fixed by the active crafting of its judicial interpreters and legal artisans. Most importantly, determinacy and indeterminacy are not pre-interpretive features of the law, but products of legal interpretation.⁴⁰ Law's meaning is always parenthetical and can never be grounded outside the contingent work of legal interpretation. As such, it is not only unhelpful, but also impossible to talk of law's meaning, whether determinate or indeterminate, as objective or given in the sense of being something that is realizable without legal interpretation. For all their good faith, Justices

40. See Duncan Kennedy, "Thoughts on Coherence, Social Values and National Tradition in Private Law" in Martijn Hesselink, ed., *The Politics of A European Civil Code* (The Hague: Kluwer Law International, 2006) 9; Duncan Kennedy, "A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation" in D. Kennedy, ed., *Legal Reasoning: Collected Essays* (Aurora: Davies Group, 2009) 154.

Butler and Goudge in *Lachapelle* and *Perron* cannot perform their duties in any convincingly objective or tried-and-true way.

It should by now be clear that a pragmatic account of law has no need for the traditional distinction between easy and hard cases. In short, there are no hard cases or easy cases: there are only cases. “Easiness” is not a quality that inheres within a case or rule. Since rules and their application do not arise or make sense outside of an interpretive context, the easiness or hardness of a case derives from background facts about agreements in judgments, historical contexts, and social stability. What goes on in easy cases is the same as in hard cases, only that its context is less contested and more taken for granted. In this sense, Hart was correct when he stated that easy cases occur where “there is general agreement that they fall within the scope of a rule,”⁴¹ provided that the emphasis is firmly on the fact of “general agreement” and not (as Hart seemed to have intended) on “the scope of the rule.” The fact of this “general agreement” (whether a matter of social consensus or social hierarchy) is important—the greater its extent and strength, the greater the existential experience of easy cases and legal certainty.⁴² When it comes to language, there is simply no fact of the matter; what any term or rule refers to or means is always an interpretive, and therefore contestable, issue. Indeed, in understanding language and law as functional instruments, it is important to see them less as individual tools, like ratchets and screwdrivers, and more as social devices, like a manufacturing process or community initiative, that demand a high degree of collaboration and integration. It is in this sense that “general agreement” is to be understood.

Nevertheless, no matter how extensive or deep the agreement, it does not alter the fact that easiness never becomes an intrinsic feature of the rule itself. The temptation to mistake dominant ways of thinking for natural necessity must be studiously resisted; the process is so ingrained and uncontroversial as to *appear* as if the process did not occur. Easy cases are not an occasion to forego the need for interpretation, but only an occasion upon which there is considered to be no political reason or political will to disturb prevailing understandings. It is as much a choice to confirm existing or old “plain” meanings as to deviate from

41. Hart, “The Philosophy of Law,” *supra* note 11 at 106.

42. See Frederick Schauer, “Easy Cases” (1985) 58 S. Cal. L. Rev. 399; Dworkin, *Law’s Empire*, *supra* note 35 at 351-52.

them; each demands and implicates an exercise of choice. Moreover, in the area of the common law *simpliciter*, once it is conceded, as it must be, that superior courts can legitimately deviate from or change rules, then it seems pointless to insist that following existing rules is an entirely non-evaluative process. Consequently, the difference between the resolution of easy and hard cases is not one of intrinsic identity or separate processes, but one of relative obviousness based on situated assessments of relevant social contexts and agreements. Whether a case is hard or easy has little to do with the particular rule itself; all rules are potentially easy and hard. What determines the perception or treatment of a case as hard or easy is to be found in a complex appreciation of the contextual and interrelated positioning of the rule(s) to be applied, the facts to be ascertained, and the parties and judges involved. The limits on judges are not imposed by the external force of the legal rules, but by the internal pressure of the judges' own imaginative strengths and political convictions; judges are situated within a context of constraints that shape as much as limit their freedom.

None of this commits me to the untenable or nihilistic position that it will always be possible to make the application of a rule come out in the way that the judge wants it to. Sometimes, cars are vehicles and horses are not, and sometimes, gardens are parks and marine parks are not. But this is a matter of imaginative insight or strategic calculation, not objective truth or ahistorical determinacy; "anything might go," but not "anything goes." In such circumstances, it does not mean that the pragmatic account has failed to give a cogent or realistic account of law and judging. On the contrary, the very fact that a critical pragmatism accepts the existential experience of rule-boundedness is what makes it cogent and realistic. But, in doing so, it does not buy into the unconvincing positivist position (drawing on Hart) that rules have a fixed core meaning or that the law's purposes (drawing on Fuller) are sufficiently compatible as to mandate one "right answer" over another. There is much more (and also much less) to jurisprudential enlightenment than that offered by Hart and Fuller; the spectrum of interpretive possibilities is much broader and richer.

Consequently, while Hart is right to point out the experience that lawyers and judges have of the core of settled meaning, he is mistaken to treat that core as a feature that rules have and to consider that core or meaning to be settled in anything but the most temporary, provisional, or contingent way. The "core of settled meaning" is only central, settled, and meaningful until the next case comes along. Similarly, while Fuller is right to insist upon the ineradicable role of pur-

positive reasoning and evaluative opportunity in applying rules, he is also mistaken to pretend that such judicial work can be done in the kind of constrained and non-ideological way that he and many others claim. As a critical pragmatism recommends, there is neither constraint nor freedom, but only a dynamic interaction. Judges must constantly work with and within the available materials such that their constraints are always in place, but never themselves outside of creative re-interpretation. So understood, adjudication is a thoroughly professional as well as thoroughly political undertaking.

So what is a “park?” The answer will depend on who asks, why they ask, and where and when the question is asked. Even if such matters are sufficiently clarified, there will still be scope for manoeuvre and choice. Jurisprudence will not provide clear and simple answers to hermeneutical conundrums because there are no such answers. Justices Milne, Butler, Maisonneuve, and Goudge will not be relieved of their judicial discretion by deference to jurisprudential insight. Whatever some jurists suggest and some judges feign, there is no available formula or method that will relieve interpreters of the considerable task of creating, not finding, meaning in particular words or phrases. The message of jurisprudential critique is that judges cannot shirk responsibility by deferring to the stark thereness of any word’s meaning. Ironically, this challenge is at its most demanding when there appears to be a settled core of meaning. In such circumstances, judges and jurists must not fool themselves into thinking that their task is one of merely acting as a conduit for detached or objective truths. All legal interpretation depends on the fluid and dynamic interaction between interpreter and text in a shifting context of social conventions, institutional expectations, and normative values. To judge is to take a stand. And, therefore, it is always a question of knowing where one stands and why one is standing there and not someplace else. This task, both a blessing and a burden, cannot be fudged or shirked; it can only be hidden.

V. CONCLUSION

For most lawyers and judges, the connection between day-to-day lawyering and general jurisprudential debate is remote at best. The legal community manages to get through their daily professional lives without fretting too much about apparently abstract questions about the nature of law, fidelity to law, and adjudicative integrity; they proceed in that artisanal way that characterises their common law craft. Indeed, many would be disappointed if they looked to the

writings of jurists for specific answers to specific cases. To do so would be like asking a saw to cut a piece of wood; it takes human skill and application to do so and the performance will vary depending on the saw user. However, the chill between lawyers and jurists is not all the fault of lawyers. For their part, many jurists tend to affect a certain detachment which encourages them not to get their hands dirty with the prosaic matters of lawyering and judging. This state of mutual suspicion and coolness does neither branch of the legal community proud. The worlds of law and jurisprudence are intimately connected—the only question is whether each wishes to recognise that and benefit from each other's insights and experience or whether each continues to pretend otherwise to the disadvantage of all concerned.