
ESSAYS

THE PATH NOT TAKEN: H. L. A. HART'S HARVARD ESSAY ON DISCRETION

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It is an extraordinary privilege to be able to introduce a previously unpublished essay by H. L. A. Hart, one of the most distinguished figures in twentieth-century legal philosophy, alongside a fine commentary by Geoffrey Shaw, the scholar whose intellectual imagination and meticulous archival research has brought the essay to light. It is particularly apt that H. L. A. Hart's essay should be published by this *Review*, appearing fifty-seven years after it was written in the early months of his visit to Harvard, thus joining a distinguished tradition of posthumously published scholarship of the 1950s, most notably Lon Fuller's *The Forms and Limits of Adjudication*,¹ and Henry Hart and Albert Sacks's *The Legal Process*.² Its publication is also timely, albeit long delayed, in that it comes hard on the heels of a period in which the intellectual history of legal thought has been the subject of wide interest and some very powerful scholarship.³

Hart's year at Harvard significantly shaped the course of his subsequent work.⁴ The essay now being published, entitled *Discretion*,⁵

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¹ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

³ See, e.g., NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 247-68 (1992); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986); *REDISCOVERING FULLER* (Willem J. Witteveen & Wilbren van der Burg eds., 1999); KRISTEN RUNDLE, *FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER* (2012); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (Cambridge Univ. Press 2d ed. 2012) (1973); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* (1978); William N. Eskridge, Jr. & Philip P. Frickey, *Commentary, The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2047-49 (1994); Gerald J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, in 11 *A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE* (Enrico Pattaro ed., 2011); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (1975) (unpublished manuscript) (on file with the Harvard Law School library).

⁴ For a general discussion of Hart's year at Harvard, for which the sources are particularly rich, given not only his correspondence with his wife, children, and friends, but also his practice of keeping a detailed diary when away from home, see NICOLA LACEY, *A LIFE OF H. L. A. HART: THE NIGHTMARE AND THE NOBLE DREAM 179-208* (2004).

⁵ H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013).

helps to explain why that was the case, for it is a testimony to the intensity of his engagement with colleagues in the Law School. During the course of the year, he laid the foundations for the vast majority of his work over the next decade: for *Causation in the Law*,⁶ for *The Concept of Law*,⁷ and for *Punishment and Responsibility*.⁸ The stimulating American context, as he later put it, “relaxed one’s neuroses”; “[i]deas started pullulating at a rather alarming rate. I thought, ‘Am I going mad?’: I was getting so many different things inside.”⁹

In his Essay, Shaw presents a searching analysis of the paper’s argument as well as a persuasive assessment of its overall significance, and I do not propose to tread the same ground. In this brief introduction, I shall rather reflect, from a biographer’s viewpoint, on the significance of *Discretion* for our understanding of the trajectory of Hart’s ideas and on the significance of his year at Harvard. I shall then move on to consider the intriguing question of why Hart did not subsequently publish or build on some of the key insights in the paper itself. Here I highlight the fact that, almost uniquely in Hart’s work, *Discretion* features a notable emphasis on the significance of institutional factors in our understanding of the nature of legal decisionmaking; and I argue that Hart’s failure fully to develop this insight in the essay, or to build on it in his subsequent work, derives from the fact that such a development would have necessitated a diversion from the philosophical issues that were his core intellectual concern, and moreover would have presented certain dangers to his conception of legal positivism. I shall conclude by considering what contribution the essay makes to our overall interpretation and evaluation of Hart’s legal philosophy.

I. H. L. A. HART AND HARVARD’S “YEAR OF JURISPRUDENCE”

I should set out by confessing that when Geoffrey Shaw told me two years ago that he intended to work on a project exploring the influence of American ideas, and of the Process School in particular, on H. L. A. Hart, my interest in the idea was tinged with a generous dose of skepticism. Notwithstanding the clear evidence, presented by Shaw in his Essay, of Hart’s early engagement with American ideas, notably his exchange with Edgar Bodenheimer in the pages of the *University of Pennsylvania Law Review*,¹⁰ my initial reaction was not far short of

⁶ H. L. A. HART & A. M. HONORÉ, *CAUSATION IN THE LAW* (1959).

⁷ H. L. A. HART, *THE CONCEPT OF LAW* (1961).

⁸ H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968).

⁹ LACEY, *supra* note 4, at 190 (quoting a 1988 interview with H. L. A. Hart by Michael G. Brock and Brian H. Harrison for their work on the history of Oxford University) (internal quotation marks omitted).

¹⁰ See H. L. A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957) [hereinafter Hart, *Analytical Jurisprudence*].

that of one of the most influential contemporary legal philosophers who, when I mentioned the project to him, described the Hart/Bodenheimer exchange as a “dialogue of the deaf.” Certainly, as I argued at length in my biography of Hart, his visit to Harvard challenged his Oxonian prejudice that law schools were poor intellectual cousins to philosophy departments, and broadened his conception of what legal scholarship could be: “It’s so odd 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.”¹¹ His diaries confirm the respect in which he held Henry Hart and Albert Sacks, as well as Paul Freund, whose lectures he attended, and Herbert Wechsler, his fellow visitor in 1956–1957, with whom he had many discussions of criminal law.¹² Moreover, no one can doubt that his intellectual exchanges with Fuller were influential in shaping his interpretation of natural law theory in both the Holmes Lecture¹³ and *The Concept of Law*. But it is equally clear that he was unsympathetic to what he took to be the naturalism of Fuller’s position. Moreover, the sociological jurisprudence of Roscoe Pound, as much as legal realism, was intellectually uncongenial from Hart’s point of view.

So while my biographical interpretation gave significant weight to the importance of the Harvard year — in which he was working on virtually all of the ideas for which he remains famous — in stimulating Hart’s imagination and in particular launching him into a period of intense writing for publication, my overall conclusion was that it was the intellectual resources of Hobbes, Hume, Mill, and Bentham, alongside the contemporary linguistic philosophy of J. L. Austin and Gilbert

That article shows that the main lines of argument of *The Concept of Law* were already well developed, and uses many phrases and examples that recur in the book. See Geoffrey C. Shaw, Essay, *H. L. A. Hart’s Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666 (2013). Here, Hart elaborated the defense of analytical jurisprudence outlined in his inaugural lecture *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37 (1954), and in his essay *Philosophy of Law and Jurisprudence in Britain (1945–1952)*, 2 AM. J. COMP. L. 355 (1953) [hereinafter Hart, *Philosophy of Law*]. Responding to Bodenheimer’s critique (and, in Hart’s view, misreading) of *Definition and Theory in Jurisprudence*, Hart defended himself against the view, common among American jurists, that positivism was to be equated with formalism — the idea that judges deduce their conclusions from closed legal premises. He did so by emphasizing the “open texture” of legal language: even from a positivist point of view, legal reasoning could never be merely deductive. See Hart, *Analytical Jurisprudence*, *supra*, at 956–57. In responding to the criticism that positivism neglected the importance of disciplines other than philosophy, he emphasized the distinction between theories of law and law itself: while legal practice could undoubtedly be improved by a systematic appreciation of the insights of other disciplines, legal theory, he insisted, was an autonomous intellectual approach in which philosophy was the appropriate disciplinary resource. *Id.* at 954–57; see also Hart, *Philosophy of Law*, *supra*.

¹¹ LACEY, *supra* note 4, at 187 (quoting a letter to his wife) (internal quotation mark omitted).

¹² See generally *id.* at 179–208 (discussing Hart’s time at Harvard).

¹³ The lecture was published as H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

Ryle, that were the deep and abiding influences on Hart's work. No reasonable reader of Hart's work could, I think, doubt that these were indeed his primary resources. But the *Discretion* essay makes me think nonetheless that I underestimated both the degree to which his critical dialogue with American scholars such as Bodenheimer shaped his thinking at this time and the intensity of his engagement with Process School ideas while at Harvard. Shaw makes a powerful case, based in part on the volume of American readings in the courses in legal philosophy that Hart designed at Oxford — reinforced, I would add, by his striking promotion of Ronald Dworkin as his successor in the Oxford Chair¹⁴ — for the existence of an abiding interest in and respect for the best American scholarship.

As I shall argue below, however, the facts that he never published the *Discretion* essay, and that some of its key ideas are neither fully worked through in the essay itself nor pursued in his subsequent work, confirm that the institutional aspects of the analysis of law attempted by the Process School did not engage Hart's deepest interest, which always centered on philosophy.¹⁵ Hence, although the framework of *Discretion* sketches an agenda for engagement between Hart's approach and questions of institutional structure and roles, the questions that are most fully pursued in the essay are those where Hart's analytic techniques can be applied more straightforwardly to questions about the nature and scope of discretion. These questions equally engaged the Process School and touched on Hart and the Process scholars' shared concern to find a middle path between the mistakes of formalism and those of legal realism. In addition, as we shall see, the question of whether the standards constraining the exercise of judicial discretion were to be regarded as part of the law touched on another key dilemma for Hart, keen as he was to retain a version of legal positivism in which all genuinely legal standards found their origin in and derived their validity from a complex social fact: the rule of recognition.¹⁶

As background to our assessment of the significance of *Discretion*, it is worth knowing that its presentation to the Legal Philosophy Discussion Group had a somewhat mixed reception from Hart's Harvard colleagues, many of whom were skeptical about the value of his meth-

¹⁴ LACEY, *supra* note 4, at 290–93.

¹⁵ There is much biographical evidence of the depth of this intellectual attachment. As he wrote to his wife in 1944: “[P]hilosophy is my only permanent intellectual interest and my mind like a hen returning to roost wily-nilly does return to the subject whenever I am not doing anything else.” *Id.* at 114 (internal quotation marks omitted).

¹⁶ Hart explained the rule of recognition as the rule that “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.” HART, *supra* note 7, at 92.

od of focusing on precise linguistic usage by setting out and analyzing a number of different senses in which the term “discretion” was used. As Shaw notes, Hart did however regard the presentation as having been a success, and observed wryly that he suspected that the (generally silent) untenured professors “had enjoyed watching him challenge the ‘potentates’!”¹⁷ This description of his counterparts is testimony not only to his assessment of the hierarchy of the Law School but also his insecurity, in his early months at Harvard, about how his genre of work was being received: even if the locals conceded that a positivist could be “quite a nice man,”¹⁸ Hart’s approach was very different from that of the prevailing intellectual culture at the Law School. In particular, Hart’s predilection for linguistic philosophy, though one of the reasons for Fuller’s sponsorship of his visit,¹⁹ was far from congenial to his Harvard colleagues. Most of them would probably have sympathized with Fuller’s view as expressed to Hart a decade later, in a good-humored exchange that nonetheless reveals a genuine difference in their assessment of the values of the analytic method:

In the current issue of the *Journal of Legal Education* there is a review by a man who has studied under both of us. At this distance in time it is a little hard for me to estimate how much damage my course did to him, but the review seems to me to reveal the truly devastating effects on a mediocre mind of too much exposure to ordinary-language philosophy.²⁰

Hart’s diaries suggest that while he formed a relationship with Henry Hart, a leading Legal Process scholar, it was not an entirely easy one: Herbert Hart remembered his namesake as “exuding nervous energy, pacing up and down for two hours before every lecture, chain-smoking, and castigating Herbert for his mistaken positivist views.”²¹ This sense of being, though a privileged visitor, something of an outsider to the Law School’s intellectual community would, given Hart’s general disposition, have led him to take especial care in preparing his presentation to a discussion group that was intended to be the institu-

¹⁷ LACEY, *supra* note 4, at 188; *see also* Shaw, *supra* note 10, at 667.

¹⁸ LACEY, *supra* note 4, at 181 (internal quotation mark omitted); *see also* Shaw, *supra* note 10, at 688. Hart’s amusing example, in the *Discretion* essay, of a person giving reasons for choosing between a martini and a sherry, *see* Hart, *supra* note 5, at 657, in fact offers a fascinating glimpse of his personality: feelings that he had either talked too much or not enough at social events haunted him through the early part of his professional life, *see* LACEY, *supra* note 4, at 128.

¹⁹ *See* Memorandum from Lon L. Fuller (undated) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 14); *see also* LACEY, *supra* note 4, at 184.

²⁰ Letter from Lon L. Fuller to H. L. A. Hart (Oct. 18, 1965) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 14). *See generally* Nicola Lacey, *Out of the “Witches’ Cauldron”?: Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate*, in *THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY* 1 (Peter Cane ed., 2010).

²¹ LACEY, *supra* note 4, at 187.

tional centerpiece of “the year of jurisprudence” in which he and Julius Stone were visiting Harvard.²² This in itself may help to explain the effort that Hart, unusually, put into connecting linguistic analysis with the Process School’s interest in the capacity of institutional arrangements to shape the course of legal argumentation.

II. DISCRETION IN THE CONTEXT OF HART’S WORK

As Shaw points out, I (like other scholars) was aware that Hart had presented a paper on discretion to the Legal Philosophy Discussion Group in the early part of his visit to Harvard. Given that the question of judicial discretion was to become the linchpin of his decades-long debate with Ronald Dworkin, it was obvious that his paper would be of the greatest interest. But the draft was not among Hart’s papers. Given his general level of disorganization — on one occasion a lodger at the Harts’ home, returning to find the living room in total chaos, mistakenly thought that the house had been burgled — I assumed that the paper had been lost.²³ Precisely because I was not focusing on the possibility that Process School ideas might have been influential on Hart’s thinking, I did not research Henry Hart’s, Sacks’s or Freund’s papers in the Law School archive, though I relied heavily on the rich resources of H. L. A. Hart’s and Fuller’s papers. So there, for a further decade, lay the small but sparkling gem of intellectual history that appears in this volume of the *Review*.

When Shaw told me that he had found the essay, I was of course intrigued. As a biographer, one’s excitement about such discoveries is, it must be admitted, always shaded with a certain anxiety. Biographical method is very far from scientific, and any biographical interpretation has to be regarded as provisional — or, as Hart might have put it, defeasible — on the discovery of countervailing material. The discovery of a lost essay also presented a potential ethical dilemma: particularly given what we know of the exceptionally high intellectual standards to which Hart held himself, and the painstaking work that he devoted to polishing drafts of the papers and books that he published, the question of whether the essay was suitable for publication immediately presented itself. Moreover this question was particularly salient given the debate about the posthumous publication of the Postscript to

²² See *id.* at 184.

²³ I was not until recently aware of Professor Anthony Sebok’s discovery of the essay, which is referred to and quoted from in ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 169 n.232 (1998); and in Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 99–100 (1999). See also Shaw, *supra* note 10, at 670 & n.22.

The Concept of Law,²⁴ meticulously constructed by Penelope Bulloch and Professors Joseph Raz and Timothy Endicott from the various (incomplete) versions that existed at Hart's death, which some scholars feel did not enhance Hart's reputation.²⁵

I therefore read the draft with a mixture of excitement and trepidation. The latter very rapidly gave way to the former. First, notwithstanding Hart's opening piece of academic *politesse*, on circulating the paper, in describing it as a "fugitive" piece not worthy of taking "so durable a form,"²⁶ *Discretion* turns out to be both fairly polished and of the deepest interest in shedding light on his thinking in the years during which he was working on *The Concept of Law*. It is moreover rich in the qualities that made Hart deservedly famous: it exhibits his trademark ability to reveal, through elegant and meticulous analysis of linguistic usage, important distinctions implicit in social practices, and to illuminate the deep logic of those practices. Second, the essay, like the working notebook to *The Concept of Law*,²⁷ discloses a close interest in, and acknowledgment of the potential significance of, differently configured legal institutions and indeed areas of legal doctrine in shaping and constraining discretion: an interest I had noted to have disappeared in the final version of the book, and to have been more or less absent in Hart's subsequent work.²⁸

I have already mentioned that Hart's levels of organization, as well as the length of his writing career, were such as to make it entirely plausible that he had lost track of the essay. Shaw rightly notes that the appearance of some passages of the paper in *The Concept of Law* suggests that Hart retained a copy of the essay while working on the final draft of the book. I have some reason to believe that a number of Hart's papers went missing after his office at University College was cleared following his death in 1992.²⁹ We will never know whether he had a copy of the draft at hand as he crafted his main engagements with Ronald Dworkin's work on discretion or as he struggled with endless versions of what became the Postscript. But given what we know about his exceptionally sharp mind and outstandingly strong

²⁴ H. L. A. HART, *THE CONCEPT OF LAW* 238 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (1961) (publishing the Postscript alongside the reissued original).

²⁵ See LACEY, *supra* note 4, at 353.

²⁶ Hart, *supra* note 5, at 652.

²⁷ The notebook is held in the library archive at New College, Oxford; Hart Papers (ACC 2006/6), Box 1, Folder 9.1.

²⁸ See LACEY, *supra* note 4, at 226–33, 348–53; Nicola Lacey, Lecture, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 *TEX. L. REV.* 945, 956–58 (2006).

²⁹ Professor John Finnis, in an interview for the Hart biography, told me that he had seen a folder relating to Hart's correspondence with Abraham Harari, a critic of Hart, which I was particularly keen to find, in Hart's University College office. See LACEY, *supra* note 4, at 274–77. The file unfortunately never materialized among the papers at Hart's home.

memory, we can be confident that he would have been able to recall the main ideas of his paper. The fact that Hart clearly did draw on the philosophical parts of the paper in later work, yet failed to draw on, let alone develop, the intriguing fragments of insight about the significance of institutional structure, cannot, therefore, be put down to accident: it tells us something important about Hart's intellectual choices.

III. DISCRETION AND HART'S THEORETICAL DILEMMAS

Ever since the publication of Ronald Dworkin's famous essay *The Model of Rules*³⁰ in 1967, the question of discretion has occupied a prominent place in analytical jurisprudence. The positivist account of adjudication, Dworkin argued, entailed a strong form of judicial discretion that implied a quasi-legislative role for judges inconsistent with their constitutional position. Hart's long struggle to answer Dworkin makes it apparent that the question of discretion touched on a number of core puzzles related to Hart's positivist theory of law. This theory was carefully crafted to occupy a middle point between what Hart saw as the "nightmare" excesses of American Realism, which saw legal rules not as normative standards but rather as predictions of official behavior, and those of the "noble dream" theories, which unrealistically regarded legal standards as determining clear results in all cases.³¹ These latter theories included not only formalism, with its purely deductive view of legal reasoning, but also natural law theory, which mistook legal for moral validity, in the process committing the logical error of deriving an "is" from an "ought." The theory of adjudication later developed by Dworkin also counted, of course, as a classic instance of the American "Noble Dream" from Hart's point of view. In this context, it is fascinating that the 1956 essay, *Discretion*, anticipates in key ways Dworkin's interpretation of the core issue, focusing itself, as Shaw argues, on debunking the objection that the existence of discretion in judicial decisionmaking is inconsistent with the rule of law in that it leaves unelected decisionmakers with a free choice, unconstrained by legal standards that have a proper democratic mandate.

Hart's approach is straightforward and illuminating. Discretion, he argued, is best understood as existing where "there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand, although the factors which we must take into account and conscien-

³⁰ Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

³¹ See H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

tiously weigh may themselves be identifiable”;³² it is “the sphere where arguments in favour of one decision or another may be rational without being conclusive.”³³ He used the techniques of linguistic analysis to map the field of discretion by drawing a set of key distinctions: that between express and tacit discretion; that between different sources of discretion (relative ignorance of fact and relative indeterminacy of aim); that between different institutions (courts and administrative bodies); and that between different institutional roles and functions within which discretion may be granted explicitly or arise tacitly (licensing, allocations of resources, common law and statutory interpretation, sentencing, and so on). “[B]ecause we are men not gods,”³⁴ we must accept that it is part of the human condition that in many decisionmaking contexts, even where governed by rules, there is no “one correct answer.”³⁵ But this uncertainty, Hart was keen to emphasize, does not mean that discretionary decisions are unconstrained: rather, the nature of the institutional role, the history of the decisionmaking, and our understanding of the purposes of the regulatory system or area of legal doctrine will usually generate plentiful standards to guide, though not to determine, the decisionmaker’s choice. Indeed, repeated discretionary decisionmaking over time, within a particular institution, will lead to a process of accumulating guidelines,³⁶ in something of the manner of the “institutional history” that Dworkin saw as an essential component in the decisionmaking balance along with the principles emerging from institutional and background morality.³⁷ To put Hart’s argument in terms of Dworkin’s later argument, discretion is in Hart’s view thus rendered “weak” rather than “strong,” and is accordingly consistent with the rule of law.

Why might Hart have seen this commonsensical argument as potentially threatening to the equilibrium of his positivism? There were two reasons. First, Hart seemed unwilling in his later work to explain how the broader constraining criteria that rebut the rule of law objection to discretion could be accommodated within the identifying criteria of his rule of recognition. Indeed, the most natural reading of *Discretion* seems to be that he did not regard those constraints as counting as law in the same sense that rules do.³⁸ Hence, on the face

³² Hart, *supra* note 5, at 661.

³³ *Id.* at 665.

³⁴ *Id.* at 661 (emphasis omitted).

³⁵ *Id.* (internal quotation mark omitted).

³⁶ *See id.* at 660.

³⁷ Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1063 (1975).

³⁸ I am inferring this from Hart’s note that “the distinguishing feature of the discretion case is that there remains a choice to be made . . . which is not determined by principles which may be formulated beforehand,” Hart, *supra* note 5, at 661, and from Hart’s reference to discretionary

of it — and without further rebutting argument — the rule of law objection stood. An argument could clearly be constructed that judges were implicitly or explicitly given authority to decide in the light of those broader standards, hence sustaining the rule of recognition as the sole touchstone for the validity of legal standards. But to reconcile this argument with Hart's overall conception of law would require the sort of further argument later developed by Neil MacCormick to the effect that Hart's rule of recognition could in fact accommodate the binding legal principles whose importance Dworkin emphasized.³⁹ And even this argument was vulnerable to Dworkin's objection that a more inclusive sources-based touchstone of legal validity would be incapable of accommodating the weighing of reasons intrinsic to the evaluative character of legal reasoning.⁴⁰ This argument, of course, became a central feature of Dworkin's own theory, and it is fascinating to see arguments about the weighing of reasons play a prominent role in Hart's account of discretionary decisionmaking in this essay.⁴¹ But how was this line of reasoning to sit with his developing idea that law is a system of rules identified by reference to the rule of recognition and existing in terms of simple validity, rather than having an evaluative weight that is contingent on the balance of reasons in any particular case?⁴²

Second, and following on from this point, discretion poses the difficulty of retaining the distinction between core cases, where rules readily settle decision, and penumbral cases, where discretion is in play. For if the broader evaluations of purpose, policy, or principle that guide discretionary decisionmaking can in fact be invoked, as Dworkin suggested, to question the weight or interpretation of rules, then the idea of law as a system of rules is destabilized by the entry of extra-legal criteria of an evaluative kind, notably in this context, arguments about aim or purpose. This argument potentially edged Hart's positivism in the direction of natural law theory, and moreover made vulner-

decisionmaking as inevitably implying a "leap" beyond established rules, *id.* at 665 (internal quotation marks omitted).

³⁹ See generally NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

⁴⁰ See Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 *YALE L.J.* 855, 878 (1972).

⁴¹ See, e.g., Hart, *supra* note 5, at 659–60. The key difference between Hart's position at this stage and Dworkin's later position is Hart's clear and repeated denial of the existence of a single right answer identifiable through a process of legal reasoning, as opposed to better or worse answers to discretionary decision. Compare *id.*, with Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART* 58, 59 (P. M. S. Hacker & J. Raz eds., 1977) ("[T]he occasions in which a legal question has no right answer in our own legal system must be much rarer than is generally supposed.")

⁴² Clearly, *Discretion* predates *The Concept of Law*, but it seems likely from Hart's working notebooks and from his other published work that the main ideas of the book had been formulated by the time of his visit to Harvard.

able his key distinction between a core of settled meaning and a penumbra of discretion.

In seeking to distance these arguments, Hart turned to the tools of analytic philosophy, and Shaw provides an excellent analysis of the various twists of his argument and their upshot for his overall position. But it is worth noting that, of the five questions that Hart sets out as his core preoccupation at the outset of his essay, questions one and three — what is discretion, and why must we accept it? — receive the lion's share of his attention,⁴³ and for good reason. For these are the two questions that lie squarely within the terrain of analytical jurisprudence, while question four — what values does discretion menace or promote? — lies most naturally in the terrain of normative political or moral philosophy, and questions two and five — under what conditions do we tolerate discretion in legal systems, and what can be done to maximize its benefits and minimize its harms? — most naturally lend themselves to a social science analysis. This distinction in my view explains why these questions are treated only briefly through reference to the need for expertise and professional experience, adequate procedures, the absence of prejudice or private interest, and so on,⁴⁴ and have dropped entirely out of view once we get to chapter seven of *The Concept of Law*, resurfacing only in the sketch of natural justice that appears later in the book. To put this in terms of the key features of Process School thinking, Hart's engagement with and philosophical development of the notion of reasoned elaboration in this essay flowed directly into his later work, while his fragmentary engagement with the idea that institutional competence is of significance for the course of legal reasoning and our understanding of law dropped out of view.

In the analytic structure that is set out on page four of the published essay, significant emphasis is given not merely to different discretion-holding bodies but also to the varying roles that those bodies, or officials within them, play. But as the paper develops, its argument becomes more abstract, and little texture is given to the institutional role occupied by different sorts of decisionmakers, nor is much made of the different structures of the relevant decisionmaking institutions. Hypothetical examples such as that of the young hostess — a wonderful period piece — gradually come to dominate the argument,

⁴³ The structure of the paper is broadly as follows: pages one through three of the fourteen-page essay, as published, deal with introductory and methodological issues; pages four through thirteen deal with questions one and three; question five, about the optimal arrangements for using discretion, is considered on pages thirteen and fourteen, which also touch on question four; and brief comments on question two, about the conditions under which we tolerate discretion, are interspersed with the discussion of question three on pages four through thirteen. See Hart, *supra* note 5.

⁴⁴ See *id.* at 661, 664.

and the opportunity to consider whether there may be systematic differences bearing on questions two and five between, for instance, collegiate and unitary decisionmaking bodies, elected and appointed decisionmakers, or expert/professional and lay decisionmakers, is not taken up. So virtually nothing is made of the potential that Hart's analytic framework would have offered in terms of a closer exploration of the ways in which institutional factors — the structure of different agencies; the roles accorded to their officials; the different positions of decisionmakers such as judges, jurors, and administrative officials of various kinds; the accountability mechanisms to which they are subject; and the tasks that they are assigned — may generate constraints. Though he suggested that the distinction may be of significance,⁴⁵ there is no attempt to explore in greater depth the potential differences, in terms of either generating constraints or the normative challenge posed by discretionary choice, between avowed and tacit discretion.⁴⁶ Neither the question of the relationship between institutional design and the suitability of certain institutional forms for certain types of decisions — with a consequent upshot for the relationship between institutional structure and the quality of decisionmaking — nor the related question of how particular institutional structures can produce implicit constraints on and guidelines for decisionmaking, is pursued.

These considerations about the interplay between institutional design and the effectiveness and accountability of decisionmaking were, of course, a key aspect of Process School scholarship. They have also figured prominently in the very considerable socio-legal literature on discretion that has accumulated over the decades since Hart's essay was written.⁴⁷ Professor John Bell's illuminating account describes the jurisprudential issues raised by this extensive literature. As Bell has put it, empirical studies of discretionary decisionmaking, much of it within public administrative bodies ranging from sentencing courts to regulatory bodies such as environmental protection agencies, suggest that "the flexibilities which discretion permits, rather than legal rules

⁴⁵ *Id.* at 656, 665.

⁴⁶ *See id.* at 663.

⁴⁷ *See generally* MICHAEL ADLER & STEWART ASQUITH, *DISCRETION AND WELFARE* (1981); STEWART ASQUITH, *CHILDREN AND JUSTICE* (1983); ROBERT BALDWIN, *REGULATING THE AIRLINES* (1985); JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES* (1981); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969); GENEVRA RICHARDSON ET AL., *POLICING POLLUTION* (1983); *THE USES OF DISCRETION* (Keith Hawkins ed., 1992). For contributions pondering the jurisprudential implications of this work, see generally D. J. GALLIGAN, *DISCRETIONARY POWERS* (1986); John Bell, *Discretionary Decision-Making: A Jurisprudential View*, in *THE USES OF DISCRETION*, *supra*, at 89; Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, in *THE USES OF DISCRETION*, *supra*, at 361; and John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation*, 4 *SOC. & LEGAL STUD.* 307 (1995).

are central to the operation of law.”⁴⁸ This insight, Bell argues, implies that from the point of view of legal theory, “law has to be understood not in terms of a discrete set of normative standards, but primarily within an institutional context.”⁴⁹ Indeed, empirical studies suggest that “reasons drawn from legal sources and other reasons are closely intertwined.”⁵⁰ The role of law in the vast areas in which discretion prevails is “not so much providing legal reasons why an act should be done, but providing legal reasons why others should view such an act as authoritative and effective”⁵¹ — a role that might best be elaborated by a nuanced analysis of the various aspects of official decisionmakers’ roles and the ways in which these aspects are reflected in institutional design. The fact that this socio-legal research suggests that discretionary decisionmaking constitutes, as it were, the core rather than the penumbra of legal decisionmaking reality makes Hart’s decision not to build on the fragmentary insights of the early *Discretion* essay all the more regrettable.

An analogous conclusion is reached by Professor Gerald Postema in his retrospective on the Hart-Fuller debate. Postema suggests that in many ways Hart’s arguments about the core and penumbra should have drawn him toward the common law interpretation of law as an emerging set of conventions within a particular professional and institutional tradition. As Postema puts it:

[A] very widely shared understanding of the rule of law favours a common-law conception of law and legal reasoning over Hart’s settled-meaning positivism and its more sophisticated elaborations. We look to law to subject the exercise of political power to public accountability and public accountability adequate to this task requires an *institutionalised* discipline of practical reason as conceived broadly along lines of common-law jurisprudence rather than conformity to determinate public rules.⁵²

This idea of an ongoing practice of decisionmaking as generating a “body of materials [that] provides a rich context of relatively fixed points from which discursive argument on contested issues of law can proceed”⁵³ is, of course, rooted in a fundamentally institutional view of law. Hence, a more fully institutionalized understanding of law as a social practice — perhaps drawing, as I suggested in Hart’s biography, on a linguistic philosophy influenced by Ludwig Wittgenstein’s con-

⁴⁸ Bell, *supra* note 47, at 92.

⁴⁹ *Id.*

⁵⁰ *Id.* at 104.

⁵¹ *Id.* at 105.

⁵² Gerald J Postema, *Positivism and the Separation of Realists from Their Scepticism*, in THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY, *supra* note 20, at 259, 275 (emphasis added); *see also id.* at 266–79.

⁵³ *Id.* at 275; *see also* A. W. B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 77, 94–98 (A. W. B. Simpson ed., 1973).

ception of language games as embedded in forms of life, rather than by J. L. Austin's more austere ordinary language philosophy — might well have emerged had Hart pursued this line of analysis.⁵⁴ But it would have done so at the cost of significantly complicating the position of the rule of recognition in his positivist account.

It is therefore doubly disappointing that Hart failed to pursue his fifth question about how discretion might be most effectively structured, both because such an engagement would have invited a productive dialogue between analytical jurisprudence and socio-legal studies, and because it might have generated a more robust response to the rule of law objection. But equally, it is not surprising that he did not do so. For to answer the question in a satisfactory way, he would have had to develop his theory in one of three directions, none of which was congenial to him. First, and remaining within a philosophical methodology, he could have moved in a more fully normative direction, abandoning or modifying the parsimonious conception of law as consisting solely of standards validated in terms of the complex social practice that constitutes the rule of recognition, and instead attempting a more ambitious ontology of legal reasons capable of constraining discretion, in the manner later developed by Ronald Dworkin.⁵⁵ Second, he could have moved in the common law direction favored by Postema, accepting a historicized view of law as an emerging set of practices rooted in a set of institutional structures and a profession with its complex array of roles and conventions. Or third, he could have interested himself in the systematic lessons to be learned from empirical studies in law, at the very least immersing himself in enough of that empirical literature to generate insights into further distinctions that might be usefully developed in terms of the structure of the institutions within which discretion is exercised and the professional training and responsibilities of discretionary decisionmakers. This third approach, I suggest, would have allowed him to make good on what he later clarified to be his real aspiration in describing *The Concept of Law* as “an essay in descriptive sociology” as much as in analytical jurisprudence⁵⁶: to provide the “normative concepts required for a descriptive sociology.”⁵⁷ But the link between institutional form and the quality of decisionmaking that so interested the Process School theo-

⁵⁴ LACEY, *supra* note 4, at 215–19.

⁵⁵ See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁵⁶ HART, *supra* note 7, at vii.

⁵⁷ Lacey, *supra* note 28, at 949 (quoting one of Hart's notebooks). Hart's original claim was made in his 1961 work, *The Concept of Law*, see HART, *supra* note 7, at vii, and his revised claim was made in his interview with David Sugarman, see David Sugarman, *Hart Interviewed: H. L. A. Hart in Conversation with David Sugarman*, 32 J.L. & SOC'Y 267, 291 (2005).

rists, and that is so manifest in Fuller's *The Forms and Limits of Adjudication*,⁵⁸ simply did not engage Hart's deep interest. And both the second and third routes would have led him in the direction of a more contingent, historically specific conception of law and away from the primarily philosophical methods that he favored. Apart from noting the very difficult analytic and normative task that Hart set for himself by insisting on a core of law with settled meaning and no space for discretion, we can also reflect, then, on how helpful a more elaborated version of Hart's account of discretion might have been for the accumulating empirical and socio-theoretic literature on discretion. But such a development of his thought, it is clear, was ruled out by Hart's insistence — emphasized, significantly, in his *Reply to Professor Bodenheimer* — on the autonomous nature and tasks of legal philosophy, as opposed to legal reasoning.⁵⁹

IV. THE PATH NOT TAKEN (BY HART . . .)

In *Discretion*, we can glimpse the sort of articulation that might have been achieved between analytical jurisprudence and the analysis of discretion as a social phenomenon had Hart's interests in law ranged beyond the philosophical. As it is, the failure to develop fully the institutional line of thought even in this paper, its absence from *The Concept of Law*, and its failure to resurface in his engagements with Dworkin in the 1980s all tell us that this essay was a particular effort on Hart's part, stimulated by the Harvard context and his intellectual respect for his Process School colleagues, to expand his intellectual horizons into terrain closer to the social sciences, and to explain the extent to which the analytic philosophical approach could clarify, refine, and advance the Process School's intellectual project. Even had he had the *Discretion* essay on hand when replying to Dworkin, I conclude, it is unlikely that he would have drawn on its fragmentary institutional insights; for the development of his analysis of constraints on discretion through an institutional analysis would not have delivered the purely philosophical rebuttal that he sought, while potentially compromising his idea that law's normativity derives entirely from the rule of recognition.

Hart's essay stands, then, as intriguing evidence of a path that Hart himself chose not to follow. That path has, however, been taken by a number of influential thinkers in the last twenty years; and it is one that represents, to my mind, a most productive way forward for legal

⁵⁸ See Fuller, *supra* note 1.

⁵⁹ See Hart, *Analytical Jurisprudence*, *supra* note 10, at 954–55.

theory today.⁶⁰ *Discretion* not only looks back to the issues that pre-occupied American lawyers in the 1950s, but also touches on many of the enduring themes of legal theory over the last sixty-five years. There is sadness, as one reads its pages, in thinking that Ronald Dworkin, whose work so directly emerged from the debate that this essay represents, will never read it. But there is also cause for celebration, as we reflect on the extraordinary intellectual advances that came out of the half century of Anglo-American dialogue that *Discretion* and other essays of the 1950s inaugurated. May that dialogue, stimulated by Harvard's "year of jurisprudence" in 1956–1957, long continue to flourish; and may the publication of this fascinating essay encourage more scholars to follow Shaw and other recent scholars' example in mining the rich resources of law school archives at Harvard and beyond.⁶¹

⁶⁰ See generally BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001); WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009); Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 *J.L. & SOC'Y* 171 (1998); Lacey, *supra* note 28; Nicola Lacey, *The Jurisprudence Annual Lecture 2013 — Institutionalising Responsibility: Implications for Jurisprudence*, 4 *JURISPRUDENCE* 1, 1–19 (2013).

⁶¹ See sources cited *supra* notes 3, 24.