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FORCE

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In the opening chapters of his magisterial study, *The Concept of Law,* H. L. A. Hart emphatically rejects John Austin's view that the essence of the law is a "situation where one person gives another an order backed by threats" and thereby "obliges him to comply."[1] Hart objects that this view fails to distinguish the law and its operations from the action of a gunman who "orders his victim to hand over his purse, and threatens to shoot him if he refuses."[2] It is simply counter-intuitive, he contends, to assimilate law to this reductive paradigm, and indeed, "Mere temporary ascendancy of one person over another is naturally thought of as the polar opposite of law, with its relatively enduring and settled characters." "In most legal systems," he adds, "to exercise such short term coercive power as the gunman has would constitute a criminal offense."[3] "Coercive power" is the key phrase here for it identifies what is for Hart the important distinction between what the law is and what the gunman does. Rather than coercing individuals by the exercise of mere force, the law binds members of society to a rule or set of rules that has the character of being general and impartial, that is, no respecter of persons. Without "the idea of a rule," Hart declares, "we cannot hope to elucidate even the most elementary forms of law."[4] Of course, as Hart himself sees, the notion of a rule does not entirely eliminate coercion, since where there is a rule of law there is necessarily some form of constraint in relation to which "human conduct is made in

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1. H.L.A. HART, THE CONCEPT OF LAW 6 (1961).
2. *Id.*
3. *Id.* at 24.
4. *Id.* at 78.

some sense nonoptional or obligatory."[5] The phrase "in some sense" identifies the difference Hart would like to establish between legal obligation and the model of the gunman; while the individual under the law is not wholly free—such freedom would be incompatible with the very idea of law—the obligations to which he is subject are not merely the effect of arbitrary power but of a power that is enabled by an independent and authoritative source. That source is the rule of law which, Hart says, operates by "conferring powers . . . on persons qualified in certain ways to legislate by complying with a certain procedure."[6] Notice how much distance there is in this account between the source of power and the object of its exercise. In the gunman scenario, the coercion is direct and discrete; in the world of rule the coercing agent stands at the end of a long and articulated chain, beginning with the rule itself. The rule mandates not an act but a procedure which itself can only be put in motion by persons who meet prestipulated and abstract qualifications (age, education, skills, etc.), and these persons authorize still other persons who must themselves satisfy additional formal requirements. It is from this chain and not from any temporarily ascendant outlaw that the pressure of obligation issues, and the obedience that then follows, if it follows, will be the result not of force and violence, but of a principled process.

Or so it might seem. Could it not be said that procedure rather than doing away with force merely masks it by attenuating it, by placing it behind a screen or series of screens? After all, the crucial question, which returns the original problem to center stage, still has to be asked: Who gets to make the rules? And once that question is answered, another question (it is really the same) waits behind it: Who gets to say who gets to make the rules? If the answer to these questions turns out to be something like "whoever seizes the opportunity and makes it stick," then there is finally little to distinguish the rule centered legal system from the actions of the gunman; this gunman is merely better camouflaged. It is precisely such a danger that Hart spies when, later in the book, he identifies and considers another and more subtle form of imposition and coercion, that exercised by a court when, under the cover of its responsibility to interpret law, it instead *makes* law, and thereby demonstrates the truth of Bishop Hoadley's famous observation: "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them."[7] As Hart notes, this is simply an older version of what is to us a familiar claim: "The law (or the constitution) is what the courts say it is."[8] If this is indeed the case, then the rule of law or, more precisely, the law of rule, becomes an illusion, for the rule as a constraint, as a safeguard against casual

5. *Id.* at 80.
6. *Id.* at 75.
7. *Id.* at 137.
8. *Id.* at 138.

violence, falls to the daily acts of violence committed by judges who call the tune as they happen to see (and desire) it. Here is a "temporary" ascendancy of one person not only over another, but over many; here is a forceful capture even more sinister than that performed by the gunman because it wears the face of legitimate authority.

The great merit of Hart's analysis is that it makes clear the close relationship—a relationship so close as to be one of identity—between the threat posed to law by force and the threat posed to law by interpretation. If it is the business of law to protect the individual from coercion that is random, unpredictable, and arbitrary, then the individual is no less at risk when he is at the mercy of an interpreting court than when he is at the mercy of an armed assailant. In both cases he is nakedly exposed to an agent who has seized authority and is in the accidental circumstance of being able to get away with it. Of course, there is the difference that in one case a legislature (sometimes democratically elected) intervenes between the would-be coercer and his victim, but that is cold comfort if Bishop Hoadley is right and the interpreter "is he who is the lawgiver to all intents and purposes." If the gunman is the paradigmatic instance of force outside the law, interpretation is the force that resides within the law, and like the gunman it must be regulated and policed lest it subvert the law's claim to enact the dictates of general principles of justice and equity. It is crucial that the law not issue from anyone in particular—even from a justice of the Supreme Court—but from an impersonal source that resists the encroaching desires of particular (interpretive) wills. *The Concept of Law* is an extended search for such a point of resistance, and after having failed to discover it in the writings of his predecessors, Hart announces that he has found it in "the idea of a rule,"[9] and more particularly in the idea of a "determinate rule" in which, he says, "the life of the law consists."[10] Determinate rules, in contrast to vague or general rules that allow "the applications of variable standards, do *not* require from officials and individuals a fresh judgment from case to case."[11] Indeed, it would be more accurate to say that determinate rules (assuming for the moment that such exist) do not *permit* a fresh judgment from case to case because they are so directing as to leave no room in which the judgment might operate. Determinate, in short, means settled, complete in and of itself, and therefore in no need of further elaboration or addition. Determinate rules perform as barriers or walls on which is written "beyond this point interpretation cannot go."

Given that in Hart's view Law is all that stands between us and "the free use of violence,"[12] and given too that for him Law is thinkable only in terms of determinate rules, it is hardly surprising that he equates the

9. *Id.* at 78.
10. *Id.* at 132.
11. *Id.* (emphasis in original).
12. *Id.* at 167.

absence of such rules with the advent of chaos. "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist."[13] This single sentence is at once a compendium and an explication of the fears and desires that inform the tradition in which Hart writes; there must be a mode of communication that is general, not tied to the linguistic system of any particular community. Once produced, these general communications must be understandable by anyone, no matter what his individual educational or cultural experience. Indeed this understanding must be so immediate as not to be in need of any further elaboration; in fact its self-sufficiency shall be so perfect that elaboration or direction—otherwise known as interpretation—will constitute an impiety. The content of this unavoidable and self-sufficient understanding will be a set of matching orders. The hearer or reader will be "required" that is, compelled, left without choice, deprived of any opportunity to exercise his creative ingenuity. Unless all of this is the case, unless the framing of such general standards in a fail-safe interpretation-proof mode is a possible achievement, there will be no law.

The point is made even more dramatically by the court in *Cargill Commission Co. v. Swartwood*[14] when it refuses to take into consideration a prior oral agreement entered into by parties who subsequently executed a written contract. In the course of its decision the court invokes the so called "parol evidence rule" which states that when a written instrument is the complete and final expression of the contracting parties, it cannot be varied or contradicted by oral testimony. Obviously the intention of the rule is to keep the writing—the palpable evidence of a binding agreement— authoritative by declaring it off-bounds to interpretation. The alternative is so dreadful that the *Cargill* court can only contemplate it in the act of dismissing it:

> Were it otherwise, written contracts would be enforced not according to the plain effect of their language, but pursuant to the story of their negotiations as told by the litigant having at the time being the greater power of persuading the trier of fact. So far as contracts are concerned the rule of law would give way to the mere notions of man at to who should win law suits. . . . Without [the parol evidence] rule there would be no assurance of the enforceability of a written contract. If such assurance were removed today from our law, general disaster would result. . . .[15]

It takes one hundred and forty pages for Hart to move from the rejection of force to the identification of force, and its potentially disastrous

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13. *Id.* at 121
14. 159 Minn. 1, 198 N.W. 536 (1924).
15. Cargill Comm'n Co. v. Swartwood, 159 Minn 1, ____, 198 N.W. 536, 538 (1924).

consequences, with interpretation. The court in *Cargill* does it in only four sentences, and in steps that can serve as a paradigm for the formalist argument. The "plain effect" of contractual language is opposed to the shifting and variable effects produced by stories powerfully—that is, forcefully—told. On the one hand, we have a stable and fixed (authoritative) shape; on the other, we have the many shapes brought into being by the exercise of verbal ingenuity. On the one side, we have the independent power of self-construing language; on the other, we have the power generated by the artful distortions of interested agents. If the power of interest is allowed to obscure matters of fact, if the determination of fact turns into a contest of persuasive styles, then the notion of a contract—of an agreement sealed by its verbal representation—goes by the boards; and if that happens, general disaster—the wholesale breakdown of communicative certainty and trust—cannot be far behind.

What the *Cargill* opinion makes clear is that in the court's view, as in Hart's, the foundations of Law are linguistic. The safeguards the law erects in order to repel the depredations of force are made of language, and if they are to perform *as* safeguards, they must be made of a certain kind of language, language that is capable of making what Hart calls an "authoritative mark."[16] An authoritative mark is a mark that commands the field in which it operates; it is a mark so complete and self-sufficient in its declaration that no one could mistake it or misread it. An authoritative mark is a determinate mark, and because it is possible to produce such a mark, it is possible to fashion determinate rules, and finally to elaborate a genuine system of law. So long as determinate rules embodied in authoritative marks are available as something to which we can have recourse in the event of disputes, we have "in embryonic form the idea of a legal system," "the germ of the idea of legal validity."[17]

Some of you will have recognized in the vocabulary of "authoritative marks" and "determinate rules" a familiar theory of language. In that theory communication is anchored by something variously called literal language, neutral language, objective language, explicit language, etc. By any name what is referred to is a level of language immune from contextual variation and therefore resistant to interpretation. The problem with this theory is well known: it seems undermined by the variety that is so obviously a feature of interpretive performance; nothing is more common than disputes concerning the meaning of supposedly plain or literal language. In the face of these disputes, in what sense could anything made of language be "determinate"? Hart answers this question by dividing language into two zones; there is at its center a "core of settled meaning" and at its outer edges or "penumbra" a realm of uncertainty and doubt. Disagreements arise in tha area of the penumbra where a certain looseness and vagueness results in that he calls "open texture,"[18] but disagreements must themselves

16. HART, *supra* note 1, at 93.
17. *Id.*
18. *Id.* at 120.

have a point of reference—something one is disagreeing *about—and* that point of reference is given by the settled core which determines the parameters of any dispute that might occur. Interpreters are thus constrained by the core even as they move with (relative) freedom in the area of the penumbra, and it is because of this "duality of a core of certainty and a penumbra of doubt"[19] that communication is able to occur. "If we are to communicate with each other at all . . . then the . . . words we use . . . must have some standard instance in which no doubts are felt about its application."[20] For then, "when we . . . frame some general rule . . . the language . . . fixes necessary conditions which anything must satisfy it if is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds."[21]

The passage then is from words with a core of settled meaning to rules with a core of settled meaning, and later, as we shall see to historical bodies of material (decisions, statutes) whose significance is no less settled. Hart acknowledged that at every level variety and difference exist at the fringe—"nothing can eliminate this. . .penumbra of doubt"—but he insists that the variety is finally controlled and contained by a stability at the center, by the "core," the "germ," the "embryon." By using these words to characterize that which stands between us and the advance of unconstrained interpretation, Hart (inadvertently) alerts us to its fragility. In each of these spatial metaphors, the still unmoving point (core, center, germ, embryon) is surrounded by a much larger area (of fringe, penumbra, open texture), and the impression is of an insurgent force always on the verge of overrunning the fortress at the center, of blurring the line that demarcates the variable from the constant, of erasing (by writing over) the authoritative mark. It is Hart's strategy repeatedly to assure us (and himself) that the encroachment of interpretative will can be resisted if only we cling to the "core," but it is a strategy of desperation, and at times Hart himself seems more than half aware that it has already failed.

The sequence is always the same: he offers a candidate that will fill the position of "authoritative mark"—of something so self-sufficiently clear that it compels agreement and precludes interpretation—but then he so qualifies the status of the "mark" that its authority is put seriously in question. We see this first in his discussion of what he calls "primary rules of obligation" (where primary, of course, is another world like center, embryon, core), rules that place "restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity with one another."[22] As they first emerge, these rules are "unofficial"; that is, they

19. *Id.* at 119.

20. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV., 593, 607 (1958).

21. HART, *supra* note 1, at 125.

22. *Id.* at 89.

stem from a shared desire for peace and security rather than from any developed and codified legal apparatus. But even as they are introduced, the primary rules are found to be inadequate, for it is only in a "small community closely knit by ties of kinship, common sentiment and belief" that they could function successfully. As soon as numbers increase and beliefs diverge—one suspect that the trouble begins when the number reaches two—there will arise "doubts. . .as to what the rules are or as to the precise scope of some given rule." In the absence of an "authoritative text" or of "an official whose declarations. . .are authoritative" there "will be no procedure for settling. . .doubt."[23] At a very early stage then a regime of primary rules will be characterized by "uncertainty" and when that happens the rules "will require supplementation."

But if the rules are uncertain and require supplementation, how can they be rules? Hart's project would seem to be compromised even before it gets under way. The entire *point* of rules, after all, is to stand alone and provide a center (core, germ, embryon) to which all parties can turn in the event of disputes. If the rules are incomplete, if one cannot know even what they are without the aid of some supplementary elaboration, then rather than constraining interpretation, the rules—so called—provoke it. Hart, however, is not without resources, and he moves to anticipate just such an objection by introducing a new line of defense in the form of a set of "secondary rules," which, he says, will provide a "remedy" for the "defects" of the primary rules. Chief among these is the "rule of recognition," a "rule for conclusive identification of the primary rules," a rule that will provide an "affirmative indication" as to whether or not a primary rule put forward by some interest is, in fact, "a rule of the group."[24] In order to perform this function, a rule of recognition must be of "a different kind"[25] than other rules of the system, and much of Hart's discussion is an attempt to specify the difference. He finds it first in the fact that this rule is "inscribed, written down in a list" or "carved on some public monument," but he realizes at once that the fact of the inscription will not be sufficiently distinguishing, since writings can proliferate just as easily as oral sayings or undeclared beliefs. The "crucial step," he declares, is "the acknowledgment of reference to the writing or inscription as *authoritative,*"[26] and this happens when the rule of recognition has been "accepted."[27] But the notions of "acknowledgment" and "acceptance" are obviously and fatally at odds with the requirement that the rule be "ultimate" and "supreme,"[28] for a rule that depends on the acknowledgment and acceptance of those who are to be bound by it can fail in both respects. It could remain unacknowledged—go *unrecognized—and* it could be refused, perhaps

23. *Id.* at 90.
24. *Id.* at 92.
25. *Id.*
26. *Id.* (emphasis in original).
27. *Id.* at 97, 105.
28. *Id.* at 102, 103.

in favor of other candidates. In order to be a rule of recognition in the strong sense—and that is the only sense that will do the job—the rule must be capable of recognizing or announcing itself and it must *compel* rather than await acceptance. How can a rule be "a supreme criterion of validity"[29] if its own validity can either go unnoticed or become a matter of dispute?

The same difficulty attends Hart's second attempt to claim for the rule of recognition a special, privileged status. Here the claim is that the rule exists "on a different level"[30] from the other rules and from the system whose center or core it is. It is in the nature of the rule, says Hart, that when confronted by it, "we are brought to a stop in inquiries concerning validity: for we have reached a rule which. . .provided criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity."[31] Where other rules must "satisfy criteria" in order to be validated, "no such question can arise as to the validity of the very rule. . .which provides the criteria."[32] But the question has already arisen as soon as acknowledgment and acceptance have been made the criteria for identifying the rule of recognition; for these criteria bring with them precisely what the rule of recognition supposedly eliminates, an area of choice, and choice in turn brings with it the spectres of dispute, doubt and uncertainty, earlier named as the defects of the primary rules, defects which were to have been remedied by the rule of recognition. If that rule can itself go unrecognized or be refused, it is not the end, but the beginning of inquiry and we are no better off than we were before.

Throughout this section of his argument Hart knows that he must firmly demarcate the rule of recognition from the field it must regulate; it cannot, in other words, be a mere item in that field, but must precede it. Indeed, says Hart, "Even if it were enacted by statute, this would not reduce it to the level of statute; for the legal status of such an enactment necessarily would depend on the fact that the rule existed antecedently to and independently of the enactment."[33] The very "assertion that it exists can only be an external matter of fact."[34] That is, its existence is not a matter of inference or interpretation; it is, and must be, self-evident, immediately perspicuous. It "escapes the conventional categories used for describing a legal system, though these are often taken to be exhaustive."[35] But even as he asserts the independence and perspicuity of the rule, Hart gives a disturbing answer to the question of how it is to be identified. Given what is required of this rule, it is a question that should not even be asked, for to ask it is to deprive the rule of the adjectives "supreme" and "ultimate"

29. *Id.* at 103.
30. *Id.* at 94.
31. *Id.* at 104.
32. *Id.* at 105.
33. *Id.* at 108.
34. *Id.* at 107.
35. *Id.*

and to yield the supremacy to the agency contained in the answer. In this case the answer is, to say the least, surprising. If the identification of the rule or recognition "were doubted" (and even to admit this possibility is to lose the game), "it could be established," Hart says, "by reference to actual practice: to the way in which courts identify what is to count as law. . . ."[36] But surely this is to put the cart before the horse: Hart's entire argument depends on a rule that stands *apart from* the field of practice, a rule to which practitioners can turn when they are in doubt as to what to do, and a rule to which arbitrators can turn when different practitioners want to do different things. If, however, one can know the rule only by extrapolating from practice, then practice rather than being generated or tested by the rule is the source of the rule; and insofar as practice is itself unsettled—not at all points uniform and stable—there will not one but many rules and no *independent* mechanism for deciding between them. Once the rule of recognition recedes into practice it becomes not a matter of fact, but of interpretation, and the way is open to exactly the situation Hart hopes to avoid, the situation in which the law is what the courts say it is. For if one locates the rule by looking "to the way in which courts identify" it, then the actions of the court come first and rule second. In short, the rule of recognition is secondary in a sense much stronger than Hart intends; it is belated in relation to the activity it purports to govern, and that activity, rather than being constrained by the rule, makes and unmakes it in response to the opportunities afforded by power and occasion.

By "that activity" I mean, of course, interpretation, and the failure of the rule of recognition prompts me to formulate a rule of my own: Whatever is invoked as a constraint on interpretation will turn out upon further examination to have been the product of interpretation, or to put it in Hart's terms, although it is always possible to distinguish a settled core form the area of open texture that surrounds it, that core has itself been formed by the very forces it supposedly repels. While the distinction between core and penumbra can always be made at a particular moment, at another moment the *interpretive* conditions within which the distinction is perspicuous can be challenged and dislodged; if that happens the distinction will not so much disappear as it will take on a new *historical* form, one that is no less precariously in place than its predecessor. The point is one Hart makes himself when he observes that "canons of interpretation"—verbal directions designed to restrict interpretation's scope—"make use of general terms which themselves require interpretation;"[37] and once one sees this, one sees too that attaching canons to the canons—putting restrictions on the formulation of restrictions—will not remedy but merely extend the difficulty. No matter how many or what kinds of rules one promulgates, the scope of interpretation will not have been the least whit diminished; for each new attempt to control it will be the occasion for its exercise.

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36. *Id.* at 105.
37. *Id.* at 123.

Although Hart both sees and says this, he cannot quite grasp its implications, for he continues to believe that the inability of rules to constrain is only partial and that at the very least they serve to narrow the area in which interpretation can operate. Hart's argument is that a rule framed in the appropriately general terms (e.g., "vehicles are prevented from entering the park") will pick out "standard instances" of its application, and that these instances will constitute a set of "central" or "plain cases" in relation to which other, less clear, cases, can be classified. Thus someone "faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate," can proceed by considering "as one does who makes use of a precedent, whether the present case resembles the plain case "sufficiently" in "relevant respects."[38] The words "sufficiently" and "relevant" indicate Hart's awareness that the agent's discretion remains wide, but still it is a bounded area, marked off by a plain case that at once gives interpretation a direction and holds it in check.

As an account of what people do (line up present cases with clear, paradigm cases) this is impeccable, but as I read it, it is an account not of interpretation subdued, but of interpretation triumphant. The question is not whether there are in fact plain cases—there surely are—but, rather, of what is their plainness a condition and a property? Hart's answer must be that a plain case is inherently plain, plain in and of itself, plain independently of the interpretive activities it can then be said to direct. But it takes only a little reflection to see that the truth is exactly the reverse. A plain case is a case that was once *argued;* that is, its configurations were once in dispute; at a certain point one characterization of its meaning and significance—of its *rule—was* found to be more persuasive than its rivals. At *that* point the case became settled, became perspicuous, became undoubted, became plain. Plainness, in short, is not a property of the case itself—there is no case itself—but of an interpretive history in the course of which one interpretive agenda—complete with stipulative definitions, assumed distinctions, canons of evidence, etc.—has subdued another. That history is then closed, but it can always be reopened. That is, on some later occasion, the settled assumptions within which the case acquired its plain meaning can become unsettled, can become the object of debate rather than the in place background in the context of which debate occurs; and when that happens, contending arguments or interpretive agendas will once again vie in the field until one of them is regnant and the case acquires a new settled and plain meaning. So that while there will always be paradigmatically plain cases—Hart is absolutely right to put them at the center of the adjudicative process—far from providing a stay against the force of interpretation, they will be precisely the result of interpretation's force, for they will have been written and rewritten by interpretive efforts.

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38. *Id.* at 124.

Another name for this process is precedent. Hart thinks of precedent as a means of controlling an indeterminate present by reference to an already determined (and therefore determining) past. To quote again the key sentence, the agent who must decide considers "whether the present case resembles the plain case 'sufficiently' in 'relevant' respects." The question that is here elided is what does the plain case resemble; what is *it* like? Hart's answer, which he gives by not giving it, is that the plain case resembles itself, establishes its own configurations in relation to which later cases are either like or unlike it. But resemblance and its opposite—that is, sameness and difference—are not immanent in the object but emerge from the perspective of the differential criteria that inform perception. If I see two poems or two cases as similar, it will be because of the categories (of size, or period, or theme. . .) within which I search; were I to search within different categories (of sameness and difference), the relationship between the two poems or cases would be seen differently. Moreover, since each is known *in terms* of the relationship between them, the poems and cases would be different depending on the different categories of difference within which they are seen. What this means is that resemblance (or difference) is always a constructed *(i.e. interpretive)* phenomenon and therefore it can always be constructed again. In fact, that is what happens in the citing of precedents; the so-called plain case doesn't sit still, silently measuring the distance or closeness between it and the present case. Indeed the demands are made from either direction, for it is the interests and concerns of the present case that generate the pressure for comparison and dictate its terms; and it is in the light of the interests and concerns flowing from the present case that the "plain case" will then be constituted.

As a result, when the plainness of the settled case is characterized, the very terms of the characterization will have been set by the case that has yet to be settled; rather than the past controlling the present, the present controls the past by providing the perspective from which the two must be brought into line. The truth about precedent then is the opposite of the story we tell about it; precedent is the process by which the past gets produced by the present so that it can then be cited as the producer of the present. It is in this way that the law achieves what Ronald Dworkin calls "articulate consistency,"[39] a way of thinking and talking about itself which creates and re-creates the continuity that is so crucial to its largest claim, the claim to have an unchanging center that founds its authority. Articulate consistency is not a fact, but an achievement, something that is forever being wrested out of diverse materials which are then retroactively declared always to have had its shape. The court in *Cargill* fears that if the parol evidence rule is disregarded, the rule of law would give way to the power of those who are able to tell the most persuasive story; but that is already the *whole* of the law, whose collective story is continually being made up and then told both to the lay public and to the agents in the legal system,

39. R. DWORKIN, *Hard Cases,* in TAKING RIGHTS SERIOUSLY 88 (1977).

i.e., to the tellers. Again Hart himself admits as much when he discusses the ways in which courts can slip out of the net of precedent; the chief way is to "distinguish" the earlier case, to find that the scope of its rule is narrower than the concerns of the present case which can then be decided independently of it. All you have to do, Hart explains, is to think up "some legally relevant difference" between the two cases, and moreover, he adds, "the class of such differences can never be exhaustively determined." That is to say, the finding of difference is for all intents and purposes an unconstrained activity, an activity which once know no natural stopping point, an activity that cannot be stopped. Yet even though Hart makes this point he fails to see how fatal it is to his general project, and continues blithely on, asserting that "not withstanding these. . .forms of legislative activity"[40] courts are bound by a "vast number"[41] of determinate rules. But his own analysis tells us that the rules are determinate only to the extent that interpreters desire them to be; if the desires of interpreters change, they will always be able to give those rules a new shape and then to declare them determinate even as they are in the process of determining them.

At one point Hart comes very close to saying as much. He is discussing those situations in which it appears that courts are "exercising creative powers which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must itself be tested."[42] That is, at times courts seem to be themselves constituting the authority (the rule of recognition) they subsequently cite as legitimizing their actions. (Just this account has often been given of the American practice of judicial review.) It may be the case, says Hart, that "when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given."[43] In short, it may be, as I put it at the beginning of this chapter, that authority rests with whoever seizes an opportunity to act and then makes the action stick, that, as Hart observes, "all succeeds is success."[44] This is a remarkable statement which is perfectly congruent with my argument not for the denial of "cores" and "centers" and "authoritative marks," but for their status as historical constructions that are in place only so long as a more powerful construction has not yet dislodged them. But even as he moves toward this position Hart pushes it away by once again invoking the distinction between the settled core and the fringe area of doubt as if it were unproblematical. "[N]ot every rule," Hart points out (correctly), "is open to doubt on all points," and, he adds, "[T]he possibility of courts having authority at any given time to decide

40. Hart, *supra* note 1, at 131.
41. *Id.* at 132.
42. *Id.* at 148.
43. *Id.* at 149 (emphasis in orginal).
44. *Id.*

these limiting questions concerning the ultimate criteria of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of law, including the rules which confer that authority, raises no doubt. . .'"[45] Hart misses what is almost, and should be, his own point: while it is true that at any one time there are vast areas free of doubt which constitute a core of certainty, that core has been established by the very forces that it now (but *temporarily)* holds in bounds. It is still the case that what succeeds is success; it is just that one of the things success brings (for a time) are vast areas free of doubt. What must be remembered is that those areas rest on a foundation that is itself doubtful, *i.e. subject* to challenge, and therefore are in no sense (except the local sense of their ascendancy) determinate.

I could go on with this reading of *The Concept of Law,* but it would only reveal further variations on the pattern we have repeatedly seen: a mechanism is proposed with the claim that it will keep force—whether in the form of the gunman or the interpreter—at bay; and in each instance force turns out to be the content of the mechanism designed to control it. No matter how many layers of rules, plain cases, cores of settled meanings, precedents one puts in place, the bottom line remains the ascendancy of one person—or of one set of interests aggressively pursued—over another, and the dream of general rules "judicially applied"[46] remains just that, a dream. It would seem that Richard Rorty is right when he characterizes interpretation as an operation in which the agent— be he a judge or a literary critic—"simply beats the text into a shape which will serve his own purpose" and "makes the text refer to whatever is relevant to that purpose."[47]

Rorty's casually brutal language names the fear in response to which Hart and so many others mount their projects, the fear, first that nothing stands between the exercise of power and its victims, and, second, that the activities we engage in are finally meaningless. The point has been succinctly put by Wayne Booth: If disagreements are settled by "the most forceful means of persuasion," we are condemned "to a sense of ultimate futility in what we do," and we become successively and perpetually bound "to whichever suitor woos most winningly."[48] The alternative is, of course, to find a stay against the workings of persuasive power, and for most of those who have thought about the questions, that stay is some form of rationality, whether is be a logic, a special kind of language, a determinate rule, a monumental text, a neutral procedure. E. D. Hirsch sums up an entire tradition (which begins at least with Plato) when he declares it is "essential to distinguish hypotheses and evidence from the rhetoric used to convey them."[49] It is essential because rhetoric is by definition the forceful pres-

45. *Id.*
46. *Id.* at 202.
47. R. RORTY, THE CONSEQUENCES OF PRAGMATISM 151 (1982).
48. W. BOOTH, A RHETORIC OF IRONY 195 (1974).
49. E. HIRSCH, THE AIMS OF INTERPRETATION 154 (1976).

entation of an interested argument—rhetoric is another word for force—and what is desired is a way of neutralizing interest so that the decisions generated by the system will not be the product of any partial or partisan point of view.

It is just such a way that Hart seeks, but even if he were to find it (in some rule or precedent) he would only have done half the job, for the neutralization of interest is an interior as well as an exterior task. The success rhetoric may have in turning the mind away from purely rational considerations is a function as much of tendencies in the mind as it is of pressuring forces external to the mind; an illegitimate appeal can hardly have an effect if there is nothing to appeal to. (Remember, primary rules are necessary because of the human susceptibility to base actions). If genuine evidence is to be disentangled from partisan posturing, a corresponding separation must occur in the mind, lest the genuine go unrecognized. As part of its program to protect the individual from force, the law must also control, by neutralizing, the forces that live within the individual, the forces that, if left unchecked, would prompt him to the subversion of the very rules that offer him a world of security and stability. That is why those who, like Hart, argue for a neutral space in the world must also argue for a neutral space in the mind, one free of biases, prejudices and presuppositions. Thus Stephen Toulmin urges us to "discount" any "biases and prejudices" we may have to that we might act "in a disinterested way,"[50] and in a similar vein, Wayne Booth advises that we "develop a habit of great skepticism about one's own hypothesis"[51] and "[exercise] a healthy tentativeness about oneself and one's responses."[52] The advice seems sound until one thinks about acting on it. Just how does one distance oneself from oneself? With what part of oneself can one be tentative about oneself? The answer lies in the assumption by Toulmin and Booth of a *psychological* core that is the equivalent of the cores Hart finds in determinate rules, settled meanings, centrally clear cases, etc.; it is this core of rationality inside us that protects us from the pressure of our own convictions and predispositions. The danger represented by the predispositions, the danger of surrendering to illegitimate appeals, is exactly like the danger represented by the gunman in Hart's scenario. The only difference is that this gunman is in our heads, but that is finally no difference at all as Terry Eagleton makes clear when he equates being "forced mindlessly" into an action by an "ideological obsession" with the pressure of somebody "holding a gun to my head."[53] It is one thing, Eagleton adds, to be "convinced by the arguments and evidence," and quite another to hold convictions "because they are convenient. . .or fashionably eccentric." In the first case one is

50. Toulmin, *The Construal of Realty,* in THE POLITICS OF INTERPRETATION, 107 (W. Mitchell ed. 1982).

51. BOOTH, *supra* note 48, at 225.

52. *Id.* at 226.

53. Eagleton, *Ineluctable Opinions,* in THE POLITICS OF INTERPRETATION 376 (W. Mitchell ed. 1982).

"able to weigh the arguments" and become convinced in a way that is "'freer'"; in the second one is the victim of "a spontaneous ideological prejudice."[54] Of course, the source of that prejudice is oneself, and therefore one is, in a curious way, self-victimized. It follows then that in order to cease being a victim one must cease being oneself. That at least is the implication of Eagleton's odd phrase "forced mindlessly"; since what you are being forced by in his scenario are the beliefs and predispositions what now fill your mind, in order not to be so forced you would have to empty your mind of everything it contains, so that in Wallace Stevens' words, you would "have a mind of winter."

The problem with this strategy is simply that it is not possible to follow it; and, moreover, even if we could somehow follow it, the condition of being free from ideological control would be wholly disabling because there would be nothing either to be free *with* or *for. There* would be nothing to be free *with* because were every preconception, acquired belief, assumed point of view, opinion, bias and prejudice removed from the mind, there would be nothing left with which to calculate, determine and decide. There is nothing to be free *for,* because a mind divested of all direction—a mind not already oriented toward this or that purpose or plan or agenda—could not recognize any reason for going in one direction rather than another or, for that matter, for going in any direction at all. It is often claimed that reason itself is what is left when belief, preconception and prejudice have been set aside or discounted, but reason cannot operate independently of some content—of some proposition or propositions whose content is definitions, distinctions, and criteria already assumed—and that content will reflect some belief or attitude that will inform whatever outcome reason dictates. (This is to say, once again, that the "core" is always and already invaded by the penumbra.) I am aware that in so arguing I am asserting the identity of two entities that are often distinguished and even opposed, reason and belief. Indeed, it is not too much to say that the quest for a way of quarantining the process of law from force depends on that opposition; for if one defines knowledge as that which exists independently of any particular perspective, belief—which is another name for perspective—becomes a bar to its achievement. In this view beliefs are the property of partisan agendas and if one is to resist their appeal, an appeal that amounts to nothing less than coercion, one must distance oneself from them and neutralize their force. It is my contention that this is precisely what one cannot possibly do, and still remain a "one," a being with a capacity for action. In short, you can never get away from your beliefs which means that you can never get away from force, from the pressure exerted by a partial, nonneutral, nonauthoritative, ungrounded point of view.

We see then that the two strategies by which force is to be held in check fail in the same way. On the other hand there is the attempt to erect an *external* barrier—sometimes a determinate rule, or a plain case or a

54. *Id.*

settled meaning—but in every instance the barrier turns out to be indistinguishable from that which it would hold back; force is already inside the gate because it *is* the gate. On the other hand there is the attempt to perform an *internal* housecleaning, to remove from the mind the tendencies that correspond to force's appeal; but this turns out to be at once impossible and in a very literal sense *self-defeating,* since a mind so cleansed would have nothing inside it. The ideal of a mind that is insulated from pressure is as unattainable as the ideal of a rule that will be a stay against the assault of interpretive desires. The mind, insofar as it is anything, *is* a structure of pressures, of purposes, urgencies, interests already in place; and the rule, insofar as it is intelligible, is an extension of some interested agenda that cannot be kept out because it is already in. To the extent that the law is compelling, it is compelling in relation to the very prejudices and biases it supposedly neutralizes; the reasons for which we do something or refrain from doing something *are* reasons only by virtue of the preconceptions and predispositions we already have.

The conclusion is inescapable and it is the one I have repeatedly reached: The force of the law is always and already indistinguishable from the forces it would oppose. Or to put the matter another way: there is always a gun at your head. Sometimes the gun is, in literal fact, a gun. Sometimes it is a reason, an assertion whose weight is inseparable from some already assumed purpose. Sometimes it is a desire, the urging of a state of affairs to which you are already predisposed. Sometimes it is a need you already feel. Sometimes it is a name—country, justice, honor, love, God—whose power you have already internalized. Whatever it is, it will always be a form of coercion, of an imperative whose source is an interest which speaks to the interest in you. And this leads me to a second aphorism: not only is there always a gun at your head; the gun at your head *is* your head; the interests that seek to compel you are appealing and therefore pressuring only to the extent they already live within you, and indeed *are* you. In the end we are always self-compelled, coerced by forces—beliefs, convictions, reasons, desires—from which we cannot move one inch away.

Another way to put this is to say that while there are constraints on the will and therefore on interpretation, those constraints are *internal* to the will and do not provide a point of reference independent of it. By "internal" I mean something directly opposite to what Hart means when he distinguishes between the internal and the external "points of view" with respect to the imperatives of a legal system. In his analysis, one operates from the external point of view when one notes, in the manner of an anthropological observer, that "a social group accepts [certain] rules;"[55] one operates from the internal point of view when one "uses" those rules in determining one's everyday obligations. The internal agent need not, and characteristically does not, state the rules by which he is guided; his knowledge of them is more integral than that of the mere observer and is

55. Hart, *supra* note 1, at 99.

expressed in the way he applies them from moment to moment. To this I would object that neither of these "points of view" is genuinely internal. To be sure, they are different: in one the agent specifies the rules without being committed to them, while in the other, the agent is committed to the rules but does not (characteristically) specify them. Both agents, however, are in the same relation of *distance* to the rules in the sense that they could be held at arms length and examined; it is just that for one the examination or nothing of the rules is the end point of the activity; while the other goes on to use or apply them. The very words "use" and "apply" make my point, that the rules in Hart's picture are separate from a self that is free to employ them or not. The words "use" and "apply" signify instrumentality in relation to an independent actor; but what I have been arguing is that the actor is never is such a relation and that the imperatives to which he responds cannot be held at arm's length—cannot, in Eagleton's terms, be "weighed"—because they are constitutive of the actor's every gesture, including the gesture of weighing.

This is the only internal perspective worth the name (and indeed the only perspective there is: even the "external" observer does his observing from a vantage point he could not observe because it grounds him; his conclusions are no less internal than the conclusions of a community member) and it is the perspective Hart cannot endorse or even acknowledge because it leaves no room for a "core" or "center" to which the agent's prejudices and desires can be referred for judgment. It is in relation to that core and to the possibility of disinterestedly identifying it that Hart imagines a superior group of citizens who, unlike their less reflective fellows, do not obey the laws out of fear or habit, but "appraise" them "critically"[56] and obey them in a more self-consciously rational way. It is this self-consciousness that marks the Hartian internal point of view which is in fact the point of view achieved when the agent has purged himself of whatever is inside him in favor of a standard he prefers to his own. That is to say, Hart's internal point of view is an external point of view in disguise and, moreover, as I have repeatedly demonstrated, it is one that cannot be occupied.

In so saying I may seem to confirm Hart's fear of a world without order or principle, wholly given over to force in the form either of gunmen or of judges unconstrained in their actions or of wills unchecked by any core of rationality. But in fact the implication of my argument is that this fear is unrealizable and is based on an incorrect understanding of what force is and is not. What force is not is "mere" force, force unconnected with any agenda or program. Force is simply a (pejorative) name for the thrust or assertion of some point of view, and in a world where the urging of points of view cannot be referred for adjudication to some independent tribunal, force is just another name for what follows naturally from conviction. That is to say, force wears the aspect of anarchy only if one regards it as an empty blind urge, but if one identifies it as *interest aggressively*

56. *Id.* at 113.

pursued, force acquires a content and that content is a complex of goals and purposes, underwritten by a vision, and put into operation by a detailed agenda complete with steps, stages, and directions. Force, in short, is already a repository of everything it supposedly threatens—norms, standards, reasons, and yes, even rules. One could, of course, object (or complain) that such rules, standards and reasons are merely local and partisan and provide no mechanism for principled adjudication. But this would be to reinvoke the dream of a principle that was neutral— of a rule of recognition, or a centrally plain case or a core of settled meaning—and in response I could only offer once again the analyses of the preceding pages in which that neutrality is shown to be unavailable, both in its material and psychological forms. What I am trying to show now is that this state of affairs is in no way disastrous or even disabling; it appears to be disabling only if the alternative to neutrality is principled force—and it is my argument that there is no other kind—then the unavailability of neutrality simply does not have and *could not have* the consequences Hart fears. The absence of external or independent constraints only means that the constraints inherent in the condition of belief—the condition of having been persuaded to some vision, the condition of not seeking, but already occupying a position—are always and inescapably in force. The facts that you can never move one inch away from your beliefs means too that you can never move one inch away from norms and principles.

To be sure, this does not solve our practical problems, since we still are faced with the difficulty of adjudicating between beliefs in the absence of a calculus that is not itself a function or extension of belief. It is a difficulty that cannot be removed, but the fact that it cannot be removed does not condemn us to uncertainty and paralysis, but to conflict, to acts of persuasion in which one party attempts to alter the beliefs of another by putting forward arguments that are weighty only in relation to still other beliefs. By definition the career of persuasion is unpredictable and theoretically interminable; there is no guarantee that either party will be victorious although in some social structures—and the law is certainly one of them—victory is mandated in the form of the obligation to render a decision. But when victory occurs, whether by the surrender of one party to the party of which he now becomes a member or by jurisdictional fiat, it is always provisional; for since it has emerged from argument, from forceful urging of some partisan point of view, it is always provisional; for since it has emerged from argument, from forceful urging of some partisan point of view, it is always possible, and indeed likely, that what has apparently been settled will become unsettled, and argument will begin again.

Once again we reach a conclusion that seems to realize one of Hart's worst fears, in this case the fear of a legal (?) structure marked by the "mere temporary ascendancy of one person over another."[57] The burden of Hart's complaint falls on "temporary," for which we might substitute,

57. *Id.* at 24.

occasional, local, transitory, ad hoc, etc. It is not difficult to see why words like these are distressing; they run contrary to the assumption, so powerful in our legal culture, that what courts and judges do is extend into the present abiding principles of law and morality. This is the content, for example, of Ronald Dworkin's notion of "law as integrity" and of his distinction between principle and policy.[58] There are all kinds of good reasons why that assumption continues to inform the story the law tells about itself even as its history enacts quite another story. After all, the law could hardly advertise itself as resting on force (given that word's bad press) and still be accepted as law. Hart is right when he insists that it is the very essence of law to distinguish itself from force; and, moreover, that distinction is *real* insofar as it refers to a society's understanding of its foundational moorings in relation to the energies that would threaten to dissolve them. My point is that such an understanding, necessary as it is to the constitution of any society or community, is itself an artifact of time, a "mere temporary ascendancy" of one vision or agenda over its rivals, and that when that temporary ascendancy has been succeeded by another, the distinction between law and force will still be in force, but the content and distribution of its terms will be different. It is that succession of differences that makes up the law's history, a history that includes a claim of continuity that is belied by its own events.

Are legal actors then living out a lie, asserting as absolute what they should acknowledge as fragile and transitory? Not at all. Legal actors, like everyone else, live *within* the temporary ascendancies they at once affirm and undo (by endlessly modifying the givens that make action possible) and no analysis of their situation, even the analysis offered here, will remove them from it. That is to say, the acknowledgment that from the long run point of view law is inseparable from force is itself without force, since no one inhabits the long run point of view, and in the succession of short runs that make up our lives, the distinction between law and force is unassailable, although one can always assail the form it has presently assumed.

I say this to ward off a conclusion often reached on the left: That a recognition of the temporally contingent nature of our "fundamental" assumptions would lessen their force and make us less likely to surrender to them. But the conclusion is possible only if one makes the mistake (which I have called "antifoundationalist theory hope") of turning the recognition of contingency into a way of avoiding contingency, as if contingency acknowledged were contingency transcended. You may know *in general* that the structure of your convictions is an historical artifact but that knowledge does not transport you to a place where those convictions are no longer in force. We remain embedded in history even when we know that it is history we are embedded in, and while that knowledge may be satisfying in relation to alternative stories about our convictions (for example that they correspond or should correspond to the unchanging nature of

58. *See generally,* R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, *supra* note 39.

things), in relation to the particular convictions (including itself) by which we are not grasped and constituted, it is of no force whatsoever.[59]

59. This essay was completed before the publication of Robert N. Moles' *Definition and Rule in Legal Theory*. Professor Moles' emphasis differs from mine—he is interested in rehabilitating John Austin—but many of the points we make are complementary. For instance, Moles writes, "Hart's mistake is. . .to suggest that ways of thinking have some autonomous existence independent of the will and device of their human authors." R. MOLES, DEFINITION AND RULE IN LEGAL THEORY 103 (1987). Moles also writes, "If the. . .core elements. . .are merely an extrapolation from the practice of the courts, then they are too vague to be helpful." *Id.* at 119. Moles further writes, "The distinction between a 'literal' and a purposive approach presents us with a false dichotomy." *Id.* at 156. Finally, Moles writes,"'Distortion' is an inevitable feature of knowledge and cannot therefore have the perjorative connotations which may initally be suggested by the use of this word." *Id.* at 183.