

Rule-Following in Legal and Political Thought

LJST-253 (FALL 2011), MONDAYS, 2–4 P.M., CLARK 100

Handouts File

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N.B. This is an omnibus file of the handouts I distribute in class; the file will grow as the term proceeds. Those entries marked with an asterisk (*) have been revised in the light of our discussion. Check back often.

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1 Meeting 1: Sept. 7—Introduction*

“No Vehicles in the Park.”

- (i) A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called “vehicles” for the purpose of the rule or not? (Hart, 607¹)
- (ii) Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were *dumb*. (Hart, 607)
- (iii) What is it then that makes such decisions correct or at least better than alternative decisions? (Hart, 608)
- (iv) [H]e thought that in the penumbral situation judges must necessarily legislate, and [...] he berated common-law judges for legislating feebly and timidly and for blindly relying on real or fancied analogies with past cases instead of adapting their decisions to the growing needs of society as revealed by the moral standard of utility. (Hart, 609, praising Austin)
- (v) If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule “is aiming at in general” so that we know there is no need to worry about the difference between Fords and Cadillacs. If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park, or to save carefree strollers from injury, we know, “without thinking,” that a noisy automobile must be excluded. (Fuller, 663)

Questions.

- (1) What is in dispute between Hart and Fuller, as presented in the excerpts above?
- (2) How much freedom is there for the “classifier” in cases of “variants on the familiar”? Does this freedom cover just the “penumbral” cases, or all cases?

¹The citations for Hart and Fuller refer to their debate in the pages of the *Harvard Law Review* 71.4 (Feb., 1958): 593–672.

- (3) In what sense is the world “dumb”? Are there perhaps more than one such sense?
- (4) What kinds of answers might we give to Hart’s question in (iii)?

Now, in the light of your reflections on the Hart-Fuller debate, turn to a few passages from Wittgenstein, excerpted below.

Wittgenstein.

- [A] “There is a gulf between an order and its execution. It has to be filled by the act of understanding.”
 “Only the act of understanding can mean that we are to do THIS. The *order*—why, that is nothing but sounds, ink-marks.—” (PI §431)
- [B] Every sign *by itself* seems dead. *What* gives it life?—In use it is *alive*. Is life breathed into it there?—Or is the *use* its life? (PI §432)
- [C] How does it come about that this arrow \mapsto *points*? Doesn’t it seem to carry in it something besides itself?—“No, not the dead line on paper; only the psychical thing, the meaning, can do that.”—That is both true and false. The arrow points only in the application that a living being makes of it. (PI §454)
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- [D] A rule stands like there a sign-post.—Does the sign-post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it...? But where is it said which way I am to follow it; whether in the direction of its finger or (e.g.) in the opposite one?—And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground—is there only *one* way of interpreting them? (PI §85)
- [E] “But do you really explain to the other person what you yourself understand? Don’t you get him to *guess* the essential thing? You give him examples,—but he has to guess their drift, to guess your intention.”—Any explanation which I can give myself I give him too.—“He guesses what I intend” would mean: various interpretations of my explanation come to his mind, and he lights on one of them. (PI §210)
- [F] ... as if... there is always a gulf between an order and its execution. Say I want someone to make a particular movement, say to raise his arm. To make it quite clear, I do the movement. This picture seems unambiguous till we ask: how does he know that *he is to make that movement*?—How does he know at all

what use he is to make of the signs I give him, whatever they are?—Perhaps I shall now try to supplement the order by means of further signs, by pointing from myself to him, making encouraging gestures, etc. Here it looks as if the order were beginning to stammer. (PI §433)

[G] “But how can a rule shew me what I have to do at *this* point? Whatever I do is, on some interpretation, in accord with the rule.”—That is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning. (PI §198)

[H] “What you are saying, then, comes to this: a new insight—intuition—is needed at every step to carry out the order ‘+n’ correctly.”—To carry it out correctly! How is it decided what is the right step to take at any particular stage?—“The right step is the one that accords with the order—as it was *meant*.”—So when you gave the order +2 you meant that he was to write 1002 after 1000—and did you also mean that he should write 1868 after 1866, and 100036 after 100034, and so on—an infinite number of such propositions?—“No: what I meant was, that he should write the next but one number after *every* number that he wrote; and from this all those propositions follow in turn.”—But that is just what is in question: what, any stage, does follow from that sentence. Or, again, what, at any stage we are to call “being in accord” with that sentence (and with the *mean*-ing you then put into the sentence—whatever that may have consisted in). It would almost be more correct to say, not that an intuition was needed at every stage, but that a new decision was needed at every stage. (PI §186)

[I] This was our paradox: no course of action could be determined by a rule, because any course of action can be made out to accord with the rule. The answer was: if *any* action can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call “obeying the rule” and “going against it” in actual cases. (PI §201)

Questions.

- (a) What might it mean for a sign to be *dead*? Consider Hart’s claim that the world is in some sense *dumb*. What is the difference between a *word*, on the one hand, and an “ink-mark,” on the other? Better: The difference between a *sentence* and a series or *assortment* of ink-marks? Can one assess an ink-mark for correctness, or plausibility, or truth? Can we say of some “brute” happening (e.g., the collision of atoms in the void) that it was *correct*?
- (b) What is the “gulf” that W speaks of in [A]? And why must it be filled by the “understanding”?
- (c) In the light of [C] and [D], how might W answer Hart’s question in (iii)? If we are forced to make *interpretations* of *dead* things, are all interpretations on all fours with one another—are they all equally “valid”?
- (d) In the two articles that make up the famous Hart-Fuller exchange, Hart seems to claim that the possibility of communication hangs on “core” meanings. Are [E] and [F] criticizing or endorsing this kind of view?
- (e) Fuller in (v) appeals to notions of *intention* and *purpose* and *aim*, for the sake of making out grounds for a rule’s meaning. How does [G] put pressure on this view? And might it be applying the same pressure on Hart’s view?
- (f) [H] might be putting pressure on Fuller’s view, too—perhaps also on Hart’s. W here speaks of a seeming *decisionism*, where each application of a rule requires a fresh start, a new (relatively unbounded) decision. What contact is this point making with Hart’s view about the necessity, for judges, of “legislating”?
- (g) Many have called what is excerpted in [I] the crucial move in W’s reflections on rule-following. We shall aim over the course of the term to make sense of §201 of the *Philosophical Investigations*. But, for now, what might it possibly mean for following or understanding a rule *not* to require an interpretation?