Positivism and judicial decisions

drastically restated. The point must be not merely that a judicial
decision to be rational must be made in the light of some con-
ception of what ought to be, but that the aims, the social policies
and purposes to which judges should appeal if their decisions are
to be rational, are themselves to be considered as part of the law
in some suitably wide sense of "law" which is held to be more il-
uminating than that used by the Utilitarians. This restatement
of the point would have the following consequence: instead of
saying that the recurrence of penumbral questions shows us that
legal rules are essentially incomplete, and that, when they fail to
determine decisions, judges must legislate and so exercise a cre-
ative choice between alternatives, we shall say that the social
policies which guide the judges' choice are in a sense there for
them to discover; the judges are only "drawing out" of the rule
what, if it is properly understood, is "latent" within it. To call
this judicial legislation is to obscure some essential continuity be-
tween the clear cases of the rule's application and the penumbral
decisions. I shall question later whether this way of talking is

Figure 1 Hart, "Separation of Law and Morals", p. 612