BRIAN BIX

H. L. A. HART AND THE "OPEN TEXTURE" OF LANGUAGE*

ABSTRACT. H. L. A. Hart and the "Open Texture" of Language tries to clarify the writings of both Hart and Friedrich Waismann on "open texture". In Waismann's work, "open texture" referred to the potential vagueness of words under extreme (hypothetical) circumstances. Hart's use of the term was quite different, and his work has been misunderstood because those differences were underestimated. Hart should not be read as basing his argument for judicial discretion on the nature of language; primarily, he was putting forward a policy argument for why rules should be applied in a way which would require that discretion.

INTRODUCTION

In this article, I will offer a detailed analysis of H. L. A. Hart's discussion of "open texture". In *The Concept of Law*,[1] Hart argued for a position on judicial interpretation halfway between formalism and rule-scepticism.[2] H. L. A. Hart's middle position was based on (or, at least, justified by) a theory of the open texture of language.[3] This concept comes from the work of Friedrich Waismann,[4] which was in turn probably based on a constructivist view of language Ludwig Wittgenstein put forward in the early 1930s.[5] My analysis in this

* I wish to thank Joseph Raz and Gordon Baker for their helpful comments on earlier drafts of this article.

[1] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

[2] Id., pp. 121–44.

[3] Hart, *The Concept of Law*, pp. 120–32.

[4] See id., p. 249; Waismann, 'Verifiability', *Proceedings of the Aristotelian Society*, Supplementary Volume 19 (1945): 119–50.

[5] See Baker, 'Defeasibility and Meaning', in P. M. S. Hacker and J. Raz, eds., *Law, Morality and Society* (Oxford: Clarendon, 1977), p. 51 and n. 76.

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article will focus in turn on Hart's text and on its origins in the works of Waismann and Wittgenstein.

I.

In a chapter in *The Concept of Law* called 'Formalism and Rule Scepticism', H. L. A. Hart argued that legal rules, whether promulgated by a legislature or derived as the *ratio* of a prior case, characteristically have a core of plain meaning. The decision whether a rule applies to a particular situation often turns on delimiting the range of meaning of a general term. For example, the application of the rule, "No vehicles in the park", will usually turn on whether a particular object is a "vehicle" for the purpose of the rule (or whether a particular area is a "park" for the purpose of the rule). In plain cases, "the general terms seem to need no interpretation . . . the recognition of instances seems unproblematic or 'automatic', . . . there is a general agreement in judgments as to the applicability of the classifying terms."[6] However, in cases in the "penumbra" of the term's meaning (for the purpose of the rule), it no longer seems clear whether the general term should apply or not. "[T]here are reasons both for and against our use of the general term, and no firm convention or general agreement dictates its use."[7] The tendency of rules to have "a fringe of vagueness",[8] to become indeterminate in their application to borderline cases Hart calls the "open texture" of rules (and of language in general).[9] Hart added that the "open texture" of legal rules should be considered an advantage rather than a disadvantage, in that it allows rules to be reasonably interpreted when they are applied to situations and to types of problems that their authors did not foresee or could not have foreseen.[10]

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[6] Hart, *The Concept of Law*, p. 123.

[7] Id., pp. 123–24.

[8] Id., p. 120.

[9] Id., pp. 124–25.

[10] Hart, *The Concept of Law*, pp. 125–26. Compare Anthony Quinton's discussion of Waismann's idea of the "open texture" of concepts: "[T]he kind of linguistic indeterminacy it implies is a positive advantage. It allows for the continuous

In this chapter, Hart was concerned with the problem of social control through law, not questions of strategy or political theory, of how social control could best be effected, but the preliminary question of how social control could be possible. How can a government guide its population's actions on the basis of legislation and precedent, and to what extent will those means necessarily need supplementation? Hart stated: "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".[11]

Hart considers two forms of guidance, corresponding to two sources of law: examples, analogous to precedent, and verbal instructions, analogous to legislation.[12] Among those two, examples seem far less clear and determinate. When someone tells us to do as he does, we cannot be certain what aspects of his performance must be imitated and where deviation is condoned because irrelevant. Transforming the example into a verbal rule seems to avoid these problems. Now the citizen "only" need "'subsume' particular facts under general classificatory heads and draw a simple syllogistic conclusion".[13] However, Hart showed how general rules actually retain both the character and the problems of guidance by example. According to Hart, when the rule (for example, "No vehicles in the park") is enacted, both the legislators and the public have in mind a particular problem, particular situations that are to be brought about or avoided. In the "no vehicles" example, the image is of excluding normal motor-car, bus, and motor-cycle traffic from the park.[14] Interpretation of the rule is thus seen as similar to reading a rule off an example, here the example being the problem the legislation was meant to meet.

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development of a language to accommodate new discoveries, as exemplified by the progressive amplification of the scope of the concept of number from the positive integers to complex numbers." Quinton, 'Introduction', in F. Waismann, *Philosophical Papers* (Dordrecht: D. Reidel, 1977), p. xiii.

[11] Hart, *The Concept of Law*, p. 121.

[12] Ibid.

[13] Id., p. 122.

[14] Id., pp. 125–26.

Hart used a mixture of a "paradigm" and a "criteria" approach to meaning. According to Hart, our first move in defining a general term for the purpose of a rule is to invoke the image, example, or particular situation at which the rule was aimed. In interpreting the rule, "No vehicles in the park", we might begin by thinking "If anything is a vehicle a motor-car is one".[15] In deciding whether, for the purpose of the rule, "vehicle" applies to roller skates or toy cars, one would "consider . . . whether the present case resembles the plain case 'sufficiently' in 'relevant' respects".[16] We begin with the plain case or the paradigm (the motor-car) and then consider a list of criteria which allow us to begin to evaluate how similar a purported extension would be. For example, like a motor-car, roller skates make noise (but not nearly as much) and they threaten safety and order (though the threat is on a much lower scale). Further dissimilarities include the facts that roller skates are far smaller than motorcars and that they do not pollute the air. There are both similarities and dissimilarities; some criteria are fulfilled, others are not. In Hart's language, "there are reasons both for and against our use of a general term".[17] This is the "open texture" of rules, that particular situations arise that we were not thinking of when proffering the rule and which are different in some ways from the situation we had in mind (the paradigm) at that time.[18]

Sometimes the extension of a general term from the original paradigm case to a different case is clear, not because there are no differences between the two cases, but because the problem of extension has come up many times before, and a consensus has developed as to

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[15] Id., p. 123.

[16] Id., p. 124.

[17] Id., p. 123.

[18] Cf. White, 'What Can a Lawyer Learn From Literature?' (book review), *Harvard Law Review* **102** (1989): 2014, 2035:

> It is . . . the genius of law that it is not a set of "commands," but a set of texts meant to be read across circumstances that are in principle incompletely foreseeable. This is what it means to pass a piece of legislation, or to decide a case — or even to draft a contract — at one point in time, with the knowledge that it will in the future be brought to bear by others (or ourselves) in contexts, and with meanings, that we cannot wholly imagine.

whether the term should apply.[19] For Hart, the problem of "open texture" will recur regularly, because there are "fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack".[20] The slow building of a consensus about whether to apply a general term to particular, relatively common, borderline cases will do little to mitigate the problem of "open texture", for life will soon provide more uncertain borderline cases to replace those convention has transformed into "plain cases".

II.

I want to consider the intellectual origins of Hart's concept of "open texture". I will trace the concept back to the writings of Friedrich Waismann, and will also consider whether it can be traced one step further back to the work of Wittgenstein.[21] This account of "open texture", though analogous to Waismann's account that Hart credits,[22] differed from it in a number of ways.

To understand Waismann's concept of "open texture", it is useful to see it within the larger context of his work in general. Waismann's work was devoted largely to presenting Wittgenstein's ideas in a more accessible form; however, some of Waismann's concepts were his own

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[19] See Hart, *The Concept of Law*, p. 123: "The plain case[s] . . . are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms."

[20] Id., p. 123.

[21] While Hart's idea of "open texture" was derived from Waismann, his talk of "a core of certainty and a penumbra of doubt", Hart, *The Concept of Law*, p. 119, may have come from Bertrand Russell, though no attribution for those ideas was given. See Russell, 'Vagueness', in *Collected Papers of Bertrand Russell*, vol. 9 (London: Unwin Hyman, 1988), p. 149 ("The fact is that all words are attributable without doubt over a certain area, but become questionable within a penumbra, outside which they are again certainly not attributable."). (That article was first read to the Jowett Society in 1922, and published in the *Australasian Journal of Psychology and Philosophy* in 1923.)

[22] Hart, *The Concept of Law*, p. 249.

extension of Wittgensteinian ideas. The concept of "open texture" belonged to the second group; it exemplified his particular approach to the philosophy of language.[23] Waismann, like Wittgenstein, disagreed with the Realist approach to language but also distanced himself from many of the positions that had been offered as alternatives to Realism. For example, the concept of "open texture" was presented as an argument against the phenomenalist position that material object statements are equivalent to (can be reduced to) some combination of sense-datum statements.[24]

"Open texture" was introduced to elucidate a particular problem for verification theory.[25] It is because of the "open texture" of empirical concepts, Waismann argued, that material object statements cannot be translated into sense datum statements and that empirical statements cannot be conclusively verified.[26] "[A] term like 'gold', though its actual use may not be vague, is non-exhaustive or of an open texture in that we can never fill up all the possible gaps through which a doubt may seep in."[27]

Like Hart, Waismann wrote about uncertainty arising from situations we have not foreseen: ". . . there will always remain a possibility, however faint, that we have not taken into account something or other that may be relevant to [the] usage [of terms in the statement]; and that means that we cannot foresee completely all the possible circumstances in which the statement is true or in which it is false."[28] Elsewhere, Waismann wrote that a complete definition of a term cannot be constructed: because "we can never eliminate the possibility of some

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[23] *See* Quinton, 'Introduction', in F. Waismann, *Philosophical Papers*, pp. xii–xiii.

[24] Waismann, 'Verifiability', 120–21.

[25] Waismann, 'Verifiability', *Proceedings of the Aristotelian Society*, Supplementary Volume 19 (1945): 119–50. Cf. Margalit, 'Open Texture', in A. Margalit, ed., *Meaning and Use*, pp. 141, 149–51 (Norwell, Mass.: Kluwer Academic Publishers, 1979), suggesting that "open texture" also creates problems for the doctrine of possible world semantics.

[26] Waismann, 'Verifiability', 121–23.

[27] Id., 123. Waismann's original label for this idea, *die Porositaet der Begriffe*, id., 121 n. *, could be translated "the porosity of concepts".

[28] Id., 123.

unforeseen factor emerging", "the process of defining and refining an idea" to meet each new factor "will go on without ever reaching a final stage".[29]

To try to understand Waismann's argument better, I will consider similar arguments from his other writings. Though discussions of verification are often the context for Waismann's analysis of "open texture", the concept is not concerned primarily with problems in that area. In *The Principles of Linguistic Philosophy*,[30] Waismann seemed almost indifferent regarding the question of verification. He wrote: "We were asking the question whether the assertion that a ball is lying on the table can be finally verified. The answer to this question is that can be decided on our part by an arbitrary determination."[31] It all depends on what we mean by "verified", and there is no *a priori* reason, according to Waismann, to choose one approach over another. Under some approaches, the statement would never have final validity.[32]

Waismann argued that our language, as well as our usual approaches to verification, is organized to respond to normal background conditions and to the small-scale problems of everyday life. Our language and our grammatical rules do not serve us well if we start to imagine wildly unusual circumstances or deceptions of a Cartesian magnitude.[33] Here Waismann's comments are quite relevant to "open texture":

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[29] Id., 125.

[30] Waismann's long work, cited as often as an explication of Wittgenstein's ideas as it is to show Waismann's ideas. F. Waismann, *The Principles of Linguistic Philosophy* (London: Macmillan, 1965). There are two long segments in the work relevant to the concept of "open texture". See id., pp. 68–86, 221–25. It is difficult to date the material, as Waismann revised the text continually over the last decades of his life, at some places even incorporating or respondng to ideas from Wittgenstein's *Philosophical Investigations*. The text was not published until nine years after his death. Quinton, 'Introduction', in F. Waismann, *Philosophical Papers*, p. ix.

[31] Waismann, *The Principles of Linguistic Philosophy*, p. 74.

[32] Id., pp. 74–75.

[33] Id., pp. 75–76.

Anthony Quinton, in his reading of Waismann, chose to emphasize changes

The laws of any age are suited to the predominating characteristics, tendencies, habits and needs of that age. The idea of a closed system of laws lasting for all time, and able to solve any imaginable conflict, is a Utopian fantasy which has no foundation to stand upon. In actual fact every system of law has gaps which are, as a rule, noticed and filled out only when they are brought to light by particular events. Similarly we must admit that grammar is incomplete, and that should the circumstances arise we would make it more complete by introducing new rules to provide for such situations. No language is prepared for all possibilities. To deplore the insufficiency of language would be merely misguided.[34]

In a later chapter, he came back to a similar theme, but under the topic of definition, of delimiting concepts (whether there is "anything at all like an exhaustive definition – a definition which limits the concept in all possible directions?"[35]). He started by considering hypothetical strange situations: e.g., a table that everyone can see but nobody can grasp, and an element that reacted chemically like gold but emitted a new kind of radiation.[36] Again, his conclusions echo his comments on "open texture":

Try as we may, no concept is outlined in such a way that there is no room for any doubt. We introduce a concept and limit it in *some* directions; we say, for example, "This is gold" in contrast to silver, platinum, etc. This suffices for most practical purposes, and we do not probe any farther. We *forget* that there are other directions in which we have not limited our concept. And if we did, we

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in "background conditions" rather than the emergence of new circumstances unrelated to those background conditions:

Waismann's point is not so much that words of common speech are vague, that there are borderline cases in which we cannot decide whether to apply them or not, though he would not have denied that; it is rather that operative criteria for their application are in practice only satisfied when certain other conditions, not included among those criteria, are satisfied as well. What we should say in a conceivable case where the criteria are satisfied but the ordinarily accompanying conditions are not is thus indeterminate.

Quinton, 'Introduction', in F. Waismann, *Philosophical Papers* (Dordrecht: D. Reidel, 1977), p. xiii.

[34] Id., p. 76.

[35] Id., p. 222.

[36] Id., pp. 222–23.

could imagine hundreds of situations which would necessitate new limitations. Are our concepts therefore incomplete, inexact? But what then would be an exact concept? One which anticipated all cases of doubt, one which is outlined with such precision that every nook and cranny is blocked against entry of doubt? But then we have to own, that *no* concept satisfies this demand; and we begin to see that there is something utopian in the demand for absolute precision. A concept is good if it fulfils the purpose for which it has been devised.[37]

In the article "Language Strata",[38] Waismann argued that different types of statements — e.g., sense datum statements, material object statements, aphorisms, and natural laws — must be analyzed in different ways. "Statements may be *true* in different senses, *verifiable* in different senses, *meaningful* in different senses. Therefore the attempts at defining 'truth', or at drawing a sharp line between the meaningful and the meaningless, etc., are doomed to fail."[39] It is a mistake to try to apply the analytical tools of one language stratum to another, or to try to reduce one stratum to another (as Phenomenalism and behaviourism attempt to do[40]). Here, and throughout the article, Waismann's discussion of different language strata resembles Wittgenstein's discussions of different "language games".

There are two arguments in "Language Strata" relevant to the concept of "open texture". First, material object statements cannot be reduced to a collection of sense-datum statements: "a statement about a cat is a statement about a cat: and not a truth-function of sense-datum statements, or an infinite group of *sensibilia*, or heaven knows what".[41] Second, the description of material objects (as contrasted with, e.g., geometrical figures) is never complete:

However many features I may assert of a thing, say of this chair, or however

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[37] Id., p. 223.

[38] Waismann, 'Language Strata', in A. Flew, ed., *Logic and Language*, Second Series 11 (Oxford: Basil Blackwell, 1961). Though not published until 1961, the article is an unrevised version of the paper that had been read to the Jowett Society in 1946. Ibid.

[39] Waismann, 'Language Strata', p. 26.

[40] Id., pp. 28–29.

[41] Id., p. 29.

many relations I may state which hold between it and other things, or however many statements I may make about its life history, I shall never reach a point where my description can be said to be *exhaustive*, that is, such that no further increment in knowledge is possible. Any real thing is inexhaustible. My knowledge of it is always extensible. There is no maximum description.[42]

Both of these arguments coincide with arguments given in the article "Verifiability".

III.

Though Waismann's concept of "open texture" is said to derive from a middle period of Wittgenstein's thought, corresponding with the material eventually published as *Philosophical Remarks* and *Philosophical Grammar*,[43] related ideas remain in Wittgenstein's later writings as well. The following quotations are from *Philosophical Investigations*:[44]

> I say "There is a chair." What if I go up to it, meaning to fetch it, and it suddenly disappears from sight? – "So it wasn't a chair, but some kind of illusion." – But in a few moments we see it again and are able to touch it and so on. – "So the chair was there after all and its disappearance was some kind of illusion." – But suppose that after a time it disappears again – or seems to disappear. What are we to say now?[45]
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> It is only in normal cases that the use of a word is clearly prescribed; we know, are in no doubt, what to say in this or that case. The more abnormal the case, the more doubtful it becomes what we are to say.[46]

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[42] Id., p. 27.

[43] L. Wittgenstein, *Philosophical Remarks* (Chicago: University of Chicago Press, 1975); L. Wittgenstein, *Philosophical Grammar* (Oxford: Basil Blackwell, 1974).

[44] Which was first published eight years after the article which contained Waismann's primary discussion of "open texture".

[45] L. Wittgenstein, *Philosophical Investigations* (New York: Macmillan, 1958), section 80; cf. L. Wittgenstein, *Philosophical Grammar*, p. 220 ff.

[46] L. Wittgenstein, *Philosophical Investigations*, section 142; see generally G. P. Baker and P. M. S. Hacker, *Wittgenstein: Rules, Grammar & Necessity* (Oxford, Basil Blackwell, 1985), pp. 229–32. There is even one place where Wittgenstein seemed to be discussing an analysis similar to "open texture" in a legal context: "It is as if our concepts involved a scaffolding of facts."

Despite these surface similarities, Gordon Baker and Peter Hacker claimed that there is actually a large conceptual distance between Waismann's concept and the ideas of the later Wittgenstein, at one point stating: "according to the outlook of the *Investigations*", "Waismann's concept of open texture is doubly incoherent".[47] They offer two criticisms of Waismann's concept. First, that Waismann's "hypotheses" of material object statements inappropriately "transcend all possible experience".[48] The criticism refers to an earlier Wittgenstein comment:

> [H]ow can I even make the hypothesis if it transcends all possible experience? How could such a hypothesis be backed by meaning? (Is it not like paper money, not backed by gold?)[49]

Second, Waismann's concept allegedly "presupposes a distorted conception of what it is for a set of rules to be complete (or incomplete")."[50] I will consider the two criticisms in turn, in this instance not to determine whether Waismann's analysis is correct, but to determine whether or to what extent Waismann's analysis actually differs from that of Wittgenstein (as Baker and Hacker implied).

That would presumably mean: If you imagine certain facts otherwise, describe them otherwise, than the way they are, then you can no longer imagine the application of certain concepts, because the rules for their application have no analogue in the new circumstances. – So what I am saying comes to *this*: A law is given for human beings and a jurisprudent may well be capable of drawing consequences for any case that ordinarily comes his way; thus the law evidently has its use, makes sense. Nevertheless its validity presupposes all sorts of things, and if the being that he is to judge is quite deviant from ordinary human beings, then e.g. the decision whether he has done a deed with evil intent will become not difficult but (simply) impossible.

L. Wittgenstein, *Zettel* (Berkeley: University of California, 1970), section 350.

[47] G. P. Baker and P. M. S. Hacker, *Wittgenstein: Understanding and Meaning* (Oxford: Basil Blackwell, 1980), 383 n. 12.

[48] Id., p. 432.

[49] L. Wittgenstein, *The Blue and Brown Books* (Oxford: Basil Blackwell, 1958), p. 48.

[50] Baker and Hacker, *Wittgenstein: Understanding and Meaning*, p. 432.

I am not sure how the first criticism, "transcending all possible experience", pertains to Waismann. Waismann wrote that material object statements cannot be reduced to a long (or even an infinite) list of sense-datum statements and that our concepts always have the possibility of vagueness because we do not know how they would be applied in unforeseen (unforeseeable) situations. For Waismann, our concepts take into consideration all experiences we have had up to now; they do not, because they cannot, take into consideration experiences that we have not yet had or that we could not even imagine having. Wittgenstein's criticism, something "transcend[ing] any possible experience", thus seems singularly inappropriate here. In context, it seems clear that Wittgenstein's comment was directed at a different target altogether: those who believed that we could extend our knowledge beyond our experience through thought and logic.[51]

The second criticism, even if conceded, would only be a mild corrective to Waismann's approach. Waismann agreed with Wittgenstein that our concepts are not completely defined/fully delimited/completely verifiable, that this "ideal" could not be reached, and that this "deficiency" had no negative consequences for our use of language in normal circumstances.[52] The problem with Waismann's writings here from a Wittgensteinian point of view is that he did not then make the distinctive Wittgensteinian continuation: if it does not make sense to speak of there being a *complete* set of rules defining and delimiting concepts, then one should not characterize concepts as being "*in*complete" or "*in*determinate".[53] Though on this matter of characterization I find the Wittgensteinian approach slightly better, I see this dispute as only a matter of philosophical writing style.

Finally, Baker and Hacker attempt to rebut the concept of "open texture" by stating that "[i]t is internally related to the concept of hypothesis (*Hypothese*), being the correlate of the thesis that an hypoth-

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[51] See L. Wittgenstein, *Zettel*, section 260.

[52] See, e.g., Waismann, 'Verifiability', 123–26; F. Waismann, *Principles of Linguistic Philosophy*, pp. 76, 223; Waismann, 'Language Strata', pp. 26–28.

[53] See, e.g., Baker and Hacker, *Wittgenstein: Understanding and Meaning*, pp. 383, 432–33.

esis can be made only more or less *probable* by any relevant evidence . . .".[54] The belief that material object statements are "hypotheses" made more or less probable – but never completely verified or falsified – by our experiences apparently intrigued Wittgenstein during his "middle period"[55] and has some resonance with an early Waismann article, "Hypotheses", that was not published during his lifetime.[56] However, Waismann did not elaborate, or even mention, a "hypothesis" position in the later articles (discussed in detail above) where the concept of "open texture" was put forward.[57]

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[54] Id., pp. 383 n.12, 432. In their text, Baker & Hacker connected the discussions of "hypotheses" with the criticism of "transcend[ing] all experience". Id., p. 432. However, the connection is difficult to follow, for the passages from Wittgenstein cited for the criticism did not refer to the "hypotheses" approach. For example, *Zettel*, section 260, seems clearly to refer back to the immediately preceding sections, which do not deal with the "hypotheses" approach:

"Philosophers who think that one can as it were use thought to make an extension of experience . . . ."

"Generality in logic cannot be extended any further than our logical foresight reaches. . . ."

Zettel, sections 256, 258. The other citation, *Blue Book*, p. 48, discussed a particular problem in the philosophy of psychology (whether I should believe that other persons have the same sort of feelings that I do, and whether this belief should be characterized as a hypothesis), not a general "hypotheses" approach to material object statements.

[55] Baker and Hacker, *Wittgenstein: Understanding and Meaning*, p. 432. Wittgenstein's ideas about "hypotheses", and their similarities to some of Waismann's writings, can be seen by looking at F. Waismann, *Ludwig Wittgenstein and the Vienna Circle* (Oxford: Basil Blackwell, 1979), pp. 99–101, 158–62, 210–11 (the book contains Waismann's transcriptions of Wittgenstein's conversations with members of the Vienna Circle in 1929–1932); and L. Wittgenstein, *Philosophical Remarks*, pp. 200–201, 282–97.

[56] F. Waismann, *Philosophical Papers*, pp. 38–59.

[57] In recent private correspondence, Gordon Baker argued that even if the conceptual framework of "hypotheses" was not explicitly present in Waismann's discussions of "open texture", it is likely that this conceptual framework was presupposed by the discussions. This conclusion is based on the ability to trace back some parts of the article 'Verifiability' to earlier writings explicitly about the

IV.

Returning to Hart's adaptation of Waismann's analysis, what is different between the two concepts of "open texture" is the type of unforeseeability – the type of exceptional circumstances – that is being considered. In this, Waismann was far more extreme; he wrote of cats growing to gigantic sizes and people disappearing (asking 'how those events would affect our labelling of the objects as "cat" and "a friend" respectively).[58] When he referred to the "unforeseen", he meant "some totally new experience such as at present, I cannot even imagine" or "some new discovery . . . which would affect our whole interpretation of certain facts".[59] Compare this to Hart's legislators, who just happened to be thinking about motor-cars when they promulgated their rule about access to the park, but who certainly *could* have imagined the possibility of roller skates, skateboards, or golf carts in the park.[60]

One could connect the two conceptions by seeing Waismann's idea of "open texture" as Hart's idea taken to its limit. Imagine an extremely careful legislative draughtsman who spent many hours

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"hypotheses" approach (see Waismann, 'Hypotheses', reprinted in F. Waismann, *Philosophical Papers*, pp. 38–59, an article composed in 1936) and to Wittgenstein's dictation on "hypotheses" (see F. Waismann, *Ludwig Wittgenstein and the Vienna Circle*, pp. 99–101, 158–62, 210–21. Letters from Gordon Baker, 27 March 1990 and 8 May 1990.

However, Dr. Baker also wrote that he now shared my doubts about the contrast the Baker and Hacker text had drawn between Wittgenstein and Waismann. He wrote that he now had "qualms about whether the contrast between hypotheses and [Wittgenstein's later writings on] criteria is as sharp as I once thought them to be". Letter from Gordon Baker, 27 March 1990.

[58] Waismann, 'Verifiability', 121–22.

[59] Id., 127.

[60] A third analysis, which has a "family resemblance" both to Waismann's idea of "open texture" and Hart's idea of "open texture" was Waismann's discussion about whether the limits of certain concepts have been "anywhere determined accurately". He wrote that for some concepts one could speak of "a nucleus of meaning surrounded by a haze of indeterminacy". F. Waismann, *The Principles of Linguistic Philosophy*, p. 222.

listing dozens of objects that might be in a park and that might be considered vehicles, and then writing detailed classificatory clauses to clarify the original, "No vehicles in the park". At that point, the type of "unforeseen" situations for Hart would begin to resemble those for Waismann, and the reasons why judicial discretion could not be avoided in applying even the most meticulously drafted statute would begin to resemble (without actually reaching) the reasons Waismann gave for our not being able to define an empirical term completely.

V.

Hart argued from the "irreducibly open-textured" nature of language to the need for judges in some cases to make "a fresh choice between open alternatives".[61] Even if the conclusion (partial indeterminacy) follows from the premise (the "open texture" of language), the basis for that premise is not well-established in the text. "Open texture" is more asserted than argued for. Gordon Baker claimed that Hart's argument is circular: Waismann's notion of "open texture" derived from his argument/assumption that a term's sense is constituted by the rules governing its application and that no rule can be formulated in a way such that the rule's application is never in doubt; given that indeterminacy of application is built into the idea of "open texture", it is not surprising to find it as one of the idea's consequences.[62] Baker went on to note: "Although this is not generally recognized, the notion of open texture makes sense only within a particular form of semantic theory. . . . As a result it might well be impossible for Hart to incorporate it into his philosophy of law."[63] Searching for the philosophical presuppositions and consequences of Hart's concepts becomes even more complex if one believes, as I do, that his idea of "open texture" is in fact substantially different from Waismann's idea.

I do not think that Hart's conclusion of partial indeterminacy – in my view, summarized by more than based upon the idea of "open

[61] Hart, *The Concept of Law*, p. 125.

[62] Baker, 'Defeasibility and Meaning', in *Law, Morality and Society*, p. 37.

[63] Id., p. 37, n. 46; see id., pp. 50–57.

texture" – derived from a view of language so much as from a view of how people create and think about rules. Hart was not concerned about creating, elaborating, or defending a particular general philosophy of language. His concern was (descriptively and prescriptively) with the way that rules are applied and the way they should be applied. Hart had not proven from the nature of language that judges must have discretion;[64] rather, he gave reasons why legal texts should be interpreted in a way that leaves judges discretion in applying the law.

In Hart's discussion of "open texture", he often seemed to refer to words, sentences and rules interchangeably. This may reflect an inexactness in transcribing an idea, not being sufficiently careful in describing the idea's domain or scope. It may also reflect a tension within Hart's concept, which arose because he was adapting an analysis of descriptive terms (Waismann's "open texture") to an analysis of rules – and not just an analysis of rules as such, but analysis of the application of rules by judges in modern legal systems.

Waismann was writing about language in general; Hart was writing about language in the context of law – in particular, in the context of applying and interpreting rules – and the problems to which his ideas responded derive from that context. If while we are walking through the park, and my friend talks about "that vehicle" while pointing towards a toy car or a skateboard, I may find her usage strange or quaint, but I understand what she said; I can understand the use of the term "vehicle" to refer to an object to which that label is not usually applied. Because the extension (from the usual usage of the term) is not radical or bizarre, I do not react by correcting my friend, as I might if she had used the term "vehicle" while trying to refer to a banana or a book. A certain tolerance or laxness in the application of terms is beneficial in normal conversation; all is well as long as I think I understand roughly what my friend was trying to say and she thinks I understood roughly what she was trying to say.[65]

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[64] Cf. Baker, 'Defeasibility and Meaning', p. 37.

[65] See e.g., Davidson, 'On the Very Idea of a Conceptual Scheme', reprinted in D. Davidson, *Inquiries into Truth and Interpretation* (Oxford: Clarendon Press, 1984), p. 196.

The situation with commands, instructions, suggestions, and so on, is different. With such uses, because the focus is on the guidance of behaviour and because such sentences are often meant to be applied ("followed") on an indefinite number of occasions, the exact scope of the rule's application – determined at least in part by the exact scope of the rule's terms – is important. As Gerald Graff, in a slightly different context, wrote: ". . . the practical concerns of the law occasion the imposition of a number of artificial restrictions on interpretive procedure, restrictions that do not apply outside the legal context. These restrictions arise from practical, ethical considerations rather than epistemological ones. . . ."[66] When language is used to guide and coordinate behaviour, the problems of interpretation and meaning will necessarily be different from those that accompany language *qua* method of expressing one's thoughts and method of communication between persons.

Properly seen, Hart's approach was not based on a theory of language, at least not if that is defined as a theory about the meaning of particular terms. While Hart at times seemed to argue that something about language makes it inevitable that judges will have discretion, he seemed at other times to concede that judges could interpret rules in such a way that they would not have discretion. However, Hart argued, any such attempt to get rid of judicial discretion would have negative consequences (for example, an inflexibility, an inability to recharacterize the rules to meet changing circumstances).[67] Hart considered and rejected a way of clarifying the meaning of terms within rules based simply on language: attaching necessary and sufficient conditions which an object or event must satisfy if it is to be subsumed under that term.[68] The problems of focusing on particular terms as a way of understanding daily communication, let alone legal rules, was illustrated by Lon Fuller's "improvement" example. Fuller showed that the meaning of "improvement" in the sentence fragment

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[66] Graff, '"Keep off the Grass", "Drop Dead", and Other Indeterminacies: A Response to Sanford Levinson', *Texas Law Review* **60** (1982): 405, 411 (emphasis omitted).

[67] Hart, *The Concept of Law*, pp. 126–27.

[68] Ibid.

"all improvements must be promptly reported to . . ." cannot be understood outside the sentence's context (not only what the requirement relates to, but also who gave the order to whom, and what set of practices surround the situation).[69]

At this point, it is helpful to introduce a distinction between what meaning a writer (or speaker) tried to convey by his or her words, and what the words, considered by themselves, actually mean ("the well-known distinction between what a speaker means and what his words mean"[70]). This distinction appears in various forms throughout the philosophical literature. For example, the nineteenth century hermeneutic theorist Friedrich Schleiermacher wrote that an act of speaking had to be understood in two separate ways: in its relation to the language (that is, the meaning of the words spoken) and as an expression of the speaker's thoughts.[71] The distinction is also illustrated by the fact that we can understand malapropisms and code-name references.[72] The distinction appears as well, explicitly and implicitly, in many of areas of law.[73]

The distinction can be used to clarify even some of the more

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[69] Fuller, 'Positivism and Fidelity of Law', *Harvard Law Review* **71** (1958): 630, 664–67.

[70] Dummett, 'A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking', in E. LePore, ed., *Truth and Interpretation* (Oxford: Basil Blackwell, 1986), p. 460.

[71] Schleiermacher, 'General Hermeneutics', reprinted in K. Mueller-Vollmer, ed., *The Hermeneutics Reader* (Oxford: Basil Blackwell, 1986), p. 75.

[72] See Davidson, 'A Nice Derangement of Epitaphs', in E. LePore, ed., *Truth and Interpretation* (Oxford: Basil Blackwell, 1986), p. 433. As an example of code names, in American political rhetoric "States' Rights" has been used as a racist code word for racial segregation, and "cosmopolitan" in Eastern European rhetoric was (and still is) an anti-Semitic code-word for Jewish. An experienced observer hearing a politician from the American South refer to "States' Rights" would know that the politician meant to refer to racial segregation, and that the speaker knew that the relevant audience would understand the phrase that way, even though this was not the phrase's literal meaning.

[73] See e.g., J. W. Harris, *Law and Legal Science* (Oxford: Clarendon Press, 1979), pp. 132–43 (the "will model" and the "natural meaning model" as alternative "models of rationality" for justifying legal decisions).

obscure arguments in legal academic writing. For example, J. M. Balkin offered a "deconstruction" of the idea that a text has a clearly definable "core" of meaning independent of context, and only the text's "peripheral" meanings are affected by context. Balkin wrote: "If two parties have adopted a code for contracts involving livestock where 'cow' means 'horse,' the core meaning of 'cow' will shift radically. . . . [I]t is the 'normal' context in which we use the word 'cow' that gives us its 'core' meaning."[74] Balkin concluded that "core" meanings, like "peripheral" meanings, are context dependent. The problem with this argument is soon clear. Balkin's contracting partners are not using the English word "cow" in an "abnormal context"; in a sense, they are not using the English word "cow" at all. They could be described either as using the word "cow" incorrectly, or of using a language of their own, where the word "cow" has different rules for usage and different applications than it does in English.[75] In terms of the discussion above, we could distinguish the fact that (in English) the word "cow" means cow from the fact that these parties used the word to mean horse. If the point of Balkin's "deconstruction" is only that the meaning (the acontextual meaning, the "core" meaning) of a word can change as we move from a common language to an idiolect (e.g., from English to these parties' code) or from one common language to another (e.g., from English to French), then his point is correct, but not interesting.

VI.

Hart's discussion in *The Concept of Law* in the section on "open texture" seemed to rest halfway between emphasizing speakers' meaning and emphasizing words' meaning, and halfway between a theory of meaning and a theory of statutory interpretation. The

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[74] Balkin, 'Deconstructive Practice and Legal Theory', *Yale Law Journal* **96** (1987): 743, 780 n. 106.

[75] See Baker and Hacker, *Wittgenstein: Rules, Grammar and Necessity*, p. 332: "If one follows deviant grammatical rules it does not mean that one is saying something wrong . . . . Rather . . . one [is] speaking of something else (which one may have to explain), just as if one follows rules other than those of chess one is playing another game" (citation omitted).

approach focused on what the speaker meant (and resembled a theory of statutory interpretation) in that Hart seemed to want the judge to focus on the problem the rulemakers had in mind. However, Hart did not have the judge try to discover the rulemakers' aim from legislative (or judicial) records, but rather from the rule's words alone: rulemakers' aims as equated with the "clear examples" that fall under "the language used in this context".[76] Because the rulemakers formulated the rule the way they did, Hart implied, they must have had *those* cases (the "clear examples") in mind, "and [their] aim in legislating is so far determined because [they] have made a certain choice".[77]

For Hart, the rulemakers' aim is embedded in the language, and where the application of the words to a particular case is no longer clear, "[the rulemakers'] aim is, in this direction, indeterminate".[78] If Hart had been concerned only with what the rulemakers meant, or only with implementing their intentions, he would not have us reach that conclusion so quickly. He would have had us try to discover whether, the words the rulemaker chose notwithstanding, their aim might still have been determinable and determinate. He would have advised us to look through relevant records or to ask counterfactual questions (e.g., "even if the rulemakers had not considered the question of skateboards in the park, what *would* they have said *had* they thought about it?") to try to discover the rulemakers' aim. However, he did not do so.

On the other hand, Hart's approach was also not dependent solely on what the words meant. In fact, for Hart decisions can sometimes actually contribute to meaning: "[w]hen the unenvisaged case does arise" and we make our decision ("by choosing between the competing interests in the way which best satisfies us"), we will have "incidentally . . . settled a question as to the meaning, for the purpose of this rule, of a general word".[79]

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[76] Hart, *The Concept of Law*, p. 125.

[77] Ibid.

[78] Id., p. 126.

[79] Hart, *The Concept of Law*, p. 126. Cf. L. Wittgenstein, *Zettel*, section 120: "'This law was not given with such cases in views.' Does that mean it is senseless?"

One matter which may explain some of the more paradoxical and counterintuitive ideas in Hart's discussion here was his use of "we" throughout the relevant section: "*we* . . . frame some general rule of conduct", "*our* aim . . . is so far determinate", "*[w]e* shall have rendered more determinate *our* aim", and so on.[80] Hart's analysis of rule-application appeared to occur in a hypothetical context where the same person, group, or institution which had created the rule had the responsibility of applying it and modifying it. Such a situation is, first, far different from the most common situation in most legal systems, and second, far less troubling. The problems legal theorists face in the area of rule-application come largely from the fact that those who apply rules usually are applying rules written by someone else; in the American context, this means judges applying statutes and constitutional provisions or judges applying rules set down by other judges. Within such a context, one's view about how rules should be applied (interpreted, modified, supplemented) will depend on one's theory about the proper role of various institutions and the relationships among them. For example, those who see judges' role as merely implementing the will of the legislature,[81] and who believe that any judicial action that cannot be so characterized is illegitimate, would probably recommend an approach different from Hart's approach for facing an "unenvisaged case". (They would probably want judges only to make decisions that could reasonably be characterized as implementing the legislature's aims or values.)

Thirty years after he wrote it, Hart's short discussion of "open texture" and legal determinacy remains a rich and provocative text. However, to gain the most from Hart's discussion, we must disentangle the various strands: conclusions based on the nature of language, conclusions based on the nature of rules and rule-application, general recommendations for how rules could best be applied, and recommen-

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[80] Hart, *The Concept of Law*, pp. 125–26 (emphasis added).

[81] See e.g., R. Posner, *Law and Literature* (Cambridge: Harvard University Press, 1988), pp. 220–47.

dations for rule-application that are grounded in particular types of situations or particular views of institutional relationships.

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