University of Kent

Closing In on Open Texture

Morton Thornton

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Contents

Abstract

This thesis concerns the notion of 'open texture'. Originally introduced within the philosophy of language by Friedrich Waismann in 1945, open texture referred to a special type of 'possible vagueness' in language. Then, HLA Hart referred to 'the open texture of law' in *The Concept of Law* (1961). Hart's notion has since caused confusion within legal scholarship, as Hart is unclear whether he is referring to the same phenomenon as Waismann – that the open texture of the language used by law is what causes the open texture of law – or whether laws and rules are open-textured in a way similar to, yet distinct from, the open texture of language. In this thesis, I argue that Waismann and Hart are writing about different phenomena, for different purposes. Hart's open texture of law bears more similarity to legal scholarship about vagueness in the law generally, than to Waismann's anti-verificationist philosophy of language. Further, I argue that the confusion begins with the mistranslation of 'open texture' from the original German *Porosität der Begriffe*. This mistranslation fails to capture a fundamental aspect of the original phrase; that this 'porosity' is a feature of concepts in language specifically. Instead, translating *Porosität der Begriffe* to 'open texture' focuses on openness more broadly, thereby allowing theorists to apply the phrase to contexts beyond its original use. Thus, my thesis aims to provide clarity on open texture as a key aspect of Hart's thesis, refining its sense and scope, and counselling against its over-extension to the strict matters in question in Waismann's anti-verificationist philosophy.

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> At the core of these views, furthermore, there lies the thought that natural languages are fairly efficient tools of human communication, even if their words and sentences are characterised by a fringe of indeterminacy – the product of both ambiguity and several forms of vagueness (ranging from ordinary vagueness to 'open texture' or *Porosität der Begriffe*).[1]
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> Waismann argued that language is necessarily open-textured, but is there an open-texture to law distinct from, or at least going beyond, the open-texture of the language in which legal rules are written? Hart seemed to believe so, but it is not at all clear that Hart was right in believing so.[2]
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> The main difficulty in assessing Hart's mediation of the formalist-rule skeptic dispute is the lack of a precise and unambiguous statement of what open texture is.[3]
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I. Introduction

The idea of open texture, as a feature of language, was introduced in 1945 by Friedrich Waismann.[4] He used the term to describe a special type of 'possible vagueness' inherent in language,[5] which prevents us from being able to fully verify empirical

[1] Pierluigi Chiassoni, 'The Model of Ordinary Analysis' in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's* The Concept of Law (Hart 2013), 253.
[2] Frederick Schauer, 'On the Open Texture of Law' (2011) Virginia Public Law and Legal Theory Research Paper No 2011-35, 1 <https://ssrn.com/abstract=1926926> accessed 10 July 2023, 2.
[3] Bruce L Miller, 'Open Texture and Judicial Decision' (1972) 2 Social Theory and Practice 163, 163.
[4] Friedrich Waismann, 'Verifiability' (1945) 19 PAS Suppl Vol 119, reprinted in *How I See Philosophy* (Rom Harré ed, Macmillan 1968).
[5] I take 'possible vagueness' to be a convenient shorthand summary of Waismann's use of open texture. In the original text, he clarified that 'Open texture, then, is something like *possibility of vagueness*.' Waismann, ibid, 42.

concepts. [6] At the time, the prevalent philosophical theory of meaning was verificationism, which held that propositions are only meaningful if they are verifiable: 'Stating the meaning of a sentence amounts to stating the rules according to which the sentence is to be used, and this is the same as stating the way in which it can be verified (or falsified). The meaning of a proposition is the method of its verification.' [7] Waismann used open texture to refute this theory.

Open texture, *as a feature of law*, was introduced by legal scholar HLA Hart in 1961.[8] He claimed that the law exhibits open texture when novel and specific situations are not captured by the general language used in framing laws – situations where the court must interpret the law in question to determine the appropriate outcome. Precisely what Hart meant by the 'open texture of law' is, however, unclear: conflicting interpretations of Hart appear across the literature and there is no consensus on which interpretation is correct. Although Hart recognised open texture as a feature of language, in line with Waismann and citing him in the endnotes as the origin of the idea,[9] the confusion occurs when he then described it also as a feature of law. At this point, it is unclear whether he intended the open texture of law to be understood in the same way as the open texture of language but applied to law, or as its own separate phenomenon. If they are the same, then it follows that because language is open-textured, and because law uses language, then law must also be open-textured.[10] If they are different, then the law possesses open texture in a way similar to, yet distinct

[6] The significance of empirical concepts will be discussed later at section II.I.
[7] Moritz Schlick, 'Meaning and Verification' (1936) 45 The Philosophical Rev 339, 341. See also Friedrich Waismann, 'Logische Analyse des Wahrscheinlichkeitsbegriff' (1930) 1 Erkenntniss 228, 229: 'Kann auf keine Weise angegeben werden, wann ein Satz wahr ist, so hat der Satz überhaupt keinen Sinn; denn der Sinn eines Satzes ist die Methode seiner Verifikation.'
[8] HLA Hart, *The Concept of Law* (Clarendon 1961; 3rd edn, OUP 2012), 123-30. Henceforth, *Concept*.
[9] '*Open texture of verbally formulated rules*. For the idea of open texture see Waismann on 'Verifiability' in *Essays on Logic and Language*, i (Flew edn.), pp. 117-30.' Hart, *Concept*, 297.
[10] The literature is not settled on whether the adjective form of open texture should be hyphenated or not. For the sake of consistency, I shall use the hyphenated version, with the exception of direct quotation of the non-hyphenated version.

from, the open texture of language. Legal scholarship is divided on the issue, with as many sources referring to the open texture of legal language,[11] as to the open texture of law,[12] with some theorists even switching between the two ideas without paying attention to the potential implications of each of these interpretations.[13]

The scholars noted above are only those who have given some analysis, however brief, of what open texture is. Many others instead simply take it for granted that law is open-textured because Hart said so, and they make single passing mentions of the existence of open texture with no further explanation of what is meant by this.[14] Further still, some scholars argue that even if we do acknowledge the lack of clarity in Hart's work, we should just ignore it because open texture is irrelevant as a feature of

[11] E.g. Wilfrid J Waluchow, 'Hart, Legal Rules and Palm Tree Justice' (1985) 4 Law and Philosophy 41; Steven Walt, 'Hart and the Claims of Analytic Jurisprudence' (1996) 15 Law and Philosophy 387; Fernando Atria, 'Legal Reasoning and Legal Theory Revisited' (1999) 18 Law and Philosophy 537; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 Nomos 3; Shyamkrishna Balganesh and Gideon Parchomovsky, 'Structure and Value in the Common Law' (2015) 163 U Pennsylvania L Rev 1241.

[12] E.g. Ilmar Tammelo, 'Syntactic Ambiguity, Conceptual Vagueness, and the Lawyer's Hard Thinking' (1962) 15 J Legal Education 56; Robert S Summers, 'Professor H.L.A. Hart's Concept of Law' [1963] Duke LJ 629; Christopher Carey, 'The Shape of Athenian Laws' (1998) 48 The Classical Quarterly 93; Stephen V Carey, 'What Is the Rule of Recognition in the United States?' (2009) 157 U Pennsylvania L Rev 1161; Michael J Broyde and Ira Bedzow, 'Alternative Views of the Mishna Berura's Methodology' in *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berura* (Academic Studies Press 2014); Daniel Tigard, 'Judicial Discretion and the Problem of Dirty Hands' (2016) 19 Ethical Theory and Moral Practice 177.

[13] E.g. Anthony R Blackshield, 'Hart's Concept of Law' (1962) 48 ARSP 329; Noel B Reynolds, 'Dworkin as Quixote' (1975) 124 U Pennsylvania L Rev 574; Cass R Sunstein, 'Problems with Rules' (1995) 85 California L Rev 953; Christopher Forsyth, 'Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66 CLJ 325; Russell D Covey, 'Rules, Standards, Sentencing, and the Nature of Law' (2016) 104 California L Rev 447; Alexandre Travessoni Gomes Trivisonno, 'Legal Principles, Discretion and Legal Positivism: Does Dworkin's Criticism on Hart also Apply to Kelsen?' (2016) 102 ARSP 112.

[14] E.g. WJ Uren SJ, 'Criteria of Legal Positivism' (1969) 55 ARSP 183, 214; DN MacCormick, 'Dworkin as Pre-Benthamite' (1978) 87 The Philosophical Review 585, 591 & 594; Lyndall Lorna Tammelo, 'From Iusnaturalism to Eunomics via Conativist Ethics' (1981) 67 ARSP 92, 98; Peter Ingram, 'Maintaining the Rule of Law' (1985) 35 The Philosophical Quarterly 359, 262; Robert J Yanal, 'Hart, Dworkin, Judges, and New Law' (1985) 68 The Monist 388, 389; Richard E Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49 MLR 168, 190; Christine A Littleton, 'Review: *The Female Body and the Law*. By Zillah R. Epstein. Berkeley and Los 'Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging' (1992) 141 U Pennsylvania L Rev 371, 415, 417, 420, 439 (in footnotes); Eric G Zahnd, 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law' (1996) 59 Law and Contemporary Problems 263, 274; Peter Cane, 'Public Law in *The Concept of Law*' (2013) 33 OJLS 649, 667.

law anyway.[15] We have here the complete logical set: either open texture is worth our time or it is not; if it is then either it is a feature of legal language or of laws themselves; if not then this distinction does not matter.

Hart's own work is unhelpful on the matter, as it is unclear whether he is referring to the open texture of law as the same or a different phenomenon to the open texture of language. In using the phrase 'open texture', and by crediting Waismann with the origin of the phrase, it suggests he is borrowing a concept from the philosophy of language and using it in a new legal context. This change of contexts has made it unclear exactly what Hart means when he makes reference to the open texture of law. It is this use of a philosophy of language concept within a legal context that is the cause of the confusion within the scholarship, as Hart is unclear in exactly which discipline he is working. This is especially problematic because Hart is one of the most influential legal scholars in English history,[16] and similarly *The Concept of Law* is considered 'the most important work of legal philosophy published in the twentieth century' and has been a foundational text of legal scholarship since its publication over sixty years ago.[17] Open texture, while discussed in relatively few pages, is nonetheless a significant part of Hart's concept of law: to understand the role of the superior courts in a common law system, we must appreciate why there are gaps in the law that necessitate this adjudication – that reason being the open texture of law. As theorists continue to deploy the notion of open texture without properly understanding what it is or the implications it may have, so does this concept become muddied, its purpose overlooked, and its value lost.[18]

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[15] E.g. TAO Endicott, *Vagueness in Law* (OUP 2000), 37-38.
[16] '[H]is writings in philosophy of law join those of Hobbes and Bentham as the major contributions in English to that subject'. Joseph Raz, 'H.L.A. Hart (1907-1992)' (1993) 5 Utilitas 145, 156.
[17] Hart, *Concept*, back cover.
[18] This is exacerbated by the fact that few people now read *The Concept of Law* as a foundational legal text. While many law students may consider themselves familiar with Hart's ideas, little of this will be

In this thesis, I will begin with a detailed exposition of the open texture of language per Waismann and the open texture of law per Hart, closely following the original source texts and discussing the relevant contextual background. I shall then move on to explain the confusion around Hart's use of open texture in law. My analysis of Hart's account of open texture will show that he used the term in a way that differs significantly from Waismann's. In short, Hart's deployment of open texture refers to a different phenomenon in law, that does not correspond with Waismann's original use of open texture in language. I will demonstrate that the confusion within the literature originates from inaccurate and (I claim) inadequate translation of 'open texture' from the original German phrase *Porosität der Begriffe*.[19] By focusing on the *porosity*

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from the primary source. As Leslie Green notes, 'Like some other important books, however, Hart's is known as much by rumour as by reading.' Leslie Green, 'Introduction' in *Concept*, xv.

[19] My focus here is on English texts, where 'open texture' is the common translation of the German phrase, *Porosität der Begriffe* (literally 'the porosity of concepts'). English texts form the majority of the literature about Hart and Waismann, and are, unsurprisingly, most relevant to the English-speaking legal tradition about which Hart was writing. I do not address, nor have I examined, whether this issue of translation has occurred in other languages, whether those languages use their own equivalent translation of 'porosity of concepts', or if they borrow the English phrase 'open texture'. However, I shall note some brief observations: German literature tends to be clearer when discussing open texture, as it uses the original German phrase instead of the English translation (or it makes clear that 'open texture' is the English name for the phenomenon that has been described in German), and as a result, it adheres more accurately to a description of open texture as possible vagueness in language than to openness or porosity generally. For example:

> Die Einsicht in die Porosität der Begriffe, wie Waismann die Vagheit des Gebrauchsfeldes nennt, läßt das einfache Prinzip, wonach Wörter in ungewöhnlichem Gebrauch philosophische Aussagen sinnlos machen, als Vereinfachung erscheinen.
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> Walter Jung, 'Review: *Logic and Language*. First and Second Series. Edited by A.G.N. Flew. Oxford 1952 and 1953. Basil Blackwell.' (1955) 3 Philosophische Rundschau 101, 108.

> Waismanns Überlegungen zur Verifizierbarkeit naturwissenschaftlicher Sätze führen ihn zu dem Punkt, Schwierigkeiten des extensionalistischen Verifikationspostulates mit der generellen „Porosität" oder Offenheit der definierten Begriffe zu begründen. Damit ist keinesfalls Unbestimmtheit gemeint.
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> Christoph Hubig, *Dialektik und Wissenschaftslogik* (De Gruyter 1978), 169.

> Friedrich Waismann (1951) weist darauf hin, dass es auch für Begriffe mit scharfen Grenzen Zweifelsfälle bezüglich ihrer Anwendung geben kann. Ihm zufolge müssen nämlich nicht nur existierende, sondern auch *mögliche* Grenzfälle in Betracht gezogen werden. Diese *Möglichkeit der Vagheit* – die er von bereits vorliegender Vagheit unterscheidet – nennt er *open texture*, auf Deutsch *Porosität der Begriffe*.
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> Nora Kluck, *Der Wert der Vagheit* (De Gruyter 2014), 26-27.
> [All italics in quotations are from the original unless otherwise stated].

(openness) element of *Porosität der Begriffe*, and by ignoring the *of concepts* aspect, this (mis)translation,[20] I argue, strips open texture of its original context – that it was a feature *of concepts* – and so misleadingly implies that Waismann's open texture as a metaphor can be applied in other contexts beyond its original use. The application of 'open texture' in other contexts then raises questions of whether this is the same open texture that Waismann described as a feature of language, or if this is a different phenomenon. If it is the former, then how does it work in this new context? If the latter, then precisely what is the new phenomenon?

This thesis comprises five sections: following this short introduction, I begin in Section II with an exposition of Waismann's use of open texture as a feature of language. I shall set out his original theory, with reference to the contextual background from which his ideas developed, and remaining as exegetically close to his understanding of open texture as possible. Section III focuses on open texture in law: I shall set out Hart's account of open texture as described in *Concept*, as well as some interpretations of his work, showing examples of where this confusion on open texture has arisen. I then give a detailed analysis of Hart's open texture, identifying where he deviates from Waismann, and the consequences this has for our understanding of the open texture of law. Further, I discuss alternative interpretations of Hart's use of open texture and analyse their compatibility with Waismann's original use of the term. Section IV focuses on the issue of translation that I have briefly introduced above: I analyse the impact that this translation of 'open texture' has had on our understanding of the concept, giving examples for the importance of translation in understanding the

For further discussion on the issues of linguistic diversity and English as a lingua franca of philosophy, see e.g. Filippo Contesi, 'The Language of Contemporary Philosophy' in J Soler and K Kaufhold (eds), *Language and the Knowledge Economy in the European Context* (Routledge, forthcoming).

[20] While I have referred to this as a mistranslation of *Porosität der Begriffe*, this can equally be seen as a translation which simply omits half of the original phrase.

sense of a concept, and I pinpoint this as the source of the issues discussed throughout this thesis. I conclude in Section V.

This thesis is a work in analytic jurisprudence, and will utilise philosophical methods of analysis to understand the nature of open texture according to Waismann and Hart and how open texture has been treated within the literature. For my purposes, it is necessary to work within the same theoretical tradition as the original authors so as to properly understand their methods and intentions; as such, my thesis will also be philosophical in nature. However, this is a thesis in law, and the ideas discussed have direct relevance and application within the legal field. This thesis therefore represents the intersection of law with the philosophy of language.

Due to the range of both philosophical and legal ideas involved in this field, it is necessary to take an interdisciplinary approach to fully appreciate the value of both fields of thought, and understand when and where they can cross over. It would be difficult to fully appreciate the wider philosophical implications of these ideas if solely considered from a legal perspective, and likewise it would be difficult to understand the legal context of these ideas if solely considered from a philosophical perspective. It is through a consideration of all these factors that I argue for a more plausible conclusion concerning the nature of open texture in language and in law and why there has arisen so much confusion surrounding it. Throughout this thesis, and through close analysis of all the above questions, I endeavour to reach such a conclusion, and provide an answer for how we should understand open texture, both in language and in law. Importantly, I hope that by the end of this thesis, we will have been able to clarify why such confusion has come to exist, and identify the errors that have been made so that they can be corrected.

II. Waismann and the open texture of language

The early 1900s saw the foundation of a new philosophical movement, pioneered by Hans Hahn and Otto Neurath. They began with small meetings in Vienna coffee shops, where they met to discuss philosophy of science and epistemology. By the 1920s, these meetings became more regular and were led by Moritz Schlick at the University of Vienna, and now included attendees such as Schlick's student, Friedrich Waismann.[21] In 1927, and after some written correspondence, Ludwig Wittgenstein first met with Schlick, before later agreeing to meet with other group members, such as Waismann, Rudolf Carnap, Herbert Feigl, and Maria Kasper. 1928 saw the foundation of the Ernst Mach Society, led by Schlick, and with the aim of promoting the global hegemony of scientific explanation, inspired by their namesake. And in 1929, *Die Wissenschaftliche Weltauffassung* ('The Scientific Conception of the World') was published, being the first official publication under the new name coined by Neurath: *Der Wiener Kreis* – the Vienna Circle.[22]

The scientific 'logical positivist' philosophy of the Vienna Circle gained popularity and spread across Europe.[23] Central to this philosophy, and largely inspired by Wittgenstein's early philosophy of language in his *Tractatus Logico-Philosophicus*, was the Verification Principle, which held that whether or not a statement was meaningful in any way was dependent on whether it was empirically testable. If it could be tested – if it was verifi*able*, regardless of its truth value – then, so the

[21] For a historical and biographical account of these figures, see David Edmonds, *The Murder of Professor Schlick: The Rise and Fall of the Vienna Circle* (Princeton UP 2020), ch 3. See also Christoph Limbeck-Lilienau, 'Waismann in the Vienna Circle' in Dejan Makovec and Stewart Shapiro (eds), *Friedrich Waismann: The Open Texture of analytic Philosophy* (Palgrave Macmillan 2019).
[22] Brian McGuinness, 'Editor's Preface' in Friedrich Waismann, *Ludwig Wittgenstein and the Vienna Circle* (Brian McGuinness ed and trans, Joachim Schulte trans, Basil Blackwell 1979), 12-21.
[23] Albert E Blumberg and Herbert Feigl, 'Logical Positivism' (1931) 28 Journal of Philosophy 281, 281-82.

positivists said, the statement was meaningful. According to Ayer (one of the leading figures in this movement):

> We say that a sentence is factually significant to any given person, if, and only if, he knows how to verify the proposition which it purports to express – that is, if he knows what observations would lead him, under certain conditions, to accept the proposition as being true, or reject it as being false.[24]

Or, in the words of Wittgenstein: 'The sense of a proposition is its agreement and disagreement with possibilities of existence and non-existence of a state of affairs.'[25]

Despite the popularity of this empirical philosophy at the time, there were numerous problems with holding philosophy to such strict scientific standards, and by the middle of the century logical positivism had fallen out of fashion.[26] Wittgenstein's later work took a turn that was 'startlingly different in character' (albeit a development of the kind of work he had earlier been trying to achieve),[27] such that scholars passionately follow either his early or later work as completely separate philosophies.[28] Ayer, an influential positivist, many years later confessed that he now considered that much of what he had written was 'full of mistakes'.[29] Of all the logical positivists' ideas, the Verification Principle in particular attracted the most criticism, in part because of the difficulties of verifying analytic statements (those which are true by definition),[30] in part because no amount of evidence will ever conclusively verify a statement to be absolutely true, when only one piece of evidence would be required to refute such a

[24] AJ Ayer, *Language, Truth and Logic* (Gollancz 1936; Pelican 1971), 48. See also Schlick and Waismann (n 7).
[25] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (DF Pears and BF McGuinness trans, 2nd edn, Routledge & Kegan Paul 1971), § 4.2.
[26] 'Logical positivism, then, is dead, or as dead as a philosophical movement ever becomes.' John Passmore, 'Logical Positivism' in Paul Edwards (ed), *The Encyclopedia of Philosophy* (Vol 5, Collier-Macmillan 1967), 56.
[27] David Pears, *Wittgenstein* (Fontana 1971), 95.
[28] Ray Monk, *Ludwig Wittgenstein: The Duty of Genius* (Vintage 1991), ch 14.
[29] AJ Ayer in Roy Abraham Varghese (ed), *Great Thinkers on Great Questions* (Oneworld 1998), 49.
[30] See WV Quine, 'Two Dogmas of Empiricism' (1951) 60 The Philosophical Rev 20, 34-39.

statement.[31] By requiring sentences to be verifiable to be meaningful, meaning is held to an unrealistically high standard which we will often be unable to achieve, and if we are unable to meet that strict standard of verification then we will never be able to confirm whether any sentence has any meaning at all.

At the Joint Session of the Aristotelian Society and the Mind Association, Saturday 14th July 1945, Waismann, along with Donald MacKinnon and William Kneale, spoke at a symposium on 'Verifiability'. He is responding to a paper by MacKinnon, and it is here that he introduces the idea that he called *Porosität der Begriffe*, or the 'porosity of concepts', for which Kneale (helpfully, in the opinion of Waismann himself) coined the English translation 'open texture'.[32] Waismann's idea was that no matter how certain we are about the meaning of empirical concepts, there is always the possibility that some unexpected set of circumstances may occur which would cause the concept to become vague in the face of these new facts. In this way, and building on Popper's problem of induction,[33] concepts are never completely verifiable because even if we have done everything we can to ensure we are confident in our use of a particular concept, we can never rule out the possibility that something might happen that causes that concept to become vague. To illustrate this phenomenon, Waismann uses the example of a cat.

Consider, I am confident in my use of the concept 'cat'. I have no problem identifying things in this world that are cats (shorthair, Maine Coon, sphynx, etc) and differentiating those from things which are not cats (dog, toaster, Taj Mahal, etc); I can identify representations of cats as still being cats, and I can identify big cats as

[31] See Karl Popper, *The Logic of Scientific Discovery* (Springer-Verlag 1935, as *Logik der Forschung*; Hutchinson 1959), 40-44.
[32] Waismann, 'Verifiability' (n 4), 41.
[33] Popper (n 30).

being within the same genetic family as domestic cats. A concept or expression 'is vague if there are borderline cases for its application.'[34] I would not consider the concept 'cat' to be vague, because there are, to my knowledge, no borderline cases of almost-cats. When I am then asked to verify the statement 'there is a cat next door', what does it take for me to confirm that with absolute certainty? I can go and look at it, and see that it looks like a cat; I can touch it, and it feels like a cat; I can hear it purr, and it sounds like a cat; I could sample its fur for genetic testing, or do an X-ray scan, or monitor its behaviour – how many tests does it take to be sure this creature satisfies all the relevant characteristics of catness?

What, then, if this creature were to grow to a gigantic size, or sprout tentacles, or to exhibit some new and unexpected behaviour? But cats do not do this! So I am now conflicted whether to call this creature a cat, albeit one with extraordinary abilities, or not to call it a cat, because cats cannot do things like that. 'Have we rules ready for all imaginable possibilities?' asks Waismann.[35] Clearly not – it was such an absurd and unpredictable case that there is no reason why anyone should have foreseen it. Our concept had a clear definition, taking into account everything we know about cats, and was not vague in any way until this freakish event happened:

> "But such things do not happen." Quite so; but they *might* happen, and that is enough to show that we can never exclude altogether the possibility of some unforeseen situation arising in which we shall have to modify our definition. Try as we may, no concept is limited in such a way that there is no room for any doubt. We introduce a concept and limit it in *some* directions [...] We tend to *overlook* the fact there are always other directions in which the concept has not been defined. And if we did, we could easily imagine conditions which would necessitate new limitations. In short, it is not possible to define a concept like gold with absolute precision, i.e. in such a way that every nook and cranny is

[34] Endicott (n 15), 31.
[35] Waismann, 'Verifiability', 41.

> blocked against entry of doubt. That is what is meant by the open texture of a concept.[36]

Whichever decision I make, cat or not, does not matter for our purposes, but the emergence of this choice is enough to exhibit the open texture of 'cat'. Our concept was not vague, but in the face of this new development it has become vague. This is what it means to say that 'cat' is open-textured. Unlikely though this may be, we cannot rule out the possibility that some unforeseen event *could* happen which would cause a concept to become vague, regardless of how remote that possibility is. And it is this possibility that distinguishes open texture from ordinary vagueness – a distinction Waismann is very clear in making: a term with indeterminate boundaries is vague; open-textured terms are those which are *not* vague – they have clear boundaries – but *could become* vague if such an improbable – but nonetheless possible – case were to present itself, thereby introducing new boundaries that were not present before. Waismann, indeed, writes precisely this: '*Vagueness* should be distinct from *open texture*. […] Open texture, then, is something like *possibility of vagueness*.'[37]

The focus of this thesis, however, is not on Waismann, but rather on how his ideas have been (mis)used and (mis)understood in other contexts. Therefore, the following is not an evaluation of Waismann's theory or whether there are better ways of understanding the notion of open texture, but a comparison of his ideas against Hart's. It is necessary to adhere to Waismann's original account in order to accurately draw these comparisons. For this reason, I shall take 'possibility of vagueness', or 'possible vagueness', as a convenient shorthand understanding of Waismann's view of open texture that reflects how a presently non-vague term has the potential to become vague when confronted with new and unexpected circumstances.

[36] ibid 42.
[37] ibid 42.

II.I. Empirical concepts

Waismann is clear that open texture is a feature of concepts, and specifically empirical concepts (those which are testable through real-world experience). Thus, he writes: 'Open texture is a very fundamental feature of most, though not of all, empirical concepts, and it is this texture which prevents us from verifying conclusively most of our empirical statements.'[38] Much of the rest of his essay is dedicated to discussion of such empirical concepts and material object statements. We have already discussed the cat example, and there are no doubts that cats are indeed empirical objects, but Waismann continues with several other examples. For instance, the concept 'gold' is defined by its chemical properties, but what if we discovered something with all the properties of the element Au but which emitted a new type of radiation – is this a new type of gold or something else? Or, perhaps, what if I point at a person across the room and say 'that is my friend over there', but as I go to shake his hand he vanishes, only to reappear seconds later?[39] Is that really my friend or an illusion? I can describe the size, shape, colour, feel, bones, tissue, and so on, of my hand. Gold, my friend, and my hand are all empirical, synthetic, testable concepts that can be verified through experience. I shall take this opportunity now to briefly explore the implications of empirical and non-empirical concepts for open texture. While this may appear as a digression from the main discussion, it is important to cover this ground now in order that we have a comprehensive understanding of Waismann's open texture of language before considering the application of open texture within a legal context.

[38] ibid 43.
[39] This in particular bears similarity to Ludwig Wittgenstein's own example of a disappearing chair in *Philosophical Investigations* (GEM Anscombe trans, 3rd edn, Basil Blackwell 1969), § 80 (henceforth, *PI*). This will be discussed later at Section III.II.I.

Empirical concepts work well to exemplify the point Waismann was making about verification. Verification is about the discovery of truth, and it is easiest to discover the truth about empirical concepts because, according to logical positivists, they are scientifically and conclusively testable – they therefore provide strong evidence in support of the Verification Principle. Thus, in attacking this theory, by proving that verification is an inadequate test for empirical concepts, Waismann is toppling the Verification Principle's strongest pillar of support. If verification is inadequate for *even* empirical concepts, then so must it be inadequate for abstract concepts that cannot, by their very nature, be tested. But it is pertinent to take this opportunity to raise a point about non-empirical concepts, nonetheless. Consider mathematical concepts. Compare the above empirical examples to, say, geometry: I can describe a triangle by giving the length of the sides and size of the angles and my description is complete, there is no more information I can add that will tell us anymore that this is a triangle. Any other description I gave could tell us more about its general appearance (what colour is it, is it shiny?), but if there were more details such as another side then this would be a new shape and not the triangle I had described. Mathematical concepts are very clearly defined, and it is in their nature that they must necessarily be so. Unlike empirical objects, changes in the real world cannot affect abstract mathematical concepts, and their definitions necessarily remain fixed. We can therefore confidently exclude these from the types of thing which can have an open texture, because of what Waismann explicitly refers to as 'the *closed texture* of mathematical concepts.'[40]

[40] Waismann, 'Verifiability', 45.

In Waismann's *Principles of Linguistic Philosophy*, he asks these same questions about gold, and about disappearing tables,[41] and about how we are to define the boundaries of our concepts. He goes on to ask:

> Are our concepts therefore incomplete, inexact? But then what 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.[42]

Although we have seen above that Waismann accepts the closed texture of mathematical concepts, he is nevertheless here referring to *all* concepts and how they can never satisfy this utopian demand for precision. This is an issue that Waismann has examined elsewhere. In a series of articles published on analyticity, he examines what it takes for something to be analytic (true by virtue of its meaning) and comes up with a definition in terms of logical truth, and in terms of operators used to transform a sentence into a logical truth. However, he then adds that as a definition, this becomes dependent on the clarity of the definiens; meaning that the extent to which something is analytic is only as good as our definition of it:

> The accuracy of this definition will thus essentially depend on the clarity and precision of the terms used in the definition. If these were precisely bound concepts, the same would hold true of 'analytic'; if, on the other hand, they should turn out to be ever so slightly ambiguous, blurred or indeterminate, this would affect the concept of analytic with exactly the same degree of inaccuracy.[43]

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[41] See again Wittgenstein, *PI*, § 80.
[42] Friedrich Waismann, *The Principles of Linguistic Philosophy* (Rom Harré ed, 2nd edn, Macmillan 1997), 223.
[43] Friedrich Waismann, 'Analytic–Synthetic' (1949) 10 Analysis 25, (1950) 11 Analysis 25, (1951) 11 Analysis 49, (1951) 11 Analysis 115, (1952) 13 Analysis 1, (1953) 13 Analysis 73, reprinted in *How I See Philosophy* (n 4), 138.

So even what is analytic is not fixed and can still allow for some unclarity to seep in if we are not careful. Concepts which are true by definition are only as clear as those definitions. This is why mathematical concepts can have a closed texture, because they are necessarily tightly defined by mathematical rules. Other analytic or abstract concepts can only be as good as the definitions we provide for them; if our definitions have gaps, then so will these concepts. This reflects a bigger problem beyond just analytic concepts but with language as a whole: 'What lies at the root of this is something of great significance, the fact, namely, that language is never complete for the expression of all ideas, on the contrary, that it has an essential *openness*.'[44] This point is echoed too in 'Verifiability' when Waismann mentions the '*essential incompleteness* of an empirical description.'[45] As Shapiro and Roberts note, in this essay Waismann presents an account of language which goes far deeper than the open texture we have looked at so far.[46]

Our focus here, though, is not on analyticity, and so I shall not continue this discussion further. It was necessary to discuss this now, however, to emphasise the context of Waismann's open texture theory, and situate it within his broader philosophy of language. The wider points about openness in language generally and in analytic language, interesting though they are, do not directly affect our understanding of open texture. Open texture, as Waismann has presented it, is a feature of empirical concepts which prevents us from ever being able to verify them. Openness in analytic concepts may well be connected to this, but analytic concepts are already harder to justify under the Verification Principle because of the difficulty in verifying something

[44] ibid 199.
[45] Waismann, 'Verifiability', 43.
[46] Stewart Shapiro and Craige Roberts, 'Open Texture and Analyticity' in Makovec and Shapiro (n 21), 207.

which is true by definition.[47] Analytic concepts are therefore the easy target to take down the Principle of Verification, whereas it still has some legs regarding empirical concepts which are easier to test. Waismann did not need to dwell on the easy target if he wanted to show the flaws with verification; rather it would be more productive for him to focus his criticism on the harder target that is empirical concepts, because if the Principle of Verification is still not adequate as a theory of meaning against the type of words it is most suited to, then it is very unlikely to be adequate for anything else. Further, although Waismann does speak of openness generally in relation to language as a whole, he does not say anything about open texture. Open texture, as we have discussed, is the very specific type of possible vagueness, and that is a feature of empirical concepts. It will be important to remember this context as we go on.

III. Open texture in law

In his 1961 book, *The Concept of Law* (henceforth, *Concept*), HLA Hart introduces the notion of the open texture of law. He credits Waismann with the origin of the phrase in the philosophy of language: '*Open texture of verbally formulated rules*. For the idea of open texture see Waismann on 'Verifiability' in *Essays on Logic and Language*, i (Flew edn.), pp. 117-30.'[48] Here, he uses the phrase to describe a feature of law. Hart notes how in a common law system, it is necessary for legislation to be written in general language, so as to apply to a broad range of situations over an extended period of time. As a result, although many cases will fall clearly within the scope of a particular law, there will inevitably be some cases where it is less clear whether a law applies to a particular situation or not, because the language of the rule is not more specific, lest it

[47] See Quine, 'Two Dogmas of Empiricism' (n 30).
[48] Hart, *Concept*, 297.

have such a narrow application as to be of relatively little use. Hart explains this with reference to clear 'core cases' of a rule's application, and unclear 'penumbra cases':

> All rules involve recognizing and classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture'[.][49]

Open texture in law, therefore, is this existence of core and penumbra cases of a rule's application. To illustrate this open texture, Hart uses his now classic example of a law which prohibits the driving of vehicles in a park.[50] Such a law obviously prevents motor cars driving through parks, so if I drive through Hyde Park in a family Ford, we can be fairly certain I am in violation of this rule. Would we be so certain if I were riding a bike? What about a unicycle? Or driving a remote-controlled toy car? Roller skates? Do these violate the rule against vehicles? These each share similarities to a car, but also have many significant differences.[51] Are they vehicles? It seems unlikely lawmakers would have wanted to prevent people cycling or playing with toy cars in parks.

A car, therefore, represents a core case of what is a vehicle – we can be certain that if anything is a vehicle then a motor car is one. Bicycles, unicycles, toy cars, and roller skates are then penumbra cases, where it is uncertain whether or not the rule applies to these cases, because the generality of the language of the rule is not clear

[49] ibid 123.
[50] 'It is the most famous hypothetical in the common law world.' Frederick Schauer, 'A Critical Guide to Vehicles in the Park' (2008) 83 NYU L Rev 1109, 1109.
[51] Hart explains the adjudicative process as being dependent on judging similarities and differences between core and penumbra cases: 'all that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case "sufficiently" in "relevant" respects.' Hart, *Concept*, 127.

enough to specify if these are in fact instances of the disputed term (in this case, a vehicle). It is easy to draw the conclusion in parallel to Waismann, that the law is therefore open-textured, just like 'cat', because its application is capable of being made uncertain in these new and unusual, or unforeseen, circumstances. Rules 'will, at some point where their application is in question prove indeterminate; they will have what has been termed an *open texture*.'[52]

While the above explanation may seem simple enough at first glance, discrepancies appear upon closer examination. When Hart refers to the open texture of law, does he mean the open texture of the language used in the law, or that the law itself is open-textured in some way? Does the law exhibit open texture inasmuch as the term 'vehicle', like any other empirical concept, is open-textured, or is the law as a whole open-textured in a way parallel to, yet distinct from, the open texture of the language within it, because its application is indeterminate? There is no consensus as to which is the correct interpretation. For instance, Anderson argues that 'Hart was not arguing specifically that law-*qua*-rules is open-textured; he was arguing that the *language* employed by law – like any other natural language – is open-textured'.[53] Schauer, on the contrary, describes open texture as a feature of laws, when 'rules that seem now to be neither under- nor over-inclusive with respect to their background justifications retain the prospect of becoming so. The most precise of rules is potentially imprecise'.[54] Hart is not clear on the matter either, stating that open texture is a feature of language,[55] but also stressing the open-textured character of legal

[52] Hart, *Concept*, 128.
[53] Scott Anderson, *Legal Contextualism: Law's "Open Texture" as Contextual Vagueness* (Verlag Dr Müller 2011), 66.
[54] Frederick Schauer, *Playing by the Rules* (Clarendon 1991), 35.
[55] Letter from HLA Hart to Brian Bix (16 July 1991), in Bix, *Law, Language, and Legal Determinacy* (Clarendon 1993), 24.

rules.[56] Bix suggests that Hart's description of open texture 'seemed to rest half-way between emphasizing speaker's meaning and emphasizing words' meaning, and half-way between a theory of meaning and a theory of statutory interpretation'.[57]

Following Hart, the concept of 'open texture' has frequently been adopted in legal scholarship, but usually in the simplistic way described above, taking it for granted that law is open-textured because Hart said so, and with no consideration for, or acknowledgement of, the differences between Hart's and Waismann's accounts of open texture. Even a cursory glance over the legal literature on open texture will show many such examples: 'They saw opportunities to engage with the open texture of the law — the fact that existing laws might not cover particular fact situations and the availability of different canons of interpretation that determine the applicability of particular laws';[58] 'the need to find the most pertinent dimension(s) of resemblance to precedent obviously serves to make the law quite open-textured. […] [T]ort law is chock full of standards and is as open textured as any area';[59] 'The intentional torts involve behavior that some would describe as self-evidently wrong, which suggest that they are at least subjective or open textured';[60] 'The UK's constitution is dependent upon deep historical forms of power that are fundamentally obscure and open textured.'[61] Clearly the phrase is being used in a different way from Waismann's use of 'open texture' such that open texture is not only a property of language and concepts, but of laws, of the field of tort law, of torts themselves, and is even a property of deep historical forms of power, however that works.

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[56] HLA Hart, 'Answers to Eight Questions' in Duarte d'Almeida, Edwards, and Dolcetti (n 1), 281.
[57] Bix, *Law, Language, and Legal Determinacy* (n 55), 22.
[58] Tan Seow Hon, 'Birthing the Lawyer: The Impact of Three Years of Law School on Law Students in the National University of Singapore' [2010] Singapore JLS 417, 420.
[59] Benjamin C Zipursky, '*Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law' (2011) 60 DePaul L Rev 473, 496.
[60] Christina Carmody Tilley, 'Tort Law Inside Out' (2017) 126 Yale LJ 1320, 1343.
[61] Sebastian Payne, 'The Supreme Court and the *Miller* Case: More Reasons Why the UK Needs a Written Constitution' (2018) 107 The Round Table 441, 441.

Alternatively, some theorists simply dismiss open texture as irrelevant, or ignore it completely. Marmor's book on *The Language of Law* contains whole sections about types of vagueness in law but makes no mention of open texture.[62] Makovec and Shapiro's book of collected essays on Waismann, specifically subtitled *The Open Texture of Analytic Philosophy*, only contains three of fifteen essays which directly focus on open texture.[63] Endicott too is very dismissive of the relevance of open texture in law:

> Legal philosophers following Hart have fastened on Waismann's distinction [between *vagueness* and *possibility of vagueness*], and struggled to make something of it. [...] I have defined "vague" to apply to an expression if there are actual *or possible* borderline cases of its application. That stipulation seems to cost us nothing, because no one has ever shown that the distinction has any consequences at all for jurisprudence. [...] In any case, there is so much actual vagueness in law that possible vagueness does not need concern us.[64]

While I disagree with the haste of Endicott's dismissal, I am inclined to agree with his conclusion, though I shall develop this idea further over the following sections. How is it that there is such a lack of clarity in our understanding of the open texture of law compared to our understanding of the open texture of language, and why is it that open texture, as a metaphor, does not seem to translate across different contexts?[65]

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[62] Andrei Marmor, *The Language of Law* (OUP 2014).
[63] Makovec and Shapiro (n 21).
[64] Endicott (n 15), 37-38.
[65] Many of these same issues with the lack of clarity in Hart's open texture are also identified by Ana Escher, 'The Concept of Open Texture in "The Concept of Law"' (2023) Lisbon Public Law Working Paper Series No 2023-03 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4530348>. She traces this unclarity back to the origins of the concept, comparing Hart's accounts to the ideas of Waismann and Wittgenstein. I agree with much of this. We diverge where she suggests open texture developed from Hart's earlier references to defeasibility, whereas I suggest that Hart used 'open texture' to refer to ordinary vagueness in law. On defeasibility, Hart said: 'the law has a word which with some hesitation I borrow and extend: this word is "*defeasible*" used of a legal interest in property which is subject to termination or "*defeat*" in a number of different contingencies but remains intact if no such contingencies mature.' Hart, 'The Ascription of Responsibility and Rights' (1949) 49 PAS 171, 175. I disagree that open texture developed from defeasibility, as the 'contingencies' which Hart gives to demonstrate open texture are ones where the application of a law becomes uncertain (i.e. *vague*), rather than it being defeated in some way. For more on this idea, see Frederick Schauer, 'On the Supposed Defeasibility of Legal Rules' (1998) 51 Current Legal Problems 223, 234-37. Legal *interests* in property, however, *are* capable of being 'defeated', such as through estoppel or overriding interests (see e.g. *Crabb*

III.I. Hart's open texture: use and meaning

Let us now examine Hart's account of open texture more closely. In doing so, I shall compare Hart's account of open texture to that of Waismann, at which point the differences between them should become clear, and the issues with Hart's use of Waismann's metaphor should become more obvious. Introduced at the end of Chapter Six, Hart first elaborates on the notion of open texture in Chapter Seven of *Concept*, under the sub header 'The Open Texture of Law'. To describe this feature of laws, he begins by introducing the idea that when interpreting the meaning of laws, there are some cases to which the law plainly does apply, and some which are less clear:

> There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable ('If anything is a vehicle a motor-car is one') but there will also be cases where it is not clear whether they apply or not. ('Does "vehicle" used here include bicycles, airplanes, roller skates?') The latter are fact-situations, continually thrown up by human nature or invention, which possess only some of the features of the plain cases but others which they lack.[66]

Rules are expressed in authoritative general language, in order to apply as broadly as possible, but this language only allows us to pick out a clearly identifiable plain case and still leaves doubt as to what else could fall within the scope of the rule. Hart continues, a couple of pages later:

> Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.[67]

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v Arun District Council [1976] Ch 179 (CA), *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 (HL), and Schedule 3 of the Land Registration Act 2002).

[66] Hart, *Concept*, 126.

[67] ibid 128.

This is the second time Hart uses the phrase 'open texture', and the first time he properly explains what it involves, namely that laws which are not indeterminate can prove indeterminate when their application is questioned. Laws are created to govern standards of behaviour, and as such they use general language. The result of this is that although a law's application will be unproblematic in the majority of cases, there will inevitably be some point where a new situation presents itself, when it becomes unclear whether that law should apply in this new situation or not. There will be clear cases where the law would be applied and penumbra or borderline cases where we are not sure, and it is at *this* point, in the presence of these borderline cases, where their application will be in question, and 'they will have what has been termed an *open texture*.'

Here is where the line between Waismann and Hart begins to blur. Waismann's original use of open texture was as a feature of language: he suggested that language is open-textured because words which are not vague have the potential to become vague in uncertain situations. This distinguishes open texture from other types of vagueness, giving it a clear purpose as a feature of language. Hart's argument is that law is open-textured because laws whose application is ordinarily certain can become uncertain when faced with a new situation. Structurally, the two descriptions appear the same – things which are not vague can still become vague – except one refers to words and the other to laws. Assuming that words and laws are functionally equivalent, then there should be no problems here, if that is what Hart is arguing. Except that there are two significant assumptions in that sentence, neither of which I believe is correct.

First of all, it is not entirely clear if this *is* what Hart is saying. We have already seen how some theorists have very different interpretations of what Hart's argument

is. As I have described it, quoting passages from Hart's own text, it appears that Hart is arguing for the open texture of law in the same way that Waismann advocated the open texture of language; that is, that the law itself (and not the language it uses) is open-textured in a similar way to how language is open-textured. The open texture of law is something similar in structure to the open texture of language, but it runs parallel to it, both addressing the same phenomenon of openness but applied to different subject matter. Hart's book includes the subheading 'The Open Texture of Law',[68] which would certainly lead one to infer that Hart was referring to the open texture of law, and not of, say, language. Hart describes, in the passage quoted above, that 'Whichever device, precedent or legislation,' will eventually prove indeterminate and therefore have an open texture, suggesting that he is attributing open texture to these devices, precedent and/or legislation – namely, law. One would be justified in seeing titles like 'The Developing Idea of "Open Texture" of Language and Law',[69] or 'On the Open Texture of Law' and reading sentences like 'H.L.A. Hart and others have argued that law is open-textured',[70] and thinking that Hart does indeed make the argument for the open texture *of law*. Schauer argues that Hart's examples demonstrate that he was not referring to language but to laws: 'That there is something about law, or more precisely about legal rules, that seems to Hart analogous to the open texture of language, but which is not simply the open texture of language, is suggested by the no-vehicles-in-the-park example.'[71] (I will examine the use of examples more closely in Section III.II). All of these things would be reasonable assumptions to make, and so it is that Hart is known for his theory on the open texture of law.

[68] ibid 124.
[69] Brian Bix, 'Waismann, Wittgenstein, Hart, and Beyond: The Developing Idea of "Open Texture" in Language and Law' in Makovec and Shapiro (n 21).
[70] Schauer, 'On the Open Texture of Law' (n 2), 1.
[71] ibid 9.

But the view that Hart takes open texture to be a feature of law is not universally accepted within legal theory. Some theorists have instead read Hart's arguments from a different perspective. Scott Anderson, for example, claims that 'Hart was not arguing specifically that law-*qua*-rules is open-textured; he was arguing generally that the *language* employed by law – like any other natural language – is open-textured', and that 'Hart's detractors … have mistakenly assumed that Hart was promoting the open texture of legal *rules*, rather than the open texture of legal *language*.'[72] On Anderson's reading, law is not open-textured *parallel to* the open texture of language, but law is open-textured *because of* the open texture of the language it employs. Brian Simpson makes a similar observation about Hart's use of open texture: 'It is central to understanding *The Concept of Law* that Hart is arguing that these metaphors capture an inescapable feature of *language*, one which explains, for example, uncertainty in the applicability of rules'.[73] Like Anderson, Simpson's focus here is on the open texture of legal language which explains the open texture of law. Brian Bix's chapter on Hart and open texture is entitled 'H.L.A. Hart and the "Open Texture" of Language',[74] not on the open texture of law. Given Waismann's original focus on language and the fact open texture was specifically a feature of language (*der Begriffe* – of *concepts*), it would make sense that Hart – following Waismann and citing his influence on this idea, and being a part of the linguistic philosophical tradition at the time[75] – would have understood that open texture was a feature of language, and so when adapting it to describe a phenomenon in law, would have kept it true to its original purpose, *per* Waismann.

[72] Anderson (n 53), 66.
[73] AW Brian Simpson, *Reflections on* The Concept of Law (OUP 2011), 116.
[74] In Bix, *Law, Language, and Legal Determinacy* (n 55).
[75] See David Sugarman, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32 J L Society 267, 273-74, and Marta Almeida, '*The Concept of Law* as Ordinary Language Philosophy' (PhD Thesis, University of Kent 2016).

Or perhaps it was Hart's intention to suggest that the open texture of the language of law is what causes the open texture of law. Hart's later work is a little clearer on the matter, saying in 1970 that *Porisität der Begriffe* is:

> a most important feature of most empirical concepts and not merely legal concepts, namely, that we have no way of framing rules of language which are ready for all imaginable possibilities [...] As we can never eliminate such possibilities of unforeseen situations emerging, we can never be sure of covering all possibilities. We can only redefine and refine our concepts to meet the new situations when they arise.[76]

Although he does mention rules here, Hart's focus is on concepts, including legal concepts, which will be refined and redefined as necessary to deal with new circumstances. This focus on concepts is clearer evidence that for Hart, open texture was indeed a feature of language. But the clearest explanation of Hart's own thinking comes from his response to Brian Bix's interpretation of his work, to which he said:

> I certainly did *not* think I was saying something applicable only to the language of *statutes* or *rules* or *statutory* interpretation etc. My view was (and is) that the uses of *any* language containing empirical classificatory general terms will, in applying them, meet with borderline cases calling for fresh regulation. This is the feature of language called 'open texture'.[77]

According to Hart himself, then, the focus should be on language, both ordinary and legal – language being open-textured ordinarily, therefore legal language is as well. This later response comes with the benefit of time and hindsight, with Hart having had opportunity to reflect upon and clarify his position on open texture, before reiterating that it was the same as Waismann's (namely regarding the open texture of language), and that this therefore had impact on the law. If we accept this position, then the

[76] HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence' in *Jherings Erbe: Göttinger Symposium zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering* (Vandenhoeck & Ruprecht Verlag 1970), reprinted in *Essays in Jurisprudence and Philosophy* (Clarendon 1983), 274-75.
[77] Hart, letter to Bix (n 55), 24.

dispute is settled; both Waismann and Hart were referring to the same open texture of language. The open texture of law is not a new phenomenon, but simply the same linguistic feature present in the language used by law. And this is from Hart himself, so why would we have reason to doubt it?

One reason to doubt it might be by reading Hart's own earlier work. While he may have retrospectively clarified his ideas, there are nonetheless inconsistencies with his previous writings. For example, Hart stated in an interview in 1988 that 'I stressed the "open-textured" character of many legal rules',[78] which appears opposite to his later remarks in 1991. Further back, looking at what Hart said in *Concept*, even more contradictions arise:

> It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question of whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives.[79]

Firstly, it is noteworthy that Hart's 'detailed rule' bears great similarity to Waismann's statement that 'it is not possible to define a concept like gold with absolute precision, i.e. in such a way that every nook and cranny is blocked against entry of doubt,'[80] showing further parallels between Hart's and Waismann's accounts of open texture. However, more confusing is how Hart describes law's 'dependence on language as it actually is, with its characteristics of open texture'. On its face, this may appear to support Hart's claim that he was referring to the open texture of the language of the law. Except that is not quite what Hart says. While he does indeed emphasise

[78] Hart, 'Answers to Eight Questions' in Duarte d'Almeida, Edwards, and Dolcetti (n 1), 281.
[79] Hart, *Concept*, 128.
[80] Waismann, 'Verifiability', 42.

the open texture of the language necessarily employed by law, there is a key phrase which draws attention away from this point: '*apart from* the dependence on language as it actually is…' (my emphasis). By including this exception, the focus is taken off of the open texture of language, thereby showing that the true focus should be on the rules, separate to language. So, to repeat his sentence, but removing this exception clause: 'It is, however, important to appreciate why we should not cherish, even as an ideal, the conception of a rule so detailed that the question of whether it applied or not to a particular case was always settled in advance'.

Having removed the reference to the fact language is also open-textured – a point with which we already know Hart agrees – the sentence now proposes that we cannot settle the application of rules, therefore making Hart's focus on the open texture of *laws*, and not, as he later claims, the open texture of *language*. Furthermore, in this passage, Hart is explaining the reason '*why* we should not cherish' the clearly detailed rule. The reason for doing so, of course, being open texture. But does he mean the open texture of the rules themselves or because of the language they use? From the context of that sentence, and for the reasons discussed above regarding the 'apart from' clause, it would seem that he meant the open texture inherent in laws themselves. However, if we trust Hart's later explanation, then maybe he really did mean to distinguish, as Anderson and Simpson do, the open texture of *legal language* 'apart from' *general language*. In the effort to uncover Hart's true intentions, a cursory examination of his own work is not helpful.

A further issue with the open texture of law, often overlooked, is whether Hart meant the open texture of law or of law*s*. So far, we have been discussing the open texture of *laws*, plural; that is, individual rules are open-textured, and these individual rules function in the same way as individual words do within the context of sentences.

But all references to legal open texture, such as Hart's own subheading, are to the 'open texture of law' in the singular form, so perhaps open texture should better be seen as a feature of *law* as an entire practice, rather than of the individual laws which make up the whole system. This is not a mere issue of pedantry: depending which interpretation Hart intended, there would be different consequences for how they function. Law as a discipline, being an abstract concept, could not begin to be verified in the same way as empirical concepts, so it is unclear how it could exhibit open texture in the same way as the empirical concepts that Waismann was so clear to focus on.[81] Likewise, we cannot consider the application of a specific law to novel circumstances if we are discussing the discipline of law *as a whole* instead of individual legal rules. When people do speak of the open texture of law in the singular, it is likely that there are gaps within the practice because of gaps in the individual rules. Because open texture is a property of its component laws, it is therefore a property of the discipline of law as a whole. We should be careful, however, not to leap to conclusions. As David Lyons notes:

> Contrary to open texture theory, the indeterminacy of law cannot be inferred from the indeterminacy of its ordinary rules. The open texture of general terms is one thing, the open texture of rules is another, the open texture of law is something else again. The first may imply the second, but neither the first nor the second (nor the first and second together) imply the third.[82]

Whichever of these objects Hart wishes to attribute open texture to, be it law, laws, legal language, or general language, it must be remembered that they are all very distinct and function in different ways, so would have very different consequences for how open texture would work. Open texture as a metaphor does not nicely transfer

[81] See discussion above, Section II.I.
[82] David Lyons, 'Open Texture and the Possibility of Legal Interpretation' (1999) 18 Law and Philosophy 297, 300-01.

across to all different subject areas, which, in turn, raises a pertinent issue: if the metaphor must be amended in some way to fit the new subject matter, because it no longer works in precisely the same way as the original, then we must consider whether or not we are still talking about the same phenomenon. If we need to change the structure of the explanation that drastically in order to apply it to different things, then it is possible that the metaphor simply does not work in this new context, and we should not try to force it. Instead, we must accept that what we are describing, though similar, is in fact a different phenomenon, and should be treated as such.

III.II. Problem of examples

Significant differences between Waismann and Hart's use of 'open texture' appear when we analyse the examples they use to illustrate the phenomenon. As we shall see, Hart's use of vehicles-in-the-park as an example, while superficially similar, is substantially different from that of Waismann's cat. Hart's example is of a law prohibiting vehicles in the park, which presents us with clear cases of vehicles (e.g., motor cars) which would violate the rule and penumbra cases where we are not sure whether the object in question is a vehicle for the purpose of this law or not (e.g., bicycles).[83] These penumbra cases may not be immediately obvious to the lawmakers

[83] Hart, *Concept*, 126. This example bears similarity to the case of *McBoyle v United States* 283 US 25 (1931), which concerned whether stealing an aeroplane amounted to the theft of a vehicle under the National Motor Vehicle Theft Act, 18 USC § 408 (now § 2311). (It did not – though aircraft were later added to this Act; see *Statutes at Large*, 24 Sept 1945, ch 383, §§ 2, 3, 59 Stat 536). Schauer speculates that Hart learned of this case during his 1956-57 trip to Harvard Law School, possibly from Fuller himself, though Hart's first published use of this example is a year prior to this. Schauer, 'A Critical Guide to Vehicles in the Park' (n 50), 1115. Hart does cite the case of *Wells v Owners of the Gas Float Whitton No 2* [1897] AC 337 (HL) as a second, comparable example to vehicles in the park, which may be its true origin. Hart, 'Theory and Definition in Jurisprudence' (1955) 29 PAS Suppl Vol 239, 259. The case concerned whether a floating metal structure incapable of propulsion was a ship or vessel under the Merchant Shipping Act 1894, for the sake of recovering compensation for its salvage. Many similar cases have occurred since, see e.g. *DiGiovanni v Traylor Bros, Inc* 830 F Supp 106 (DRI 1993) (is a barge a 'vessel' for the purpose of suing for negligence under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 USC § 905(b)?); *Stewart v Dutra Construction Company, Inc* 543 US 481 (2005) (is a dredge a 'vessel' under the LHWCA § 905(b)?); *R v Goodwin* [2005] EWCA Crim 3184,

at the time of writing, only to present themselves as and when that situation occurs, at which point the courts must step in to determine the appropriate outcome. Although the penumbra cases may appear similar to the sort of freak occurrences which demonstrate the open texture of a term, their presence in law is in fact reflective of a different type of indeterminacy, which is highlighted even more in comparison of Hart's vehicle and Waismann's cat. Amongst the many differences between cats and vehicles (not least that one is a small house pet and the other a large mechanical mode of transportation), the distinction of interest here is this: 'vehicle' is a vague concept, 'cat' is not. No one has a problem distinguishing cats from not-cats, and there are, as far as we know, no borderline cases, though, importantly, there *could* be if something unexpected were to happen. This is the type of possible vagueness that, according to Waismann, is characteristic of open texture. 'Vehicle', however, already has a number of borderline, or penumbra, cases which come readily to mind (bike, toy cars, roller skates, etc), many of which are mentioned by Hart in demonstrating his point. That we can already think of these borderline (or penumbra) cases shows the term is *actually* vague, and not *possibly* vague – i.e. it is not open-textured. It is the park example which suggests that Hart saw the open texture of legal rules as something analogous to the open texture of language.[84] But, despite its use in *Concept*, this example was never meant to demonstrate open texture.

While the vehicles-in-the-park case has since become a classic example of legal indeterminacy, popularised by Hart, this was not the first time he had used the example to demonstrate a point. In his famous 1958 debate with Lon Fuller, Hart

[2006] 1 WLR 546 (is a recreational jet ski a 'ship' or 'vessel used in navigation' under section 313(1) of the Merchant Shipping Act 1995?); *Lozman v City of Riviera Beach* 568 US 115 (2013) (is a floating home a 'vessel' under the Rules of Construction Act, 1 USC § 3?). See also *Corkery v Carpenter* [1951] 1 KB 102 (KB) (is a bicycle a 'carriage' under section 12 of the Licensing Act 1872?).

[84] Schauer, 'On the Open Texture of Law' (n 2), 9.

discussed this same 'vehicles' example.[85] Explaining the insights given by the American Legal Realists about legal interpretation, he repeated the example of the no-vehicles law, which plainly forbids automobiles but is less clear about bikes, roller skates, toy cars, planes, etc. He then made the distinction between core and penumbra cases: 'There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out', further elaborating that, 'Fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge.'[86] The core and penumbra cases given here clearly do not reflect open texture in the way described by Waismann; the presence of these penumbra cases reflects the regular vagueness of laws, not the possible vagueness that is characteristic of open texture.

But Hart's attention to vehicles in the park was not intended to demonstrate the open texture of law, rather the vagueness inherent in law. Later, speaking of legal theorist John Austin, Hart comments how 'he was very much alive to the character of language, to its vagueness or open character'.[87] Austin is clear in speaking about 'the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived',[88] and Hart's line here echoes his line in *Concept* about 'vagueness or "open texture"'. Open character, or indeed open texture later, appears merely as another term for vagueness, which was the focus of this vehicles example here. Often

[85] The debate centred on the role of morality in the law. Hart used the vehicle example to show how the ultimate deciding factor in law is human interpretation, not logical deduction. Fuller's response claimed that core cases are only clear because we can see what the law was 'aiming at in general', and the penumbra cases are where the law's purpose is not clear – is the law intended to preserve peace and quiet in the park, or to prevent injury? An army truck is plainly a vehicle, but if this truck were mounted on a pedestal in the park as a war memorial, would this be in violation of the law? Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 HLR 630, 663.
[86] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 607.
[87] ibid 609.
[88] John Austin, *The Province of Jurisprudence Determined etc*. (John Murray 1832; Weidenfeld and Nicolson 1954), 207.

overlooked, however, is that the first published use of no-vehicles-in-the-park was actually three years earlier. There, Hart discusses the vehicles example much the same as above, as well as introducing borderline cases of 'signing' a contract, such as having your hand guided by another or initialling instead of a full name. Except, his purpose in writing here is much more explicit: he is asking the question 'In what sense are legal rules vague, uncertain and unclear?' [89] Vehicles-in-the-park, therefore, was never meant to illustrate open texture, rather the regular vagueness inherent in a common law system because of the use of general language. Hart's use of this example to show the open texture of law suggests one of two things: either it was a poor example that does not demonstrate the point Hart wants, or 'open texture' in law is being used in a very different way to Waismann's 'possible vagueness', instead being more akin to just regular vagueness.

In order to properly demonstrate open texture, it is necessary to use extreme, even ridiculous, examples because this highlights the *possibility* of vagueness that is key in distinguishing open texture from ordinary vagueness. Vague terms have unclear boundaries, we are not sure exactly where to draw the lines. When an open-textured term becomes vague, it is because an entirely new boundary comes into existence that was not previously there. It is only by considering these sort of wild scenarios that new aspects come into play which were never a part of the term's meaning before. [90] A mutating cat demonstrates the improbable yet conceivable possibility that circumstances could force the concept 'cat' to become vague; a vehicle is already a vague concept. Similar points about vagueness and indeterminacy have been made by JL Austin, Ludwig Wittgenstein, and Saul Kripke, who likewise use extreme examples (an exploding goldfinch, disappearing chairs, and demon cats, respectively) to

[89] HLA Hart, 'Theory and Definition in Jurisprudence' (1955) 29 PAS Suppl Vol 239, 258.
[90] David Lanius, *Strategic Indeterminacy in the Law* (OUP 2019), 38.

illustrate this.[91] Such abstract examples help in two ways: firstly in highlighting the remoteness of this phenomenon occurring; and secondly in thereby demonstrating the distinct consequences that would follow. Were these scenarios not so remote then they could more easily be seen as cases of everyday vagueness. These differing examples also emphasise the purpose for which Waismann and Hart were writing, because although Hart's vehicle does not show the same possible vagueness as Waismann's cat, it may be enough to make a different point: 'In other words: extreme examples are *necessary* to refute the verification theory of meaning in natural language (Waismann's goal), while ordinary examples are *sufficient* to undermine legal formalism (one of Hart's goals).'[92]

III.II.I. Verification, rules, and what we can know

To fully understand Waismann's use of 'open texture', it is important to remember the purpose for which he was writing. At the Joint Session of the Aristotelian Society and Mind Association, in London, 14 July 1945, Waismann was speaking at a symposium on Verifiability, along with Donald MacKinnon and William Kneale. He was responding to MacKinnon, in particular to his claim that the 'fundamental presupposition' of empiricism is that 'There is no more to the content of a statement than the total evidence which would warrant its assertion.'[93] In attacking MacKinnon

[91] Kripke's writing comes much later than the others, but he used a cat example similar to Waismann, although he was discussing whether the statement 'cats are animals' is necessarily or contingently true: 'It seems to me that it is necessary. Consider the counterfactual situation in which in place of these creatures – these animals – we have in fact little demons which when they approached us brought bad luck indeed. Should we describe this as a situation in which cats were demons? It seems to me that these demons would not be cats. They would be demons in cat-like form. We could have discovered that the actual cats that we *have* are demons. Once we have discovered, however, that they are *not*, it is part of their very nature that, when we describe a counterfactual world in which there were such demons around, we must say that the demons would not be cats.' Saul Kripke, *Naming and Necessity* (Blackwell 1981), 125-26.
[92] Mateusz Zeifert, 'Rethinking Hart: From Open Texture to Prototype Theory – Analytic Philosophy Meets Cognitive Linguistics' (2022) 35 Intl J Semiotics L 409, 413.
[93] Waismann, 'Verifiability', 39.

here, Waismann was refuting the verification theory of meaning that was prevalent in the early 20th century, with the popularity of logical positivism. All that is therefore necessary for him to show is that there will never be sufficient evidence to fully verify a concept, and that there is always even the most remote possibility that our concepts will become vague at some later point. How we deal with such vagueness after this point is irrelevant for Waismann's purpose, because as soon as such indeterminacy presents itself then a concept is no longer settled and thus cannot be verified with absolute certainty. Open texture, then, reflects this possible vagueness, in order to demonstrate the impossibility of complete verification. It is important to remember this context.[94]

Although Austin's exploding goldfinch is very similar in structure to Waismann's mutant cat, more so than Hart's vehicle, it was used to illustrate a different point. In the 'Other Minds' symposium, Austin questioned how one might know whether an object is a particular thing or not. When I see a bird on a branch outside and identify it as a goldfinch, you can ask me how I know that it is one. I can then list the characteristics that led me to that conclusion (its markings, its colour, its behaviour, etc), and this can then be challenged: you may disagree that these are the correct criteria for identifying goldfinches, or you may disagree that I have correctly judged the present bird according to those criteria, or perhaps you may object that I have not given enough information to conclusively prove that this is in fact a goldfinch and not, say, a woodpecker. This is not to say that the bird is not a goldfinch, but that I should not say I know whether or not it is one. We can now ask questions about how much evidence it would take to accurately make such a conclusion, and what evidence

[94] The reprint of this essay in Anthony Flew, *Logic and Language* (1st series, Basil Blackwell 1951), 117, makes a point of reminding the reader that this was only one part of a symposium, and apologises for any loss of context by separating this from MacKinnon's paper.

that would be, and whether we can be absolutely sure this is a real goldfinch and not something else. This is now a question about reality and what it takes to say that we know something:

> It seems a serious mistake to suppose that language (or most language, language about real things) is "predictive" in such a way that the future can always prove it wrong. What the future *can* always do, is to make us *revise our ideas* about goldfinches or real goldfinches or anything else.[95]

Austin develops his idea further, describing the 'normal process of language', in which we first observe a complex of features (C), of which we can say 'This is a C'. Then, if the whole of, or a significant and characteristic part of, C frequently appeared alongside another distinct feature, we may revise our ideas about C to include this new feature, and distinguish actual Cs which possess this feature from dummy Cs which do not.[96] Only through repeat occurrences of this additional feature do we think we should change our definition. One exploding goldfinch is an unfortunate, if spectacular, anomaly, but if there were a sudden boom in the number of birds which met such an untimely end then we may start to think combustibility might actually be a property that our definition of goldfinch should account for. This seems a more accurate description of how we use ordinary language; Austin is here explaining how we adapt our linguistic use and change our definitions when faced with indeterminacy.

Ludwig Wittgenstein also gives a similar case of indeterminacy in his famous passage about disappearing chairs. If I see a chair and go to pick it up but it disappears, then perhaps it was an illusion, but then it reappears, and yet it has a physical presence. What then? 'Have you rules ready for such cases – rules saying whether one may use the word "chair" to include this kind of thing?'[97] In fact, the earliest iteration of this

[95] JL Austin, 'Other Minds' (1946) 20 PAS Suppl Vol 148, 160.
[96] ibid 160-61.
[97] Wittgenstein, *PI* (n 39), § 80.

type of example can be traced back to a Vienna Circle conversation at Moritz Schlick's house on 22 December 1922:

> If I say, for example, 'Up there on the cupboard there is a book', how do I set about verifying it? Is it sufficient if I glance at it, or if I look at it from different sides, or if I take it into my hands, touch it, open it, turn over its leaves, and so forth? There are two conceptions here. One of them says that however I set about it, I shall never be able to verify the proposition completely. A proposition always keeps a back-door open, as it were. Whatever we do, we are never sure that we are not mistaken.[98]

Wittgenstein can also be differentiated from Waismann, as, despite the similarities, he too was writing for a very different purpose. In *Philosophical Investigations*, Wittgenstein's focus is on rules, and although the disappearance and reappearance of the chair does highlight a case of indeterminacy, indeed demonstrating the term's open texture, Wittgenstein asks how our ordinary language deals with such indeterminacy, not focusing on the presence of the indeterminacy itself in the way Waismann was. This distinction is even clearer when compared to the earlier passage from 1922, where he is explicit in asking what it would take to verify a proposition, with this open back door being the reason why we can never be certain in doing so. The open back door makes a near identical point to Waismann's later comments on open texture, because the comment occurs within the context of verification, whereas the disappearing chair focuses on use of language. This change of focus from verification to use is characteristic of the distinction between the early and later works of Wittgenstein, again highlighting how Wittgenstein's later work took a different turn from Waismann and how the disappearing chair serves to illustrate a

[98] Conversation recorded 22 Dec 1929 (at Schlick's house) in Waismann, *Ludwig Wittgenstein and the Vienna Circle* (n 22), 47. There is some contention whether the passages in this book are Waismann's transcriptions of Wittgenstein or if they are Waismann's original thoughts. Whoever wrote it, I do not think this affects the point that both shared similar ideas at this time.

different point about language from the possible vagueness to which Waismann, and the early Wittgenstein, drew attention.

Both Austin and Wittgenstein's work had a very significant impact on Hart. Hart credited Austin as his strongest philosophical influence 'for his direct effect on my jurisprudence', then Wittgenstein second.[99] Austin was a close colleague of Hart's at Oxford, they co-taught a class together, and Hart's knowledge of law benefited Austin's philosophy[100] as Austin's philosophical method and focus on rules influenced Hart's own jurisprudence in *Concept*.[101] Hart later clarified that his work with Austin on rules impacted his aim in writing *Concept*, which was to show: 'The truth as I saw it about the relationship between what law was and how the master concept of a rule – which I'd studied so closely under J.L. Austin – could be used to throw light on it.'[102] Hart also greatly admired Wittgenstein's work,[103] and in a 1970 lecture, even described open texture in the words of Wittgenstein, despite Wittgenstein never having used the phrase: 'a powerful feature of the philosophy inspired by the modern form of analytical jurisprudence. Wittgenstein expressed it in words which fit the law very closely…',[104] relegating Waismann to a footnote and describing him only as 'a close adherent of Wittgenstein's' in the text.[105, 106] It is much clearer to see the influence of Austin and Wittgenstein in Hart's work,[107] and his account of the open texture of law as the

[99] Sugarman (n 75), 275.
[100] For example, a favourite example used in his class with Hart was the case of *R v Finney* (1874) 12 Cox 625, of which Austin then provided a detailed discussion in 'A Plea for Excuses' (1956) 57 PAS 1, 21-27.
[101] MW Rowe, *J.L. Austin: Philosopher and D-Day Intelligence Officer* (OUP 2023), 545.
[102] Sugarman (n 75), 282.
[103] Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (OUP 2004), 140.
[104] He then quotes *PI*, §§ 84, 80, and 68.
[105] Hart, 'Jhering's Heaven' (n 76), 274-75.
[106] While he was indeed a close adherent of Wittgenstein's, Waismann's later work 'increasingly diverged from Wittgenstein's'. Stuart Hampshire, 'Friedrich Waismann, 1896-1959' (1960) 46 Proceedings of the British Academy 309, 311.
[107] Alisdair MacIntyre described the trio as some of the most prominent figures in the ordinary language philosophy movement: 'The work of the later Wittgenstein, the work of Austin, the work of Professor Hart, all these bring out the need for patient descriptive labour in answering the question of how concepts of different kinds are used'. In Bryan Magee, *Modern British Philosophy* (St Martin's Press

indeterminacy of a law's application bears more similarities to Austin than to Waismann's 'possible vagueness'.[108]

III.III. Open texture as vagueness

Further evidence that Hart's open texture was simply another phrase for ordinary vagueness can be found through examining the legal scholars, rather than the philosophers, who influenced Hart's ideas. In the endnotes to *Concept*, Hart credits Waismann with the origins of open texture. Nevertheless, we have already seen how, despite this, Hart aligns himself more with the philosophical ideas of Austin and Wittgenstein on vagueness rather than being a close follower of Waismann. More telling is how, in that same endnote, Hart then recommends John Dewey and Julius Stone, as well as his earlier writings, 'For its [open texture's] relevance to legal reasoning'.[109] That these other figures are useful specifically for open texture's relevance *to law* immediately suggests there will be differences between their ideas and those of Waismann in the philosophy of language. Let us look now examine their work directly and how it supposedly helps to explain open texture's relevance to legal reasoning. Thus Dewey writes:

> In part legislation endeavours to reshape old rules of law to make them applicable to new conditions. But statutes have never kept up with the variety and subtlety of social change. They cannot entirely avoid ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions will be

1971), 194. For the importance of understanding Hart's *Concept* as a work of OLP, see also Almeida, (n 75).

[108] Austin, in 'A Plea for Excuses' (n 100), 7-8, defends the ordinary language philosophy approach in part because our language has found all distinctions worth drawing, and vague concepts are handled unproblematically in the ordinary course of language. Waismann, in contrast, suggests sense datum talk can provide a protocol sentence platform to draw new distinctions as a response to novel stimuli. In this way, Hart is again more in line with Austin than Waismann. I am grateful to Mark Wilson for suggesting this point.

[109] Hart, *Concept*, 297.

> vague and classifications indeterminate. Hence the claim that old forms are ready at hand that cover every case and that may be applied by formal syllogizing, is to pretend to a certainty and regularity which cannot exist in fact. The effect of the pretension is to increase practical uncertainty and social instability. Just because circumstances are really novel and not covered by old rules, it is a gamble which old rule will be declared regulative of a new case.[110]

The above passage from Dewey gives an account of the law very similar to that given by Hart, and one that will be familiar to any common lawyer.[111] Laws cannot possibly cover every imaginable situation, so they are framed in vague, general language, and then when faced with new situations the courts must work out which law is applicable to the new facts. This much is an accurate description of how our legal system works, as we have been discussing it, and indeed as any common lawyer would understand it; in this way, it sets the scene in which Hart claims open texture occurs. We can see some similarities to Waismann, such as Dewey's 'impossibility of foreseeing all circumstances' reflecting Waismann's claim that it is impossible to define a concept so that every nook and cranny is blocked against entry of doubt; as well as Dewey's comment on how legislation will be revised and 'reshaped' in the face of new conditions mirroring how our definitions are clarified when confronted with their open texture. But that is where the similarities end. Dewey is clear that without being able to account for all possible circumstances, then 'definitions will be vague'; not that they will *become* vague only when faced with such a novel situation, but that they will be vague from the outset because there are fact situations which are not outside of our knowledge, but which we have simply not considered. While we could attempt to write the most comprehensive law ever, a statute with an ongoing appendix listing every conceivable instance which might arise and which would fall under the

[110] John Dewey, 'Logical Method and Law' (1924) 33 The Philosophical Rev 560, 570.
[111] For the avoidance of doubt, I am referring to any lawyer who practices in a common law jurisdiction.

scope of that law, this would be an extraordinarily long task and even then something would probably be missed. It is necessary, therefore, that laws possess some amount of indeterminacy to deal with such circumstances, and to be settled at some later time in whatever manner a court sees fit. However, this means that laws *already* possess this indeterminacy, whether we know the direction of this indeterminacy or not, rather than this indeterminacy *possibly* arising if and only if radically new circumstances occur. That is to say, if they are already vague, they are not open-textured.

Hart references Chapter Six of English-Australian legal theorist Julius Stone's *Province and Function of Law*, in which he has the following to say about the nature of adjudication:

> For each concept and proposition thus formulated and arranged is, in the first place, divorced from any existing "social law" on the same matter, because it is couched in general terms and "can never be as concrete as the case itself". When applied, therefore, to other situations in the future, or even in the present, it will not necessarily coincide with the "social law" even if in the original case it did so. The human relations which legal propositions seek to govern are always, by reason of the uniqueness of successive situations, or even concurrent situations, outrunning the propositions available for the settlement of disputes concerning them.[112]

Again, it is another accurate depiction of how a common law system functions, and again, we can see the similarities to Hart, especially in relation to his core and penumbra cases of a rule's application. Stone's reference to 'the case itself' reflects a 'core case', the clear scenario present in the minds of the legislators, and thus it follows that a law written in general language can never be as precise as that particular case as the legislators intended it. Human situations continuously evolve and develop and so outrun the language we use to frame a general rule. It is because of this that there will

[112] Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control; A Study in Jurisprudence* (Associated General Publications 1946), 143.

always be a need for adjudication. This much fits clearly with everything we have discussed about common law systems, and indeed with Hart's account of the English and Welsh common law system described in *Concept*. But we see the same thing here with Stone as with Dewey: that laws are couched in general language from the start, and so this represents ordinary vagueness that runs throughout law, rather than a possible vagueness that has not yet emerged. If these laws are already vague, then that is to say they are not open-textured.

Stone was in turn citing Austrian socio-legal scholar Eugen Ehrlich, who developed some of these ideas a little further (it is necessary to provide a longer quotation to cover his full ideas):

> The norm for decision contains the general proposition on which the decision is based, and thereby sets up the pretension that it is a truth which is valid, not only for the specific case under discussion but for every like or similar case. [...]
>
> This is the law of the stability of norms, which is of such vast importance for the creation of law. [...]
>
> The stability of the norms for decisions receives a special significance because of the fact it extends not merely to like or similar cases but also to cases that are only approximately similar. This makes it possible to apply a norm to cases as to which it is not a decision at all, on the sole ground that the latter are similar to the decided cases. Every such decision, indeed, is based on a new norm for decision, but the content of this new norm is merely this: that the existing norm is applicable to the case. The new norm has extended the sphere of application of the original norm and enriched its content; and every such extension and enrichment in turn functions according to the law of the stability of the norms for decisions. Juristic law-making is based chiefly on this continued projection, as [Karl Georg] Wurzel has called it, of the norms to new cases.[113]

[113] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Duncker & Humblot 1913; WL Moll trans, Russell & Russell 1962), 132-33.

Ehrlich here expands on some of the ideas mentioned above, but these are nonetheless familiar sentiments, describing the function of precedent within a common law system. We again see the notion of a general proposition, or plain case (or 'the case itself'), and the idea that this general proposition can be applied to alike cases, or even those which are similar in some ways but not all. This is the legal principle of stare decisis and is exactly the purpose of adjudication, that it is up to the courts to determine whether or not the present case sufficiently resembles the plain case and so whether to apply the rule. Ehrlich's reference to norms extending their sphere of application does resemble Waismann's account of open texture where upon encountering such an open-textured term, we can choose whether or not to extend that term's meaning. But it is similar because this is how we deal with instances of vagueness. When a vague word is confronted with a novel application, we must decide whether to extend its meaning to this new thing or not; and similarly, when a vague law (or norm) is confronted with a novel situation, we must similarly decide whether to extend its sphere of application. In either case, this is how we deal with vagueness after the fact – it has no bearing on the *possibility* or *actuality* of the vagueness prior to this. As Ehrlich states, this indeterminacy is a result of a general proposition being at the heart of the decision or the rule, abstracted from all possible specific situations, and therefore will be framed in vague language. And if it is already vague, then that is to say that it is not open-textured.

Hart also cites two of his own earlier articles to illustrate the relevance of open texture to law. I have already discussed how in 'Positivism and the Separation of Law and Morals', Hart used the vehicles-in-the-park example in a way that highlights the actual vagueness, or 'open character' of law – something which he later developed into open texture; and further how in 'Theory and Definition in Jurisprudence', his first

published use of vehicles-in-the-park, he is explicit that he is talking about vagueness in law.[114] As noted briefly above, Hart also mentions 19th-century legal philosopher John Austin – student of Jeremy Bentham and later Professor of Jurisprudence at the newly-established UCL – whom he claimed was particularly 'alive' to this 'open character'.[115] Let us look briefly at what Austin has to say about this openness:

> The definition of the abstract term *independent political society* [...] cannot be rendered in expressions of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible society. It would hardly enable us to determine of every *independent* society, whether it were *political* or *natural*. It would hardly enable us to determine of every *political* society, whether it were *independent* or *subordinate*.[116]

> [The difficulty in distinguishing legal concepts, such as sovereignty or independent society] arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived. And this, I suppose, is what people were driving at when they have agitated the very absurd enquiry whether questions of this kind are questions of law or of fact. [...] the difficulty is in bringing the species under the rule; in determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact.[117]

Yet again, we see the same thing as with Dewey and as with Stone, with Austin describing the actual vagueness inherent in the law, and not its possible vagueness. Abstract legal concepts cannot be rendered in perfectly precise terms, and even the best definition will not be sufficiently comprehensive as to have a clear application in every possible circumstance. By now this is all very familiar, as this same sentiment has been echoed by most common law legal theorists since. This is how our common law legal system works, using general language to cover broad situations, which will

[114] See discussion above, 32-34. Hart, 'Positivism and the Separation of Law and Morals' (n 86); Hart, 'Theory and Definition in Jurisprudence' (n 89).
[115] Hart, 'Positivism and the Separation of Law and Morals' (n 86), 609.
[116] Austin, *Province of Jurisprudence Determined* (n 88), 202.
[117] ibid 207.

be interpreted by the courts as and when issues arise. Austin puts this very clearly, stating how the issue arises because of the *vagueness of the terms* in which the definition is necessarily conceived, and emphasising how this vagueness is resolved not by some inquiry into the truth of the law or of the facts, but by questioning the law's *application*. This matches very closely with the ideas presented by Hart earlier, but this is a description of the law's actual vagueness. If the law is actually vague, then that is to say it is not open-textured.

Dewey, Stone, Ehrlich, and Austin all say broadly similar things about the role of vagueness in a legal system, as does Hart, and as have many other legal scholars since. There is little that is contentious in anything they say; in fact, that laws use general, vague language is a fairly commonly accepted fact about our English and Welsh legal system, and indeed any other common law system. It is no surprise that Hart cites these figures as some of the leading names in contemporary legal theory, but it is telling that he cites them *for the relevance of open texture to legal reasoning*. These figures all spoke clearly about vagueness in law, but Waismann was clear that open texture is a distinct phenomenon from vagueness. That Hart considers Dewey, Stone, and Austin to be relevant figures who recognise the open texture of law therefore suggests that he considers the open texture of law to be vagueness in law, another name by which to call the same thing. This would make Hart's arguments much clearer to understand: we are wrong to try to transpose a concept from philosophy of language onto a feature of law, when we could more plausibly, and more consistently understand it as this much simpler, ordinary feature of law that is commonly accepted. Thus we see that in *Concept* (and in his other works too), Hart deployed 'open texture' to refer to ordinary vagueness in law. Vagueness, as a feature of law, is far less contentious than open texture; however, as Waismann was very clear

to note, ordinary vagueness is not open texture. Hart therefore is at odds with Waismann's understanding of the term.

III.IV. Another interpretation of Hart

Contrary to the arguments I have been making about Hart so far, Marta Almeida, in her PhD thesis, has an alternative interpretation of Hart, claiming that he is actually very clear on what he means by open texture. Her thesis argues (correctly, I think) that Hart's book should be understood as a work in ordinary language philosophy, and that Hart's aim in *Concept* was not to put forward a new theory of law, but rather to describe the very concept of 'law' as we understand it.[118] In doing so, Hart simply describes the state of lawmaking as being one where lawmakers will be unable to foresee every possible border case and so cannot include those cases in the words of the law – an uncontentious idea, as discussed above in III.III – but, more significantly, it is this lack of foreseeability which she suggests amounts to the open texture that Hart was describing. Hart states that human lawmakers suffer two handicaps: relative ignorance of fact and relative indeterminacy of aim.[119] And it is because of these detriments that we are unable to think of and legislate for every single possible border case of a rule. Instead, we must have a general purpose for implementing that rule, which should be identifiable through the core cases of the rule's application. Open texture then comes from these *unforeseen* possibilities, due to this indeterminacy of our aim. It is not that the language used within the law is in some way vague that causes the open texture of law; rather the open texture of law *is* these unforeseen cases where legislators were unsure exactly what was the purpose of the rule. As she explains:

[118] Almeida (n 75). I am grateful to Dr Almeida Hill for a very insightful conversation on this topic.
[119] Hart, *Concept*, 128.

> It is due to the fact that our aim is unclear, that rules are open-textured. So, the open-texture stems not from the fact, as Bix contends, that it is unclear whether "electrically propelled toy cars" are a vehicle, but whether they are a vehicle for the purpose of this rule, since the legislator might decide to relax the requirement of peace and quiet, to allow the happiness of children who enjoy playing with electrically propelled toy-motor cars.[120]

While Almeida's view might seem slightly at odds with open texture *à la* Waismann, it nonetheless does fit with the account of open texture that she presents: 'A concept or expression is open textured when it is precise along some dimensions, but has not been considered in other dimensions.'[121] If we take open texture to be a lack of consideration in certain directions, then Hart's open texture of laws makes much more sense, as despite the use of *actually* vague terms in the wording of the rule itself, the *possible* vagueness comes from the possibility that borderline cases will arise, whether they were realistically foreseen or not. This foreseeability remains at odds with Waismann: originally open-textured concepts were those which were clearly defined and the circumstances in which they became vague were so extraordinary that we would never reasonably have expected it to happen. If we had foreseen the possibility of things changing then we might have accounted for this in our definition of the concept, especially remembering that Waismann was talking in the context of verification and holding meaning to scientific standards of proof: in order for a term to be able to become vague in the way Waismann describes, it must be not vague to begin with, so there cannot be any possible doubt about whether it might or might not be true in a certain case because that would be actually vague and not possibly vague (precisely the issue described earlier with 'vehicles'). What Almeida is describing here allows *actual* vagueness regarding semantics, but *possible* vagueness regarding the

[120] Almeida (n 75), 111.
[121] ibid 103.

intentions of the lawmakers. Although the words used might be semantically vague and we can think of current borderline cases, within the context of the rules, the lawmakers at the time did not envisage these borderline situations – and why would they when these scenarios can be so detached from ordinary reasonable behaviour, and when it would take an infinite amount of time to consider every possible alternative factual scenario and determine whether the law applied to these cases or not?

Further, Almeida suggests that 'Hart is, I claim, very clear in that he is not looking at concepts in isolation, but rather at concepts as part of rules.'[122] Perhaps this is not too much of a divergence; while Waismann originally applied it only to language, maybe it could be able to extend further. Margalit, for example, suggests that 'Open texture is a phenomenon that may potentially affect all of our rule-governed behaviour, not just the projected use of our language.' [123] Wittgenstein's discussion of disappearing chairs, showing a similar phenomenon to open texture, was also framed in terms of rules (albeit rules of language and not rules of law): 'Have you rules ready for such cases – rules saying whether one may use the word "chair" to include this kind of thing?'[124] An even clearer description of the applicability of this to law comes from Wittgenstein's *Zettel*:

> If you can 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 this new circumstance. — 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

[122] ibid 110.
[123] Avishai Margalit, 'Open Texture' (1979) 3 Meaning and Use 141, 149.
[124] Wittgenstein, *PI* (n 39), § 80.

> 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.[125]

Here, Wittgenstein is not just talking about the rules for language use in general, but specifically the application of concepts *for the purpose of laws*. Given the influence of Wittgenstein on Waismann and specifically on Hart, and the fact that these ideas of rule-following and open texture are closely linked, more force is lent to Almeida's argument that Hart was clearly looking at concepts as part of rules and not individually. In fact, Waismann even says something very similar himself:

> 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 foundations 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.[126]

However, the above description, while discussing laws in a very similar way to open texture, is not specifically talking about open texture. It is taken from Waismann's *Principles of Linguistic Philosophy*, a textbook somewhere between Wittgenstein's ideas and Waismann's own.[127] Waismann does not refer to this phenomenon as being open texture, nor does he acknowledge the open texture of law as a phenomenon, so we should therefore not take the above passage to mean that Waismann supports the open texture of law as an idea. What this does show is that Waismann accepted the phenomenon of vagueness in law, something far less contentious.

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[125] Ludwig Wittgenstein, *Zettel* (GEM Anscombe ed and trans, GH von Wright ed, Basil Blackwell 1967), § 350.
[126] Waismann, *Principles of Linguistic Philosophy* (n 42), 76.
[127] The book 'was intended to reflect the current views of Wittgenstein and Wittgenstein was never satisfied with any of the drafts that Waismann submitted to him.' AJ Ayer, *Philosophy in the Twentieth Century* (Weidenfeld and Nicolson 1982), 131.

Bruce Miller's understanding of Hart poses a possible problem for this idea of open texture as unforeseen cases. He criticises Hart for having a 'lack of a precise and unambiguous statement of what open texture is',[128] with which I agree, and he sets forward three features of law which Hart, at times, appears to describe as open texture. Firstly, the vagueness of rules due to the vagueness of general terms in the rules ('This imparts to all rules a fringe of vagueness or "open texture"'),[129] although we know Waismann distinguishes actual vagueness from possible vagueness. The second is the 'indefinability of general terms', which he claims Hart suggests is what he means by open texture. And thirdly is 'unenvisaged cases', which we have been discussing in this section. (Unenvisaged cases being different from indefinability of general terms, because we may have clear necessary and sufficient conditions for a general term yet still be faced with an unenvisaged case). Unenvisaged cases is certainly the idea that Waismann initially proposed with his mutating cat example, because it is only in these cases that we had no possibility of foreseeing that our definitions come under question. And under Almeida's description, unenvisaged cases is what Hart means by open texture, because these unexpected borderline factual scenarios are equivalent to the possibility of vagueness through unforeseen circumstances that Waismann initially explained. However, Miller then asks this:

> Of the three features of rule application discussed by Hart – vagueness of general terms, indefinability of general terms and unenvisaged cases – which of them is open texture? The last one cannot be open texture because Hart cites it as a reason why we should not attempt to get rid of open texture by providing necessary and sufficient conditions.[130]

[128] Miller (n 3), 163.
[129] Hart, *Concept*, 123.
[130] Miller (n 3), 165.

Hart does indeed state that in a possible world, we could know everything and legislate clearly for every possibility in a mechanical way, but 'Plainly this world is not our world', and this inability to anticipate all possible circumstances is therefore the cause of the relative indeterminacy of aim. He then describes how when we frame general rules, the language used will fix the necessary conditions to identify the plain cases of this rule, and therefore we have made a choice which common features of the plain cases are the ones the rule wants to target, thus making our aim more determinate.[131] It is unclear in this passage, which is the page Miller references, where exactly Hart gives unenvisaged cases as a reason to preserve open texture. Hart is describing unenvisaged cases as a fact of the human predicament – it is not a reason to keep open texture and not use necessary and sufficient conditions; it is simply something that we cannot eliminate, even if we do try using such conditions to make our aims more determinate. Miller's interpretation of Hart's reasoning is not compelling, nor his conclusion that indefinability of general terms is the best interpretation of open texture. Although Miller claims Hart suggested that the use of necessary and sufficient conditions to define general terms is a logical error, there are many instances where providing definitions for such terms is unproblematic.

Almeida's account, that Hart's open texture is a lack of foresight or consideration in the intentions of the lawmakers,[132] faces a more significant worry why we should not accept this as an interpretation of open texture, namely that Rudolf Carnap has already made this distinction between what he calls intensional and extensional vagueness – intensional vagueness being something similar to, but which is not, open texture. According to Carnap, extensional vagueness is vagueness about the extension of a term – can we identify the real-world things to which this term

[131] Hart, *Concept*, 128-29.
[132] Almeida (n 75), 103.

applies? Intensional vagueness, then, is a lack of clarity in the intensions of the speaker when using the term – which clear cases he had to mind, and therefore which possible cases he had not foreseen.[133] Take the speaker Karl, and his use of the word 'Mensch': there is little extensional vagueness, as the word applies to all people but not to animals, and any early ancestors somewhere between animals and man died off with evolution some years ago so do not currently pose a problem. But if we were to try and determine Karl's intensions about the use of the term, we would have to ask him questions about borderline cases, and whether 'Mensch' applied to crosses between man and dog, man and lion, and so on, even though such creatures do not exist so there has never been a need for him to think about what he would call them if they did.

> Karl's ignorance has the psychological effect that he has seldom if ever thought of these kinds [...] and therefore never felt an urge to make up his mind to which of them to apply the predicate 'Mensch.' [...] The fact that Karl has not made such decisions means that the intension of the word 'Mensch' for him is not quite clear even to himself[.][134]

Or, put simply: 'An expression *e* is INTENSIONALLY VAGUE iff *e* allows for possible borderline cases.'[135]

Some have equated Carnap's intensional vagueness with open texture: 'But this open texture ("intensional vagueness"), Carnap believes, does not mean that the meaning of '*Mensch*' is not understood by Karl.'[136] Lanius suggests that this is because Waismann's stated observation about open texture being the '*possibility of vagueness*' appears simply as a different expression for intensional vagueness, and that is why many, including Hart, understood the two ideas synonymously.[137] However, if we look

[133] Rudolf Carnap, 'Meaning and Synonymy in Natural Languages' (1955) 6 Philosophical Studies 33, 39.
[134] ibid 39-40.
[135] Lanius (n 90), 25.
[136] E.g. Margalit (n 123), 149.
[137] Lanius (n 90), 37.

closely at Waismann's cat example, it is actually describing a different phenomenon. According to Lanius, regular vagueness entail boundarylessness; open texture does not: 'There is no continuum on which cases of open texture could be ordered.'[138] Open texture, on the other hand, introduces an entirely new dimension by having such an extreme case that was never a part of the term's meaning in the first place. 'By considering such wild scenarios, new aspects come into play that have not been relevant for the expression's application before.'[139] It is the craziness in these scenarios which separates open texture from other, regular forms of vagueness, and this is precisely the issue discussed earlier with the use of the vehicles example instead of giant cats or exploding goldfinches. Intensional vagueness is simply a lack of clarity in what one intends with their use of a particular term, but that is different to having a clear idea which then gets thrown out the window by something unexpectedly bizarre. Lanius summarises it well: 'In short, open texture is the possibility of strange and unforeseen cases in which a competent and well-informed language user has doubts about the application of the term – something similar to, but not the same as, intensional vagueness.'[140]

If we have differentiated intensional vagueness from open texture, then Almeida's description that Hart's open texture simply refers to a lack of foresight on the part of the legislators does not seem to hold up. And nor do any other attempts to rework the structure of open texture to fit a different phenomenon. Waismann presented a clear account of what open texture was, that it was a feature of language and applied to empirical concepts, and that it described the ability of new and radically unforeseen circumstances to cause a presently clear concept to become vague in light

[138] ibid 38.
[139] ibid 38.
[140] ibid 38.

of these circumstances. To allow the open texture of laws, as Hart suggests, and as Almeida interpreted it, we need to change the structure of this theory so that open texture is a property of laws in general rather than specific concepts, and allow that the unforeseen circumstances can simply be ignorance of plausible circumstances rather than completely unpredictable factual situations. The fact that this does not work as clearly, and that it seems more accurately described by Carnap's intensional vagueness which we can distinguish from open texture, means, I think, that we can say that the open texture of laws, as Hart appears to describe it, is wrong.

Whatever Hart intended by the open texture of law, one thing is clear: it is not the same open texture that Waismann spoke of. For Hart, open texture refers to cases where the application of laws or rules is uncertain. A central difference between the two figures is, notably, that open texture and vagueness are not distinct in the way that Waismann was so clear to point out; they overlap, as Hart variously discusses open texture, or the source of indeterminacy, as the uncertain application of terms, or of rules, or a lack of intentions of the lawmakers:

> Hart's use of "open texture" refers to situations where the application of legal rules is uncertain. For Hart, "open texture" is not clearly distinct from "vagueness," as the two are distinct in Waismann's analysis; for Hart, the two seem to overlap. Hart's description of the source of uncertainty – which he discusses as the "open texture" – is variously characterized as the uncertain application of particular terms, the uncertain application of whole rules, or uncertainty based on intentions (or lack thereof) of the rule-makers.[141]

It is not clear precisely what Hart intended open texture to encompass (language, law, or both), and how it is meant to work, and the way he discusses these ideas along with the examples he uses to illustrate his points only confuses the matter

[141] Brian Bix, 'Waismann, Wittgenstein, Hart, and Beyond' (n 69), 254.

even more. I am inclined to agree with Endicott, then, that 'the best interpretation of [Hart's] use of the term is that he was looking for a term for vagueness in the broad sense.'[142] Schauer makes the same point as well, highlighting too the impact that Hart's general interpretation of open texture has had on the wider legal literature:

> A generation of law professors (who shall remain unnamed here), perhaps attempting to look sophisticated, has used "open texture" as a synonym for "vagueness." [...] Hart unfortunately fostered some of the problem, for in *The Concept of Law* we see the phrase "vagueness or 'open texture,'" which in context was ambiguous as to whether Hart was describing two different phenomena or whether he was merely providing two terms for the same idea.[143]

For Waismann, open texture was a very specific feature of language – its possible vagueness – in the specific context of showing why we can never fully verify empirical concepts, whereas for Hart, open texture seems to merge ideas about possible vagueness with actual vagueness in law and with Austin and Wittgenstein's work on rules. Baker makes a clear point about Hart's theory: 'Although it 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.'[144] So if open texture in law is clearly not the same open texture that Waismann described as a feature of language, why is it that Hart thought the metaphor appropriate to apply across disciplines?

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[142] Endicott (n 15), 37.
[143] Frederick Schauer, 'A Critical Guide to Vehicles in the Park' (n 50), 1126 (footnote 62).
[144] GP Baker, 'Defeasibility and Meaning' in PMS Hacker and J Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977), 37.

IV. Lost in translation

To understand why such confusion around open texture has occurred, we must look back to a name often overlooked in the open texture literature: William Kneale. Recall from earlier, upon having introduced the notion of open texture, Waismann credits Kneale in the footnotes with its translation: 'I owe this term to Mr. Kneale who suggested it to me as a translation of *Porosität der Begriffe*, a term coined by me in German.' [145] This apparently insignificant line actually has far more severe consequences than realised, and is, I claim, the ultimate source of the issues we have been discussing. 'Open texture' is, of course, not a direct translation of *Porosität der Begriffe*, but rather a new metaphor coined in English. While there is nothing inherently problematic with newly coined metaphors, 'open texture' does not accurately capture the same sense as the original German phrase, and is therefore more likely to mislead us towards a different meaning. A meaning which, although similar, fails to capture a significant part of Waismann's original metaphor. *Porisität der Begriffe* – the *porosity of concepts* –under Waismann is a theory about language, about empirical concepts, and about how they can never be completely verified to absolute certainty because of the possibility of becoming vague in the face of unexpected circumstances. There are gaps in language, it is porous, but porosity is necessarily a feature of empirical concepts. However, by translating *Porosität der Begriffe* to 'open texture', this highlights the *Porosität* and eliminates the *Begriffe*, thus sounding like what we have now is a general term for openness, which could apply in different contexts and different ways to how actual *Porosität der Begriffe* was intended.

[145] Waismann, 'Verifiability', 41.

Open texture as a metaphor gives the impression that *something* possesses openness in *some way*. It is a type of texture, and many things have a texture: physical things have a literal texture, abstract concepts have a metaphorical texture. It can apply in many ways to different things which we perceive as having a texture which is open. In this way, language is open-textured,[146] law is open-textured,[147] legal language is open-textured,[148] deep historical forms of power are open-textured,[149] analytic philosophy is open-textured,[150] even cheese is open-textured![151] Anything which might reasonably have a texture which could be considered in some way as being open is therefore capable of being open-textured. Compare this to the *Porosität der Begriffe* metaphor, where it is very hard to use it outside of the context of discussing language and concepts. Try using the *Porosität der Begriffe* metaphor to describe anything else and we find it works in a very different way, with the reference to *Begriffe* necessarily reflecting purpose of the metaphor without confusing the *Porosität* as a property of anything else: to say that law is a porous concept suggests that the concept 'law' has holes, is undefined in some way, not simply that some rules may or may not apply; to say cheese is a porous concept does not imply that physical cheese contains air pockets, but that the very concept of 'cheese' is in some way uncertain. Simpson too picks up on a similar point, not just about openness in the general sense, but specifically the differences between Hart's own metaphors of both open texture and the core and penumbra, which both have different implications: 'The sense of the two metaphors

[146] Waismann, 'Verifiability'.
[147] Almeida (n 75), Broyde and Bedzow (n 12), Cane (n 14), Carey (n 121), Carey (n 12), Hart, *Concept* (n 8), Ingram (n 14), Littleton (n 14), MacCormick (n 14), Morawetz (n 14), Summers (n 12), Susskind (n 14), Tammelo (n 12), Tammelo (n 14), Tan (n 58), Tigard (n 12), Tilley (n 60), Uren (n 14), Yanal (n 14), and Zahnd (n 14).
[148] Anderson (n 53), Atria (n 11), Balganesh and Parchomovsky (n 11), Lanius (n 90), Simpson (n 73), Walt (n 11), Waldron (n 11), and Waluchow (n 11).
[149] Payne (n 61).
[150] Makovec and Shapiro (n 21).
[151] Frank G Martley and Vaughan L Crow, 'Open Texture in Cheese: The Contributions of Gas Produced by Microorganisms and Cheese Manufacturing Practices' (1996) 63 Journal of Dairy Research 489.

plainly differ. With the core and penumbra there are no holes in the middle, whereas open texture suggests holes all over the place, as in a fishing net.'[152] Using *Porosität der Begriffe* instead of open texture does not have these problems, however. It necessarily keeps us within the realm of uncertainty about concepts because it is in the very name.

Even when being conscious of the fact that *Porosität der Begriffe* was a feature of language and concepts, it is still possible to confuse the translated metaphors. Consider this passage from Hart: 'This recognition of the *Porosität* or, as the English call it, 'open texture' of concepts, is, as I say, a powerful feature of the philosophy inspired by the modern form of analytical jurisprudence.'[153] Although Hart does specify here that he is talking about the open texture of concepts, he does not translate *Porosität der Begriffe* as open texture. Instead, he singles out the *Porosität*, equating *that* to 'open texture', before saying that *this* is a feature of concepts. On his understanding here, 'porosity of concepts' does not translate to 'open texture', but rather 'open texture' is a translation of 'porosity' alone, which in this case happens to be a feature of concepts, but could just as easily be a feature of anything else porous. As Hart seems to suggest, open texture *is* simply another word for porosity, or openness, or indeterminacy in some general sense, which would imply open texture is not equivalent to the porosity of concepts, but instead it should better be seen as the *open texture of concepts*.

Hart is not the only one to have done this. For instance, Vecht states that '*Open texture* (*Porosität*) is a term introduced by the Vienna Circle's Friedrich Waismann'.[154] Ogleznev, too, on the possibilities of circumstances in which we are uncertain of a

[152] Simpson (n 73), 117.
[153] Hart, 'Jhering's Heaven of Concepts' (n 76), 275.
[154] Joost Jacob Vecht, 'Open Texture Clarified' (2023) 66 Inquiry 1120, 1121.

term's application, describes how 'This is its porosity, or open texture.'[155] Kneale's 'open texture' metaphor has made it easy to equate open texture just with the porosity part of *Porosität der Begriffe*, detaching it from being a feature of concepts and thereby appearing as though the metaphor can be used in any context simply to refer to openness. Even Waismann himself is not entirely free of this confusion. Throughout his essay he refers to 'the "open texture" of most of our empirical concepts.'[156] This is precisely the issue we saw with Hart, that open texture appears to equate itself more with just *Porosität* sans *Begriffe*, thus the 'open texture *of concepts*' merely reinforces this idea that open texture is equivalent to *Porosität*, not to *Porosität der Begriffe*. That Waismann is falling for this trap too shows just how easy it is to draw the wrong conclusions from the open texture metaphor instead of *Porosität der Begriffe*.[157] If open texture is simply a term for openness or porosity generally then there is nothing special about it, and it is not unless we consider it in the context of the open texture of concepts that it becomes significant as a theory. If that is the case then we are in significant trouble, as are the many other people who have taken open texture to be a translation of *Porosität der Begriffe* – we have mistakenly thought that by open texture we are referring to a special type of possible vagueness in our concepts, and our arguments have been framed in such a way, but in reality the open texture we have been discussing simply means openness generally. Surely this cannot be right.

[155] Vitaly Ogleznev, 'Friedrich Waismann's Open Texture Argument and Definability of Empirical Concepts' (2023) 51 Philosophia 273, 274.
[156] Waismann, 'Verifiability', 41.
[157] In a later essay, comparing language to strict logical systems, Waismann described how language 'is of a much more loosely knitted texture.' Although he does not speak of open texture directly, it nonetheless shows how easily the 'texture' metaphor can apply more broadly than the 'porosity of concepts'. Waismann, 'Language Strata' in Antony Flew (ed), *Logic and Language* (2nd series, Basil Blackwell 1953), reprinted in *How I See Philosophy* (n 4), 109.

To illustrate this further, let us look back on some earlier discussions of open texture, but let us substitute in the original phrase 'porosity of concepts' in place of open texture to see whether the two phrases really are interchangeable:

> Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or [porosity of concepts].[158]

> Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed [a porosity of concepts].[159]

> This recognition of the *Porosität* or, as the English call it, [porosity of concepts] of concepts, is, as I say, a powerful feature of the philosophy inspired by the modern form of analytical jurisprudence.[160]

> In the main it is due to a factor which, though it is very important and really quite obvious, has to my knowledge never been noticed – to the [porosity of concepts] of most of our empirical concepts.[161]

> Hart was not arguing specifically that law-*qua*-rules is [a porous concept]; he was arguing that the *language* employed by law – like any other natural language – is [a porous concept].[162]

Each of these passages plainly shows that 'open texture' and 'porosity of concepts' are not substitutable as metaphors. Either the structure of the sentence remains relatively unaffected but the meaning is no longer clear; or this results in doubling up, as we then have the porosity of concepts *of concepts*; or, in the case of the final passage, we must struggle to work out what the appropriate adjectival form of the phrase would be.[163] If

[158] Hart, *Concept*, 123.
[159] Hart, *Concept*, 128.
[160] Hart, 'Jhering's Heaven of Concepts' (n 76), 275.
[161] Waismann, 'Verifiability', 41.
[162] Anderson (n 53), 66.
[163] Indeed, I have replaced the adjective phrase entirely and restructured the sentence to describe it as the noun, 'a porous concept', rather than attempt to create a new adjective form of 'porous-concept-ed'.

the two metaphors are not easily interchangeable then this suggests they are not equivalent and should not be taken as such.

At the heart of all of this, then, is a problem of translation. There is plenty of philosophical scholarship on translation between languages which has not been the focus of this paper, but we must now turn our attention to this issue. Quine describes a process of radical translation dependent upon the assent and dissent of a native speaker when presented with a particular term and stimulus: 'For meaning, supposedly, is what a sentence shares with its translation; and translation at the present stage turns solely on correlations with non-verbal stimulation.'[164] The present case is far less radical, involving bilingual speakers, but we can nonetheless take the assent of speakers as a good indication of the accuracy of a translation. That the use of open texture within the legal context (if not other contexts which I have not examined here) has at the very least caused confusion, if not outright dissent, to its use should be cause enough for us to question its appropriateness as a translation. Substituting the English phrase for the original German meaning, as above, does present a clearer case than by examining our use of the phrase 'open texture' in English, showing that they are neither equivalent nor interchangeable, and thus producing from us, as ordinary speakers, a reaction of dissent. This should be enough to reject 'open texture' as a translation of *Porosität der Begriffe*.

Waismann himself is also conscious of the role of translation in understanding meaning, commenting in a later essay that:

> A word in such a language has not only a meaning but something else as well, not quite easy to describe, something that surrounds it like an atmosphere – a dim halo or aura, formed of all those countless figures of speech to which it lends itself or into which it fits. This aura, so important to the feel of a word and

[164] WVO Quine, *Word and Object* (MIT Press 1960), 32.

> yet so elusive, cannot be recaptured in translation. [...] Yet this aspect of the matter, important as it is, is constantly overlooked in any analysis of 'meaning'.[165]

He was here describing how gendered nouns in European languages make it easier to personify such nouns, thereby introducing a more mythical element to the language. In German fairy tales, for example, the sun is personified as an old woman, due to the feminine gender of *die Sonne*; or how the masculine gender of the Greek *logos* smoothed the way for its later interpretation as 'son of God'. Gendered nouns do not exist in English, so native English speakers are less inclined to view these words in this way – it is a dimension to language quite unnatural for us. Besides fiction, however, there are plenty of other examples from ordinary language use of this type of 'elusive aura'. Similarly to gendered nouns, many European languages differentiate between a formal and informal version of the pronoun 'you', depending on the subject of the sentence.[166] We do not have this distinction in English, and although we convey formality through conversational etiquette, the air of respect that is shown through the formal 'you' cannot be directly translated. Or there are words in some languages which have no meaning at all, in the normal sense, but whose existence is purely functional.[167] Consider the Mandarin participle 吗 (ma), which is added to the end of a statement to turn it into a question. In this way, 吗 acts as a request for affirmation, but it has no semantic content and cannot be translated in any way other than describing its function.[168] Despite this 'elusive aura' in language being itself difficult to

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[165] Friedrich Waismann, 'The Linguistic Technique' in *Philosophical Papers* (Brian McGuinness ed, D Reidel 1977), 160.

[166] German, *du*/*Sie*; French, *tu*/*vous*; etc.

[167] I have specified in the normal sense here anticipating that one could argue that its 'meaning' *is* its grammatical function. This argument would, however, be understanding 'meaning' in a different way to describe functional purpose instead of semantic content.

[168] Consider the question, 你好吗? While it means 'how are you?', translating the characters literally would be 'you good [question indicator]?' The English equivalent to this 'statement + request for affirmation' structure is a statement with a rising tone at the end to indicate the speaker is asking a question (represented grammatically just through a question mark – 'you good?'). As a tonal language,

explain, we can nonetheless find many instances where there is more to the 'sense' of a word in its original language than can be captured by any translation.[169]

Accepting Waismann's point here, that words possess a certain indescribable 'aura', reinforces how careful we need to be when translating concepts or phrases across from one language into another. It is therefore all the more concerning that Kneale's translation of *Porosität der Begriffe* to open texture falls exactly into this trap, failing to consider this 'aura' and thus producing a new metaphor that misses true sense of the original. Interestingly, comparing the English literature on open texture to the German literature, we can see that the German literature has more fidelity to Waismann, because when discussing *Porosität der Begriffe* in its original language, it is hard to take it out of the context of concepts which is explicitly part of the name. Schmitz, for instance, says how it was because Waismann spoke fluent German that he naturally referred to the 'porosity of concepts', while it was Kneale suggested translating it to 'open texture of concepts' (specifying that 'of concepts' is a part of the translation here – something often disregarded), and that it is not enough simply to define open texture by a direct translation into German as '*offene Struktur*' ('open structure').[170]

however, Mandarin represents this 'question indicator' function through its own character after the statement rather than through the pronunciation of the statement itself.

[169] Another example, suggested to me by Dejan Makovec, is that the classic definition of knowledge as justified true belief, if translated directly to Slovenian as *upravičeno pravo prepričanje*, is effectively nonsense.

[170] 'Keinem Studenten schließlich ließe man auch nur mündlich durchgehen, was der ehemalige Dozent und Dr. phil. Pape uns al Erläuterung des Terminus »Open texture« zumutet: »Philosophischer bzw. wissenschaftsteoretischer Terminus, engl. (dt. ›offene Struktur‹), begrifflich geprägt von dem oesterreichischen Philosophen Friedrich Waismann [...], ursprünglich ›Porosität‹, bekannt als die Theorie der ›open texture‹ empirischer Ausdrücke, deren Vagheit bzw. Unbestimmtheit nach Waismann essentiell ist. [...]« Und natürlich beherrschte Waismann die deutsche Sprache, weswegen er von Porosität sprach, und zwar von Porosität der Begriffe, was Kneale mit »open texture of concepts« zu übersetzen vorschlug.' H Walter Schmitz, 'Aber der Lehrer muß den mut haben, sich zu blamieren' (1999) 1 SEMA: Rezensionen in Sachen Kommunikation 14, 19.

'Open texture' is a convenient name which appears to fit, especially if you are not familiar with its German origin. But once we compare the two phrases, we easily see that something has been lost in translation here. 'Open texture' is not an accurate translation of *Porosität der Begriffe*; it strips it of its relevance for concepts in specific, and focuses on openness in a general sense, which people have then misapplied in other contexts. Kneale's translation misses the important aspects of this theory which were clearly expressed in its original language and can still be clearly expressed through its direct translation into English as the 'porosity of concepts'. It is because of this, because of William Kneale's translation, that it has become so easy to lose focus on what open texture actually is, and how it should be understood.

V. Conclusion

Let us now reflect on ground we have covered throughout this thesis and on the clarification that I have argued for. Firstly, on the nature of open texture. When Waismann uses the term 'open texture', he is referring to possible vagueness; that is, possible vagueness as a feature of language, specifically of empirical concepts. As a feature of empirical concepts, it reflects the fact that however precise a particular concept may be at a particular time, there will always remain the possibility that some radically new occurrence will cause us to reconsider the scope and sense of that concept. In this way, a concept which was not vague always possesses the *possibility* to *become* vague when confronted with radically new and previously unknown facts. Waisman introduced open texture within a specific context, of refuting the verification theory of meaning. (Through this, we also saw the place of Waismann's work within the wider context of the rise and fall of the Vienna Circle and logical positivism, as well as seeing in his work the clear influence of his close colleague, Ludwig Wittgenstein.)

It is of the utmost importance to Waismann that open texture is a feature *of empirical concepts*: by their very nature empirical concepts are easier to test and to verify, and so provide a compelling demonstration in support of the Verification Principle, if logical positivism is correct. To refute logical positivism, therefore, it is more effective for Waismann to challenge the verifiability of empirical concepts rather than non-empirical concepts. Open texture demonstrates why even empirical concepts, as the strongest supporting evidence of the Verification Principle, can never be verified in a way that satisfies the requirements of that principle, because of the possibility that even clearly defined concepts could still become vague in unpredictable circumstances. This is the phenomenon Waismann called *Porosität der Begriffe*, and what he meant to pick out as open texture.

In contrast, Hart borrows the term from Waismann, using it to describe a type of indeterminacy in law caused by the application of general language to specific factual situations. On the surface, the open texture of language and of law may appear similar insofar as both concern the indeterminacy caused by unexpected novel occurrences. Many scholars do indeed take Hart at this (surface) level, understanding open texture to be the uncertainty in unpredicted 'penumbra' cases. Close analysis, including attention to the discordant contexts and motivations of Hart's ideas next to those of Waismann, brings to light problematic inconsistencies and a general unclarity in Hart's work. For example: is open texture a feature of language or of law (or indeed laws) or of both? At times, Hart refers to all of these things: he acknowledges that open texture is a feature of language and references Waismann's work, then in *Concept* he refers to the open texture of law and of 'verbally formulated rules', and then in a later interview reiterates that he has always understood open texture to be a feature of language. Particularly salient is Hart's use of the no-vehicles-in-the-park example, as

his use of an *actually* vague concept fails to demonstrate, or even connect with, the *possible* linguistic vagueness that is shown through Waismann's cat example (and indeed Austin's exploding goldfinch, Wittgenstein's disappearing chair, and Kripke's demon cats). Whichever way one tries to understand Hart's open texture, serious inconsistencies manifest, both external in relation to Waismann, and internal, in relation to Hart's work itself.

On a generous interpretation of Hart, we might say that he meant that the open texture of law comes from the unforeseeability of the sort of penumbra cases we see in the vehicles example. Rules necessarily use general terms to apply broadly so cannot possess the same sort of precise definition as our empirical concepts do. The foregoing analysis should not obscure a point of commonality: both Waismann's cases (empirical concepts) and Hart's cases (penumbral cases of rules' application) concern unforeseeability. Indeed, it is this unforeseeability which motivates Hart to use the term 'open texture'. But there the similarity ends. For Hart, lack of foreseeability is an epistemic handicap of the lawmakers, and this is not the same as a precise thing becoming imprecise. In fact, the lack of foreseeability Hart has in mind is actually closer to the concept of intensional vagueness as described by Rudolph Carnap – something which can appear similar to open texture, but can clearly be (and, indeed, for this reason *should* be) distinguished from it.

Having examined these multiple interpretations of Hart, it becomes clear that any account of the open texture of law which mirrors the structure of the open texture of language does not quite work. As Bix notes, at different points Hart uses open texture to refer to multiple sorts of indeterminacy within language, within law, and within the intentions of the lawmakers. Hart's work too shows greater alignment with the works of Austin and Wittgenstein on the use of ordinary language and the

vagueness inherent within it, than with Waismann's anti-verification philosophy of language. The most reasonable interpretation of what he meant, therefore, is that 'open texture' was simply a convenient term to describe vagueness and uncertainty in the normal sense, and not as a specific type of possible vagueness, as per Waismann.

Not only is the former clarification important, but my thesis also claims that the persistent issue begins with an issue in translation. William Kneale proposed the English phrase 'open texture' as a translation of the original German *Porosität der Begriffe*, but this is not an accurate or complete phrase. 'Open texture' seems equivalent to porosity – if something is porous then it clearly has gaps, has an open texture – but it omits the fact that this is a feature of concepts, and thus it appears as if open texture is simply another phrase for describing openness, vagueness, or uncertainty in a general sense. This point is reinforced by Hart's further specification at times of the 'open texture of concepts', providing still further reason for supposing that 'open texture' is a translation of porosity alone, and not the *Porosität der Begriffe*, the porosity *of concepts* as Waismann intended. With this part-translation, it becomes easy to see how one could confuse Waismann's concept with another concept, which shares the root of being *porous*. Strikingly, despite the attention that open texture has received from both philosophers and legal scholars, an analysis of the 'open texture' as a translation of *Porosität der Begriffe* has not previously been undertaken.

In this thesis, I hope to have provided some clarity on the notion of open texture in law. I have shown evidence of the confusion within the academic literature on Hart, and analysed Hart's own writing, tracing back the development of his ideas on open texture and comparing these to Waismann's original use of the concept. Through this, I have shown that open texture in law should better be understood as a misappropriated name used to describe ordinary vagueness (or indeterminacy of some

sort) within the law – a commonly accepted phenomenon within common law jurisdictions – and not, instead, as some type of possible vagueness, however one considers this to function within law. If seen this way, then Hart's argument is clearer to understand, his writing more consistent, and his account more closely aligned with his wider thesis concerning how common law systems operate.

There are, however, questions which arise out of this research which I have not been able to answer here, but which are pertinent to note, and might now stimulate further enquiry. Firstly, on the relationship between Hart and Waismann. It is known that they were colleagues at Oxford at the same time, and it is known that Hart referenced Waismann's article, whence he took the name 'open texture'. Other than this, there is little information available on the connection between the two figures. I have inferred from this that they probably did not have a close relationship and that the substance of Waismann's work (at least in the philosophy of language) bore little influence on Hart. However, if there is more information on their relationship then it would be interesting to see whether Waismann may have had a greater influence on Hart than I have suggested; and if so, then the question must be asked: how and why did Hart think it appropriate to use the concept of open texture in law?

Secondly, I have closely adhered to Waismann's account of open texture, under the definition of 'possible vagueness'. It was not my aim here to analyse this in more depth and determine whether or not there is a more appropriate definition of open texture which would explain the phenomenon even more clearly. If there is, then perhaps that would further answer some of the questions addressed in this thesis. Thirdly, and finally, on the relationship between open texture and other theories of language and meaning, such as compositionality, and on the necessary and sufficient conditions for defining concepts. I have briefly touched on some of these issues here,

but this research could benefit from a deeper analysis of these topics. However, that would be a separate issue to be addressed in another thesis – one perhaps more at home in philosophy, rather than law.

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