5-1999

Open Texture and the Possibility of Legal Interpretation

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(Accepted July 28, 1999)

This essay concerns the possibility of interpreting law. It is always possible to interpret law in the weak sense, which assigns meaning it is not assumed the law previously possessed. My concern here is interpretation in the strong sense, which, if successful, reveals meaning that lies hidden in the law. Theories of legal interpretation have recently received much theoretical attention. The received theory of law's open texture suggests that this interest is misplaced.

Interpretation is most clearly called for when there is reasonable uncertainty or disagreement about law's meaning or proper application. The received theory of law's open texture implies, however, that legal interpretation is impossible when language gives rise to reasonable uncertainty or disagreement about law's meaning and proper application.

Furthermore, ideas surrounding open texture theory imply that this predicament is even more widespread. They tell us that interpretation is impossible whenever there is reasonable uncertainty or disagreement, from *any* source, about law's meaning or proper application. The received theory thus indicates that there is little scope for a theory of legal interpretation.

This paper argues, first, that the received theory misconstrues the legal implications of the open texture of language. It argues, secondly, that open texture theory provides an untenable basis for rejecting the possibility of legal interpretation. This paper assumes no theory of interpretation, not even that interpretation of law is generally possible. It concerns ideas about law that are widely

[1] My thanks to Thad Metz and anonymous reviewers for this journal for their comments and suggestions.

Law and Philosophy **18:** 297–309, 1999.

accepted among theorists and which, if sound, would seem to rule out the possibility of legal interpretation.[2]

I'll first summarize Hart's theory of law's open texture and consider its supposed implications. Later I'll address the terms in which Hart presents that theory and their broader (though possibly unintended) implications.

A. OPEN TEXTURE

Consider the example used by Hart in his exposition of open texture theory.[3] A local ordinance bans vehicles from the public park. Competent users of English will readily agree that "vehicle" applies to automobiles but does not apply to peanut butter and jelly sandwiches. Let's assume that competent users of English are uncertain or disagree about whether bicycles are vehicles.[4] Like many paradigmatic vehicles that might be brought into a park, bicycles are used for transport, have wheels, can move on their own (at least when fully equipped with a cyclist), and so on; but they lack conventional motors (electrically powered or internal combustion), are normally quiet and unpolluting, routinely share paths with pedestrians, and so on. There are good reasons for regarding bicycles as vehicles and good reasons against doing so.

If bicycles seem clearly to qualify as vehicles, try children's tricycles; if bicycles seem clearly not to qualify, consider battery-powered, electrically propelled, motorized wheelchairs instead. Nothing turns on our choice of example.

Hart says that any general term in a natural language has a central "core" of determinate meaning and a surrounding "penumbra"

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[2] My arguments have little in common with Ronald Dworkin's in "The Model of Rules," *University of Chicago Law Review* 35 (1967), 14–46 (reprinted in *Taking Rights Seriously* [Harvard 1977]) or "No Right Answer?", *New York University Law Review* 53 (1978) 1–32 (reprinted in *A Matter of Principle* [Harvard 1985]).

[3] H.L.A. Hart, *The Concept of Law* (Oxford 1961; Second Edition 1994), chap. VII, sec. 1. (Parenthetical page references will be to the Second Edition.)

[4] Note that there can be reasonable uncertainty not only about what things are vehicles, but also about what counts as "operating" a vehicle, "bringing" one into a park, under what circumstances a vehicle is truly "in" a park, etc.

of indeterminate meaning. (123) Thus "vehicle" applies to automobiles, does not apply to sandwiches, and (I shall assume) its application to bicycles is problematic. Hart appears to mean that a general term *is true of* those items to which it *clearly* applies, *is false of* those items beyond the penumbra to which it *clearly* does *not* apply, and *is neither true nor false of* penumbral items ("vehicle" is neither true nor false of bicycles).

Hart infers from these considerations that the *rule* banning vehicles from the park likewise has a core of determinate meaning and a penumbra of indeterminate meaning. If "vehicle" is neither true nor false of bicycles, then bicycles are *neither barred from the park by the rule nor permitted by it*. Unless some other rule of law pushes bicycles from the vehicular penumbra, they linger in that legal limbo until the law is made more precise.

In order to decide penumbral cases, Hart says, courts must, and do, further develop the rules. In deciding whether to count bicycles as vehicles,[5] a court expands the rule's core of determinate meaning. A court must assign the rule an increment of determinate meaning that it did not have. The refined rule is then capable of deciding similar cases. Courts thus act as surrogate legislatures, filling gaps by amending the law.

Hart does not suggest that a judge deciding a penumbral case is free to amend the rule any way she likes. A judge is expected to display "characteristic judicial virtues" such as

> impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. (205)

Traditional maxims guide a judge's rule-refining decisions, and her choice will be limited to a small set of alternatives. But, Hart insists, no single one of them will be required by existing law.

The point I wish now to emphasize is this. Hart holds that gaps in ordinary[6] rules are gaps in the law as a whole. If a case involves a fact-situation that falls in the penumbra of an applicable rule, a court cannot decide it on the basis of existing law; it can be decided only by adding to the law. That is the first point I wish to question. I shall

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[5] Hart says, "for the purposes of this rule" and refers to "peace in the park." (129) But he discounts legislative intent as a basis for interpreting law. (136)

[6] My reason for using this term will emerge in a moment.

do so on grounds that are neutral with respect to legal theories as we know them.

Although Hart argues that there is more than one basic type of legal rule, I shall focus here on the restrictive rules of legal systems – rules that require or prohibit certain forms of behavior, such as bringing vehicles into the park. That will suffice for my first point.

Let's assume that vehicles are not banned from the park save by the vehicle-banning law. An item is either banned or is not banned by that rule. The rule does not ban non-vehicles, such as sandwiches. We are assuming that it neither bans nor permits bicycles.

My claim is that the law is generally asymmetrical with respect to banning and permitting. If bicycles are not banned from the park by any legal rule (or any other legal norm, if there are legal norms other than rules), then bicycles are permitted in the park *by the law.*

That seems to me a reasonable view of human law, the law of legal systems (more certain, at any rate, than open texture theory). We can express the point by framing it as a background principle, that *conduct which is not legally prohibited is legally permitted.*

Consider, then, Ann's operating a bicycle in the public park from which vehicles have been banned. If her act falls within the rule's penumbra, as we are supposing, so that *the rule* neither prohibits nor permits such conduct, it does not follow that *the legal system* of which the rule is a component part neither prohibits nor permits such conduct. The specific rule does not settle the issue, but the legal system would seem to do so. If, as we are further assuming, no rule or other legal norm prohibits Ann's act and, as seems true, the law permits whatever the rules of law do not prohibit, then Ann's bicycling in the park is permitted by the law – by the system as a whole. In other words, the open texture of general terms and of rules does not automatically give rise to gaps in the law.

It might now be suggested that we can equally well infer (by parity of reasoning, but inconsistently with the point just made) that conduct in the penumbra of a restrictive rule is likewise prohibited, because the vehicle-banning rule no more permits than prohibits bicycles. That would miss the point. Legal freedom is the default condition.

Contrary to open texture theory, the indeterminacy of the 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.

Now let's consider this case in court. Ann has been charged with violating the rule banning vehicles from the park. The judge must determine whether riding a bike in the park is a violation of the law by virtue of its violating that rule. If the vehicle-banning rule does not prohibit such conduct (and no other rule does so indirectly), and if the judge decides the case according to existing law, then the judge must hold that such conduct does not violate the law. The judge must find that there's no cause of action. For whatever isn't prohibited is permitted.[7]

As we have seen, this is not the approach that Hart believes judges actually take in penumbral cases. Hart's discussion implies that a judge would (and should) view Ann's case as follows. She would first determine that Ann's act is neither prohibited nor permitted by existing law. Finding that gap in the law, she would assume the office of surrogate legislator and would proceed to modify the rule, so as to fill the gap. Then she would apply the revised rule retrospectively.

But judges do not generally act in that way. A judge may comment on difficulties arising from a bad fit between the facts of a case and the language of a statute that she is called upon to apply. But she is unlikely to declare that the rule neither prohibits nor permits the act, conclude that the law does not prohibit the conduct that has been attributed to the defendant, and then amend the law.

Hart acknowledges that judges *act as if* they interpret the rules that they are called on to apply. (135–136; 273–274)[8] When judges issue opinions in cases that seem to call for interpretation of the

[7] Someone might suggest that this would be an undesirable policy – too lenient on law breakers. That would assume, however, that Ann violated the law, or in other words that bicycles are prohibited by the vehicle-banning rule – which open texture theory denies. Open texture theory implies that Ann has not in fact broken the law.

[8] In his Postscript (included in the posthumously published Second Edition), Hart once again discounts "the ritual language used by judges and lawyers in deciding cases" and notes further that eminent judges and lawyers agree that law is sometimes indeterminate. (274) The question is not, however, whether there is

law, they do not generally suggest that they are making new law and applying it retroactively. They provide reasons for their reading of existing law and reasons against competing interpretations. And it is not merely judges who act as if they interpret law. When judges write opinions, they may respond to the arguments of lawyers and of dissenting colleagues who defend competing interpretations. The lawyers do not generally suggest that they are arguing for revisions in the law. Legal academics likewise defend some interpretations as soundly based on existing law and criticize competing interpretations as unsound. If judges, lawyers, and legal academics act in that manner and do not behave as Hart believes they do and should, an explanation is required.

There is a further reason for puzzlement. Systems of law like ours are committed to the idea that people deserve fair warning of legal liability. A rule imposing liability should be publicized before conduct may legitimately be penalized under it. This provides another reason to hold that, if the theory of law's open texture is sound, we should expect judges not to revise the law and apply it retrospectively, without apparent qualms, but to throw out penumbral cases.

I have now sketched two alternative ways in which open texture theory suggests judges might be expected to deal with penumbral cases – if they understand what they are doing and proceed without pretence. If we assume, with Hart, that such cases are undecidable on the basis of existing law and are disposed of by applying retrospective judicial legislation, we should expect that fact to be more clearly manifested in judicial behavior and in legal practice more generally. It is not.[9]

The other way in which judges might deal with penumbral cases is suggested by what seems a reasonable view of law, which includes

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some legal indeterminacy but whether it obtains wherever the received theory of law's open texture implies.

[9] In the Postscript Hart suggests that "resistance to the claim that judges sometimes ... make ... law" is principally explained by "the importance characteristically attached by courts when deciding unregulated cases to proceeding by analogy so as to ensure that the new law they make, though it *is* new law, is in accordance with principles or underpinning reasons recognized as already having a footing in the existing law." (274) It is unclear, however, how this use of analogical reasoning explains the relevant systematic and uniform legal practice.

the background principle that conduct which is not prohibited is permitted. On that view, we should expect penumbral cases to be thrown out. They aren't.

There seems a clash, then, between open texture theory and the seemingly interpretative behavior of judges, lawyers, and legal academics. That fact might lead our thinking in either of two directions. If open texture theory is sound, then judges and lawyers either sincerely try to do, or make a pretense of doing, what open texture theory tells us they could not possibly be doing, namely, figuring out what the law already requires and allows. In that case, judges and other legal professionals are either deluded or deceitful: they have either deceived themselves about their practice or they systematically misrepresent it. In the latter case, the lawyers and legal academics are really urging that the law be amended in certain ways and the judges are really endorsing some legislative amendments and rejecting others.

Although we can assume that judges and lawyers, like other mortals, can be and sometimes are confused or deceitful, the clash between open texture theory and legal practice suggests that the confusion or deceit of legal professionals is quite extensive. I think we should hesitate to embrace a view of law that implies so sweeping a disparagement of the bench and the bar on purely abstract, theoretical grounds, without corroborating factual evidence. It would not only be unfair; it would seem methodologically unsound – jumping to a weakly supported conclusion without considering the alternatives.

We should therefore consider the second possibility – that open texture theory is unsound.

B. OVERKILL

Hart's presentation of open texture theory proves too much. Let's look at what he actually says.

Hart says that when a fact-situation falls within the determinate core of a term's meaning, one

> has only to recognize instances of clear verbal terms, to "subsume" particular facts under general classificatory heads and draw a simple syllogistic conclusion. (125)

But not every situation is like that, for "there is a limit, inherent in the nature of language, to the guidance which general language can provide." Some "fact-situations ... possess only some of the features of the plain cases but others which they lack." (126) As a consequence,

> something in the nature of a crisis in communication is precipitated: there are reasons both for and against our use of a general term, and no firm convention or general agreement dictates its use, or, on the other hand, its rejection by the person concerned to classify. (127)

In these penumbral cases, "subsumption and the drawing of a syllogistic conclusion" are impossible, and "something in the nature of a choice between open alternatives must be made." (127)

Some qualifications (friendly amendments) seem in order. We should probably understand "reasons both for and against our use of a general term" to mean "good but less than decisive reasons both for and against our use of a general term."[10] And we can probably dispense with the added reference to "a firm convention or general agreement" regulating use of the term, for a convention or agreement would simply provide reasons, decisive or otherwise, for or against application of the term.

Hart's discussion thus suggests the following model for the application of a rule. A rule applies to a given fact-situation if, and only if, the situation provides good reasons for subsuming the case under the rule and provides no good reason not to. Suppose the rule is

1. Anyone who **operates a vehicle within the public park** is subject to a $50 fine.

For this rule to apply, the facts must fit perfectly the highlighted segment. Suppose that

a. Jack drove his car in the park.

The question, according to Hart, is whether driving a car clearly counts as operating a vehicle – whether there are good reasons for so counting it and no good reasons to the contrary. Let's assume that that is so; in other words:

b. Driving a car clearly counts as operating a vehicle.

In that case, we can draw the syllogistic conclusion:

[10] I'll abbreviate this hereafter by omitting "but less than decisive."

2. Jack operated a vehicle in the park.

Premises a and b entail conclusion 2. Propositions 1 and 2 entail the conclusion

3. Jack is subject to a $50 fine.

Now compare the case of Ann, who rode her bicycle in the park. For the purpose of illustrating open texture, we have been assuming there are good reasons both for and against our application of the general term "operating a vehicle" to the act of riding a bicycle, so that Ann's case falls in the penumbra of the rule.

Note that we are not to ask whether "operating a vehicle" is true of riding a bicycle, for that is what this test is meant to determine. The applicability of a general term depends on whether there are good reasons for and against its application.

This would explain why Hart neglects the topic of interpretation, although he comments on the assignment of meaning by courts. Attempts at interpretation are occasioned by the existence of non-negligible considerations on two sides of a legal question – reasonable grounds for more than one way of understanding and applying a law. If genuine interpretation of law is possible, it involves balancing conflicting legal considerations, and this does not fit Hart's syllogistic model.

Although Hart explicitly refers to syllogistic reasoning only in connection with the application of a general term to a fact-situation, his discussion seems to commit him to a syllogistic model much more generally. For he holds that, when there are good reasons on each side of a legal question raised by a case, so that balancing of them is needed, there is no "uniquely correct answer." (132)

Thus Hart seems to reject out of hand the possibility that a rule might have determinate implications when they cannot be derived from it deductively. This suggests that he would also reject the idea that the law might have determinate implications for a case when its rules cannot be applied deductively – when they apply contrariwise to the case, so that balancing of them is required. Hart suggests that legal judgments can be derived from general legal rules when, but only when, the rules apply unequivocally.[11]

[11] This seems the closest that Hart comes to embracing the "model of rules" that Dworkin attributes to him in "The Model of Rules." Contrary to Dworkin's claims, however, these points have no bearing on the essentials of legal positivism;

On such a view, there would seem to be no scope at all for the interpretation of law – at least interpretation that is occasioned by conflicting legal considerations. Hart's presentation of open texture theory precludes it.

But open texture theory needs revision, for it proves too much. As presented by Hart, it implies that true descriptions cannot be uncertain or controversial. And that's implausible.

Consider what Hart says about laws that incorporate moral or evaluative terms. He imagines that "the legislature may require an industry ... to charge only a *fair rate* or to provide *safe systems* of work." Hart regards these as "vague standards" and suggests that they are substantially less determinate than rules lacking such terms. He says that some "cases of what is, or is not, a 'fair rate' or a 'safe system' will always be identifiable *ab initio*," but "these are only the extremes ... and are not likely to be met in practice." In the "real cases," application of such a law requires an "official choice" between different ways of balancing the "conflicting interests." It is impossible for there to be "one uniquely correct answer." (131–132) Hart's discussion thus suggests that legal rules incorporating moral or evaluative terms are more gappy than determinate – virtually all applications of them are penumbral.

We can understand this as follows. Consider the circumstances in which a court will be asked to apply a law requiring safe systems of work. It is extremely likely that each of the opposing sides will be well informed and equipped with supporting arguments that cannot be dismissed out of hand. There is likely to be some good reason for regarding a proposed or existing system as safe and some good reason for regarding it as unsafe. That fact satisfies Hart's condition for legal indeterminacy. The interpretation of a law with moral or evaluative language is thus out of the question.

But there seems no reason to assume that moral and evaluative standards have no uniquely correct application because interests conflict and good reasons are available on both sides.[12]

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nor do they flow from the essentials of Hart's theory of law, as developed in *The Concept of Law*, chaps. I–VI. (In the Postscript, however, Hart counts his open texture theory as "central to [his] theory of law." (259))

[12] In the Postscript Hart says that "legal theory should avoid commitment to controversial theories ... and should leave open ... the question of the objective standing moral judgments." (253–254) Instead of avoiding such a commitment,

And as Hart himself did not address "real" issues of political morality with skeptical diffidence, I am not at all sure that he would be happy with those or other implications of his open texture theorizing.[13]

On the one hand, his discussion seems to imply, falsely, that there will often be no "uniquely correct answers" to historical, scientific, and other factual questions. On the other hand, Hart's theoretical objectives do not seem to require so extreme a notion of open texture.

As to the first point, suppose that the legislature enacts a law restricting development at sacred sites of the indigenous population. Suppose, further, that the location of ancient sites has been obscured as a result of changes in the land wrought by the non-indigenous expropriators of it over many generations. Experts might well disagree about the true location of ancient sites, in which case there would be reasonable disagreement about the application of the general term "sacred site." Subsumption and the drawing of a syllogistic conclusion would be impossible, and open texture theory would imply that there is a corresponding gap in the law. Despite that fact, it seems reasonable to assume that ancient sites had, and therefore retain, precise locations, of which "sacred site" is true.

Similarly, if the legislature restricted development on hundred-year flood plains, inadequate records and differing theories about flooding could generate reasonable uncertainty or disagreement among experts as to the boundaries of such plains. We might well suppose, however, that "hundred-year flood plain" is true of certain geographical areas and not others. Hart's presentation of

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however, Hart includes the contrary view in his legal theories. He accepts, for example, "that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values." (250) This implies that, in those cases, rules cannot be validated as law unless they satisfy the appropriate moral or evaluative criteria. When he insists, however, that "the law may be identified without reference to morality," (270) he in effect assumes that there are no determinate moral or evaluative criteria and incorporates into his legal theory the notion that moral judgments lack objective standing. This accords with his treatment of moral and evaluative criteria in his discussion of law's open texture.

[13] In *Ethics and the Rule of Law* (Cambridge 1984), p. 52, I mentioned that relativism is implied by Hart's treatment of morality in *The Concept of Law.* As he soon after remarked to me, "Of course, I did not mean that." The same applies here.

open texture theory would seem, however, to imply the contrary. Examples like these can be multiplied indefinitely.

Hart employs too weak a condition for indeterminacy. He should also distinguish conflicting reasons due to linguistic indeterminacy from those occasioned by other factors, such as conflicting theories and evidence.

And a more modest conception of open texture would serve his announced theoretical purposes adequately. Hart contrasts his doctrine with two competing views: the "formalist" notion that law always provides adequate grounds for deciding any legal question that might arise and the "realist" claim that law never does so. He holds that each view makes but exaggerates a valid point. Offered as a moderate mean between those two theoretical extremes, Hart's theory claims that law often provides adequate grounds for deciding legal questions but cannot always do so.

Hart's basic point concerns the limited precision of language.[14] He allows that law's determinacy can be enlarged, but he argues that indeterminacy can never be banished entirely, as it flows from law's unavoidable use of language. Hart might still be able to make that more limited (but theoretically significant) point without suggesting that indeterminacy obtains whenever there are good reasons both for and against the application of a general term used in law.[15]

C. FURTHER REFLECTIONS

Hart's first. In responding to Dworkin's criticisms, Hart comments on related issues.

(i) Although he confirms our understanding of open texture theory (252; 272–276), Hart is equivocal about the surrounding ideas. In distinguishing "hard cases," which he says are "controversial in the sense that reasonable and informed lawyers may disagree about which answer is legally correct," from cases in which "the law

[14] Hart does not claim that all legal indeterminacies arise from open texture. He regards judicial precedents as loci of more radical indeterminacy, and he would no doubt regard conflicts between statutes or precedents, among other factors, as sources of indeterminacy.

[15] Whether such an argument could succeed depends, of course, on overcoming objections I raised in Section A.

. . . is fundamentally *incomplete*" (252), he implies that reasonable disagreement is not a sufficient condition of legal indeterminacy. But in characterizing "hard cases" as "cases which the law had left completely unregulated" (276), he implies that reasonable disagreement is a sufficient condition of legal indeterminacy.

(ii) The balance seems to be tipped in the latter direction by Hart's discussion of legal principles. (259ff) Hart acknowledges "the explanatory and justificatory role of principles in relation to rules" (260) and "their 'non-conclusive' character." (261) One of his main points is that

> in any hard case different principles supporting competing analogies may present themselves and a judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best and not on any already established order of priorities prescribed for him by law. (275)

What can we conclude? My aim has been modest: to address an assumption that seems frequently to be made in legal theory, which implies that interpretation of law is impossible when it is needed. I have not argued (nor do I suppose) that legal rules lack open texture or, more importantly, that there are no indeterminacies in law. My point is that reasonable uncertainty and disagreement are usually taken as occasions for interpreting the law – for figuring out meaning that it may have. Open texture theory implies that interpretation is then impossible, but it provides no good reason for believing that to be the case. Given the failure of open texture theory, we may reasonably consider theories of legal interpretation on their merits.

Nothing said so far provides support for any such theory, or even suggests that the best-known theories are tenable. The two most important theories, in my opinion, are original intent (when viewed as a value-free basis for reading or applying law) and Dworkin's value-based "law as integrity." As for them, I am, frankly, skeptical. But those are matters for other occasions.[16]

[16] The next stage of my argument is sketched briefly in "Original Intent and Legal Interpretation," *Australian Journal of Legal Philosophy* 24 (1999) 1–25. Some suggestions of a subsequent stage may be found in the last two chapters of *Moral Aspects of Legal Theory* (Cambridge 1993).