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## ON THE OPEN TEXTURE OF LAW

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### 1. *Introduction*

In *The Concept of Law*, H.L.A. Hart famously claimed that the law is *open-textured* (Hart 1994, 123, 128-36). Hart borrowed the term from his Oxford colleague Friedrich Waismann (Waismann, 1945), whom he duly acknowledged as the inspiration for the conclusion that law as well as language is open-textured. But is Hart's claim correct? 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 so believing. Nor is it apparent that Hart and others are correct in maintaining that law's open texture produces the necessary defeasibility of legal rules. For even if law is open-textured, it does not follow for law, as it may follow for language, that the uncertainty generated by an instance of open texture is necessarily an occasion for revising an existing legal rule. Indeed, resistance to

precisely such revision may well be what characterizes rules. If that is so, then Hart's insistence on law's essential defeasibility may well be mistaken. Or so I shall argue here.

## 2. *Waismann on the Open Texture of Language*

I begin with a *précis* of Waismann's basic idea. Arguing against the logical positivist credo that meaning was a function of verifiability (Ayer, 1946), Waismann observed that even the most precise and carefully delimited empirical terms might nevertheless produce uncertainty in the face of unforeseen and virtually unimaginable instances. Because language cannot anticipate all possible occurrences in all possible worlds, he argued, there persists the ineliminable potential that a definition of an empirical concept bounded in all now-foreseeable dimensions can break down in the face of unforeseen and unforeseeable events. To illustrate the phenomenon, Waismann observed that if we attempted to verify the statement, "There is a cat next door," no amount of seeing, touching, or patting the cat to verify that it was indeed a cat could foreclose the logical possibility that the creature we thought was a cat according to all of the existing criteria of catness might then grow to gigantic size, or die and then come back from the dead. Were such eventualities to occur, Waismann argued, the existing criteria for application of the term would collapse. An uncertainty that had not previously existed would arise precisely because of the appearance of the unexpected, and it is central to Waismann's idea of open texture that the possibility of the unexpected, at least for material object statements, can never completely be foreclosed.

At about the same time that Waismann was writing about open texture, J.L. Austin captured the identical idea even more vividly. Austin asked us to imagine a creature that

appeared to be a goldfinch according to the existing definition of what it is to be a goldfinch, but which then proceeded to explode, or quote Virginia Woolf (Austin 1946, 160). Under such circumstances, he says, “we don’t know what to say.” It is precisely the lack of knowing what to say (or do) in the face of the unforeseen and unforeseeable that Waismann originally called, in German, “*Die Porosität der Griffe*” (the porosity of concepts), and then, at the suggestion of W.B. Kneale (Waismann 1945, 121), relabeled in English as “open texture.” Thus, as Stewart Shapiro puts it in summarizing Waismann’s idea, “*P* exhibits *open-texture* if there are possible objects *p* such that nothing in the established use of *P*, or the non-linguistic facts, determines that *P* holds of *p* or that *P* fails to hold of *p*. In effect, *Pp* is left open by the use of language, to date.” (Shapiro, 2011).

As Waismann explicitly stressed, open texture is not to be confused with vagueness (Waismann 1945, 122). Some terms are indeed vague in that they are indeterminate with respect to known (existing or currently imaginable) applications. It takes no great foresight to understand that some collections of things may or may not be *heaps*, that certain kinds of behavior may or may not be *kind*, or that a car traveling at 90km/hour on a particular stretch of highway may or may not be traveling *quickly*. In such cases, we perceive now that some applications of the term are indeterminate. But open texture is different. It is the *possibility* of vagueness – the *potential* vagueness – of even those terms that appear to have no uncertainties with respect to known or imagined applications. We could list all of the existing criteria for something being a goldfinch, and thus the term “goldfinch” would not be vague for any of the known existing goldfinches and non-goldfinches in the world. But because such a precise and non-vague definition of “goldfinch” would not likely contain the criteria of “does

not explode” or “does not quote Virginia Woolf,” the occurrence of the previously unimagined would render the hitherto non-vague term newly vague with respect to that application. And because such a possibility could never entirely be eliminated for empirical concepts, Waismann maintained, attempting to define the meaning of such concepts in terms of verifiability was destined to failure.

### 3. *Hart and the Open Texture of the Law*

In analyzing the operation of legal rules, Hart purported to adopt Waismann’s idea and adapt it to law. Hart claimed that rules necessarily possess “a fringe of vagueness or ‘open texture’” (Hart, 1994, 123), and he attributed the idea to Waismann (Hart, 1994, 297). But it is not obvious that Hart and Waismann were talking about the same thing. One problem is that Hart’s language is ambiguous as between the view that vagueness and open texture are distinct, as Waismann argued, and the view that “open texture” is for Hart simply a synonym for “vagueness.” Perhaps he is merely following the common practice of using the “x or y” locution to say that y is an alternative and possibly better way of saying x, as when I describe my dog as “my pet, or my cherished companion.”

Although Hart’s language is susceptible to that interpretation, a more plausible reading is that Hart did see vagueness and open texture as different, but not in the same way as Waismann. After introducing the term “open texture,” Hart defines it as the fringe area of a term with clear and unclear – core and fringe (or core and penumbra) – applications. Thus, a man who is two meters in height is clearly tall, and a man who is one and one half meters is clearly not tall, and so a man who is in the area of uncertainty – 1.85 meters, say – exists in the

fringe of the term “tall.” And the same applies to terms less pervasively vague than “tall” – that is, to terms which, unlike “tall,” are determinate for most of their known applications. Take “wine,” for example. Its extension is quite precise, such that the vast majority of substances, and even the vast majority of potable liquids, are easily classified as wine or not wine. But whether non-alcoholic wine is wine at all is not so clear. Consequently, we can say that non-alcoholic wine is located in the relatively small fringe of a term with a large core of settled meaning – a term containing, overwhelmingly, clear cases of application or non-application.

That “open texture” was to Hart the label not for potential vagueness but for the *actual* vagueness surrounding the determinate applications of partially non-vague terms becomes even more plain when we examine his introduction of the now-famous example of a rule prohibiting vehicles in the park (Hart 1994, 129; Schauer 2008). For most of the “paradigm, clear cases,” the application of the term is straightforward, and Hart offers “motor-cars, buses, and motor-cycles” as examples of such clear cases. But with respect to an electrically propelled toy motor-car, he says, the application of the term “vehicle” is no longer straightforward. Accordingly, with respect to the question whether the no-vehicles-in-the-park rule applies to the electrically propelled toy motor-car, Hart continues, the law can be seen to have exhibited its open texture. He then goes on to say that in such cases we “confront the issues at stake and [] then settle the question by choosing between the competing interests in the way that best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for purposes of this rule, of a general word.” (Hart 1994, 129). “The open texture of the law means that there are, indeed, areas of conduct which must be left to be developed by courts or officials striking a balance, in the light

of circumstances, between competing interests which vary in weight from case to case.” (Hart 1994, 135).

#### 4. *The Open Texture of Law and the Open Texture of Language*

Hart’s explication of the open texture of legal rules is as interesting as it is important, but Hart may be less explaining or using Waismann’s idea than he is modifying it. Of course many terms do have cores of settled meaning and fringes of now-debatable applications. What Hart said about the term “vehicle” in a legal rule holds also for most terms. And it holds even when those terms are not components of prescriptive rules. In numerous contexts, there are core and fringe applications of “bus,” “run,” “blue,” and “dead,” for example, and so the core and fringe feature of most of the words in any language will be part of the language of legal rules as well. Waismann’s point, however, is different. It is that even terms with *no* currently known fringes may still develop such fringes in the face of currently unforeseeable applications, and that this possibility can never completely be eliminated. The claim of language’s open texture is thus a claim about (empirical) language’s inevitable potential uncertainty, and it is this idea that Hart seeks to transfer to legal decision-making.

In one respect Hart is plainly correct. Law is inevitably potentially uncertain just because language is inevitably potentially uncertain. Legal rules are ordinarily canonically written in language, and are typically (or perhaps necessarily) understood in language even when, as is often the case in common law systems, they may have no single formal canonical inscription in a book of statutes, regulations, or constitutional provisions. Because legal rules are thus language-dependent, the properties of language in general are present with respect to

legal rules expressed in language. More particularly, the phenomenon of open texture, as identified by Waismann, must be a feature of all legal rules.<sup>1</sup> To illustrate, imagine a legal rule pertaining to goldfinches – say, a rule declaring the goldfinch to be an endangered species and thus protected against hunting, capturing, and the like. The rule would specify what could or could not be done with or to goldfinches, and, because “goldfinch” is a term with no special legal meaning, might then implicitly or explicitly incorporate the ordinary meaning of “goldfinch” then present in the language. But if someone were charged with violating the law by, say, capturing an exploding goldfinch, the very uncertainty of whether such a creature was a goldfinch at all would make the legal consequences of the capture *pro tanto* uncertain as well.

If Waismann’s idea is sound, then open texture is indeed an ineliminable feature of law, but it is ineliminable in law precisely because it is ineliminable in language. As long as law is written and understood in language, then the characteristics of language infuse law as well. Law is thus open-textured, and necessarily so, just because of the ineliminable open texture of language, but this conclusion does not yet suggest that legal open texture is any more than, or any less than, the open texture of the terms in which the law is written and understood.

##### 5. *Is the Open Texture of Law More than the Open Texture of its Language?*

The open texture of language thus produces open texture in law, but this conclusion is neither startling nor particularly interesting. Insofar as language is open-textured, it follows that *any* use of language is *pro tanto* open-textured. Law is thus open-textured, but so too are

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<sup>1</sup> For purposes of this article, I assume that Waismann is basically correct. My question is not whether Waismann is, ultimately, right, but what, if Waismann is right, this says about law.

novels, theatrical productions, everyday conversations, restaurant menus, and the instructions I give to the automobile mechanic. If Waismann is right, then the phenomenon of open-texture pervades language use, and Austin's exploding goldfinch can appear and make the immanent open texture of language present and problematic in *any* use of language, including but by no means limited to legal language.

Hart, however, seems to make a broader claim, as his examples demonstrate. The important difference for our purposes between Austin's exploding goldfinch and Hart's electrically propelled toy motor-car is that we can not only imagine the latter, but can also describe it with existing linguistic tools. A toy electric motor-car does not exemplify the open texture of language, and so for it to be an example of the open texture of law, Hart must have had in mind a feature of law distinct from the open texture of language.

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. The no-vehicles-in-the-park rule is a straightforward example of a rule. Many rules, including this one, are presently both under- and over-inclusive with respect to their background justifications (Alexander & Sherwin, 2001; Schauer 1991). Consider the typical highway speed limit. The speed limit is a rule, designed to serve the background justification of fostering highway safety. But we know now that a designated speed limit aimed at ensuring safe driving will excessively limit some experienced and safe drivers under ideal conditions who are in fact driving safely, albeit above the speed limit. And by reaching some instances of safe driving, the rule reaches beyond its background

justification, and is accordingly over-inclusive. Conversely, some forms of unsafe driving – driving just below the limit in snow and ice, for example, or an inexperienced driver’s driving right at a high motorway limit – are not covered by the speed limit rule. The rule is thus under-inclusive to the extent that some behaviors covered by the rule’s background justification of ensuring safety are not covered by the rule itself. But neither such over- nor under-inclusion represents open-texture in either Waismann’s or Hart’s senses, because neither involves a confrontation with what was previously unexpected or undecided. For all of the reasons of predictability and consistency, among others, that we use rules, the speed limit rule is knowingly adopted with full-knowledge of its under- and over-inclusion, and with, ideally, full appreciation of the fact that achieving the virtues of rule-based decision-making involves enduring the vices of a rule’s under- and over-inclusiveness.

In other instances, however, the tokens of under- or over-inclusiveness may not be imagined by the rule-makers at the time a rule is made, and thus not anticipated in selecting the language of the rule. Such instances are presumably what Hart had in mind when he used the example of the toy electric motor-car (Bix 1993, 17-35). He considered it an example of legal open-texture because a particular application of a rule was not settled by the language of the rule, as it would have been had the rule-maker specified that the prohibited vehicles were of a certain size, or propelled in a particular way, or capable of carrying a designated number of passengers. But in Hart’s example, the extension of the rule is not so limited, extending to anything that is a “vehicle.” And because we do not know whether the toy electric motor-car is a vehicle, we do not know whether it contravenes the no-vehicles-in-the-park rule.

The mere fact that a new occurrence is not covered by a rule, however, need not produce the same “we don’t know what to say” response that the exploding goldfinch occasions with respect to the previous criteria for proper use of the word “goldfinch.” The rule could have carefully defined “vehicle” in all then-known directions, and could also have said that anything not a vehicle according to that definition would not be covered by the rule. And the rule could accomplish this goal with then-existing linguistic resources. Were the rule to be formulated in this way, and if, say, the rule defined a vehicle in a way that limited vehicles for the purpose of the rule as being of a certain size, or having the capacity to hold a certain number of human passengers, then the toy electric motor-car would simply not have been covered by the rule, even though this particular application was not imagined at the time the rule was written and enacted. But if the rule, as in Hart’s example, is specified simply in terms of “vehicles,” then the presence of the toy electric motor-car might well be an example of the limited foresight or imagination of the particular drafters of a particular rule, but little more than that. If the term “vehicle,” standing alone, is indeterminate with respect to toy electric motor-cars, then we have an example of the open texture of language as manifested in a legal rule, but not an example of a feature of law going beyond the open texture of language. And if the term “vehicle,” standing alone, is determinate with respect to toy electric motor-cars (assuming that toy electric motor-cars *are* vehicles), then this is like the speed limit – an application lying within the scope of the rule but not serving the rule’s background justification. This, to repeat, is a familiar (and often intentional) feature of rules, but does not generate the quandary or uncertainty that characterizes open texture.

## 6. *On the Possibility of Closure Rules*

As noted above, rules may contain closure provisions, excluding (or, in theory, including) all applications not plainly encompassed by the rule. And as Hart observed (Hart 1994, 272), Jeremy Bentham imagined and discussed just this kind of rule, one with its own specified closure. For Bentham, who notoriously abhorred the idea of judicial legislation, a gap in the law was not the occasion for judicial gap-filling, but for legislative action, albeit legislative action prompted by the a proposal from the judge. Bentham, with his penchant for neologisms, called this the “suspensive” power or “sistitive” function, whereby a judge would suspend execution of the law pending legislative revision (Postema 1986, 434-439). For present purposes, however, the issue is not principally about the strategy to be followed when a legal rule does not plainly cover some occurrence in the world. Rather, Bentham shows that a set of rules can in theory provide a closure or default rule specifying what is to happen in *all* events not plainly covered by the existing rules (Gardner 2001, 212). Consider the implicit closure rule of the Anglo-American criminal law, according to which all behavior not clearly prohibited by an enacted legal prohibition is permitted. Or consider a hypothetical rule of private law, pursuant to which claimants could recover against defendants only if an explicit rule authorized such recovery, and only if the claimant’s actual claim clearly fell within such an explicit rule. In all other cases, the claim would fail. This might well be a bad rule, neglecting to account for the fact that in private law an uncompensated wrongfully caused injury is as regrettable as compensation where there is no injury or wrong. But the justice or injustice of the rule is a side issue. What is important is simply that a closure or default rule is entirely possible.

Any closure rule would, of course, remain subject to the open texture of the language of the closure rule itself. But if the closure rule’s language were determinate, then there is no

reason why law would necessarily be compelled to face a situation in which the law simply runs out, in the way that language runs out when confronted with the exploding goldfinch. Indeed, Hart appears to concede as much, in his posthumously published “Postscript,” when he is describing Bentham’s approach (Hart 1994, 272). By characterizing Bentham’s proposal – a form of closure rule -- as an alternative to judicial discretion, Hart implicitly concedes that there are systemic options for law other than judicial discretion or judicial law-making. In so conceding, however, Hart sets himself at odds with what he, earlier in *The Concept of Law*, appears himself to have maintained, and sets himself at odds with what others have said about legal defeasibility. And it is to this that we now turn.

### 7. *The Possibility of Non-Defeasibility*

With the foregoing analysis in mind, consider Hart’s claim that a rule with an “unless” clause can still be a rule (Hart 1994, 136). This itself seems uncontroversial. A rule that is specified in “If A, then  $\phi$ , unless B” form is merely a different way of formulating a rule with multiple conditions for its application, as in “If A and not-B, then  $\phi$ ” (Schauer 1991, Stone 1985, 68-73).<sup>2</sup> Moreover, using an “unless” clause is sometimes a method of formulating a genuine reason-providing but still non-absolute rule. In American constitutional law, for example, a governmental classification by race is unconstitutional *unless* the government can justify such a classification by a “compelling interest” where it is understood that a compelling interest is a heightened standard of justification substantially stronger than that minimally necessary – a

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<sup>2</sup> I put aside burden-of-proof considerations, which may make the two formulations more different than they would be absent such considerations (Chapman 1998; Finkelstein, 1999).

mere “rational basis” – typically needed to justify ordinary legislative classifications (*Loving v. Virginia* 1967). But neither using an “unless” clause to formulate a rule with multiple conditions for its application nor using one to express a non-absolute rule genuinely implicate the idea of open texture. The latter is, to be sure, a way of accommodating for the possibility that the details of all potential overrides cannot fully be anticipated in advance, but still differs from the case in which specific law confronts the genuinely unexpected. Making rules defeasible and using a vague standard for defeat is a way of managing the uncertainty of the future, but is different from the case in which a non-vague rule confronts the genuinely unexpected.

Although intentional vagueness to manage an uncertain future is more or less straightforward, Hart makes a stronger and more problematic claim when he maintains not only that a rule with an “unless” clause is still a rule, but also that the list of “unlesses” cannot be exhaustively specified in advance. (Hart 1994, 136; MacCormick, 1974, 117). In this he marks a position now quite common in the legal literature. Richard Posner, for example, insists that courts *always* (the word is crucial) retain the power to append “ad hoc exceptions” at the moment of application even to existing, precise, and exceptionless rules (Posner 1988, 834-835). Similarly, Richard Tur argues that courts *necessarily* have the power to set aside the indications of rules in the service of equity or justice when applying the rule would produce an unjust result or a one at odds with the rule’s background justification (Tur 2001), Ronald Dworkin has described the list of legal principles as “numberless,” (Dworkin 1977: 43-44), and Neil MacCormick has offered a slightly more qualified version (MacCormick 1995) of the same claim. And although Ronald Dworkin’s later insistence that there is a “real” rule existing behind the formal words of a written rule is mysterious (Bix 1993, 34-35), the heart of his argument is

the view, related to those just set out, that written rules are necessarily defeasible in the service of the real rule lurking in the background (Dworkin 1986).

Thus a new argument is now before us -- that law's open texture is not merely the open texture of law's language, and not simply the conventional claim that legal rules, like all rules, *can* be treated as defeasible,<sup>3</sup> but that legal rules are *necessarily* defeasible. The claim is not that treating legal rules as defeasible is desirable, useful, or common, but that it is in the nature of rules or the nature of law that legal rules are necessarily and thus invariably defeasible.

To be distinct from the defeasibility occasioned by the open texture of language, *legal* defeasibility must exist within the area of linguistic determinacy. Were it otherwise, we would simply be rehearsing in legal context the issues of linguistic open texture and consequent linguistic indeterminacy. Thus the claims of Dworkin, MacCormick, Posner, and Tur, among others, and suggested by Hart in asserting the impossibility of listing in advance all of the possible "unlesses," are best understood as claims positing defeasibility even in the face of linguistic determinacy. Consider, to take the obvious example, the case featured by Ronald Dworkin, the 1889 decision of the New York Court of Appeals in *Riggs v. Palmer*. In *Riggs*, Elmer Palmer's grandfather had named Elmer in his will, but was contemplating changing the will, to Elmer's disadvantage. In order to accelerate his inheritance, Elmer killed his grandfather with poison. He was eventually caught, charged with murder, tried, convicted, and imprisoned.

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<sup>3</sup> Indeed, there is a vast literature exploring the logic of legal defeasibility (Hage 2005; Prakken 1997; Sartor 1995; Stelmach & Brożek 2006), but that literature attempts to model and analyze defeasibility when chosen by a legal system, rather than addressing the question whether such defeasibility itself is a legal or logical necessity.

But Elmer argued that he was still entitled to inherit his grandfather's estate, relying on the New York Statute of Wills, which provided, to oversimplify, that anyone named as a beneficiary in a will would inherit upon the death of the testator. Importantly, the Statute provided no relevant exceptions to that rule, and the judges who thought Elmer should inherit and even those who thought he should not agreed that the rule as written was clear and did not contain grounds for an exception.

The judges who thought that Elmer should lose were in the majority, relying on the "no man should profit from his own wrong" principle to produce that outcome. But it is important that there was agreement among *all* the judges that a literal application of the rule would allow Elmer to inherit. This was not, therefore, a case of linguistic vagueness, ambiguity, or open texture in Waismann's sense. The language was clear. It is just that the clear language happened to produce an unfortunate and seemingly unfair result. But is such a result an indication of the open texture of law *qua* law? Is it an example of the necessary defeasibility of legal rules?

*Riggs* illustrates the distinction between a rule that gives no answer and a rule that gives a bad answer, and precisely this distinction undercuts the claim of necessary defeasibility. The rule in *Riggs* did not contain an "unless" clause, and thus we might conclude, or Hart might have concluded, that *Riggs* presents a situation not envisaged when the rule was drafted. And we might also conclude that the situation presented by *Riggs* is one in which a previously unimagined situation shows how a hitherto unneeded and unanticipated "unless" clause might have been a good idea. Yet even if that is so, the rule without the "unless" clause is still capable

of generating a clear outcome, albeit a morally (in this case) unpalatable one. Consequently, the existence of hypothetical “unless” clauses whose addition would have prevented an unfortunate outcome is insufficient to make the case that legal rules are necessarily defeasible. If there is such a case to be made, essentially a claim that all of the rules in a system should have open-ended “unless” clauses, it must be a moral or policy claim rather than a logical or linguistic one. A rule that ill serves its background justification in a particular case is still a rule capable of producing an outcome, and whether such an outcome should be tolerated when it is unsound as a moral or policy matter is different from whether such an outcome presents an “exploding goldfinch” type of genuine uncertainty.

#### 8. *On the Grounds for Defeasibility*

When the New York court concluded in *Riggs* that Elmer could not inherit because of the “no man shall profit from his own wrong” principle, it treated the most directly applicable legal rule as defeasible in the service of justice. The “no man may profit from his own wrong” principle is narrower than the full domain of justice, but few dimensions of justice – probably no dimensions of justice -- are not instantiated by some common law principle. Thus, the court avoided the unjust outcome by implicitly concluding that all legal rules are defeasible in the service of justice. And a similar situation arises when the rule-generated outcome result is unreasonable or ridiculous, even if not unjust. In *United States v. Kirby*, for example, a Kentucky law enforcement officer had been convicted under a federal law making it a crime to interfere with the delivery of the mail. And that is exactly what Kirby had done. He had unquestionably interfered with the delivery of the mail, but did so in the process of boarding a

steamboat to arrest a mail carrier named Farris who had been validly charged with murder by Kentucky court. The case reached the Supreme Court, where the Court treated the statute as defeasible, rejecting its literally dictated outcome where that outcome was inconsistent with the purpose of the statute, inconsistent with commonsense, and inconsistent with justice.

If we depart the realm of the real and enter that of the hypothetical, we see the same phenomenon captured in Lon Fuller's famous response to Hart's no-vehicles-in-the-park example (Fuller 1958, responding to Hart 1958). Fuller imagined a group of patriots who installed a fully functional military truck in the park as a war memorial. This would clearly be a vehicle, Fuller argued, but it would just as clearly be absurd to exclude it from the park on the authority of the "no vehicles in the park" rule.

Had this been an empirical debate, Fuller may well have won. If Hart is understood to claim that the plain meaning of the terms of a rule provides a conclusive answer in most real cases in real legal systems, and if Fuller is understood as responding that the plain meaning answer was typically defeasible and rarely conclusive in well-functioning legal systems, then Fuller is closer than Hart to the reality in many modern legal systems (Schauer 2008).

But Fuller made a broader claim. For him (and Dworkin, MacCormick, Posner, and Tur), it is not merely a contingent empirical fact that legal rules are typically (and, to Fuller, preferably) defeasible in common law legal systems, but also that the defeasibility of legal rules is an essential feature of legality itself, on a par with those other desiderata of legality that for Fuller came close to defining law itself (Fuller 1969). For Fuller, failing to treat a rule like the no-vehicles-in-the-park rule as defeasible was simply to abandon reason, and for him it was of

the essence of law that it be reasonable. A system that did not allow purpose-based or equitable override of the plain indication of a legal rule when necessary to achieve a reasonable outcome was for that reason just so much less of a *legal* system, and perhaps not even a legal system at all. Indeed, we can understand Fuller's claim in the best light, and without saddling him with the view that nondefeasible law is not law at all, by interpreting him as maintaining that non-defeasible law is necessarily *defective* as law, even if the defective law is still law. Just as *any* boat that leaks is defective as a boat even as it remains a boat, so Fuller is best understood as insisting that any legal system is necessarily defective as a legal system, and as law, insofar as it treats its rules as non-defeasible.

The course of action that Fuller rejects, however, is conceptually possible, often adopted, and often far from unjustifiable. The New York Court of Appeals *could* have said that Palmer would inherit despite the wrong he committed, just as the United States Supreme Court could have concluded that Kirby violated federal law even though he did it for good reason, and even though punishing Kirby was inconsistent with the purpose of the law he literally violated. And some hypothetical judge could conclude that a war memorial made from a functioning military truck was nevertheless a vehicle, and thus to be excluded from the park by virtue of the no-vehicles-in-the-park rule. Such outcomes might be condemned as ridiculous or absurd, or, even more pejoratively in some legal circles, *formalistic*, but they are neither conceptually nor linguistically impossible. As long as words have literal meanings with a context-independent core, and as long the meaning of a word is not entirely a function of the particular context in which it is used on a particular occasion (Bix, 1993, 21-22), then rules – which are written in

words – can indeed generate poor outcomes, and judges can embody those poor outcomes in their rulings.

Indeed, not only can this happen, but it does – frequently. The result in *Riggs* is more exceptional than normal, even in the anti-formal American judicial system. There are other cases in which the outcomes do resemble those in *Riggs*, but in many others beneficiaries who were culpably responsible for the death of the testator were allowed to inherit. (Schauer 2004). Indeed, suboptimal or unjust applications of statutes are often allowed to stand, as in *Tennessee Valley Authority v. Hill*, in which a literal application of the Endangered Species Act mandated the preservation of the habitat of a small, unattractive, and ecologically unimportant fish called the snail darter, even at great cost to the aggregate public welfare by virtue of blocking of an important public works project. And in *United States v. Locke*, a statute setting a filing deadline of “prior to December 31” was upheld even when its literal application resulted in the arguably unfair exclusion of a claim filed on December 31 by someone who assumed, not unreasonably, that the statute really meant to say “on or prior to December 31.”

There are numerous other examples, in the United States and elsewhere, and it would be mistaken to describe the defeasibility of legal rules as a universal or even overwhelmingly common feature of legal decision-making. Although legal decision-makers sometimes treat rules as defeasible, frequently they do not. Often they treat the literal language of a rule formulation as conclusive, and refrain from adding exceptions at the moment of application, overriding the indications of rules in the service of justice or equity or efficiency, or modifying rules at the moment of application. Such non-defeasibility may not be wise, but it is both

possible (Baker 1977, 38) and widespread. Rule-formulations have meanings distinct from the background justifications lying behind the rules and distinct from what the best (or even a good) rule-free outcome in some particular instance would be. Although treating rules as defeasible is widespread in many legal systems, examples like those just offered show that rules are often applied as written – treated as non-defeasible – even when what seem to be valid defeating conditions are present. As a descriptive matter, it is hard to defend the position that a legal system without widespread and legitimate defeasibility is for that reason no legal system at all.

Moreover, non-defeasibility is hardly without justification. The arguments for rules are familiar, and most of the arguments for rules in general are arguments for treating rules as non-defeasible. When the designers of some decision-making environment are distrustful of judges and other legal decision-makers who might be biased, corrupt, incompetent, ill-equipped for the job, or just very rushed, then the designers might want to constrain those decision-makers by rules rather than granting wide discretion. Indeed, when distrust is at its acme, decision-makers may not be granted the authority to decide when some application of a rule is ridiculous or absurd, let alone unfair, inequitable, unjust, or inefficient. It is easy to see that it would be absurd to exclude the truck used as a war memorial from the park, but the real question is whether and when some class of officials should be empowered to decide which applications are absurd and which are not. Moreover, rules also serve to allocate decision-making responsibility. To treat a rule as non-defeasible is often simply to decide that some but not other officials will have the power to cancel, override, amend, or modify an existing rule. And insofar as rules also bring the advantages of certainty, predictability, settlement, and

stability for stability's sake, treating the rules as defeasible comes at the sacrifice of each of these values, even though of course it brings the potential advantages of fairness, equity, and, in theory, reaching the correct result in every instance.

### 9. *The Contingency of Defeasibility*

It now becomes apparent that the traditional defenses of the necessary defeasibility of legal rules – whether Hart's, or Posner's, or MacCormick's, or Tur's – mostly rest on a certain view about the powers and abilities of judges. Few people would maintain that police officers or ordinary bureaucrats, for example, should have the power to revise the rules that constrain them when those rules appear to indicate a poor outcome in a particular case. And if that is so, then the view that defeasibility in the hands of judges is required by the Rule of Law while defeasibility in hands of others is not turns out to be a view about the capacities of judges within particular legal systems. So long as we can imagine something properly called a legal system in which the power of rule revision and rule override is not entrusted to judges, then we can imagine something properly called a legal system in which defeasibility is somewhat or even largely absent.

Defeasibility is thus not a property of rules at all, but rather a characteristic of how some decision-making system will choose to *treat* its rules. The Wittgensteinian maxim that rules do not determine their own applications reminds us that how a rule will be treated is not something inherent in the rule itself. If the plain or literal (but not necessarily the ordinary language) meaning of a rule can indicate an outcome, it is a function not of the rule but of how the rule will be treated whether that indicated outcome is to be taken as conclusive,

presumptive, or even, at the extreme, as having no weight in itself, being but a totally transparent (to its background justification, or to the all-things-considered best outcome) heuristic or rule of thumb. The question of defeasibility is not a question about what is *in* a rule, but is rather a question about how what is in a rule, or about how what a rule says, is to be treated, and this is not, and can never be, something that can be determined by the rule itself.

The question of defeasibility is thus exposed as descriptive and prescriptive, but neither logical nor conceptual. It is logically and conceptually possible for rules to be interpreted, understood, applied, and enforced according to the literal meaning of the component language of their formulations. Whether in this or that legal system they are in fact so treated is a descriptive question, and it turns out, as the examples above illustrate, that as a descriptive matter defeasibility is less universal in actual legal systems than we might have thought, even in the legal systems in which we might have most expected it to exist.

With respect to the prescriptive question, whether the literal meaning of a rule-formulation will be treated as what the rule indicates, and whether what the rule indicates will be treated as conclusive, are questions that cannot be answered by reference to the moral goals of particularized justice. Those goals exist, to be sure, as Plato, Aristotle, and countless successors have argued. But so too do the Rule of Law goals that might be thought of as the goals of generalized justice, or aggregate justice, or systemic justice. And as long as those non-particularistic goals have a place in our moral and prescriptive reasoning, then we cannot conclude, the actual practices of some parts of some legal common law legal systems notwithstanding, that the defeasibility of legal rules is a necessary part of all legal systems, or

that the defeasibility of rules in general is a necessary part of all decision-making environments. Defeasibility may well be a desirable component of some parts of some legal systems at some times, but it is far from being an essential property of law. And if law is not necessarily defeasible, then law is not open-textured in Waismann's sense. Insofar as language is open-textured, then so too, necessarily is law. But the open texture if law's language exhausts the open texture of law, and thus when law's language does not exhibit language's open texture, there is no residual open texture of law at all.

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