# VAGUENESS AND THE LAW

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We all know that much in our thought and language, as well as much in the law, is vague. We are also reasonably good at recognizing cases of vagueness, even though most of us would be hard pressed to say exactly what vagueness is. In recent decades, there has been a flowering of work in the philosophy of logic and language attempting to do just that. Much of this work focuses on what it is for a word or phrase to be vague. The aim of this effort is to clarify what it is for a claim, question, command or promise expressed using such a term to be vague, as well as what it is to reason with such terms. Different logico-linguistic theories have different conceptions of the scope of putative laws of classical logic, including bivalence (which states that every declarative sentence or proposition is either true or false) and excluded middle (which asserts all instances of A or  $\sim A$ ). In addition to this work in philosophical logic, recent decades have seen a growing interest in vagueness among legal scholars and philosophers of law. Here the focus is not so much on what legal vagueness is, which is generally assumed to be readily recognizable. Rather, it is on the extent and sources of vagueness in the law, the implications of vagueness for interpretation and adjudication, the systemic effects of vagueness and the function - i.e., important positive value – of vagueness in certain areas of the law, as opposed to its disutility in others (Endicott 2000, 2005; Soames 2011).

To date, these two investigations of vagueness – in philosophical logic and the philosophy of law – have been largely independent of one another. This independence gives rise to a natural line of questioning. Can work in one domain contribute to work in the other? Does a commitment to one philosophical theory of what vagueness is carry with it lessons for vagueness in the law? If so, might the need to make good sense of legal vagueness play a role in deciding which philosophical theory of vagueness is correct? Conversely, might one be misled about the pros and cons of vagueness in the law by a faulty conception of what vagueness is? These are the questions to be investigated here. This will be done by comparing two leading philosophical accounts of vagueness, and exploring their implications for understanding the value of vagueness in the law and the issues at stake in interpreting vague legal texts.

### Vagueness and borderline cases

In ordinary life, a remark is often considered vague if the information it provides is insufficiently specific to advance the accepted conversational purpose (especially when the speaker is expected to possess that information). Philosophical logicians have focused on one particularly interesting sub-case – involving the notion of *a borderline case* – of this more general phenomenon. Vague predicates - like "old," "bald," "rich" and "red" - are those for which a range of borderline cases separate things to which the predicate clearly applies from those to which it clearly does not apply. These are cases in which there is no clear answer to the question of whether a predicate is, or is not, true of an object o. In such cases, we are pulled in both directions – being inclined to resist definitive verdicts in favor of equivocal remarks like "It sort of is and sort of isn't," "It's not clearly one or the other" or "Call it what you like, but neither choice is definitely correct." In some contexts it may be acceptable to treat the predicate as applying, while in others it may be fine to treat it as not applying. But no investigation into the facts in virtue of which the predicate means what it does could ever identify one of these uses as definitely correct and the other as incorrect. In situations that call for a verdict, this means that a decision is required that is not dictated by knowledge of the nonlinguistic facts under discussion plus the linguistic rules governing

vague terms. This is the sense in which "philosophical vagueness" – susceptibility to borderline cases – is an instance of ordinary vagueness: insufficient informativeness (Soames 2011). If a theater director's assistant has been told to cast a bald character and the chief candidate for the role is a borderline case of baldness, the director's request plus the assistant's knowledge of the candidate are insufficiently informative to determine whether or not to offer the role. Some further basis for decision is needed.

### Two philosophical theories of vagueness

According to one theory, vague predicates are both partially defined and context sensitive. To say that P is partially defined is to say that it is governed by linguistic rules that provide sufficient conditions for P to apply to an object and sufficient conditions for P not to apply, but no conditions that are both individually sufficient and disjunctively necessary for P to apply or not to apply. Because the conditions are mutually exclusive, but not exhaustive, there are objects not covered by the rules for which P is *undefined*. In the case of vagueness, this, in turn, gives rise to context sensitivity. Since the rules of the common language, plus all relevant nonlinguistic facts, don't determine P-verdicts for every object, speakers using P in certain contexts have the discretion of extending its range to include some initially undefined cases, depending on their conversational purposes. Often they do so by predicating P of an object o, or denying such a predication. When they do, and other conversational participants accommodate their conversational move, the class of things to which the P does, or doesn't, apply is contextually adjusted to include o, plus objects similar to o (in certain respects). In such cases, P is (partly) "precisified" by narrowing the range of items for which P is undefined (Tappendon 1993; Soames 1999, ch. 7; Endicott 2000; Shapiro 2006).

Since what counts as a rule of the language (governing the use of a particular predicate) is also vague, higher-order vagueness arises when one considers the predicate [is determinately P], where for o to be determinately *so-and-so* is for the claim that o is *so-and-so* to be a necessary consequence of the rules of the language governing "*so-and-so*" plus the (relevant) nonlinguistic facts about o. Because of this, the range of application for an ordinary vague predicate P can be divided into five regions as follows:

P	?	Undefined	?	Not P	
R1 <sub>PDP</sub>	$ R2_{PDP} $	R3 <sub>PDP</sub>	$ R4_{PDP} $	R5 <sub>PDP</sub>	

Let "red" be P. Items in  $R1_{PDP}$  are determinately red, items in  $R3_{PDP}$ – $R5_{PDP}$  are not determinately red and it is unsettled whether items in  $R_{PDP}2$  are determinately red or undefined for "red." Similar characterizations hold for "not red," working from  $R5_{PDP}$  and moving left. Iterating "determinately" doesn't change things (Soames 2003).

Next consider the proposition p expressed by "It's red" relative to an assignment of o as referent of "it" and a context C including a set of standards governing "red." We are *not* here considering the proposition *asserted* by an agent who utters "It's red" in C, referring to o. The issue is semantic (the proposition semantically expressed relative to a context and an assignment), not pragmatic (the proposition asserted by an utterance). If, given C's standards for "red," o is in R1<sub>PDP</sub> (R5<sub>PDP</sub>), then p is true (not true) in C; if o is in R3<sub>PDP</sub>, p is undefined for truth in C. ("False" and "not true" are interchangeable when applied to propositions.) If o is in R2<sub>PDP</sub>, it is unsettled whether p is true or undefined in C; if o is in R4<sub>PDP</sub>, it is unsettled whether p is not true or undefined in C; if o is in R4<sub>PDP</sub>, it is unsettled whether p is not true or undefined. When a proposition p is not true, it is a mistake to assert p, but it may be correct to deny p - i.e., to assert its negation. However, when p is undefined for truth, it is a mistake to ei-

ther assert or deny p because neither p nor its negation can be *known* to be true (Soames 2010). When it is unsettled whether p is true or undefined it is unsettled whether one who accepts it has made a mistake.

Now consider the related case in which an agent A says "It's red" of o in a context in which the standards governing "red" prior to A's utterance place o in regions 2 or 3, but the audience accommodates A by adjusting the contextual standards to render A's remark true. In such a case the proposition q that A uses "It's red" to assert is different from the proposition p that the sentence semantically expresses, relative to the context and prior to accommodation (plus an assignment of o as referent of "it"). After accommodation, the partially defined property contributed by "red" to the asserted proposition has o in its region 1. If o was in region 3 originally, A's remark will be true by stipulation, in the sense that it is only because A's sentence has been taken to assert q, rather than p, that A's remark counts as true. By contrast, if o had been in region 2 by previous standards, A's remark will again be judged true, but this time it will be unsettled whether it is true by stipulation, because it will be unsettled whether the proposition p that A's utterance would have asserted without accommodation is itself true. These instances of smooth accommodation contrast with an attempt to extend the extension of "red" to an item x in region 4 prior to A's remark. In such a case, A's remark will be problematic and may not be accommodated, since prior to A's utterance it was unsettled whether o was undefined for "red" (and so open for inclusion under the predicate) or definitely not red (and so outside the range of legitimate speaker discretion).

That, in a nutshell, is one philosophical theory of vagueness. Another important theory is the epistemic theory, according to which vague predicates are always totally defined, with sharp boundaries separating items to which they apply from those to which they don't – e.g., a single

second separating moments when one is young from those when one is not, and a single penny separating one who is rich from one who is not. Borderline cases are those of which we can never *know* the vague predicate P to be true, or to be untrue. So, whereas the previous theory takes borderline cases to be those for which P is undefined, the epistemic theory takes them to be cases for which one can never know how, in fact, P is defined (Williamson 1994). Here I will be concerned with the standard version of epistemicism, which does not take vague terms to be context sensitive, as opposed to the version in Fara (2000), which does.

According to this theory, bivalence and the law of the excluded middle hold without exception, even for sentences containing vague language. Sorites paradoxes are blocked by denying the major premise of paradoxical arguments like the following:

Minor: A newborn baby is young at the moment of birth.

Major: For every number n, if one who is precisely n seconds old is young, then one who is n+1 seconds old is also young.

Conclusion: Everyone is young.

Whereas the previous theory of vagueness rejects the major premise while also rejecting its negation (since both are undefined), epistemicism claims the major premise to be false and its negation to be true, which it asserts:  $\sim$  Major: There is a number of seconds n such that anyone who is precisely n seconds old is young, but anyone who is n+1 seconds old is not young.

What epistemicism doesn't do is *identify* any number n as the number in question. Unlike still another theory – supervaluationism about vagueness (Fine 1975) – which also preserves the law of the excluded middle, and asserts (~ Major), epistemicism acknowledges every instance of the quantified major premise to be either true or false, despite the fact that some of the truths are unknowable.

Higher-order vagueness arises for the epistemicist when one considers the predicates [is an object that can be known to be P] and [is an object that can be known not to be P]. When P is vague in the epistemicist's sense, these predicates are also vague. This means that although both predicates are totally defined, and although there are sharp lines separating things to which they apply from things to which they do not, the precise location of these lines is unknowable. Thus, the range of application of P can be divided into four regions as follows:

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Let "red" be P. Items in  $R1_E$  are red and can be known to be so; those in  $R2_E$  are also red, but cannot be known to be red. Similarly, items in  $R4_E$  are not red, and can be known not to be, while those in  $R3_E$  are not red but cannot be so known. Since the norm of assertion is knowledge (Williamson 1996), this means that to assert of an item x in  $R2_E$ – $R4_E$  that "It is red," as well as to assert of an item y in  $R_E1$ – $R_E3$  that "It is not red" is to violate the norms governing our linguistic practices, and so to make a kind of mistake. Of course, some of these mistakes are worse then others since when x is in  $R_E3-R_E4$ , and y is in  $R_E1-R_E2$ , what one asserts is also false (in addition to being unknowable). However, all are violations.

This creates a *prima facie* difficulty. Together, epistemicism plus the view that knowledge is the norm of assertion direct us not to assertively predicate either a vague predicate P, or its negation, of any item in its unknowable range  $R2_E-R3_E$ . In many conversational settings this is unproblematic, since there is often no need to provide definite P-verdicts for particular borderline cases. In some settings, no judgment whatsoever is required, while in others a hedged judgment– e.g., [That may be P], [That is probably P], [That is unlikely to be P] -- will do. However, if there are situations that do require definite P-verdicts, such hedges will not serve. In these cases, the demand for an unequivocal verdict conflicts with the epistemic theory of vagueness plus the conception of knowledge as the norm of assertion. Since there appear to be legal contexts of this sort, they may provide good test cases for evaluating the dispute between the epistemicism and other theories of vagueness.

## Vagueness in the law

Since vagueness in the law comes in different forms with different consequences, some preliminary distinctions are needed to narrow our focus. Three domains of legal vagueness are particularly important: vagueness in the content of the law, vagueness in the allowable evidence and prescribed procedures used in reaching a legal verdict, and vagueness in the enforcement or effect of the laws. A good example of the latter is the enforcement of the 65-mile-per-hour speed limit on freeways in southern California. Though the content of the law is precise, the practice of enforcing it includes a range of speeds of roughly 66-70 miles per hour at which whether or not one is stopped is (under normal conditions) a matter of substantial discretion on the part of the highway patrol. The effect is to create a range of borderline cases in which it is vague whether, and to what extent, drivers are in legal jeopardy. This sort of vagueness – which has no effect on the content of the law – is valuable and necessary both to allow law-abiding citizens a reasonable margin for error in their attempts to comply with the law, and to allocate the resources of law enforcement and the judiciary reasonably and efficiently.

Vagueness in allowable evidence and prescribed procedures for reaching legally definitive verdicts is different. The standards "preponderance of evidence" and "guilt beyond a reasonable doubt" used in different types of cases are examples of vagueness encoded in legal language that govern the process of reaching a verdict. The exclusionary rule in the United States – which excludes evidence obtained from an illegal arrest, an unreasonable search or a coercive interrogation (as well as secondary evidence obtained by routes not sufficiently distinguishable from primary evidence so obtained) – is an example of vagueness encoded in authoritative legal texts, including prominent Supreme Court opinions. This type of vagueness can be treated as a subcase of vagueness of content in which the legal provisions are those governing the conduct of trials and other legal proceedings.

I here assume that the content of a law or set of laws is (to a first approximation) that which the appropriate lawmakers assert, stipulate or prescribe by adopting authoritative legal texts (against the interpretive background provided by already existing laws). I will refer to the contents of these authoritative speech acts as "assertive or stipulative contents," without here going into further detail about the relationship these contents bear to the semantic contents of the sentences used to make the assertions or stipulations (Soames 2009, 2011). Lawmakers are assumed to include legislators enacting statutes, administrative bodies authorized to issue binding

rules implementing statutes, ratifiers of constitutions, voters on ballot initiatives and judges issuing precedent-setting opinions. In the sphere of "private law," lawmakers may also include the parties of a contract, those responsible for legislation regulating the general law of contracts and judges as well as other judicial bodies adjudicating disputes in this area.

Given this conception of legal content, we can discern two different ways in which vagueness in the content of the law may arise. First, and most obviously, a law may be vague because the authoritative text used by lawmakers to enact it contains vague terms. When this is so, the assertive or stipulative contents of the lawmakers' authoritative speech acts will typically be vague, and so will be ripe for interpretation. The need for such interpretation often arises in legal proceedings in which reaching a verdict requires making an unequivocal decision about the application or nonapplication of a vague predicate P, used to express the relevant law or laws, to a borderline case of P.

The second main way in which vagueness of legal content can arise is through the resolution of contradictions generated by different laws, or provisions of the same law, taken in conjunction with the facts of a particular case (Soames 2011). In these cases, contradictory legal conclusions are derivable from the facts of the case plus different but equally authoritative preexisting legal contents. This glut of legal results is unacceptable, and so produces what is in effect a gap in the law that must be filled by modifying the content of the relevant laws. Often, if there is one way of filling this gap, there are many among which the relevant judicial authority must choose. Although the basis for this choice may vary from one legal system to the next, I will here confine attention to systems governed by the following norm, RJ (Role of the Judiciary): RJ. Courts are not to legislate, but to apply the laws adopted by legislative authorities to the facts of particular cases. When the content of the relevant body of laws plus the facts of a case fail to determine a unique legal outcome in situations in which one is required, the task of the judicial authority is (i) to discern the predominant legislative rationales of the lawmaking bodies in adopting the relevant laws and (ii) to fashion the minimal modification of existing legal content that removes the deficiency and allows a decision to reached that maximizes the fulfillment of those legislative rationales.

Here, in speaking of the rationale of a law or other legal provision we do *not* mean the mix of causally efficacious factors that motivated lawmakers to adopt it, but the chief reasons publicly offered to justify and explain it (Soames 2011, section 7). Though these reasons are often discernable, what counts as "the predominant legislative rationale," "a minimal modification removing the deficiency" and "a modification that maximizes the fulfillment of the discernable legislative rationales" are vague, and so subject to interpretation. Understood in this way, the judicial resolution of legal conflicts can be seen as a sub-case of the precisification of vague language, even though the language in question is not limited to that of the authoritative texts, or to legal language in general.

## Vagueness in the law: the partial definition – context-sensitive model

In the simplest case, vagueness in the content of the law arises when lawmakers employ a vague term in adopting an authoritative legal text. On the theory of vagueness under consideration, they may be understood as using the term either with its default content (provided by the rules governing its use in the common language) or with a partially precisified content. In the former case, the application of the law to items for which the term is undefined is left indeterminate, and subject to future precisification by other authorities. In the latter case, lawmakers narrow the range of future interpretation by stipulating in advance how the law is to be applied to certain borderline cases. For example, lawmakers adopting H. L. A. Hart's ordinance (Hart 1958) banning "vehicles" from the parks might respond to lobbying on behalf of the disabled by adding a clause "for the purpose of this ordinance, wheelchairs for the disabled, whether motorized or not, shall *not* count as vehicles." In such cases, the extension of [legally P] is a partial precisification of the ordinary extension of P.

What should be done in interpreting a legal text when it emerges that the verdict in a case crucially depends on whether or not P applies to a given item for which P, as used by the law-makers, is undefined? In some special cases, it may be possible to send the matter back to them for clarification and precisification. In others, a rule of lenity may dictate favorable verdicts for defendants in situations in which no clear violation is established – where one form of exonerating unclarity involves indeterminacy in the law. But in many cases neither of these exceptions apply, with the result that judges, or other authorities, are expected to fill gaps by precisifying the governing legal provision in a manner not determined, and sometimes not even envisioned, by the lawmaking body. When the relevant judicial decision sets a legal precedent for similar cases, the result is not just an explication, clarification or application of existing law, but an (authorized) modification of the law. Whereas prior to the decision, the law was undefined for, and so silent about, a certain class of cases, it now declares them to have one status or another.

This can be made clearer by considering again the range of a vague predicate P.

<u>P</u>	?	Undefined	?	Not P	
R1 <sub>PDP</sub>	$ R2_{PDP} $	R3 <sub>PDP</sub>	R4 <sub>PDP</sub>	R5 <sub>PDP</sub>	

When the item x on which the outcome of the legal case depends is in  $R2_{PDP}$  or  $R4_{PDP}$ , and there are no other complicating factors; it is relatively easy to specify what the outcome should be. If x is in  $R2_{PDP}$ , and the judge assigns x a certain legal status L+ on the basis of ruling that x counts as an instance of P, it will be unsettled whether x was already in the extension of P or whether the judge has exercised the minimum possible discretion. By contrast, if the judge rules that x does not count as an instance of P, and thereby assigns x legal status L-, it will be unsettled whether the judge has violated the existing law or whether maximal discretion has been exercised. When there are no extraneous issues pulling in either direction, and including x in the extension of P complies with the rationale of the law, such a decision is clearly called for. This will result in the minimum possible change in the law – a class of things for which it had been legally unsettled whether they were L+ or indeterminate in status, have now become determinately L+. Analogous results hold when x is in R4<sub>PDP</sub> and is assigned the legal status L-.

When x is in R3<sub>PDP</sub> the situation is different. Since P is undefined for x, there is a gap in the content of existing law rendering it silent about the status of x. Since the resolution of the case depends on giving it a status, the judge has no alternative but to make new law. Here, our assumption RJ about the role of the judiciary plays an important role. Returning to Hart's novehicles-in-the-park example, we may imagine two scenarios providing the rationale for the city ordinance. In scenario 1, the ordinance was passed to preserve the traditional peace and quiet of the park, which had recently been disturbed by cars, motorcycles and motor scooters, and also to reduce air pollution in the city, which had grown worse in recent years. In scenario 2, the ordinance was a response to overcrowding in the park resulting in a number of accidents involving cars, motorcycles, and bicycles, all competing for limited space with pedestrians crowding paths, walkways and roads in the park. Although the content of the law passed in these two scenarios is the same – in both cases simply banning vehicles from the park – the implications for future precisification are different. Against the background of scenario 1, judgments that, for purposes of the ordinance, bicycles, skateboards, rollerblades, tricycles and little red wagons are not vehicles, are correct. Against the background of scenario 2, some at least of these judgments are not. This difference has nothing to do with which borderline cases of being a vehicle are more like genuine, known vehicles, and which are more like known non-vehicles. Since, on the view of vagueness under consideration, there simply is no fact of the matter about whether these borderline cases (in  $R3_{PDP}$ ) are, or are not, vehicles, the court's inquiry must be directed toward other matters – which in a legal system featuring RJ is the rationale for the legislation. Once such a precedent-setting judicial decision has been reached, the content of the law will change, bringing its content more fully into line with its original rationale.

It is here that we find the value of vagueness in the contents of laws. In a legal system in which the judiciary operates under a reasonable approximation of RJ, and in which vagueness is understood along the lines of the partial-definition-context-sensitivity model, lawmakers framing legislation with the goal of achieving certain social benefits while avoiding other undesirable results may sometimes rationally prefer a vague law to a more precise one. This will occur when all or most of the following conditions are fulfilled: (i) the vague formulation of the law assigns the clear, non-borderline cases of the term the legal status desired by most lawmakers; (ii) the variety of borderline cases of the term is wide, making them hard to exhaustively anticipate; (iii) the lawmaking body is either divided about the borderline cases or ignorant of the likely consequences of treating some such cases one way rather than another, and so is uncertain about what legal status they should have; and (iv) the lawmakers recognize the value of incremental, case-

by-case precisification of the law resulting from adjudication of borderline cases aimed at furthering the law's rationale, in light of the full factual backgrounds uncovered in judicial proceedings. In short, legislation sometimes involves broad agreement about central objectives, combined with disagreement or ignorance at the margins, plus a confidence that those who implement the law and adjudicate disputes arising from it will, through acquaintance with the facts of particular cases and the benefit of an incremental procedure, be in a better position than the lawmakers to further the law's rationale. In such cases, vague language serves the valuable function of delegating rule-making authority to administrative bodies issuing rules implementing the law, to agencies responsible for enforcing the law and to courts adjudicating disputes arising from it.

Here, it is important to distinguish the value of formulating legal rules with borderline cases – in the sense understood by the present philosophical theory of vagueness – from other values served by the use of words that happen to be vague. It is noteworthy that when vagueness is easily resolvable – e.g., by defining "adult" and "child" in terms of precise ages for particular purposes – the law very often does so, with the result that the vague terms one regularly finds in the law – like "neglect," "well-being," "reasonable," "fair," "unnecessary" and "all deliberate speed" – are often what Timothy Endicott calls "extravagantly vague" (Endicott 2005: 6–7). Unfortunately, this is a bit of a misnomer. Although these terms are usefully vague, their exceptional utility in the law comes from the combination of their vagueness with other semantic features, related to, but distinct from, vagueness. It is not that the ratios of borderline to non-borderline cases for Endicott's "extravagantly vague" terms are always so much greater than the ratios of such cases for more garden variety cases of vagueness; the crucial fact is that his terms are, for the most part, highly general, multidimensional and resistant to specific codification – as well as being vague.

Consider, for example, the use of "neglect" in laws regulating the responsibility of parents and other adults for children in their care. In addition to being quite general, this term is multidimensional in the sense that its application is determined by an open-ended combination of factors that includes providing for the satisfaction of children's nutritional, medical, educational, social and emotional needs, in addition to their safety. As a result, judgments about whether particular patterns of behavior constitute neglect tend to be holistic, with lows in one dimension capable of being partially offset by highs in others. Because of this, the variation in behavior exhibited by the range of obvious, non-borderline cases of neglect is enormous and incapable of exhaustive legislative enumeration. Even clear (non-borderline) cases of neglect may sometimes bring together surprising clusters of facts which, though unanticipated by legislators, are obvious when brought to light. This provides a reason for lawmakers to delegate authority for making judgments about individual behaviors to those best able to gather and evaluate the relevant facts -e.g., social agencies and the courts. This delegation is accomplished by using a general, multidimensional term, which, in the nature of things, will also be vague. However the value of its vagueness - in the sense of susceptibility to borderline cases - is analytically distinguishable from the value of its generality and multidimensionality.

## Vagueness in the law: the epistemic model

Earlier I mentioned a *prima facie* difficulty for epistemicism, which characterizes assertive predications of a vague predicate P, or its negation, of any item in its unknowable range  $R2_E$ - $R3_E$  as violations of the norm of assertion:

 $\begin{array}{|c|c|c|c|c|} \hline P \& so \ knowable \ |P \ but \ unknowable \ |Not \ P \ but \ unknowable \ |Not \ P \ \& so \ knowable \ |\\ \hline R1_E \ R2_E \ R3_E \ R4_E \ \end{array}$ 

Since adjudicating legal disputes sometimes requires authorities to make such predications, one may wonder whether the epistemicist can accommodate the use of vague legal language. The answer, I think, is that the epistemicist can do so, up to a point, but only at the cost of underestimating the value of vagueness in the law.

Although knowledge is the (default) norm of assertion, not all assertions are held to the same standard. We all recognize circumstances – such as planning future actions in light of well-founded assumptions about future contingencies – in which assertions are acceptable even though that which is asserted isn't known. Of course, not anything goes, even in these cases. When definite (nonconditional) plans must be made in the face of uncertainty, the assertions that occur as parts of those plans are still expected to be justified by a preponderance of evidence. This may not be knowledge, but in some cases, it is close enough.

With this in mind, consider a case the outcome of which depends on applying a vague predicate P to an item x in the extension of P that is barely inside its unknowability range (by virtue of differing very little from items known to be in P's extension, while differing much more from those known not to be in it). This is similar to the case for the previous theory of vagueness in which x is in region R2<sub>PDP</sub>, rendering it unsettled whether P determinately applies to, or is undefined for, x. There, the correct decision was to declare that P applies to x, leaving it unsettled whether the court exercised minimal discretion or no discretion at all. According to the theory in question, a precedent-setting decision to this effect changes the content of the law so that a class of things including x comes to have a determinate legal status which, prior to the decision, it would not have been correct to claim it had. For epistemicism, the outcome of the case is the

same, though both the justification and the effect of the decision on the content of the law are different.

Here, the epistemicist may make four reasonable assumptions: (i) for many vague predicates P, elements in the unknowability range for P and its negation ( $R2_E-R3_E$  above) can be partially ordered along dimensions that determine the applicability of P (e.g., age for "young" / "not young," income and assets for "rich" / "not rich"); (ii) knowledge obtained about where such an item x falls on these dimensions can provide evidence for the claim that P applies, or does not apply, to x; (iii) for many such P, evidence that an item x in R2 is closer along these dimensions to things that are known to be in P's extension than to things known not to be in the extension of P provides justification for the claim that x is in the extension of P; and (iv) a corresponding result holds for evidence that such an item is closer to things known not to be in the extension of P than to any item known to be in it. One need not assume that all vague predicates satisfy these conditions to a robust degree, but surely many do.

When this is so, a legal case that turns on whether P applies to an item x in R2<sub>E</sub> that is barely inside its unknowability range should ideally be decided by assertively predicating P of x. After all, judicial decisions should be made on the basis of the best available evidence. If conditions (i)–(iv) are satisfied, and the court is in possession of all relevant evidence, the application of P to x in this case will be mandated. Though no decision made by the judge in this case can (according to the epistemicist) be *known to conform*, or *known not to conform*, to the existing the law, fidelity to the law requires that x be declared to be in the extension of P, since this decision is supported by a preponderance of evidence. If the decision is precedent setting, *the content of the law* – expressed by [Items that are P have legal status L+, while items that are not P have legal status L-] – will not change, even though *the effect of the law* will. Something the legal status of which was before unknown will come, with the precedent, to be known. The vague predicate P at the center of this change will not have changed its extension, even though what counts as sufficient, for legal purposes, for being included in its extension will have changed.

Although the disposition of this case is the same for the epistemicist as it was for the theorist who views vagueness as a matter of partial definition and context sensitivity, the different justifications provided by the two theories generalize differently. The key cases are ones in which the partial-definition theory places the crucial item x in the genuine undefined region  $R3_{PDP}$  of the range of P, whereas epistemicism places x well into the unknowable section  $R2_E$  of the extension of P (closer to  $R3_E$  than to  $R1_E$ ). Recall the two scenarios of this sort extending Hart's no-vehicles-in-the-park example. On the non-epistemicist account of vagueness, two different results were reached for some borderline cases of vehicles (e.g., skateboards), based on different rationales the ordinance was intended to serve in the two scenarios. Since the content of the law (as conceived by the non-epistemicist) makes no claim whatsoever about the legal status of x, fidelity to the law requires that the court make its decision on the basis of the rationale the law was intended to serve. Hence the different results in the two scenarios.

Such results cannot be reproduced by the epistemicist for those items x in the unknowability range  $R2_E$  of P that are more like things *known to be in the extension of P* than they are like things *known not to be in P's extension*, and hence for which there is discernable (though not overwhelming) evidence supporting the claim that x is in P's extension. In these cases, fidelity to the law requires treating x as being in the extension of P (which it in fact is). Except in cases in which such a decision would produce an absurd result that clearly subverts the law's rationale, this decision is mandated by the norm of adjudication RJ. Things may be otherwise in cases in which the evidence is as weak for the claim that x is in the extension of P as it is for the claim that it isn't – as it may be when x is just barely inside the unknowable boundary line separating things in the extension of P from those not in its extension. In such cases, the epistemicist might reasonably argue that fidelity to the law requires a decision based on the law's rationale. However, on the plausible assumption that such cases constitute a proper subset of the cases for which the partial-definition approach mandates decisions based on the rationale, rather than the content, of the law, we have found a significant difference in the jurisprudential consequences generated by the two philosophical theories of vagueness.

This difference has a material effect on the values the two theories accord to vagueness in the law. As we saw earlier, lawmakers who have achieved general agreement on the rationale for a vaguely worded statute, and its treatment of clear, non-borderline cases, may be ignorant of, or unable to achieve consensus on, how best to advance that rationale in many actual and hypothetical borderline cases of the statute's vague terms. If vagueness is understood as partial definition plus context sensitivity, the lawmakers will realize that their vaguely formulated statute is noncommittal about how these items are to be treated. If they are also confident that later administrative or judicial authorities will be guided by fidelity to the law, they will realize that future adjudication of borderline cases will be aimed at how best to advance the rationale that they, the lawmakers, have agreed on. When it is reasonable to expect these authorities to possess important information about how to achieve this goal, which the lawmakers lack, it will be rational for the latter to employ vague language as a way of delegating authority over difficult cases to those in the best epistemic position to advance their goal. Hence, the value of vagueness in the law.

Epistemicism cannot provide a comparable story. The epistemicist will tell you, correctly, that judicial and administrative authorities downstream from the enactment of a statute have no special expertise that the lawmakers lack about where the extension of a (totally defined) vague

predicate ends and that of its negation begins. Moreover, since the content of the statute already determines the legal status of every borderline case, the first duty of the downstream authorities is to assign the borderline cases that come before them the legal status those items most probably already have - in situations in which judgments about such relative probabilities can reasonably be made. There may, of course, be items for which such judgments cannot be made, in which case fidelity to the rationale of the statute may then become the basis for adjudication. For this small subset of cases, the two philosophical theories of vagueness can agree on the consequences of legal vagueness, and the basis for adjudicating cases involving it. What the epistemicist cannot do is extend this line of reasoning to the full range of borderline cases for which the proponent of partial definition finds utility in vague legal language. Whereas the latter can properly declare minibikes, skateboards and children's gravity- or pedal-powered, soapbox derby racers to be non-vehicles permitted in the park in scenario 1 of our extension of Hart's example, while properly declaring them to be vehicles prohibited from the park in scenario 2, the epistemicist cannot justify arriving at different verdicts in the two scenarios. More precisely, he can't do so on the plausible assumption that he can't reasonably deny that some at least of the examples just mentioned are more probably vehicles than not (given his view that each really is a vehicle, or really isn't). In this way, the epistemicist's view of what vagueness really is prevents him from recognizing much of the value that vagueness in the law really has.

# Idealization

So far, I have tried to show two things. First, that if legal actors in an idealized system implicitly knew both that vagueness were what the partial-definition-context-sensitivity model says it is, and that adjudication and implementation of the laws were guided by something like the norm RJ

of fidelity to the law, then they would correctly and rationally anticipate jurisprudential consequences of the legal use of vague terms of the sort discussed above and rightly assign a high utility to the use of certain vague language in the law. Second, that if they implicitly knew that vagueness was merely epistemic, while also knowing that adjudication and implementation were guided by RJ, then they would correctly and rationally anticipate different jurisprudential consequences (discussed in the previous section), and rightly assign a much lower utility to the use of vague language in the law. To these idealized observations I now explicitly add a further, more empirically based suggestion – namely that the actual jurisprudential consequences of legal vagueness, plus their actual and perceived utility, fit the partial definition model better than they do the epistemic model.

There are several ways of reacting to these claims. A committed epistemicist could accept all of them, except for the final suggestion about the actual value of legally vague language in systems like ours (as well as the suggestions about which adjudications of certain cases are genuinely mandated). Such a theorist would argue from the presumed correctness of epistemic vagueness to revisionary claims about the function, or lack thereof, of vagueness in the law. The point is not hypothetical; an extreme version of this position is taken in Sorenson (2001). A different sort of legal theorist might agree with me about the value of vagueness in our law, while attempting to reconcile epistemicism with this evaluation by challenging the claim that RJ is a governing norm for judicial interpretation. The idea would be to authorize judicial and administrative attempts to further what these authorities take to be the rationale of a law, even in cases in which the weight of evidence indicates that this would result in a revision of its content (which could otherwise be preserved without absurdity). The challenge for this interpretive strategy is to articulate a principled basis for allowing this freedom in cases of vagueness without loosening the constraints on interpretation too far, and so getting undesirable results in cases in which vagueness is not the central issue.

By contrast, one can imagine a committed proponent of partial definition and contextsensitivity who agrees with me about the nature of vagueness, but whose legal scholarship leads him to suspect (a) that relevant actors in our actual legal system *fail* to implicitly recognize that vagueness is what we both take it to be, and (b) that the principles governing adjudication and implementation of the law, as practiced in our legal system, *do not* require very much by way of fidelity to its preexisting content, and are not even approximations of RJ. For this theorist, the job is first to educate our legal actors about what vagueness really is, and then, depending on his normative view about the proper relation between legislation and adjudication, to offer a normative argument that fidelity to the law, in the sense of RJ, is what *should* govern adjudication and implementation.

The main lesson I draw from the discussion in the previous sections is different from, and more straightforward than, any of these. It is based on four suppositions: (i) that relevant actors in our legal system should be credited with implicitly knowing, or at least acting as if they know, what vagueness is; (ii) that legal content is, to a first approximation, the assertive or stipulative content of lawmakers' adoption of authoritative legal texts (against the background of already existing law); (iii) that judicial adjudication and administrative implementation of our laws are, and should be, guided by a principle of fidelity to the law that assigns priority to maintaining existing legal content when possible, while mandating decisions that further legislative rationale when cases cannot rationally be decided on the basis of existing content alone; and (iv) that vague language in our law really does have, and is implicitly perceived to have, roughly the value assigned to it by the partial-definition / context-sensitive model. Given all this, I conclude that whereas the genuine value of vagueness in the law is naturally explainable on the theory that treats vagueness as a matter of partial definition and context sensitivity, it cannot adequately be accommodated by the epistemic theory of vagueness. If I am right, then the special role played by vague language in the law provides us with an argument for one philosophical theory of what vagueness is, and against another. References

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Further reading

For further reading, see: T. Endicott (2001) Vagueness in Law, Oxford: Oxford University Press; T. Endicott (2005) "The Value of Vagueness," in V. K. Bhatia, J. Engberg, M. Gotti and D. Heller, eds., Vagueness in Normative Texts, Bern: Peter Lang, pp. 27–48; S. Shapiro (2006) Vagueness in Context, Oxford: Oxford University Press; S. Soames (1999) Understanding Truth, New York: Oxford University Press, ch. 7; S. Soames (2003) "Higher Order Vagueness for Partially Defined Predicates," in J. C. Beall, ed., Liars and Heaps: New Essays on Paradox, Oxford: Clarendon Press, and reprinted in S. Soames (2009) Philosophical Essays, Volume 2, Princeton, NJ: Princeton University Press; S. Soames (2009) "Interpreting Legal Texts: What Is, and What Is Not, Special about the Law, in Philosophical Essays, Volume 1, Princeton, NJ: Princeton University Press; S. Soames (2011) "What Vagueness and Inconsistency Tell Us about Interpretation," in A. Marmor and S. Soames, eds., The Philosophical Foundations of Language in the Law, Oxford: Oxford University Press, pp. 31–57; R. Sorenson (2001) "Vagueness Has No Function in Law, Legal Theory 7: 387–416; and T. Williamson (1994) Vagueness, London: Routledge.