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Varieties of Vagueness in the Law

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Abstract

The main purpose of this essay is to articulate the different types of vagueness, and related linguistic indeterminacies, that we find in statutory language and to explain their different rationales. I argue that the various normative considerations involved in employing vague terms in legislation depend on the kind of vagueness in question. I show that while some cases of vagueness in law are concerned with fairly standard problems of borderline cases, other are not. I also argue that semantic vagueness can be distinguished from conversational vagueness, which we also find in law, and that vagueness in law should be clearly distinguished from cases of ambiguity and polysemy.

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Vagueness in the law, as elsewhere, comes in different forms. Some of it is unavoidable, while other cases are optional and deliberately chosen by lawmakers. My main purpose in this essay is to distinguish between different types of vagueness in the legal context, and to explain their rationales. The argument proceeds in two main stages: The first part is taxonomical, mostly about the semantics of vagueness, and related linguistic indeterminacies, that we find in statutory language. The second part takes up each one of these different types of vagueness in law, suggesting some ways in which legal decision makers reason with vague language, and some of the normative considerations that apply, depending on the kind of vagueness involved.

1. Varieties of Vagueness

In philosophy of language, the term vagueness is used to designate a particular aspect of the relation between the words we use in a natural language and the objects picked out, or designated, by those words. Consider, for example, a word like "rich" applied to persons. Some people in the world are clearly and undoubtedly rich. The set of people who satisfy this condition, that they are undoubtedly rich, we call the *definite extension* of the word. Innumerable other people are clearly and undoubtedly poor, not rich; we call this set the *definite nonextension* of the word. And then there are many borderline cases: These are people about whom, knowing all the relevant facts, there is no saying whether they are rich or not. From a semantic perspective, it would not be a mistake to say that "this person is rich," nor would it be a mistake to deny it, and say that "this person is not really, or not quite, rich." There is no answer – or, according to some views, there is an answer but it is not knowable[1] – to the question of whether a borderline case of "rich" is within the extension of the word or its nonextension.

[1] According to the epistemic theory of vagueness (mostly developed by Timothy Williamson *Vagueness*), there is a fact of the matter about the application of vague terms to what seems like borderline cases, but those facts are *not knowable*. The epistemic theory of vagueness is rather controversial, and in any case, I will not explore its possible implications in this essay. Mostly, it probably makes no difference, in the legal context, which particular theory of vagueness one works with. Soames (2012), however, argues that the ways in which we think about vagueness in the legal case may actually provide support to non-epistemic theories.

Now, consider a particular person who is clearly and undoubtedly rich, if anyone is. Then imagine that we subtract one cent from his possessions. Surely he is still just as rich. Now subtract another cent, and he is still, undoubtedly, rich. But of course, if we continue this subtraction, at some point we would have to doubt that the person is rich; the problem is that we cannot tell what that point is. There is no saying where exactly the borderline cases begin and where they end. This fuzziness of borderline cases is what gives rise to the famous *sorites* paradox.[2] We start with a true generalization, say, "Any person who has $100 million is rich"; we add another true premise (called the induction step), saying that "If X is rich then X minus one cent is rich." Now the problem is that repeated applications of the induction step lead to a false conclusion. If you repeat the induction step many million times, your conclusion would have to be that a person who has very few dollars, or none at all, is rich, which is clearly false. And the problem, of course, is that we cannot tell where the induction step needs to be halted. There is no clear cutoff point in this (so-called) sorites sequence; there is no particular phase at which we can say that X is still rich but X minus one cent is no longer rich.[3]

Lawmakers do not tend to use such obviously vague terms as "rich" (or "tall," "bald," etc.). If Congress wanted to impose higher taxes on rich people, for example, it would define the regulation much more precisely, using income figures in dollar terms.[4] And of course the law can pick different figures for different purposes. But that doesn't mean that the law can avoid linguistic vagueness even when it has precise alternatives. Suppose that a law purports to impose a higher level of income tax on rich people, and defines the higher tax bracket in terms of a precise dollar figure of annual income, say, at a million dollars. This would be a very precise definition, but then we might face borderline cases about what counts as "income" (e.g., a gift from a relative, even a very small one? etc.). Even if "income" is defined by the relevant statute, the definition must use other words that are bound to have borderline cases. In

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[2] What I call "fuzziness" of borderline cases is often called second-order vagueness, meaning vagueness about where borderline cases begin and where they end. As long as it is clear that there is no first-order vagueness without second order vagueness, the terminology should not be problematic. Still, I prefer to avoid the notion of second-order vagueness because I doubt that this is a matter of hierarchy.

[3] Notably, the epistemic theories of vagueness (and some others) deny the truth of the induction step. The main motivation behind the epistemic theories, and some other theories offered in the literature, is precisely the idea that we have to avoid the sorites paradox, otherwise we face serious problems with the principle of bivalence and the law of excluded middle in propositional logic. There is certainly no consensus in the literature about how deep the sorites paradox is, and whether it is avoidable. I intend to take no stance on this complex issue.

[4] There are exceptions, of course. For example, in child support law in the U.S. there are some federal guidelines, adopted by most states, that provide an exemption to payors who have "an extraordinarily high income." I will discuss this case later on.

short, the ordinary linguistic vagueness of general terms in a natural language cannot be avoided, thought its scope can be reduced in specific contexts .

Words like "rich," "mature" or "bald" are obviously and transparently vague. Other words are vague in exactly the same manner, but perhaps less obviously so. Consider, for example, a term like "entering" the premises, which forms part of the definition of burglary. Suppose that the defendant broke the window and had his arm through the boundary of the premises in question: Did he enter the building? And what if only his finger got through? Or only some instrument he was using to break the window?[5] Let me call these *ordinary* cases of vagueness, as opposed to words or expressions that are obviously or transparently vague, such as "rich" or "mature," etc. Now you might think that obviousness (or transparency) is a vague criterion. That is true, of course, but in the legal case, there is a certain significance to the transparency of vagueness, in that the law typically tries to avoid it. We have countless laws using words such as "entering" or "premises," but very rarely laws using words such as "rich" or "mature." And it is an interesting question, I think, why that would be the case. After all, as we just saw, most general words we use in a natural language are vague, even if they do not carry their vagueness on their face. So why is it the case that the law strives to avoid one but not the other? Is it simply because some words like "mature" or "rich" are somehow more vague than others, or just too obviously vague? Here is a reason to suspect that this is not the only, or even the main, reason: The law does not shy away from using words that seem to be obviously very vague, even extravagantly so (to borrow a term coined by Endicott[6]), such as "reasonable care," "due process," "neglect," "unconscionable," etc. So why is it that we rarely, if ever, find legal norms using words such as "rich" or "mature," but we find countless legal norms that employ terms such as "reasonable" or "neglect"?

The answer resides in a very important difference between words that are *transparently* vague and those we are calling *extravagantly* vague. The essential feature of vagueness, in the strict semantic sense, consists in the fact that when a word, W, is vague, there are bound to be borderline cases of W's application to objects that are in a space between W's definite extension and definite non-extension, objects about which there is no saying whether W applies or not. In other words, if W is vague then we are bound to have a sorites sequence.[7] This is clearly the case with words such as "rich," "mature," "bald," etc. However, in the kind of cases Endicott calls "extravagant" vagueness, the main semantic

[5] See, for example: *Commonwealth v. Cotto* 52 Mass.App.Ct 225, 752 N.E.2d 768 (2001).

[6] See Endicott (2011: 24-25)

[7] I am not suggesting that this is the only semantic feature of words we can call vague in some sense, or that there is a consensus in the philosophical literature about what vagueness really is. It is at least one standard sense of vagueness and that is how I use the term here.

feature is neither the obviousness nor the extent of a sorites sequence in the application of the word to concrete cases, though both would also be present, of course.

To see this, let's work with the example that Endicott uses, of a UK statute making it an offense to cause a child to be "*neglected*…in a manner likely to cause him unnecessary suffering or injury to health." The word neglect is, indeed, extravagantly vague. But it doesn't seem to be any more vague, so to speak, than "rich" or "mature"; it's not the case that we have more borderline cases here relative to the definite extension of the word. The main feature of extravagantly vague terms consists in the fact that they designate a *multidimensional* evaluation with (at least some) *incommensurable* constitutive elements. Neglecting a child is a very complex evaluative term. There are many potential elements that determine whether a certain case constitutes neglect. And, crucially, there is no common denominator that would allow a quantitative comparison of the various constitutive elements on a single evaluative scale. We can say, for example, that leaving a child unattended for five hours is worse than leaving the same child unattended for two hours; or that it is worse to leave a 2-year-old unattended for an hour than to leave a 6-year-old unattended for the same amount of time. But even these two simple factors (age and time) are not quite commensurable: Can we say whether it is worse to leave a 2-year-old child unattended for 10 minutes than a 6-year-old unattended for two hours? And of course, when you add more elements to the picture, such as the exact conditions in which the child was left unattended, the relevant environment, the child's level of maturity and the like, problems of incommensurability become obvious.[8] Needless to say, this does not mean that we are unlikely to face borderline cases. Extravagantly vague terms are also vague in the ordinary sense of vagueness. But it is the multidimensionality of such terms that makes them particularly problematic and particularly resistant to precisification.

The difference between ordinary vagueness, transparent or not, and extravagant vagueness might be a matter of degree. Even the simplest vague terms, such as "bald" or "mature" are not single-dimensional; baldness, for example, might be a matter of both the number and the distribution of hair on a person's sculp. The main difference is, however, that the various elements that constitute the relevant predicate in standard cases of vagueness are not deeply and unavoidably incommensurable. Or, if some of them are, it is not typical for the incommensurability to pose a serious practical problem in determining whether an object or thing falls within the definite extension of the word or not.

[8] I assume here that incommensurability is a relation between two (or more) items such that it is not true that one item is better or worse than the other, nor is it true that they are on a par with each other, according to the relevant evaluative dimension.

And this has an important consequence that explains the difference in their occurrence in law: When we have an ordinary vague term, with a sorites sequence, it is typically possible to stipulate a certain cutoff point in the sequence. Though such cutoff points are bound to be somewhat arbitrary, for the law to determine an arbitrarily chosen cutoff point is not an arbitrary decision. Consider familiar cases: We know, for example, that a certain level of maturity should be required for the exercise of certain rights, such as voting in elections. Maturity is a vague term, obviously susceptible to a sorites sequence. But the law tends to stipulate a fairly precise cutoff point, such as 18 years old for voting. Needless to say, the exact figure of 18 years is both arbitrary and somewhat rough for the purpose.[9] But it is not arbitrary, in the sense of not being supported by reasons, to have such a cutoff point. For various obvious reasons of fairness and efficiency, it makes a lot of sense.[10] Furthermore, the cost of precisification such cases is very clear: Any reasonable cutoff point that the law chooses is bound to have some over – and some under – inclusiveness. There are going to be some persons older than 18 who are not mature enough to vote, and some persons younger than 18 who are actually mature enough to vote. Over – and under – inclusiveness is always the cost involved in such precisification. And, normally, we weigh this cost against the benefits of having a precise cutoff point. But now think about extravagantly vague terms: Here, the main problem is not the sorites sequence; The main problem in such cases is the incommensurability of the various elements constituting the multidimensional evaluation. And because the main problem is not the sorites sequence, such cases resist the stipulation of an arbitrary cutoff point. You just cannot stipulate that, say, leaving a child unattended for *n* hours would constitute neglect, even if you make *n* a variable relative to age. There are countless other factors in play, and they cannot be weighed with any precision against hours of un-attendance, the child's age, etc. And this is why the law cannot replace extravagantly vague terms with some stipulated precisification.

The kind of vagueness discussed so far is *semantic vagueness*, because it concerns the relations between the meaning of words and the objects they apply to. Vagueness, however, is not confined to the semantic aspect of language use. Expressions can be vague in the information they provide relative to a conversational context, whether they employ semantically vague terms or not. Suppose, for example, that during a political campaign, candidate M declares: "I did not receive any contributions from X, not a single dollar!" This statement

[9] By this roughness I mean that we know that age is not the only dimension determining maturity, but it is the dominant one, and making the cut-off point determined by this single criterion, tough inaccurate and oversimplified, for sure, is not an obvious miss or a gross misconception.

[10] Endicott (2011) provides a very elegant account of these considerations in greater detail.

does not seem particularly vague. But suppose the context is such that there is some suspicion that X channeled funds to the candidate's coffers indirectly, financing various organizations that are known to support M. Relative to *this context*, M's statement might be rather vague. Or, suppose that in response to my friend's enquiries about a movie I saw last night, I express praise for one of the actors, going on and on about how well she performed her role. If my friend was interested in my opinion whether she should go and see the movie, my answer was probably too vague.

Conversational vagueness, as I will label such cases, does not have to be deliberately evasive. Expressions can be vague relative to a conversational context for a host of potential reasons, whether the speaker is deliberately evasive or not. The essential point here is that an expression that is not semantically vague can be vague relative to a specific conversation with respect to the information it contributes to the conversation. Contributions to a conversation can be more or less relevant. Some are clearly relevant and advance the common purpose of the conversation, others are clearly irrelevant (or baffling, or conspicuously evasive, etc.), and then, there are borderline cases in between. In short, the idea is that conversational vagueness is typically a function of the relevance of the speaker's contribution to the conversation in question. Relevance is a pragmatic aspect of speech, always relative to a specific conversation, its exact context, its normative framework, and various presuppositions taken for granted by the parties to the conversation. Borderline cases about relevance are, basically, what I call conversational vagueness.[11]

Notice that conversational vagueness is quite independent of semantic vagueness. Just as an expression can be conversationally vague in a given context without using vague terms, an expression can be precise even when it uses a vague term applied to a borderline case. Suppose, for example, that in responding to my wife's question, I say, "I wore the blue jacket." This may give my wife all the information she wanted to have, even if my jacket's color is actually a borderline case of blue (somewhere between very dark navy blue and black). If I only have one such jacket (say, the only other one I have is light brown), then by saying "the blue jacket" my expression picks out a singular object, relative to the conversational context that is mutually known to me and my wife. Similarly, referring to somebody in a conversation as "the tall guy," the speaker may well succeed in referring to a particular person, even if the person referred to is not particularly tall, for example, when the only other person one

[11] It is possible that other conversational maxims, such as the maxim of quantity, also have borderline cases that would generate conversational vagueness in a similar way.

could have mentioned in the specific context is particularly short, and this is known to both parties to the conversation.[12]

Before I end this taxonomical section, let me mention two types of linguistic indeterminacy that should be kept separate from vagueness. I mention them here because legal cases are sometimes confused about them.

First, philosophers of language draw a sharp line between ambiguity and vagueness, and for good reasons. Normally, when we face an ambiguous expression, the assumption is that the speaker *intended* to use one of the two possible meanings; disambiguation, whether by context or other pragmatic factors, aims at figuring out the communication intention of the speaker in the specific context of the utterance. Furthermore, ambiguity, as opposed to many cases of vagueness, is typically avoidable. There are two main types of ambiguity in a natural language: syntactical and lexical. As an example of the former, consider the sentence: "I know a man who has a dog who has fleas." The sentence can be read in two ways: Either the man has fleas or the dog has them and, by itself, the sentence is indeterminate between these options. Lexical ambiguity concerns those cases in which a given word has two separate and unrelated meanings in the natural language in question, such as the word "bank" in English, meaning, in one sense, the side of a river and in a very different sense, a financial institution. This is the standard case.

It is possible, however, to extend the idea of semantic ambiguity to include expressions that have become idiomatically or colloquially ambiguous even if they are not lexically so. Suppose, for example, that somebody asks me whether I use drugs. That depends, I would reply; if by "drugs" you mean hallucinatory substances, the answer is no. But if by "drugs" you mean to include medications, then yes, I regularly use prescription drugs. The word "drug" is not lexically ambiguous (like "bank"), because the two meanings are closely related, but it has come to be used, idiomatically in English, in a way that is, in effect, ambiguous. And this phenomenon is, I think, quite common, though how far it extends is not entirely clear.

Be this as it may, lexical ambiguity is a fairly special case. A much more prevalent aspect of meaning is *polysemy*. Consider, for example, the following two sets of utterances:

(1a) "I broke the window" (the window's glass)
(1b) "I opened the window" (the window's inner frame with the glass)
(1c) "I entered through the window" (the window's outer frame)

[12] It is not essential to my point here that the examples in the text have something to do with the distinction between referential and attributive uses of definite descriptions; other kinds of examples will be used later.

(2a) "John struggled to pull the cart out of the mud" (physical effort)
(2b) "John struggled to finish his dissertation in time" (intellectual effort)

As these examples demonstrate, the objects or features that words pick out within their definite extension -- "window" in (1) and "struggle" in (2) -- can vary with circumstances and contexts of expression. According to some views in semantics, polysemy is not an exception but the rule; the meaning of words, the information they encode, is very minimal, and hearers almost always work out the relevant meaning in the context of the conversation as they go along. I don't think that this minimalist (or sometimes called contextualist) semantics is quite right, but it's not my purpose to argue either way. Suffice it for our purposes to say that words often designate a particular subset of their semantic range, depending on the particular context of the conversation in which they are used. In some cases, polysemy is the opposite of vagueness; we face a sorties sequence when we need to extend the application of a word beyond its core, definite extension. Polysemy, on the other hand, often arises when the speaker refers only to a particular subset of the definite extension. (Not always, sometimes the distinction between polysemy and figurative or metaphoric use of a word is not all that clear.[13]) Both cases are prevalent in law, but they create very different interpretative challenges.

2. Vagueness in the Legal Context

Vagueness in legal language can arise in many different contexts: in legislation or agency regulations, in constitutional documents, in judicial decisions, in private contracts and wills, etc. For simplicity's sake, I will focus on the context of statutory interpretation. Thus, the standard case I will consider here would be an act of legislation that contains some relevant expression that is, in one of the senses defined above, vague. Since the application of the law to particular cases crucially depends on what the law says, applying a legal prescription to a borderline case of a general term used in the relevant statute would seem to be a paradigmatic case of the problem of vagueness in the law.[14]

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[13] Consider, for example, the various uses of the word "man," such as in, "Jo finally behaved like a man" (man as stereotype); "Marriage is a contract between a man and a woman" (man as adult male or gender); "Socrates is a man and therefore mortal" (man as a member of *Homo sapiens*). These kinds of examples are often given as examples of polysemy, and surely there is a sense in which they are. But the use of "man" to stand for a stereotype can also be analyzed as a quasi-figurative use, one that goes well beyond the definite extension of the meaning of the word.

[14] On the role of general (and very vague) concepts, as opposed to conceptions, in constitutional documents I have written a separate paper, "Meaning and Belief in Constitutional Interpretation"

a. Ordinary vagueness

Let us begin with a case of ordinary vagueness, using H. L. A. Hart's famous example (slightly modified).[15] A city ordinance stipulates that "No motor vehicles are allowed in the park." Now, we know what motor vehicles are; the definite extension is pretty clear. But suppose that the question arises whether a bicycle powered by a small electric engine also counts as a "motor vehicle" for the purposes of this ordinance and thus prohibited from entering the park. Can we say whether an electric bicycle is a motor vehicle or not? The answer would seem to be that from a semantic perspective it can go either way. It would not seem to be a mistake to say that it is, nor would it be a mistake to say that it isn't.[16]

We saw earlier that semantically vague expressions are not necessarily vague about the information they convey in a particular conversational setting. Speakers can use a vague term, even if applied to a semantically borderline case, to convey information that is precise enough in the specific context of the conversation. Applied to the kind of cases we are discussing here, this means that when a court faces a decision about the classification of a borderline case of a vague term, the semantic indeterminacy of the classification does not necessarily entail that the law says nothing about it. The context of the legislation, its overt purposes and similar pragmatic factors may determine an answer in some concrete cases. Suppose, for example, that in our case, the city ordinance was enacted in response to protests by residents about noise and pollution in the park. One can argue that such a context makes it clear that the ordinance was not intended to prohibit the use of vehicles that are neither noisy nor polluting, and hence it was not intended to prohibit electric bicycles.

Elsewhere I have expressed some doubts about moving too swiftly from analysis of ordinary conversational settings to legal speech.[17] In an ordinary conversation, the context is usually rich enough to enable hearers to grasp the content conveyed by the speaker, even when the content asserted is somewhat different from the meaning of the words/sentences that the speaker uttered. In the legal case, however, context is often not rich enough to justify such inferences with a great deal of certainty. Perhaps the ordinance about vehicles in the

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(draft available on SSRN). The concept v conceptions distinction raises many complicated issues that could not be dealt with here.

[15] See H.L.A. Hart (1958)

[16] Furthermore, it is easy to see how we get a sorites sequence here: Suppose we say that an electric bicycle is not a motor vehicle. Then what about a small golf cart powered by an electric engine? A golf cart powered by a regular engine? A small scooter? And so on and so forth. As I explain in the text below, however, sorites sequence, which results from semantic features of words used, should not be confused with slippery slope arguments, particularly of the causal-predictive type.

[17] See Marmor, "Can the Law Imply More than It Says?".

park was initially motivated by the neighbors' protests about noise and pollution; perhaps it was enacted in response to such demands. But this would not necessarily entail that reducing noise and pollution are the exclusive purposes of the ordinance. Legislatures often use a particular social-political context to motivate an act of legislation, but then enact it with broader purposes, aiming to solve other problems in its vicinity as well. Truth be told, it is very difficult to generalize; sometimes the context of an act of legislation is clear enough to warrant conclusions about the assertive content of it, even if the particular case is semantically a borderline one. A nice case in point is *Garner v. Burr:* The British Road Traffic Act of 1930 stipulated that any "vehicle" traveling on a public highway must be fitted with pneumatic tires. Mr. Burr fitted a poultry shed with iron wheels and pulled it with his tractor on a stretch of a highway. The court of appeals reasoned, quite sensibly, that even if a poultry shed fitted on wheels is not quite a vehicle, it counts as a vehicle for the purposes of the this law, because the manifest purpose of the law requiring pneumatic tires is simply to prevent damage to the asphalt roads[18]

More often, however, the context is just not sufficiently clear or determinate to justify such conclusions. And then, of course, semantically borderline cases remain genuine borderline cases, so to speak, and the court would need to make a reasoned decision about which way to classify the borderline case, given all the normative considerations that bear on it. Such decisions would not be an instance of applying the law but of extending it or narrowing it, that is, adding a precisification that goes beyond what the statute actually asserts. And, of course, courts often do just that.

One might be tempted to think that at least in criminal cases, the rule of leniency might resolve the issue: If the definition of the criminal offense leaves some doubt about its application to the particular features of the conduct in question, as it clearly does when the conduct is a borderline case of the relevant definition of the offense, then the doubts must be resolved in favor of the defendant. But this is illusory. The rule of leniency may do the trick in cases of ambiguity, but not, generally speaking, in cases of vagueness. What makes vagueness semantically problematic, is not simply the fact that there are borderline cases about the application of the vague term, but the fact that there is a great deal of fuzziness about where those borderline cases begin and where they end. Consider, for example, the case of burglary we mentioned earlier; suppose, that you regard someone who broke the window and only got his tool through the border of the premises in question as a borderline case of entering

[18] *Garner v. Burr* (1951), 1KB 31. The case is discussed by Endicott in his entry on "Law and Language" in the *Stanford Encyclopedia of Philosophy* and by Cartson in "Legal Texts and Canons of Construction" at 20-21.

the premises, and thus, true to the rule of leniency, you would decide to acquit the defendant. Now another defendant comes along who had his finger through the premises, and you apply the rule of leniency here as well and acquit. And then the next one comes along who had his whole arm through the window, and then one who had half of his body through the window, and so on and so forth. Where exactly would you stop applying the rule of leniency? In short, it is an essential aspect of vagueness that we have no clear demarcation of where borderline cases begin and where they end. The rule of leniency, even if you interpret it very broadly, just cannot solve such issues; it cannot determine its own application when its application is in doubt. The rule of leniency is applicable and helpful when the linguistic indeterminacy is due to ambiguity, not vagueness. If the definition of a criminal offense is plausibly ambiguous, lexically or syntactically, then the rule of leniency can apply, requiring disambiguation in favor of the defendant

It is, I think, quite impossible to suggest general guidelines about how courts should go about making such precisification in borderline cases; the considerations that bear on particular cases are enormously varied. But it is easy to say what kind of reasoning courts should avoid. They should avoid relying on the sorites paradox as a way of making a (type of) slippery-slope argument.
A *sorites slippery-slope argument* takes the following worry as an argument against the inclusion of a borderline case under a vague term: Let us say that the relevant expression is W, the definite extension of W is o_n, and let us assume that the court is asked to determine whether o_{n+1} is W or not. Now suppose the court reasons that o_{n+1} is W because it is very similar to o_n; it has almost all of the features that make an o W, just ever so slightly less so. So now we will have a ruling that o_{n+1} should be included under W. Then the next case might come along, o_{n+1+1}, which is very similar to o_{n+1}, has almost all of the relevant features that make it W, just ever so slightly less so. Thus, a decision might be reached that o_{n+1+1} is also W. And then, the next case comes along…until we are bound to reach the conclusion that o_{n+m} is also W, when clearly it is not. Therefore, the argument concludes, it would be a mistake to make the first step. Better not to decide that o_{n+1} is W from the start.[19]

Why is this a bad argument? Because it can be applied with equal force to *any* borderline case of a vague term. As we saw earlier, we get paradoxical results whenever we have a sorites sequence. An argument based on paradox is never a good argument. In other words, whenever we have a sorites sequence, we can easily construct a type of slippery-slope argument because the whole point of the sorites sequence is that there is no semantically determined cutoff

[19] See, for example, Randall v BSA…. where one of the main worries of the dissenting judge relies on this kind of argument.

point; there is no particular point at which we can say that the sequence needs to be halted, that it can go no further. Thus, pointing out that there is a kind of sorites slippery slope here is just stating the semantic feature of vagueness; no conclusion should follow from it. Any classification of a borderline case is going to be arbitrary from a linguistic point of view. The relevant question is whether there are good reasons to stipulate a certain arbitrary cutoff point or not, and if there are, what reasons would bear on the question of where the law should put it.

To be sure, suggesting that a sorites slippery slope is always a bad argument does not mean that there are no plausible versions of a slippery-slope argument that can apply to such cases. A *causal-predictive* version of a slippery-slope argument may well be relevant. The worry in the causal version is that the cutoff point stipulated by the court's decision is too far removed from the definite extension so that actual, real-life factors may cause the legal consequences to slip too far down the road to undesirable results. Notice that the nature of such an argument is empirical and predictive: The worry is that if the court includes a given borderline case under a vague term, then future decision makers, such as agencies, lower courts or even the same court in future cases, might find it difficult to resist the temptation to go further down the road, reaching results that one finds objectionable. Now this is a matter of prediction, and such arguments tend to be rather speculative. Though the concern is empirical in nature about matters of fact, it is not unrelated to the nature of vagueness. The concern that motivates causal slippery-slope arguments derives its force from the fuzziness of borderline cases, from the fact that there is no obvious or salient cutoff point that can warn us against slipping down the road too far from the original reasons that justified the legal rule in question.

Given the speculative nature of causal slippery-slope arguments, they should always be treated with great caution. The burden of proof should be high, because it is the nature of slippery-slope arguments that they counsel against doing something that would be the right decision on the merits of the case at hand, only due to a fear that future decisions are likely to lead us astray. Thus, at the very least, the argument should provide sufficient evidence that likely errors in the future will be difficult to avoid. Gut feelings and speculations, which are mostly what one finds in such cases, should not be enough.

b. Transparent vagueness

Transparently vague terms, such as "tall," "mature," "rich," etc., are rarely found in statutory language. But they are not entirely absent. In some cases, and typically in addition to a set of much more precise regulations, one finds that the law includes a transparently vague term as part of its regulatory scheme.

Often the purpose of such vague additions to a regulatory scheme in a given area is preemptive: Legislatures want to safeguard against the possibility that some unpredictable, yet clearly wrong (or otherwise relevant), conduct does not fall between the cracks of the set of precise rules that purport to govern the area in question. There is an endless variety of permutations; one just cannot predict them all.[20]

Be this as it may, the most obvious aspect of legislating transparently vague standards, whether in the kind of cases discussed above or others, is that the legislature in effect delegates the decision of how to make the standard more specific to the courts or to administrative agencies. Using vague legislative language is, actually, the main technique for legislatures to delegate power to the courts without explicitly saying that this is what they are doing. Accordingly, there are two main types of reasons for opting for such transparently vague regulation: Sometimes the vague language is simply a result of a compromise between legislators enacting the bill. Legislators often have conflicting aims or intentions with respect to a bill they would want to enact, and if neither side can muster the requisite majority for their position, opposing sides may settle on wording that is sufficiently vague to let each party hope that their specific purposes might win the day in future decisions by the relevant courts or agencies that get to interpret the act in question. (Or, I presume, sometimes there is no such hope, only the attempt to conceal from the constituency that one gave up.)[21]

Compromise, by its nature, is regarded by the parties to it as second best. The use of vagueness in the law, however, is not confined to such second-best choices. Sometimes there are good reasons to opt for a vague term in an act of legislation as a means of delegating the decision to the courts, and those are mostly the kind of cases I want to focus on. But let me answer an objection here before we proceed.

Some writers suggest that vaguely worded regulation in some areas is justified by the need to delegate the relevant decisions not to the courts but to the law's subjects, to those whose behavior the law purports to regulate. The idea is that in some cases, instead of telling people what it is exactly that they ought to do (or not to do), it is better to set a vague standard, leaving it for the subjects themselves to exercise their own discretion and take responsibility for the choices they make. So when the law tells drivers that, no matter what, you

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[20] Traffic regulations often have some kind of a requirement to drive with reasonable attention to the conditions of the road. There are also countless such examples in U.S. tax legislation. For instance, section 541 imposes an accumulated earnings tax on corporate-retained earnings beyond those retained "for the reasonable needs of the business." Section 535(c): Tax-free mergers are typically conditioned on the transaction having a corporate "business purpose." Etc. etc.

[21] I explained this in greater detail in Marmor (2011) at 97.

ought to drive *carefully*, the law imposes on the drivers themselves the responsibility to determine what careful driving is under the circumstances. It is your responsibility, the law says to its subjects, to determine what is right or reasonable under the circumstances, and you need to bear the consequences of your own choices. And, some writers claim, this is sometimes a very good idea; it is as it should be.[22]

Presumably, the attractive feature of this rationale for vague regulation is that it respects people's autonomy or, at least, forces people to take responsibility for their decisions. Writers who like this idea admit that in some cases there might be a concern about chilling effect, but I think that they underestimate the normative problem here. Consider this example: My teenage daughter is going out on a Saturday night. I want to make sure that she gets back home at a reasonable hour, so I face a choice here: I can either tell her, "Make sure to be home by no later than 2 a.m.," or I can be much more vague, and tell her, "Make sure not to come home too late!" Now, we might think that the vague instruction is more respectful of my daughter's autonomy. It is more educational, in a sense, too, because it makes her more responsible for her own actions, which is generally a good attitude to foster. So far, so good. But now let's suppose that there is a sanction looming here, that is, suppose that my daughter knows that I am the one who gets to determine what would count as "too late" to come home, and that if I decide that she came home too late, I get to impose a penalty. And let us further suppose that she cannot be sure, in fact she only has a vague sense of, what I would consider "too late" under the circumstances. (Notice that if my daughter knows exactly what I have in mind when I say "too late", then my instruction is no longer really vague.) Now we might begin to doubt that the vague instruction is more conducive to her autonomy. In all likelihood, it might have a chilling effect. If the sanction is not trivial, she would need to play it safe and err on the side of caution, and the more threatening the sanction is, the greater the margin of safety she would need to allow.

The legal case is, of course, in line with the latter part of the example. When the law regulates conduct with vague standards, it puts the decision about sanctions for violation in the hands of the courts, and it is the court that gets to determine, ex post, whether the subject violated the standard or not. Therefore, the real effect of such vague regulation is transferring to the subjects not the kind of decision that is respectful of their autonomy or moral agency, but the burden of trying to predict what the courts will decide. And the less information they have about it, and/or the more severe the cost of violation, the more the subjects would need to err on the side of caution. Perhaps in some

[22] Waldron (2011) Endicott (2011).

cases this legislative strategy is efficient or justified, but I don't quite see how, morally speaking, it is particularly respectful of the subjects' moral agency.[23]

None of this is meant to suggest that there are no cases in which there are good reasons to delegate the decision about precisification of vague standards to the courts. On the contrary, there are many such cases. But the rationale of delegation of power must be derived from considerations pertaining to the relative institutional competence of legislatures vis-à-vis the courts or other decision-making agencies. That is the real choice here, not the concern for the subjects' autonomy. Furthermore, I will argue that there is typically a much stronger case for the legislature to delegate to the courts decisions about specifications of extravagantly vague terms than cases in which the legislature uses a transparently vague term. In any case, different kinds of reasons apply here.

What reasons, if any, might legislatures have for using a transparently vague term as a means of delegating the precisification of a vague standard to the courts? Remember that the main problem in such cases is to set a cutoff point in the sorites sequence. Is there any reason to think that the courts will do a better job in that? Generally speaking, probably not. The relatively infrequent use of transparently vague terms in legislation suggests that it is generally recognized that legislatures are better equipped to make those kind of decisions compared with the courts. Furthermore, it is worth keeping in mind that courts' decisions, which are based on particular cases adjudicated, inevitably have a retroactive effect; unlike legislative acts and guidelines issued in advance, the decision of a court applies to conduct that has already occurred and determines a resolution to the case ex post. So there is always some cost of retroactivity involved in judicial, as opposed to legislative, decisions.[24]

I want to suggest that there is a type of cases where delegating to the courts the decision of determining the particular cutoff point in a sorites sequence makes a lot of sense, namely, when the following two conditions obtain: First, the precisification is particularly context sensitive. Second, it is an area of conduct where parties concerned do not have good reasons to know in advance the exact regulatory content that applies to them. Consider, for example, the law I mentioned earlier in a note, of granting exemption from the federal guidelines concerning child support on the basis of "extraordinarily high

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[23] In fact, the problem is often more severe, because a serious concern about fairness also comes into the picture. The more vague a legal regulation is, in the sense discussed here, the more crucial it becomes for potential litigants to have information that enables them to predict courts' decisions, which gives repeat players, mostly large corporations, considerable advantage over ordinary citizens.

[24] In some areas, precisification requires a great deal of expertise, of the kind that legislatures typically lack. But in such cases, legislatures tend to delegate the decisions to administrative agencies, not so much to the courts. And administrative agencies tend to issue detailed general guidelines, not case-by-case decisions.

income." Why not have the legislature stipulate a certain income figure as a cutoff point? The answer is twofold: First, the relevant considerations are very context sensitive. The rationale of the exemption has something to do with the fact that the needs of children are not unlimited, that there is no reason to allow either the children or the custodial parent to have an extravagant lifestyle. But, of course, these things tend to vary a great deal with particular circumstances. The difference between comfort and luxury profoundly depends on the environment in which one lives, the kind of opportunities available to others in one's vicinity, etc. Therefore, it makes a lot of sense to avoid a generally stipulated cutoff point and allow the courts to set it on a case-by-case basis.

Furthermore, there is a distinction between the kind of regulations where it is important for the law's subjects to know, ex ante, what the law requires, and those cases in which prior knowledge of the exact legal regulation is not very important. In most cases, when we plan our conduct in a given area, knowing what the law requires or permits is of crucial importance. But not in all cases. And child support belongs to the latter. Parents do not (and certainly should not) plan separation or divorce from their spouse on the basis of considerations about the exact amount of child support they will be required to pay. Ex post determination of such matters doesn't frustrate legitimate expectations, as long as those determinations are within reason, of course.[25] Thus, allowing the courts to determine, on a case-by-case basis, the exact cutoff point in a sorites sequence – which would normally have a retroactive, ex post facto element – is not normatively problematic in such cases. Notice, however, that when the rationale of opting for transparently vague terms consists in the particular context sensitivity of the relevant factors, decisions made by the courts on a case-by-case basis should have very limited precedential effect. If the whole point of letting the courts decide such matters derives from the inherent difficulties involved in ex ante generalizations, then granting courts' decisions too much precedential effect would defeat the rationale of the delegation of power to the courts.

c. Extravagant vagueness

It may seem paradoxical that legislatures have much stronger reasons to delegate decisions to the courts when the relevant concept in play is extravagantly vague. But that is actually the case, and the ubiquity of such terms in legislation might attest to the fact. Let me explain why this is so. Remember that

[25] This idea is supported by the fact that most U.S. states do not allow child support arrangements to form part of a prenuptial agreement. US tax legislation, as I mentioned earlier, is also replete with transparently vague terms. It is not all that surprising, given the fact that in US federal tax law, quite generally, retroactivity is not regarded as a major concern.

the main feature of extravagantly vague terms consists in their multidimensional aspect, not so much in the sorites sequence they entail. Thus, it might help if we focus our attention on the ways in which we make choices or decisions in cases involving multidimensional and incommensurable elements. Suppose, for example, that one of your colleagues received an offer to move to a different job in a different city, and she needs to make up her mind about whether to accept it. So let us assume that this is what she knows: The new job pays better, but it will involve a bit more teaching; she will be able to afford better housing, though the commute will be a bit longer; the faculty in the new place is probably stronger than in her current department, but the quality of the graduate students is not as high. And then there is the fact that she will need to move from a small college town to a big city, with all the differences involved in that. And so on and so forth.

The essential point is that the various factors that your colleague needs to consider present her with a problem of incommensurability. It is very difficult to decide, on rational grounds, how much better the housing has to be relative to a given addition of commute time, and even more difficult to think about how to compare, say, better housing with more teaching or lower quality of students. So how can one make a rational decision in such cases? There seem to be two main possibilities here: In some cases, a particular factor stands out as more or less decisive. Your colleague may think, for example, that improving her housing condition is much more important to her than other considerations in play, and then she would assign it a much greater weight in her deliberation. And this may well tilt the balance in favor of a particular decision. However, if no such decisive factor is in play, her only choice is to make an all-things-considered holistic judgment here; she would need to take everything she deems relevant to the choice into account, and decide between the two packages, as it were, in a holistic manner. She would look at the whole thing, so to speak, and ask herself which one seems more attractive, overall. There is no guarantee, of course, that such a holistic method would yield a reasoned preference for one of the options, but then she might as well just flip a coin.

Now consider the example we used earlier, of an extravagantly vague legal norm such as "neglecting a child." Suppose you are presented with the particular facts of a given case that would seem to be a case of neglect. Like in the job-offer example, it is quite possible that a particular fact of the case stands out as more or less decisive. Upon hearing that the care provider left a baby in a bathtub full of water unattended for half an hour, you may not need to hear much more. But of course, many cases are not like that. In many actual cases, there isn't any particular conduct that decisively counts as neglect, but the overall behavior of the care provider, over time and in varying circumstances, might well amount to criminal neglect. And you can only make this kind of judgment

holistically, looking at the whole package, so to speak. And again, the whole package may not give you a decisive answer; borderline cases cannot be ruled out.[26]

I hope we can see the reason for trying to avoid ex ante specifications of how to resolve such issues. Just as it would make very little sense to decide in advance how you would react to any job offer you might receive in the indefinite future, or to try to make yourself a list of specific conditions that such an offer would have to meet (and to what extent) for you to accept it, it makes little sense for the law to try to legislate in any great detail what counts as neglecting a child. Even if one can think in advance of some factors that may stand out as decisive, often there are no such decisive factors in play, only all-things-considered, holistic judgments to make. And of course, if these kinds of decisions cannot be made ex ante, legislatures have no choice but to delegate the decisions to the courts on a case-by-case basis. And here too, for reasons we mentioned earlier, it would be a mistake to assign courts' decisions in particular cases great precedential value. The whole point of delegating such decisions to the courts is that they have to be made ex post, on the basis of the particular features of the case at hand.

Some of the more familiar examples of extravagantly vague terms in law are a bit more complex than that, because they tend to be partially defined. Consider, for example, the use of the word "corruption" in the context of bribery laws: The definition of bribery under federal law (18 USC 201) defines bribery as "*corruptly* giving, offering or promising anything of value to a public official or candidate to influence any official act." The word "corruption" is, no doubt, extravagantly vague. Very much like "neglect," in most cases the determination of whether a given set of circumstances amounts to corruption has to be made contextually and holistically. But the law does not quite leave it at that. Corruption is partly defined by various rule-like decisions, such as requiring some *quid pro quo* element, whereby merely gaining access to officials does not count as corrupt. So we end up here with a tension between two kinds of reasoning: On the one hand, we have the extravagantly vague term, aiming to allow the courts to form a holistic, all-things-considered judgment of the particular case at hand; on the other hand, we have some specific rules that are aimed to shape such decisions and determine, in advance, *some of the conditions* that the relevant conduct has to meet to count as corrupt. This compromise between different types of legal regulation, embodied in the partial definition of a trans-

[26] In some rare cases in the US vague statutory references to a child's "welfare" or a child's "neglect" have been struck down as unconstitutionally vague. (See, for example, *Roe v Conn*, 417 F. Supp. 769, (1976).) Most of these cases, as *Roe v Conn* exemplifies, are entangled with problems of racial discrimination and racial bias at the enforcement level, and I am told by experts that these kind of issues are almost always lurking in the background of void for vagueness constitutional cases.

parently vague term such as corruption, reflects the fact that the law needs to set some fairly specific guidelines in advance, but that there is a limit to how specific those guidelines should be. The limit, however, is not epistemic; it does not derive from lack of knowledge or limited foresight. It derives from the multidimensionality of the evaluative elements that constitute the idea of corruption. And of course, corruption is just one example. Similar considerations apply to legal concepts such as "due process," considerations of "equity," protection of "privacy" and many others. I venture to speculate that most extravagantly vague terms deployed in the law are partially defined.

d. Ambiguity and polysemy

Linguistic indeterminacy in law is not confined to vagueness. Ambiguity, and as I will argue, much more frequently, cases of polysemy, are different forms of linguistic indeterminacy that we also find in law. Standard lexical ambiguity is rarely a problem. Since the standard case of lexical ambiguity concerns words whose different meanings are unrelated, context is usually clear enough to determine which one of the two meanings of the word was intended by the legislature. Syntactical ambiguity is a bit more prevalent, and typically inadvertent. Legislatures make an effort to avoid syntactical ambiguities; sometimes they fail, of course, which is typically unfortunate, as syntactical ambiguity serves no useful purpose.[27]

The problematic, and much more interesting, cases are those in which the indeterminacy is due to polysemy. Consider the famous case of *Smith v. U.S.*[28] The relevant statute mandated a much harsher punishment for drug-related crimes if the defendant was "using a firearm" during the drug-related activity. In the *Smith* case, the defendant used a firearm in a barter deal in exchange for the drugs. So the question was whether using a firearm as an object of value, not as a weapon, counts as "using a firearm" in connection with a drug deal. The majority decided affirmatively, but in a famous dissent, Justice Scalia argued that there is no linguistic indeterminacy here whatsoever. Using an object is normally understood as using it for its intended purpose or function, not for just about any use whatsoever. Hence he argued that the expression "using a firearm" only applies to cases in which the firearm is used as a weapon, not as an object of value for a barter deal. His main argument was based on the thesis that "using a firearm" is simply not ambiguous. And, in a

[27] Scope ambiguity is the typical case of syntactical ambiguity we find in legislative language.
[28] 508 US 223 (1993).

sense, though a somewhat different sense from what he meant, Scalia is right; this case is about polysemy, not ambiguity.

Consider again the pair of sentences:

(a) "John struggled to pull his cart out of the mud"
(b) "John struggled to finish his dissertation on time"

Two points worth noting here: The word "struggle" in (a) stands for something different from "struggle" in (b); But it is equally clear that we do not need any particular contextual information to understand the relevant extension of the word "struggle" in the sentence uttered. Our ordinary background knowledge of the world, so to speak, is sufficient to determine which one of the references is meant. The word "struggle" is polysemous but not ambiguous (the two meanings in context are closely related, well within the semantic range of the word). In this respect, I think that Justice Scalia is quite right about the fact that there is no ambiguity involved in "using a firearm." In fact, we can easily construct a similar pair of sentences about the expression "using an x":

(a*) "Jane uses a laptop"
(b*) "Jane uses a laptop to keep the door open"

We can assume that (a*) refers to using the laptop as a computer, and with equal certainly we can infer that in (b*) the laptop is used as a doorstop. But again, we don't need any contextual knowledge of the specific speech situation to understand which one of the meanings is intended by the speaker; our ordinary background knowledge of the world is sufficient. So it is quite right that the expression "using an x" is not semantically ambiguous. The problem in *Smith* is about polysemy. The word "use" has a very wide semantic range; when we use an expression like "using an x," we may designate a specific subset of the word's definite extension. And in most cases, this is clear enough from the meaning of the relevant sentence, combined with our background knowledge of relevant aspects of the world.

Having said this, Scalia's conclusion would be correct if it is generally the case that an unqualified (without anaphora) use of "use" is normally understood in a restricted extension within the wide semantic range of the word. If it is generally true that an expression of the form "A uses an x" is understood by default in the restricted sense of using the x for x's typical purpose or function, then Scalia is right. And that seems quite plausible.[29]

[29] Technically speaking, this is probably an example of what Grice called "generalized conversational implicature", such as the expression "an X", without anaphora or further clarification, normally im-

However, I doubt that this is generally the case with similar examples of polysemy. Notice that this does not work with words like "struggle." The expression "A struggled to φ" does not indicate what kind of effort "struggle" designates if we do not know the nature of φ. Or, consider the case often mentioned in parallel with *Smith*, the case of *Muscarello v. U.S.*[30]: The question was whether "carrying a firearm" in relation to a drug deal applies to carrying it in the trunk of the defendant's car. Once again, Scalia used the same argument to conclude that it does not. But here I think that he was mistaken. I doubt that the expression "carrying an x," without anaphoric addition, by default refers to carrying it on one's body. If I ask a driver who happens to have a flat tire, "Are you carrying a spare tire?" he would respond quite sensibly by saying "Yes, it's in the trunk of my car". Or, the sentence, "The accident victim was carried to the hospital," would certainly not imply that he was carried on somebody's person. When I ask my wife whether she happens to carry some cash with her, I would refer to carrying it in her purse, of course, not in the trunk of her car. But that is so because we know that people normally carry cash in their wallet or purse. In other words, polysemy applies to words used in a given context to designate a particular subset of objects within the word's semantic range. The relevant context is typically given by our general background knowledge of how things are in the world. The context does not have to be specific to the particular conversation in question. However, it is not generally the case, as Scalia seems to assume, that by default non-anaphoric expressions of such words are normally understood in a restricted, narrow sense. It all depends on the nature of the object or instance on which the word is predicated, and things we generally know about the relevant aspects of the world. To conclude: From a semantic perspective, Scalia's reasoning was probably correct in *Smith*, but incorrect in *Muscarello.* And I suspect that most cases of polysemy are like the latter.

e. Conversational vagueness

Let us recall that expressions using a vague term, or any other form of semantically indeterminate expression for that matter, can be sufficiently precise in the specific context of the conversation. In fact, though not dealing with vagueness, the majority opinion in *Smith* argued along these lines: The argument was, in effect, that even if "using a firearm" would normally be understood as using the firearm as a weapon, the context of the legal regulation here

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plicating that the speaker has no particular knowledge about the specifics of X or does not deem it relevant to the utterance in question. See Grice, (1989), at 37. Similarly, the expression "A uses an X" would normally implicate that A uses the X for X's typical function or purpose.

[30] 524 US 125 (1998).

makes it clear that the word was intended in its wide semantic sense to apply to any use whatsoever. And that is so, the majority argued, because the legislature clearly wanted to act against the dangers of mixing drugs with guns, given the well-known dangers involved in the potential for deadly violence in drug deals. Hence the mere presence of a firearm in a drug deal is precisely what the legislature wanted to discourage. Let us assume that the majority is correct in its assumptions about the background purposes of this piece of legislation. Is it also correct to claim that the pragmatic elements of the regulation here determine the content of the legal speech with sufficient certainty to warrant the conclusion that it favors? I suspect that most readers will doubt that this is the case. Perhaps it is true that the legislature would have decided in this case, if it had considered it, as the majority ruled; but we must bear in mind that speakers often fail to convey all that they had intended to convey on an occasion of speech. For a speaker to be able to assert some content that differs from what his or her sentence semantically means, the contextual knowledge shared between speaker and hearer has to be quite rich. I doubt that the context is rich enough in this case to warrant such a conclusion with sufficient certainty, especially given the fact that the relevant legislation here is in the criminal law domain.

I want to conclude this discussion, however, with the opposite type of case, where we have a legal formulation that is semantically precise relative to a certain object or instance of application, but conversationally vague in the context of its utterance. To illustrate the (very limited) point that I want to make here, consider the case of *FDA v. Brown & Williamson Tobacco Corp.*[31] The question in this case was whether the FDA was granted the authority to regulate tobacco products. The relevant part of the statute defining the FDA's authority to regulate drugs said that the FDA has the authority to regulate "articles (other than food) intended to affect the structure or any function of the body." Now, if you think about it from a semantic perspective, surely you would think that cigarettes and other tobacco products are intended to do just that, "affect the…function of the body," and hence they are clearly within the *definite extension* of the relevant expression here. So why is this regulation conversationally vague in the context? The answer, which gave rise to this famous litigation, consists in the combination of two additional facts: First, the legal fact that if tobacco falls under the jurisdiction of the FDA, other parts of the statute render it clear that the FDA must prohibit its sale. Second, the fact that between 1965 and the time of the court's decision in 2000, Congress enacted six separate pieces of legislation regulating the sale, advertisement, etc., of tobacco products, clearly presupposing that the general sale of tobacco products is per-

[31] 529 US 120 (2000). I am certainly not suggesting that this is the only issue that is central to this complicated case, nor that it bears on the desirable result.

fectly legal. Thus, the conflict between different pieces of legislation here, and their accompanying presuppositions, renders it questionable whether tobacco products fall within the ambit of the authority granted to the FDA. In the overall context of tobacco regulation, the relevant statutory expression is conversationally vague, even if it is not an instance of a semantically borderline case[32]. And there is an interesting lesson here: contextual knowledge is often deemed helpful in determining some asserted content that would otherwise be under-determined or vague. Sometimes, however, the opposite is the case; an expression that is not particularly vague or indeterminate, becomes pragmatically or conversationally vague precisely because the particular context of the conversation makes it doubtful that the expression applies to its ordinary semantic extension. Given the complex contextual background of legal regulations, I suspect that conversational vagueness in law is much more common than one might have thought. Sometimes context makes thing less, rather than more, clear.[33]

[32] In one clear sense, this is an oversimplification because I ignore the time sequence between the different pieces of legislation. But my point in the text is not to analyze the case, only to illustrate a general point.

[33] I am grateful to the participants of the legal theory workshop at UCLA (Feb 2013), the participants of the conference on *Vagueness in Law* at the NYU department of philosophy (March 2013), and the participants of the legal theory workshop at the Julius Stone Institute of Jurisprudence at the University of Sydney (April 2013) and to David Enoch and Alon Harel for helpful comments on a draft of this paper.

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