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VAGUENESS HAS NO FUNCTION IN LAW*

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Islamic building codes require mosques to face Mecca. The further Islam spreads, the more apt are believers to fall into a quandary. X faces Y only when the front of X is closer to Y than any other side of X. So the front of the mosque should be oriented along a shortest path to Mecca. Which way is that? Does the path to Mecca tunnel through the earth? Or does the path follow the surface of the earth?

Contemporary Western legal theorists are apt to dismiss this enigma on the grounds that there is no right answer—even within the Islamic legal system. The vagueness of "face" infects the law that all mosques must face toward Mecca. A judge should just use his discretion to settle the case. However, the Islamic system has no room for this kind of discretion. Islamic law is a divine-command theory. An act is illegal exactly when God forbids it. Since God is never undecided, every legal question has a determinate answer. The judge's aim is to *discover* what God's judgment is.

Islamic law is blind to borderline cases. This insensitivity impairs an Islamic judge's ability to identify and handle an important species of defective question. Instead of dismissing borderline cases or settling them by fiat, the Moslems vainly attempt to discover an answer to a question that, on conceptual grounds, resists all inquiry.

A good theory of vagueness should account for this Western advantage over Islam. Supervaluationism meets this requirement by picturing borderline propositions as being neither true nor false. If there is no fact of the matter as to which way faces Mecca, then there is nothing to discover. Once we recognize there is nothing to know, we switch from "What is the answer?" to "What should count as the answer?" The change of perspective lets us exchange the tools of discovery in favor of the tools of invention. And once we acknowledge that there is a role for stipulation and imaginative interpolation, we can appreciate how certain features of law are adaptations to indeterminacy. Knowing how law ought to work sheds light on how it does work.

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The epistemic view of vagueness does not seem to satisfy the requirement of explaining the logical deficiency of Islamic law. In a notorious effort to preserve both classical logic and commonsense ontology, the epistemicist says that borderline cases involve a hidden truth (Sorensen 1988, Williamson 1994). There is a right answer. We just cannot know it. Hence, the epistemicist appears to endorse Islamic faith in right answers. However well epistemicism fits the legal systems in Iran and Saudi Arabia, it seems ill suited to the United Kingdom and the United States.

Nevertheless, epistemicism actually guides us to the best account of vagueness in law. Epistemicism classifies vagueness as a species of irremediable ignorance. Thus it implies that vagueness can be functional only in the ways irremediable ignorance is functional. Since this kind of ignorance is rarely functional, epistemicism breeds skepticism about attempts to portray vagueness as an adaptation.

I. BORDERLINE CASES FORCE JUDICIAL INSINCERITY

My case against the functionality of vagueness gets a running start from a moral observation that is independent of any particular theory of vagueness. When a judge adjudicates a case that he believes to be absolutely indeterminate, he is being disingenuous. He cannot know what he is presenting himself as knowing because this kind of indeterminacy implies that the proposition cannot be known by any means. That includes stipulation. As a Dartmouth professor, I can make "Some Dartmouth professor will snap his fingers in one minute" true by snapping my fingers in one minute. That suffices to show that the statement is knowable and hence not absolutely indeterminate. No truth-value gaps are created by putting the truth-value of statements under our control.

The judge is not like a contestant in a quiz show who can answer without committing himself to belief in his answer. He cannot say "The defendant is guilty but I have no belief one way or the other about his guilt." The judge's verdict is an assertion (although sometimes just a conditional assertion—more below). If the judge were to admit insincerity, then he would be doing more than undermining his authority; he would be retracting his verdict. Since the judge has a duty to be decisive, he quietly resigns himself to an insincere verdict. This is more than embarrassing. Like the rest of us, judges disapprove of duplicity. They try to avoid being put in a position where they will be forced to dissemble. Consequently, judges precisify for moral reasons.

Assessments of judicial sincerity are tricky. A judge oversees an answer system. His verdicts are assertions that are made from the perspective of that system. In this respect, the judge is like a mathematician extracting a consequence from a set of axioms and inference rules that he himself need not endorse. The mathematician is sincere if he believes the consequence

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follows from the axioms via the inference rules. He need not believe the consequence itself. Of course, if he also accepts the axioms and inference rules, then he also unconditionally asserts the consequence. Similarly, when there is no discrepancy between the judge's official basis for judgment and his actual basis, the judge can unconditionally assert a verdict. But rules excluding illegal evidence frequently create a discrepancy. In such cases, a judge who believes a defendant guilty can sincerely pronounce him not guilty, and a judge who believes a defendant innocent can sincerely pronounce him guilty. The judge is insincere if and only if he fails to assign a sufficiently high conditional probability of guilt. In principle, the absolute probability of guilt is irrelevant.

In practice, there is pressure to keep the two types of probability in alignment. The pressure is greater for innocence than guilt. If jurors assign a high conditional probability of guilt and yet believe the defendant is innocent, then they tend to act disobediently on their absolute probability.

Since there is citizen participation in judgments of guilt and innocence, legally naïve people must be sensitized to the contrast in sincerity conditions between unconditional assertions and conditional assertions. Lawyers often try to convey the difference in a way that is literally false. I have in mind those who *define* "guilty" as "proven to have committed the crime beyond a reasonable doubt." This is like saying "hungry rat" means "rat that has been deprived of food for twenty three hours." Operational definitions confuse a test for a property with the property itself. Legal systems vary in how they test guilt. But it does not follow that "guilt" means something different in each of these systems. If we tie the test of guilt too tightly with guilt itself, we undermine the possibility of one test being a more reliable test of guilt.

For the sake of simplicity, I concentrate on cases in which the judge both asserts and conditionally asserts the verdict. In these situations, the only discrepancy to consider is between what the judge says and what he believes.

There are a few corrupt judges who believe that the defendant did not commit the crime but pronounce him guilty anyway. Their belief runs in direct opposition to what they state. That's *commissive* insincerity. My topic is a less grave form of prevarication. I am interested in the *omissive* kind of insincerity in which the judge merely fails to believe what he states. (And remember, I am putting aside the complications introduced by conditional assertion.)

J.L. Austin's theory of performatives can be misread in a way that seems to preclude both kinds of judicial insincerity. Under this view, verdicts are *stipulations* of guilt or innocence, just as marriages are stipulations of marital status. I cannot lie when stipulating. For my stipulation is true by fiat.

If, in the case of verdicts, saying so makes it so, then it is a necessary truth that all verdicts are sincere. Moreover, judges would always have *infallible* knowledge that their verdicts were true. Each judge would be equally reliable—because all would be *perfectly* reliable. All of their worries about

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which decision to make would be of the practical sort that concern inventors of neologisms and labelers of geometrical figures.

If all the legal borderline cases are resolvable by fiat, then I am done. Remember my thesis is that vagueness has no function in law. If there are no absolute borderline cases in law, then there is no vagueness in law. Therefore, vagueness has no function in law.

I do not think I am done. I do not think that fiat really is a panacea for legal indeterminacy. Officials do engage in a rich variety of stipulative maneuvers to cope with indeterminacy (and embarrassing determinacies). But these precisifications are regarded as fictions or technical uses. They are not regarded as acts which bring into existence an answer to the original question. Broadly speaking, a term's borderline cases are part of its meaning, just as its clear cases are. Those who draw sharp lines for vague terms are changing the topic—often in helpful ways. People who "draw the line" normally signal that they are not claiming to know the threshold for the term. They justify the artificial threshold pragmatically. After all, they must say something, and what they are saying is as reasonable as any of the remaining alternatives.

Later I will show that Austin's original theory of performatives has the resources needed to accommodate insincere verdicts and legal indeterminacy. But for now, I will take the existence of insincere verdicts for granted. I shall instead focus on the *nature* of the insincerity.

Are insincere judges lying? Yes, according to Arnold Isenberg's definition: "A lie is a statement made by one who does not believe it with the intention that someone else shall be led to believe it" (Isenberg 1964, 466). One cannot wittingly believe a borderline statement. Of course, there are some borderline statements that you unwittingly believe—just as there are some falsehoods that you unwittingly believe. But if you regard oral sex as a borderline case of "sex," then you are unable sincerely to assert "Oral sex is sex."

Isenberg's definition can be supported by a moral experiment. The next time you are asked a yes-no question about which you are evenly undecided, answer anyway: "Will it rain?" "Yes." "Does Jack live on the left side of the street?" "No, Jack lives on the right side of the street." "Did the bride keep her maiden name?" "No, she sided with tradition and took her husband's last name." You will feel that you are lying. You may feel anxiety. You may feel guilt. You may feel "duping delight" (Ekman 1985, 76–79). You will emit the same behavioral clues as liars. Your duplicitous feelings and behavior are physiologically grounded. Your autonomic nervous system will be aroused in the ways measurable by polygraph operators. If you later disclose that you answered without believing your answer, your interlocutor's autonomic nervous system will also be aroused. But his system will manifest anger and resentment rather than anxiety and embarrassment. With the revelation of your insincerity, you will feel shame. The best explanation of your emotions (and your interlocutor's emotions) is the simple one: You feel as though you are lying because you *are* lying.

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Because I think Isenberg's definition of lying is correct, I think judges lie whenever they render a verdict about a case they believe to be absolutely borderline. Many prefer to say that the judge is merely being misleading or deceptive.

This milder level of insincerity is enough for my primary purpose. I chiefly wish to show how absolute borderline cases create a forced choice between sincerity and decisiveness. But I have a secondary goal of indicating how bad the dilemma is. This requires gauging the severity of the insincerity option. If I acquiesce to the mild description, I will bias the measurement with euphemisms.

The loser of a lying verdict would be justifiably indignant at the judge's insincerity. The philosopher Michael Scriven was ordered to demolish his house because it violated a law that protected the pristine appearance of a California mountain range. The house was visible as a speck in the distance—a speck that most people needed coaching to discern. Suppose Scriven appeals to a judge who believes that Scriven's house is only a borderline infraction of the law. The judge rules that Scriven's house violates the law and so must be demolished. Put yourself in Scriven's shoes (as he hands over a check to pay the exhausted demolition crew) when he discovers that the judge neither believed nor disbelieved that Scriven's house violated the law. (Actually, Scriven prevailed.)

Those with a wider perspective may have sympathy for the judge. I do. Judges are honorable people. I believe that, on average, judges are more honorable than those of us in professions that do not put such a premium on probity and justice. The more honorable judges are, the better for my thesis. For I am saying that judges suppress vagueness because they hate being a position where they will be forced to render an insincere verdict.

When the judge is adjudicating a case he believes to be absolutely borderline, he is torn between two considerations. Each consideration rises above the status of a supererogatory ideal. In particular, the judge is in the kind of predicament Walter Sinnott-Armstrong (1988, 39–52) characterizes as a conflict between moral requirements. On the one hand, the judge has a professional obligation to adjudicate the case and so must issue a decision. On the other hand, he has an obligation to answer sincerely. There is no way to satisfy both moral requirements.

The dilemma between decisiveness and sincerity does not occasion any moral uncertainty. The judges know that decisiveness takes precedence over sincerity. Ditto for other adjudicators such as umpires and referees. However, this moral certainty does not relieve the judge of a sense of guilt and regret. The judge is in a solemn, censorious setting, officiating over important matters. With the help of the state's impressive courthouses, robes, and the general regalia of justice, the judge cultivates trust from both sides of the dispute. When rendering a verdict, he adopts a posture of rectitude and knowledge. When the judge renders an insincere verdict, he has reason to wonder whether he has betrayed the trust he solicited. Moreover, there is an

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air of hypocrisy when one violates a moral requirement in the course of punishing others for their legal violations. The irony must be especially sharp when the judge punishes borderline perjurers.

The judge's negative evaluation of his insincere verdict falls short of repudiating his action. Indeed, judges rebuke their few brethren who gravitate to the other horn of the dilemma between sincerity and decisiveness. The *International Herald Tribune* (Sept. 30, 1991, p. 6) reports that one American judge decided the guilt or innocence of traffic violators by a public flip of a coin when he could not decide it on the basis of evidence. Action was taken against the judge before the state commission on judicial fitness.

The judges can avoid the forced choice between sincerity and decisiveness by withdrawing from the business of adjudication. But this way of avoiding "dirty hands" is an overreaction. There may be a moral requirement to avoid professions in which one can foresee that one will be ensnared by conflicting moral requirements. Still, such a requirement would be overrideable (Sinnott-Armstrong 1988, 104). The benefits of medicine ensure that I can become a physician even if I foresee that this will sometimes force me to choose between an obligation to give a patient the most effective therapy and my obligation to report truthfully what is wrong with him. Even so, minimizing moral conflicts is a desideratum of any activity. Hence judges are morally motivated to avoid adjudicating borderline cases. This motive competes with other high-minded concerns, so judges sometimes acquiesce to the moral problem presented by a borderline case.

Once we appreciate the moral problems posed by (known or believed) absolute borderline cases, we become more skeptical of attempts to show that vagueness is functional in law. These defenses of vagueness, most prominently H. L. A. Hart's in *The Concept of Law*, were inspired by Ludwig Wittgenstein's *Philosophical Investigations*. I shall argue that the appearance of functionality is due to a cluster of logical and linguistic errors about the nature of vagueness.

II. PHILOSOPHERS FOCUS ON ABSOLUTE BORDERLINE CASES

Terms such as "indeterminate," "undecidable," and "borderline" are usually relativized to answering resources (bodies of information, inference rules, measuring instruments). Fishermen who abide by size limits first use casual inspection to sort their catch into keepers and throwbacks. Borderline cases are set aside. Their status is settled with a special effort involving weight scales and rulers.

Normally, we want to know the answer and so turn to the strongest answering resource available. But there are circumstances under which weaker resources are used. In blind refereeing of scholarly articles, editors

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conceal the identity of the author. This forces the referee to make a less informed decision. People will even adopt answering resources that they know to be completely unreliable. To understand astrology better, an astronomer may learn enough of this pseudoscience to perform tasks such as sorting couples in terms of their romantic compatibility. One sign that the astronomer has learned his astrology is his indecision over borderline cases. The astronomer consistently believes that two people are romantically compatible while also believing that the two are, according to astrology, a borderline case of "romantically compatible."

Once we relax the concern for reliability, we can admit random answer systems. These provide a useful baseline of performance. If my stock predictions are no more accurate than those you obtained by throwing darts at the *Wall Street Journal*, then you have refuted my claims of reliability.

Sometimes we overestimate the completeness of an answering resource. If two fishermen disagree whether a fish conforms to the size limit, that very disagreement is evidence that the fish is actually a borderline case. If they interpret the disagreement as revealing a limitation of their answering resource, then each lapses into neutrality about whether the fish fits the size limit. They do not "agree to disagree." Recognition of borderline status restores consensus.

Relative borderline cases may arise in precise disciplines such as mathematics. Suppose students are punished with the following assignment: List all the composite numbers less than one thousand. The students know that a composite number is any number that has a divisor other than one and itself. They can identify many of the easy cases. All the even numbers after 2 are composite. The students can also identify many large odd numbers, such as 999, as composites because these numbers have obvious divisors. But the students classify the remaining numbers as "borderline cases" because they require more laborious tests.

Although "composite" has relative borderline cases, only the possession of *absolute* borderline cases makes a term vague. An individual x is an absolute borderline F if, and only if, x is borderline given *any* means of answering "Is x an F?"

No absolute borderline case is a relative borderline case. For a relative borderline case does yield to inquiry given some answering resource or other. Absolute borderline cases are impervious to all methods of inquiry.

Many semantical theories connect a sentence's capacity to be true or false with our capacity to grasp the kinds of conditions that would make that sentence have that particular truth-value. These semantical theories imply that absolute borderline cases have a qualitatively different semantic status from relative borderline cases. Logical positivism implies the meaninglessness of "x is F" when x is an absolute borderline F. Proponents of fuzzy logic say that "x is F" has an intermediate degree of truth. Supervaluationists say that "x is F" is semantically incomplete and so is neither true nor false.

The intuition behind these semantical theories is deep and emerges early.

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When Plato discusses the proper punishment for crimes of passion, he refuses to describe them as voluntary or involuntary: "[T]here is a borderland which comes in between, preventing them from touching. And we were saying that actions done from passion are of this nature, and come in between the voluntary and involuntary" (*Laws* 878b). Plato thinks we must hedge and describe the problematic actions as shadows or likenesses of voluntary acts. He suggests an intermediate punishment for crimes of passion to reflect their intermediate status between "voluntary" and "involuntary."

Note that all of the semantical theories of vagueness allow for *qualitative* borderline cases such as the opening example involving "faces Mecca." Here the alternative rules of usage do not lie along a spectrum. Borderline cases illuminate the concept by prompting contrasting responses from the alternatives. There are examples from the history of physics (Sorensen 1992, chap. 7). But my favorite is fanciful. It has the virtue of illustrating how theories of vagueness give contrasting assessments of vague reasoning. A daughter pleads to a king for her father's freedom. The king decrees that the father be freed from prison if and only if she returns to court both naked and not naked. The next day, the daughter arrives wearing nothing but a net. The king reasons that she is naked (because she is not wearing any clothes) and is not naked (because she is covered by cloth netting). The king releases her father. Epistemicism and supervaluationism condemn the king's reasoning; although it is unclear whether the daughter is naked and unclear whether she is not naked, it is clear that she is either naked or not naked. Intuitionists balk at this criticism of the monarch, because neither disjunct is provable. And proponents of fuzzy logic will object that the king should release her father only to degree .5. The fuzzy rule for evaluating a conjunction is to assign it the lowest truth-value possessed by a conjunct. Given that "the daughter is naked" has the same degree of truth as its negation, the entire conjunction, "the daughter is naked and the daughter is not naked," receives a truth value of .5. The left and right side of a biconditional must receive the same truth-value. Consequently, "I will release your father" will also receive a truth-value of .5. (Perhaps the father should be put under house arrest!)

Quantitative borderline cases, such as those associated with "excessive bail," are situated along a spectrum of cases. Logicians gravitate toward quantitative borderline cases because they allow easy formulation of a sorites argument:

1. Base step: A billion dollars is excessive bail.
2. Induction step: If n dollars is excessive bail, then $n - 1$ dollars is excessive bail.
3. Conclusion: One dollar is excessive bail.

Only absolute borderline cases generate sorites paradoxes. Here the borderline cases of "excessive bail" play the critical role. Predicates with abso-

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lute borderline cases allow one to slide from clear positive cases to clear negative cases without making any detectible misstep. Indeed, the transitions seem licensed by the meanings of the predicate. If someone were to insist that $100,000 is excessive bail but $99,999 is not excessive, we would suspect either that he or she misunderstood the phrase "excessive bail" or that he or she had theoretical views which blocked linguistic competence.

One solution to the sorites paradox is to deny that there are any absolute borderline cases. Nihilists do this by characterizing vague predicates as incoherent. Since nothing falls under an incoherent predicate, nihilists reject the existence of excessive bail. Hence they deny the base step of the sorites argument.

The less radical way of denying absolute borderline cases is to recharacterize them as *relative* borderline cases. The stipulativist does this by claiming there is always the option of stipulating a truth that appears otherwise undiscoverable. Thus he or she claims to have knowledge of the least number of dollars that constitutes excessive bail.

There is a less assertive way of reducing apparent absolute borderline cases to relative borderline cases. James Cargile (1969) has no suggestion about how one could possibly learn what the smallest amount of money is that constitutes excessive bail. But he thinks the threshold could be imagined and discovered by a future legal thinker. Therefore, Cargile rejects the induction step of the sorites argument. He thinks there is some number that n such that n dollars is excessive bail but $n-1$ is not excessive. Of course, Cargile humbly admits that he cannot specify that number. But he sees no reason to imperialistically generalize the humility to all possible thinkers. Who are we to say what can and cannot be discovered?

In a more specific vein, Israel Scheffler (1979, 72–78) cautions against the use of inconceivability arguments in setting the limits on inquiry. He believes that these arguments rest on an untenable distinction between analytic and synthetic statements. Consequently, the proposed limits are unreliable and constitute an irresponsible form of intellectual defeatism. Timothy Williamson has echoed some of Scheffler's skepticism about a priori limits on inquiry. His "margin for error" explanation of our ignorance of borderline cases yields only relative borderline cases—albeit of a high degree of generality. Thus Williamson does not accede to demands for absolute unknowability. He does not offer a specific reason against the existence of absolute borderline cases but sees no reason why they need to be postulated.

Unlike other epistemicists, I endorse the existence of absolute borderline cases. I preserve classical logic by characterizing borderline statements as propositions that have truthmaker gaps (Sorensen 2001). The kinds of truths we normally think about are made true by substantive states of affairs such as my chair being squeaky. But there are less salient propositions that do not owe their truth-value to any fact at all. Propositions have truth-values in the same inevitable way that objects in an environment have shapes.

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When there is no fact of the matter, the proposition has an uncontrolled truth-value.

Nothing needs to be done to confer a shape on an object. Often we control which shape the object has. But we cannot prevent an object from having some shape or other. Similarly, we sometimes control which truth-value a proposition has (by acting to make it true or false) but we cannot prevent it from having a truth-value. Objects are sometimes described as shapeless if they lack any clear shape. A topiarist may criticize my hedges as amorphous. But my hedges clearly have a shape even if there is no particular shape they clearly have. Similarly, absence of a clear truth-value may move some to deny that a proposition is either true or false. But the speaker is just denying that anyone could be in a position to *assert* the proposition is true or to *assert* the proposition is false.

Truths are known by virtue of cognitive relationships between the knower and the proposition's truthmaker. Consequently, every truthmaker-less truth is absolutely unknowable. The epistemicist can accept inconceivability arguments that conclude there can be no state of affairs that makes *n* the smallest large number. For these thought experiments are aimed at detecting a *state of affairs* that could make the proposition true. The epistemicist can instead challenge the presupposition that every truth needs a truthmaker. The resulting brand of epistemicism resembles supervaluationism; instead of truth-value gaps, this epistemicist has truthmaker gaps.

Most lawyers and legal theorists acknowledge the existence of absolute borderline cases. There is no way to discover the first day a person becomes an adult. Minimum ages for voting, drinking, and driving do not purport to be scientific constants such as the minimum velocity for escaping into outer space. The arbitrariness of a minimum age for drinking is defended on the grounds of ineliminability. We have a reason to draw the line somewhere but no reason to draw it in one place rather than another. Once the arbitrariness is acknowledged, we are free to adopt different precisifications of "adult" for different purposes—one for military service, another for punishment, yet another for voting.

In effect, John Chipman Gray (1921) cites precisifications as counterexamples to Savigny's claim that positive law resides in the common consciousness of the people. Gray notes that in New York, a contract by letter is complete as soon as it is mailed but in Massachusetts it is complete only when received. The common consciousness of New Yorkers may differ from common consciousness of residents of Massachusetts, but not in any way relevant to the question of when a contract is complete. If we confine ourselves to ordinary language, there is no determinate answer to "Is a contract by letter complete when sent or when received?" In the interest of avoiding uncertainty and disputes, lawyers need to draw the line as to when mailed contracts are complete. By happenstance, authorities in New York and Massachusetts drew different lines.

Although the existence of absolute borderline cases is of both practical

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and theoretical interest to lawyers, many attempts to show that vagueness is functional inadvertently change the topic to functions performed by *relative* borderline cases. For instance, one rationale for vagueness is that it promotes cognitive division of labor. Questions about what constitutes an "unreasonable search" get delegated to officials with the best knowledge of local circumstances, practices, and standards.

This rationale has an extralegal extension. Instead of enriching law to cope with a new development, the law can be left incomplete. This allows some questions to be answered through nonlegal means. Joseph Raz characterizes this restraint as creative indeterminacy.

> The fact is that the discretion allowed in most legal systems is much in excess of that required to deal with inevitable indeterminacy of any legal system. Most legal systems introduce deliberate indeterminacy into many of their rules in order to leave certain issues to the discretion of the courts. This practice should not come as a surprise. We know that in many matters individuals may, and are often encouraged by law, to agree to refer their disputes to arbitrators who are often allowed to apply nonlegal standards. Similar considerations would suggest that on certain issues it is best to leave the law indeterminate and compel the parties to litigate before courts, which will be bound by law to apply nonlegal standards. On other occasions the legislator may lack the political power or will to decide an issue and may prefer to leave it for judicial determination. (1984, 83)

I agree that *relative* indeterminacies are deliberately created. Legislators and judges will ensure that a question is not answerable by purely legal resources. Law is self-limiting.

My disagreement with Professor Raz is over his interpretation of the phenomenon. Raz regards these indeterminacies as truth-value gaps (1984, 81). This shows his interest in using "indeterminate" in a logical sense, not the sense that is trivially compatible with standard logic. My complaint is that the processes Raz describes involve relative unanswerability, not absolute unanswerability. Legislators deliberately create relative borderline cases to control the way a question is answered, not to make it entirely unanswerable.

Consider the trajectory of *Brown v. Board of Education*. (Jamie Tappenden [1995] cites the deliberate indeterminacy in this decision as a counterexample to epistemicism.) In 1954, the Supreme Court ruled that schools must be integrated with "all deliberate speed." The phrase was crafted to give subordinate courts flexibility. The phrase is certainly vague. "All deliberate speed" has absolute borderline cases that can figure in a sorites argument. But which kind of borderline cases are involved in the subordinate court's flexibility? I say that relative borderline cases are doing the work and the absolute borderline cases are epiphenomenal.

In 1971 the Supreme Court revisited the issue of school integration. *Swann v. Charlotte-Mecklenburg Board of Education* concerns a school system that had not yet integrated despite prodding from lower courts. The Su-

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preme Court ruled that the Charlotte-Mecklenburg Board of Education had not integrated with "all deliberate speed" and so was obliged to integrate forthwith. The Supreme Court made precedent by approving vigorous race-conscious means of speedily implementing its decision. But the Supreme Court did not address the unanswerable question: "Exactly how long do schools have to integrate if they integrate with all deliberate speed?" The court determined only whether too much time had elapsed.

The Supreme Court handled vagueness with the patience and silence counseled by the third head of the Stoic school of ancient Greece. According to Chrysippus, one should assent to the early questions in a sorites progression. For those involve clear, positive cases. But as the interrogator approaches the borderline cases, one should refuse to answer. Let the soritesmonger go on with his unanswerable questions. After he leaves the borderline area and is again asking questions about clear cases, answer forcefully.

The great critic of the Stoics, Carneades, ridiculed Chrysippus' effort to avoid an arbitrary pattern of answers. Chrysippus is merely substituting an arbitrary pattern of yes answers and no answers with an arbitrary pattern of answers and nonanswers. As a theoretical solution to the sorites, Chrysippus' proposal fails. But it has merit as a practical solution to sorites progressions. The Supreme Court coped with borderline cases of "all deliberate speed" by waiting them out.

Most predicates have both relative and absolute borderline cases. Merely showing that a vague predicate serves a function is not sufficient for showing that its *vagueness* serves a function. I can show that a grey fan belt serves a function in an automobile without showing that its greyness serves any function. Granted, the greyness *may* serve a function. Perhaps the greyness distinguishes the fan belt from other belts because its greyness is part of a color-coding scheme. But simply to assume that the greyness has a function would be an instance of the fallacy of division. The whole artifact can be functional without each of its properties being functional.

Absolute borderline cases do have their uses. They confuse and amuse. There have been cruel sovereigns who enjoyed putting subordinates in awkward positions. Recall the episode from the 1976 BBC production of Robert Graves's *I Claudius* in which the Roman Emperor Caligula orders his soldiers to use "Give me a kiss" as a password. In the same spirit, Caligula might have ordered his judges to decide how many grains are contained in the smallest heap. The judges would be forced to say foolish things. Humiliation of the judiciary may have served Caligula's purposes. But this would not show that absolute borderline cases have a function in law. Law is a system of public rules that aims at the promotion of the common good. Individual laws are passed for many particular purposes. A legislator's goals for this statute or that statute may be independent or even incompatible with the aim of the legal system as a whole. Analogy: The aim of soccer is to outscore the opposition, but the goals of the individual soccer players are multifarious (exercise, amusing fans, national glory, earning a large salary, etc.).

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The function of a wrench is to tighten bolts. Striking workers sometimes throw wrenches into machines to stop the machines from working. But even those who approve of the effects (better treatment of the workers) do not conclude that the wrench has a hidden function. Similarly, absolute borderline cases can be thrown into legal machinery. Even if one approves of the effect (maybe it is best that the law break down in the case at hand), one should not conclude that this useful property is a *function* of the absolute borderline case.

Politically astute individuals have found several uses for absolute borderline cases. If Mack E. Avelli wants roller skates banned from the park, he may indirectly defeat the roller skate supporters by first legislating a ban on vehicles. Roller skates are absolute borderline cases of "vehicles." Nevertheless, Mack foresees that the anti–roller skate activists will (baselessly) assert that roller skates are vehicles. Mack knows that the judge has an unacknowledged bias against roller skaters and so will (baselessly) rule that roller skates are vehicles. Mack's motives for engineering a roller skate ban may be lofty. Mack's means may betoken deep understanding of how the system works. But Mack is just working the system. Mack's insights into psychology and legal institutions have helped him to circumvent safeguards for an informed, just resolution of the dispute.

Mack E. Avelli's talents will be valued by those who want effective advocates. Inhibitions about hiring such people weaken when one realizes that others are backing their own Mack E. Avellis. Thus, through an invisible-hand process, we will be guided by people with special abilities to hot-wire, short-circuit, and stall legal machinery. Absolute borderline cases will be systematically useful in this respect. But this systematic utility does not suffice for functionality. After all, people also tinker with the machinery to compensate for Mack E. Avellian abuses. If absolute borderline cases were functional, custodians of the common good would welcome Mack E. Avelli's tactics. Instead, the custodians disrupt his secretive projects by drawing the public's attention to his machinations.

Legal systems do need to adapt to new circumstances and interests. Relative borderline cases can be instruments of change. What is undecidable relative to current law may be decidable with the help of supplementary premises and procedures. The resulting decision about a relative borderline case does change law by adding a precedent. In this fashion, new law is created by incrementally incorporating new, extralegal developments.

Absolute borderline cases do not prompt this kind of reliable responsiveness to new information and procedures. After all, no amount of new information sheds any light at all on the issue of whether an absolutely borderline F is really an F. It is impervious to news. Of course, if one fails to recognize that the issue is inquiry resistant, then one may try to answer the question. If others also fail to recognize that the judge is answering an unknowable question, then his decision will have force as precedent. But

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the resulting change in law will not be through a reliable mechanism. Those who want the law to adapt to new circumstances do not favor unreliable change. They want an answer that is sensitive to an enlarged body of evidence and considerations.

In contrast to relative borderline cases, absolute borderline cases are poor agents of change. In addition to the reliability problem, answers to unknowable questions tend to be unpersuasive. Little more than linguistic competence is needed to identify absolute borderline cases. One also faces the problem of judicial evasion. Judges are as adept at recognizing borderline cases as anyone else in the legal profession. Indeed, they are in an especially good position to detect a borderline case. Since clear cases are not worth bringing to trial, the judge is exposed to a sample of litigation that is biased in favor of borderline cases. In an adversarial system, both sides of an issue are designed to be competently and zealously presented. If the issue is borderline, then the competing efforts of attorneys will tend to reveal the issue's borderline status.

When judges regard x as an absolute borderline F, they try to avoid answering "Is x an F?" Both sides of the abortion debate tried to get judges to answer: "When is a fetus first a person?" Judges skirted the question on the grounds that there is no knowable answer. Some Catholic judges may have mistaken the absolute borderline cases of "person" as relative borderline cases. Although there is no Catholic doctrine that a fertilized egg is a person, there is a moral safety argument that instructs Catholics to proceed on the assumption that a fertilized egg is a person. This distinction between p being true and acting as if p is true is overlooked by many Catholics. They tend to think that Catholicism implies that a fertilized egg is a person. Consequently, some Catholic judges think they know (via religious revelation) that a fertilized egg is a person. But since the First Amendment ("Congress shall make no law respecting an establishment of religion, . . .") prohibits judges from using religious evidence, these Catholic judges believe that abortion involves recalcitrant *relative* borderline cases. Consequently, they must join their secular brethren in trying to settle the abortion issue in ways that bypass the metaphysical issue of whether a fetus is a person. For instance, in Roe v. Wade, the Supreme Court went to the length of recasting abortion as a privacy issue.

III. THE DILEMMA CANNOT BE DILUTED AWAY

Judges cannot discover the correct answer to a question about an absolute borderline case because no one can. When a judge regards x as an absolute borderline F, he can no longer even try to learn whether x is F. He is stuck. The judge is not permitted just to confess his ignorance; the judge is obliged to answer. Therefore, he is obliged to answer insincerely.

Teachers often find themselves in the same straitjacket. Consider a stu-

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dent who is absolutely borderline between a B+ and a B. The teacher is forced to assign one grade or the other. What should he do? Well, he can first check whether the student is really borderline. Sometimes an apparent borderline B is an illusion due to a miscalculation or overlooked evidence. But once the teacher has verified that the student is a genuine, absolute borderline case, then he must make the best of a bad situation. Instead of merely answering arbitrarily, the teacher could choose the answer that has the best pedagogical consequences such as a more balanced grade distribution or a decrease in grade inflation. These external considerations are irrelevant to which grade the student deserves. But they are relevant to the question of which grade ought to be assigned. Of course, the question one ultimately answers is the original one about which grade the student deserves. The insincerity is inescapable.

Answering insincerely is deceptive except when there is no implication that one believes one's answer. Answering arbitrarily is deceptive unless one signals that the answering process is arbitrary. A teacher could inform his borderline students that he was forced to answer arbitrarily. In my experience, such frankness is rare—even rarer when the arbitrary decision went against the student. Normally, teachers assign their grades and quietly move on. Judges do the same.

One might try to exonerate the judges by diluting the notion of assertion. The epistemic dimension of assertion has been weakened in discussions of "essentially contested concepts." According to W. D. Gallie, there are "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users" (1955–1956, 172). But if the definer of "democracy" believes his own definition is no better than its rivals, then he no longer has an epistemic preference for his own definition. So he does not believe the definition he espouses. Jeremy Waldron tries to restore the possibility of sincere advocacy of the definition by lowering the epistemic requirements for assertion:

> Realistically to hope to prevail in such a dispute is to believe, first, that one can convince others to take more seriously the considerations one has been advancing; second, that one can explain why alternative views are less persuasive than they have been thought to be; and third, that though one expects a continuation of the debate in both familiar and novel forms, one thinks one will have something to say about any alternative view or argument that might imaginably come up. Someone who has these hopes will acknowledge that he is engaged in a debate whose richness and usefulness stems only partly from his own contribution; but he will aim to show that this rich and useful fabric of argumentation culminates in the desirability of according greater recognition to his view. (1994, 534)

Anyone with such restrained expectations should signal them. One cannot baldly assert p merely on the grounds that p is underrated. There are unbelievers who take up the case for p simply because they believe the case

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for p is underrated. But they must preface their arguments with a disclaimer so that people do not infer that they believe their conclusion.

A. D. Woozley tries to dilute assertion semantically:

> Reasonable, hardheaded lawyers can properly discuss the question (and disagree with each other in their answers to it) what the right answer to a question of law is, even though they agree that there is not a right answer to it—yet. So having grounds for asserting *p* does not imply that *p* has a truth-value—unless to say that *p* is true (false) just means the same as saying that we have better (worse) grounds for asserting *p* than for asserting ~*p*. But it quite obviously does not. (Woozley 1979, 30)

If Woozley were right about assertion being independent of truth-value, then one could make assertions which explicitly detached themselves from truth, for instance: "Patty Hearst robbed a bank voluntarily but it is neither true nor false that Patty Hearst robbed a bank voluntarily." However, such propositions are contradictions. Woozley's dilution also grates against the fact that belief aims at truth. If I assert that p, I express my belief that p. But if I believe that p, then I believe that "p" is true.

A third way of challenging my claim that the judges are lying is to emphasize the performative aspect of adjudication. When an umpire calls a batter out, the batter is made out by the umpire's declaration. Similarly, when a judge declares the defendant guilty, the defendant is thereby guilty. Saying so makes it so. The defendant's guilt is independent of whether he actually performed the alleged act. This is especially vivid when the judge declares the defendant not guilty because the overwhelming evidence of his guilt must be excluded on procedural grounds. The judge is free to explain the special circumstances that move him to declare the defendant not guilty. He need not conceal his knowledge that the defendant did commit the crime. The judge can exhibit similar candor if he instead believes that the procedural infraction freed a borderline case of a guilty man.

J.L. Austin (1962) distinguished between five kinds of performatives. Commissives (promising, proposing, contracting) are commitments which need not be based on evidence. Excertives (voting, appointing, proclaiming) are exercisings of power. They also have a measure of freedom from evidential constraint. But verdictives (acquitting, diagnosing, grading)

> consist in the delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact, so far as these are distinguishable. A verdictive is a judicial act as distinct from legislative or executive acts, which are both exercitives. But some judicial acts, in the wider sense that they are done by judges instead of for example, juries, really are exercitive. Verdictives have obvious connexions with truth and falsity, soundness and unsoundness and fairness and unfairness. That the content of a verdict is true of false is shown, for example, in a dispute over an umpire's calling "Out," "Three strikes," or "Four balls." (1962, 153)

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When a batter disputes an umpire's call of "Strike," he cannot be charitably interpreted as disagreeing about whether the umpire declared a strike. The batter is disputing whether the pitch conformed to the definition of "strike." The topic of the dispute between the batter and the umpire is also evident from the reasons the umpire cites in defense of his call. The umpire does not self-referentially justify his call of "Strike" by citing the performative nature of his declarations. He bases the call on his personal observation of whether the ball passed through the officially defined strike zone. His reasons for calling the pitch a strike are the same as those given by batters or fans. The topic of the dispute is also evident from the way an instant replay can show whether the umpire or the batter was right.

If the umpire declares "Strike!" without believing it is a strike, then he is lying. For the sake of orderly play, the umpire's call is treated as if it were true. And, in a qualified fashion, it is true. The umpire's calls contribute to the official account of the game. "Officially" works much like "In the story." It is false that the district attorney in Manhattan is Adam Schiff. But it is true in the television series *Law and Order*. Fictions can be composed principally of truths. In *Law and Order* people have feet, the earth is round, and Neil Armstrong was the first man on the moon. Moreover, new facts about New York City (snowstorms, strikes, winning baseball seasons) are steadily assimilated into the ongoing fiction to keep it realistic and current. Interestingly, new court decisions are also faithfully incorporated. The automatic growth of fictions is also evident in simple make-believe. When children pretend to be cowboys, the drama is driven partly by independent facts. If someone's hat is blown off by the wind, then the observation "His hat blew off" is true in real life and becomes true in their game of make-believe.

The umpire's calls are empirical reports. Their performative aspect stems from the fact that they are used to elaborate an official record of the state of play. This creates a double system of bookkeeping. There is an official log of the game which is orderly and precise. But there is also the unregimented history of the game which guides the formation of the official log. The unregimented history takes the evidential lead. Think of a coroner pronouncing death. The coroner does not kill anyone when he "makes them dead" by pronouncing them so. The coroner's role is to track the organic facts.

The law has a similar double system. The duality is exploited by equivocators. When a Los Angeles jury found O. J. Simpson not guilty of murdering his ex-wife, reporters asked General Colin Powell what he thought of the verdict. Powell dismissed the hubbub: Simpson was obviously not guilty. The verdict was witnessed by all on television, so we should drop the issue.

Umpires are not permitted to confess frankly that they do not know whether a certain pitch was a strike. For the sake of the sport, they must immediately declare the pitch a strike or a ball. Consequently, umpires are sometimes forced to make insincere calls.

Tiebreaking rules merely change the location of the indeterminacy. In

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baseball, ties go to the runner (even though ties do not go to the batter). When the runner reaches base at the same time as the ball, the runner is safe. But there are still borderline cases of "reaching base at the same time." Some of these would not arise if the rule were that the runner is safe unless he is *clearly* preceded by the ball. But since "clearly" is itself vague, there will always be higher-order vagueness.

Judges are in the same professional predicament as umpires. In criminal cases, they have the tiebreaking rule of "innocent until proven guilty." But this is just a displacement of indeterminacy, not an elimination.

The judges do have one significant advantage over the umpires. Judges can help themselves to more time and can use a wider array of evidence and methods than the umpire's hurried observation. This leisure allows the judge to resolve much ignorance about the facts, about the law, and about conceptual matters. But the extra resources are useless against absolute borderline cases. That's why judges have a special motive to prevent them from cropping up. Judges are powerful people with ample discretion over how to shape issues.

Many adjudicators appreciate their awkward position. They feel moral pressure to reduce the amount of deceit. Some teachers reduce the number of absolute borderline cases with a precise grading system. One of my colleagues uses four grading assignments each worth 100 points, plus a public quota of points for each grade. Fewer students end up near grade thresholds.

Most judges also feel moral pressure to reduce the occurrence of absolute borderline cases. They do not have the same resources as teachers for preventing borderline cases. But they can precisify key concepts and mold issues so that a clear answer will be available. Judges do not like to prevaricate and do not like to put other judges in a position where they must prevaricate.

Some teachers deny that there are any absolute borderline cases. In effect, they grant that there are relative borderline cases but believe that all questions about grades have answers that are discoverable with enough investigation. A slightly weaker position is to concede that there may be absolute borderline cases but insist that they are so rare that the teacher should always presume that there is a discoverable answer. Ronald Dworkin (1977) has a position similar to this with respect to judicial adjudication.

IV. GENERALITY IS ALSO CONFUSED WITH VAGUENESS

Vagueness would be functional if its presence was explained by how it served a goal of the legal system. Generality, covering many things with a single term, is functional because it permits us to regulate actions with concise, abstract instructions. If each particular action needed its own law, there would be as many laws as particular actions.

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Generality also lets us home in by choosing progressively narrower targets—a feature underscored in the game of Twenty Questions. Directions can be given piecemeal in light of new information and interests. Qualitatively, these advantages are not peculiar to law. Generality is functional in legal discourse for the same reasons that it is functional in ordinary discourse.

One kind of ambiguity, indexicality, is also functional. Indexical terms (*I*, *here*, *today*) change meaning systematically across different contexts. So although there is a sense in which we mean the same thing when we each utter "I have a lawyer," there is also a sense in which we mean different things (I am talking about my lawyer and you are talking about your lawyer). The meaning change of indexical terms is systematic. Once you know the input values (the character of the term and its context of utterance), you can calculate the output value. Indexicality helps us cope with changing circumstances in a uniform way. Lenders and borrowers cope with financial uncertainty by agreeing that the interest rate will be two percent more than the prevailing prime rate. Failure to exploit indexicality is a common legal blooper. The Seventh Amendment was passed in 1791: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." Inflation bloated the right to trial.

Polysemy is the possession of many senses. This kind of ambiguity is unsystematic. So is amphiboly. Amphiboly is ambiguity wrought by syntax. For instance, one commits perjury if one testifies under oath "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or. . . ." (18 USCS at 1621 [1999] p. 1). But what is the scope of the negation in "he does not believe to be true"? Must the perjurer believe his assertion is not true or does it suffice that it not be the case that he believes his assertion? The ambiguity is only resolved by further reading.

Unsystematic ambiguity arises in law for the same reasons it arises in ordinary discourse. There is a trade-off between explicitness and efficiency. Long messages disambiguate by redundancy. But long communications stop us from moving on to other projects. We tolerate unsystematic ambiguity in the way we tolerate imperfections when painting a room. Gaps, dribbles, and droplets are foreseen but unintended side effects. They can be lessened and, if we are willing to pay the price, entirely eliminated.

Intensional vagueness, the possession of *possible* absolute borderline cases, is a fixed quantity. One can choose to use another predicate that has fewer borderline cases. But that means a (perhaps insignificantly small) change of topic.

Extensional vagueness, the possession of *actual* borderline cases, is a variable quantity. The number of actual borderline mothers depends on which reproductive technologies are available. In contrast, the number of logically possible borderline mothers is insensitive to *actual* technology.

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In law, actual borderline cases are controllable side effects. Vagueness arises in legal discourse because we want to use predicates that happen to have borderline cases, not because we want the vagueness itself. The words figuring in today's *New York Times* crossword puzzle are almost all vague. But the vagueness of these words does not explain their presence in the puzzle. Their vagueness is a secondary effect of the need to use a vocabulary familiar to puzzle enthusiasts. Since most words are vague, word games will use vague words. Similarly, laws must be couched in words. Therefore, we antecedently expect legal discourse to be vague.

V. GENERALITY AND AMBIGUITY DO WORK MISCREDITED TO VAGUENESS

Some of the functions that are attributed to vagueness are really performed by generality. Consider the advantages H.L. Hart touts for open-textured terms such as "vehicle" and "torture." "All torture is prohibited" is more flexible than an itemized list such as "Do not squeeze anyone's fingers with a thumbscrew or drip water on their head for days or insert bamboo shoots beneath their fingernails." We could never make the list exhaustive by adding further specific disjuncts. So the vague prohibition has an advantage over its precise counterparts.

Agreed. But this open-endedness has nothing to do with borderline cases. Open-endedness is a consequence of the fact that generalizations make little cognitive demand on those who assert them. I can say that all lawyers have hearts and thereby refer to each lawyer without being acquainted with each lawyer. I do not need to define "lawyer." I do not need to resolve borderline cases of "lawyer." My sentence selects each and every lawyer without me conducting any kind of *search* for lawyers.

There is a quick explanation of why a search is unnecessary in the case of open sentences such as "If x is a lawyer, then x has a heart." Values for the variable are assigned prior to the evaluation of the sentence. The referent for x is stipulated. Demonstrative terms such as "this" and "that" have the same kind of prepackaged reference. Pronouns such as "he" and "they" have demonstrative uses. If I point to a group and say "They are criminals," I select a group of people without relying on the predicate "criminal." After all, they might not be criminals. In that case I have successfully referred to them even though what I said was false.

In logic, a universal generalization is sometimes said to be equivalent to a long conjunction, for example, "F. Lee Bailey is a lawyer and has a heart, and Johnny Cochran is a lawyer and has a heart, and Marcia Clark is a lawyer and has a heart and. . . . " However, there is at least an epistemological difference between the two. I can know the generalization "All lawyers have hearts" without knowing the conjunctive list and can know the conjunctive list without knowing the generalization (because I might not know that the

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list is exhaustive). The same point applies when the generalization concerns classes rather than individuals. Knowledge that "All mammals have lungs," when combined with the discovery that whales are mammals, produces knowledge that whales have lungs. Hart writes that ". . . uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact" (1961, 128). But the versatility of "mammal" is due to its generality, not its possession of borderline cases. The precise generalizations of logic and mathematics have the same ability to cover unanticipated cases as so-called "open-textured" generalizations such as "No vehicles are allowed in the park." In practice, mathematicians cannot anticipate all the algebras that are now subsumed under "All Boolean algebras have a null element."

Contrary to the intimations of Ludwig Wittgenstein, family resemblance is a mode of generality rather than a form of vagueness. (The point may have been appreciated by the medieval developers of the theory of analogy, who denied that there need be a unique essence common to all uses of a word.) The mere absence of a condition that is necessary and sufficient for application does not entail that the term has borderline cases. Indeed, the American Psychiatric Association *precisifies* diagnostic terms by characterizing them as family resemblance terms. The strategy behind the *Diagnostic and Statistical Manual for Mental Disorders* is to define terms as applying when a quota of diagnostic features is satisfied. Since a quota can be satisfied without having any item be shared by all the qualified members, quota terms are family resemblance terms.

Wittgenstein pictured family resemblance terms as arising from the rough-and-tumble process of language development. Even if this process is vague, there is no guarantee that the product is vague. I may define a set of numbers by weighing the first five jolly people that enter my office. This loose definitional process gives rise to a precise set.

VI. UNDERSPECIFICITY IS OFTEN FUNCTIONAL

The Swedes have lots of regulations. One requires children to cross streets by holding the hand of an adult. There are pictures at intersections reminding pedestrians of this rule. One cartoon shows a father and daughter, hand in hand, about to cross the street. A scowling police officer points to the posted picture of what to do. The father is at first puzzled because he is already holding his daughter by her left hand. But then he notices that the sign shows the father figure holding his child by her *right* hand. So he switches hands with the child and proceeds to cross the street with the officer's beaming approval.

The cartoon illustrates overconformity. Law is a guidance system that must be sensitive to the costs as well as the benefits of constraining action. Guiding at the appropriate level of generality is an important skill. Part of

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learning law is learning techniques that pitch principles at the appropriate level of detail.

My thesis, that vagueness has no function in law, must be understood in terms of absolute borderline cases. There is a sense of "vague" that makes it a species of generality (Sorensen 1989). In this distracting sense, vagueness means underspecificity. Penal sentences of between two and twenty years are vague only in this irrelevant sense.

What is underspecific for one purpose may be sufficiently specific for another. A wise administrator does not micromanage. He formulates goals with a light touch that promotes flexible responses from subordinates. He does not let his preconceptions of how the job should be done restrain the effectiveness of his instructions. He transcends his own narrowness by crafting policies in a way that intelligently dissipates superfluous content.

Artificial generality is often frustrating to others and so draws complaints of vagueness. The administrator may well concede that the instructions are vague for certain purposes (such as predicting or guiding the manner of implementation) but claim that there are compensating advantages. Vagueness, in the sense of abnormal dearth of detail, is often functional in law. The benefits of having underspecificity explain its presence.

Underspecificity can also be malfunctional. Loose instructions confer discretion, discretion confers power, and power sets the stage for abuse of power. For instance, some minorities complain that police selectively enforce the law against them. Only *their* infractions are punished. Specificity protects unpopular people against this abuse of power. The second problem with underspecificity is unpredictability. If I cannot foresee what will be punished, I will live in fear or unproductive restraint. The "void for vagueness" doctrine is intended to correct this chilling effect and the earlier problem of biased enforcement. The doctrine does not concern vagueness in the sense of borderline cases. Underspecificity, whether functional or malfunctional, is irrelevant to the question of whether vagueness is functional in its philosophically challenging sense—the sense associated with the sorites paradox.

VII. A FUNCTION FOR SUBJECTIVE VAGUENESS WOULD NOT BE ENOUGH

We can imagine legal systems that are free of vague laws in both senses of "vague." In *The Brothers Karamazov*, Ivan Karamazov envisages such a legal system. He assumes a divine command theory of law, painfully infers that God does not exist, and then validly concludes that everything is permitted. Such a system would have no borderline cases of "permitted."

Ivan would concede that the Christian legal system has laws that are *subjectively* vague. Consider the predicate "bald barber who shaves all and only those who do not shave themselves." The small percentage of English speakers who are familiar with Russell's barber paradox realize that, on

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strict logical grounds, this predicate is precise (because it is logically impossible for there to be a barber who shaves all and only those who do not shave themselves). But all other speakers regard the predicate as being vague. They exhibit characteristic puzzlement when it is inserted in a "sorites" paradox. They sort cases into clear positives, clear negatives, and borderline cases—with just the right shading between the categories. But none of this "vagueness" behavior suffices to make the predicate vague. This shows that vagueness is not a purely psychological notion. Vagueness has the normativity associated with epistemology. To characterize borderline cases, one must bring in notions of knowledge or justification or entitlement.

It is possible for an entire legal system to have subjectively vague laws but no actual vague laws. Indeed, such a legal system may actually exist. If God's existence is contradictory, then the laws that imply His existence only have subjective vagueness.

Contradictory systems can still be action guiding. The rule book for Little League baseball requires that home plate be a geometrically impossible pentagon (Bradley 1996). "Home plate" is used in definitions of "strike zone," "out," "run," and so on. Yet thousands of valid Little League baseball games have been played with home plates that only approximate a regulation home plate.

Inconsistent systems can continue to be action-guiding even when the inconsistency is exposed. In *Witchcraft Oracles and Magic among the Azande*, the anthropologist E.E. Evans-Pritchard describes the Azande legal system as suffused with internally inconsistent beliefs about witchcraft. Yet he himself was content to conduct his daily affairs by this system while living amongst the Azande.

The historical candidates for degenerately precise legal systems are controversial in various respects. Let me take refuge in a hypothetical case. Consider a religious society that believes in a god of law, Suehim. Suehim is the only being who is not identical to itself. A statute has legal force only if its enactment recognizes the existence of Suehim by being formulated with the schema "The being who is distinct from itself commands that ____." People fill in the schema in a way that is mostly but not wholly independent of their belief in Suehim. For instance, they have laws requiring Suehim baptism, taxes for Suehim churches, penalties for blaspheming Suehim, and so on. The logical properties of Suehim stimulate about the same amount of dissonance as the doctrine of the Trinity in Christian societies. People muddle along. A few become skeptics about Suehim. These skeptics correctly note that each report of a Suehim commandment is an indivisible, logical contradiction; the contradiction cannot be translated into a conjunction of individually consistent propositions. Therefore they cannot make sense of the laws by simply ignoring a conjunct asserting that there is a being who is not identical to itself. The best they can do is to focus on the proposition that Suehim is alleged to have commanded. This is good enough for most practical purposes.

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There is no objective vagueness in the Suehim legal system. However, there is plenty of subjective vagueness. An anthropologist who studies the Suehim legal system may find functions for this kind of "vagueness." But finding functions for subjective vagueness is like finding functions for subjective *apriority*. The "a priori" belief that outsiders are cannibals may promote group cohesion. A priori fears do not wait for empirical positive evidence and resist refutation by empirical counterevidence. But no function for genuine apriority would follow. Similarly, a function for subjective vagueness need not be a function for genuine vagueness.

VIII. IGNORANCE LACKS ANY RELEVANT FUNCTION

This point about subjective vagueness affects functionality theses that are otherwise friendly to epistemicism. These attribute functions to ignorance. Scientists recognize the possibility of functional ignorance. Biologists have speculated that the cryptic estrus cycle of women promotes a strong parental bond (a core reproductive strategy for men is then to mate regularly and cultivate fidelity). If ignorance can be functional in biology, why not in psychology and sociology? Why not in politics and law?

Gregory Kavka (1990) notes that uncertainty breeds solidarity. Most policies hurt the few to benefit the many. If I know that I am among the few, I oppose the policy. But if I do not know, then the policy offers me a positive expected return. Consequently, I do not oppose the policy; indeed, I am apt to support it. In addition to explaining how laws get passed, Kavka's principle may explain how they are administered (under a veil of ignorance as portrayed in the blindfolded figure of justice weighing each side on scales).

Certainty can be achieved with bright-line rules. Gillian K. Hadfield (1994) notes that these rules prompt a sharp bifurcation of behavior. All those who can afford compliance steer into the safe harbor offered by the rule. Those who find compliance too costly ignore the rule entirely. So there is either excessive compliance or none. Enter the vague rule. The uncertainty of the vague rule creates a spectrum of expected utilities that varies gently with the cost of compliance.

Given Hadfield's account, one would expect public, methodical randomization to supplant crude forms. Casino operators do not let impartial judges arbitrarily pick winning numbers. They use roulette wheels and other mechanical randomizers. Scientists do not conduct random clinical trials by allowing the experimenters personally to assign their subjects into control groups and treated groups; they use random number tables and double-blind testing.

Even honest people act in patterns when informally attempting to randomize. The difficulty of spontaneous randomizing is illustrated by "psychic computers." Their software designers exploit the common confusion between randomness and unmemorability. The computer makes a secret

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prediction of your next hundred "heads or tails" choices. You try to evade the prediction by choosing heads or tails helter-skelter. But the computer normally gets more than half of the predictions correct. It simply avoids sequences that have long blocks of heads or long blocks of tails.

The randomization devices of statisticians can be outperformed in some circumstances. In "The Punishment that Leaves Something to Chance," David Lewis (1989) offers an explanation of why we punish successful crimes more severely than failed crimes. We could punish all criminal attempts by lottery (in the way mutinous regiments are punished by executing every tenth member of the regiment). This could be done formally by drawing straws. But it could be done better by a perfect simulation of the crime. For that would impose the same risk on the criminal as he imposed on his victim. But wait! Every crime is a perfect simulation of itself. So if we let the outcome of the crime determine the punishment, we will have exactly matched the desired probability of punishment.

Lewis's explanation might be right. Punishment by lottery may be more widespread than it seems. But vague instruction is an implausible randomizer. If you force people to answer questions that have no knowable answers ("What is the smallest large number?"), they do not behave as random-number generators. As bad as people are at randomizing when they try to randomize, they are far worse randomizers when they try to act in a conscientious, principled fashion. Like it or lump it, their effort to treat like cases alike does enhance their predictability.

IX. THREE POSSIBLE BASES FOR DISCRETION

Generality, like vagueness, is a propositional phenomenon. Ambiguity is multiplicity of meanings. Generality is meaning a multiplicity. "Triangle" is a general term because it means either obtuse triangles or right triangles or acute triangles. "Square" is ambiguous because it either means an equiangular planar figure with four equal sides or means a conventional person. The distinction between ambiguity and generality is confusing. Part of the difficulty is the subtle syntactic difference between meaning either and either meaning. The distinction is also confusing because almost all words are ambiguous and general—and vague. Consequently, a clear attribution of ambiguity, generality, or vagueness must be relativized to the set of alternative readings. "Child" is ambiguous with respect to the offspring/immature offspring readings, general with respect to girls and boys, and vague with respect to the end point of immaturity for the immature offspring reading: Is a sixteen-year-old female a child?

Let's try relativizing discretion to these three forms of multiplicity. Generality discretion involves a choice of how to satisfy a description. Mothers have wide discretion over what their babies' names will be because there are so many ways to satisfy the requirement "Pick a name for your child." In New Hampshire, I can purchase the right to choose a six-element alphanumeric

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license plate—36 × 36 × 36 × 36 × 36 × 36 alternatives is a lot of freedom. But, in an existentialist twist, I have no choice about bearing the state motto on that license plate: "Live free or die." New Hampshire motorists are condemned to freedom. (Jehovah's Witnesses are *exempt* from bearing the slogan but that does not give them any more *discretion*.)

Ambiguity discretion is discretion between alternative meanings of a sentence. In ordinary discourse, the speaker's intention dictates which meaning his ambiguous utterance bears—or whether it has any meaning at all. In this sense, ambiguity gives the speaker discretion over which reading his utterance possesses. There may be uncertainty as to what his intention is. The speaker may even share this uncertainty. But he is in control of the meaning.

Whereas generality provides the *listener* with discretion, ambiguity provides the *speaker* with discretion. Well, there is an important exception: The rule of construction against the drafter says that ambiguous contracts are to be assigned the interpretation dictated by the party who did not write the contract. The imposition of reading 1 can take place even if the speaker proves that he intended reading 2. For the rule of construction against the drafter entitles the non-author of the contract to ignore the author's post hoc disambiguations. Once the sentence has been established as ambiguous, the person who did not draft the ambiguous sentence gets to choose the reading which is legally operative. There is no pretext of discovering the real meaning of the sentence. Meaning is being explicitly stipulated. So in the case of imposed meaning, ambiguity confers listener discretion.

The rationale for the rule of construction against the drafter cites two effects. First, construction against the drafter balances the advantage that accrues from authoring a contract. Second, the rule makes contracts robust. If a contract required that both parties believe the same proposition, then any ambiguity would void the contract. Too many deals would fall through. Thus construction against the drafter simultaneously discourages the generation of ambiguity and resolves the ambiguity that fails to be deterred.

The robustness rationale can be extended to legislation. At first blush, ambiguity should void democratic votes because no proposition was agreed upon by a majority. Semantic versions of phenomenalism and holism led some philosophers to conclude that no two speakers can ever mean exactly the same proposition. If ambiguity is this extreme, then democracy is semantically infeasible. Even a moderate amount of ambiguity makes democracy problematic.

Small-scale votes are sometimes voided by ambiguity. The chairman of a committee can respond to an ambiguity by having members of the committee revote on a disambiguated proposal. But I do not know of any large-scale votes that have been voided by ambiguity. Presumably, the cost of voting again is too high. Any disambiguation is left to special authorities such as bureaucrats and judges. Legislators have a motive to frame statutes unambiguously lest they cede too much power to subordinates. Under some

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circumstances, however, they may prefer to cede the power by deliberately passing ambiguous statutes.

Notice that this (completely speculative) legislative rule of construction does not require even the pretext of discovering what the framers intended. The statute takes on a life of its own. A subordinate could concede that the legislature intended reading 1, but impose reading 2. The legislature is free to issue new statutes and so can reverse its subordinate's decisions. But as time goes on, legislators change, and so this practical consideration for abiding by legislative intent dissipates.

The rule of construction against the drafter is intended to fix a malfunction. However, malfunctions are sometimes deliberately triggered for constructive ends. If the fail-safe mechanism comes to be routinely exploited, the indirection does become functional. So one could see how ambiguity could become functional in an indirect fashion.

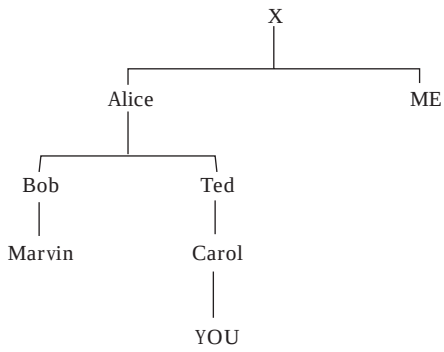
If vagueness were "ambiguity on a grand and systematic scale" (Fine 1975, 282), then vagueness could provide the same basis for listener discretion as afforded by ambiguity. However, vagueness cannot be ambiguity because propositions themselves can be vague. Ambiguity is a pre-propositional phenomenon. Words are ambiguous between different concepts. But concepts themselves cannot be ambiguous. Nearly all concepts are vague. Most importantly, "vague" is itself vague. This is the foundation for higher-order vagueness, the master phenomenon in the literature. In contrast, "ambiguous" is not ambiguous. Since there is no higher-order ambiguity and there is higher-order vagueness, vagueness is not a species of ambiguity (Sorensen 1998).

Discretion is power. By exaggerating the basis for discretion, one increases power. Larry Solan (1993) has meticulously documented the phenomenon for ambiguity. Compassionate judges overestimate the amount of ambiguity in insurance contracts, because that helps pitiful accident victims gain coverage under the rule of construction against the drafter. The exaggeration also occurs for vagueness in the sense of underspecificity. Civil libertarians, acting from more abstract motives, exaggerate underspecificity in the hope of triggering the "void for vagueness" safeguard.

X. THE IMPORTANT KIND OF DISCRETION IS OVER QUESTIONS RATHER THAN ANSWERS

Vagueness is not a form of ambiguity. Yet it often stimulates a switch in meaning. Judges try to avoid questions about borderline cases by substituting analogous questions that are more precise or which at least are less apt to generate borderline cases in practice. Consider the problem of determining "next of kin" for the purpose of intestate inheritance (Holdsworth 1923, 177–183). Suppose that one of our relatives, Marvin, has a mansion and dies without a will. Next of kin inherits the mansion. Our other relatives, Bob, Alice, Ted, and Carol are already dead. So who inherits the mansion, you or me?

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To be next of kin is to be the fewest degrees removed. But what counts as a degree? Under the "gradual scheme" a step of ascent or descent counts as a degree, yielding five degrees from Marvin to YOU and four from Marvin to ME. That suggests the mansion belongs to ME. According to the "parentelic scheme," we start from the person and exhaust his descendants, then exhaust descendants of his ascendent, and so on. So since Marvin has no descendants, we try Bob. Since Bob has no descendants, we ascend further to Alice and find that she has a descendent, Ted. But since Ted is dead, we look to Ted's descendent, Carol, who is also dead, leading us finally to YOU. That suggests the mansion belongs to YOU. Although the schemes are equally reasonable and agree most of the time, they yield conflicting results in this case. In ordinary language, we are stuck with a borderline case of "next of kin."

However, judges are not stuck because they do not let the issue be formulated in ordinary language. They relativize "next of kin" to types of inheritance. The gradual scheme is given dominion over "personality" inheritance and the parentelic over realty. YOU get the mansion.

Legal language is adjusted to minimize contact with borderline cases. Familiar words get attached to slightly different concepts that are, normally, more precise—at least with respect to problematic borderline cases. Like science, law gains decisiveness by controlling which questions get asked. Neither science nor law can eliminate the intensional vagueness present in any given question. But scientists and lawyers can change the topic to a related question which is more tractable. Unlike scientists, judges have a moral reason to change the topic. A scientist is free to answer a question and add the qualification that he is just guessing. Judges do not have that flexibility.

The substitution strategy is limited by the desideratum of completeness. There is a trade-off between precision and relevance. Law must be relevant to human concerns; science need not. Scientists are free to leave many more questions unanswered, so science can afford the greater alienation from human affairs that goes with precisification.

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Nevertheless, the strategy of question-switching is powerful and is made more powerful by awareness of the problem it is aimed at solving. If vagueness is denied, then the strategy will not be applied efficiently. More borderline cases will come up for adjudication. There will be more and more evidence of arbitrariness, dishonesty, and bad faith among judges. The authority of the judges will have to be propped up with myths and force.

Legal realism is an exaggerated recognition of judicial bad faith. The realists note that judges rarely confess that there is no ascertainable answer. When required to answer, judges rarely shrug their shoulders (publicly). Legal realists draw attention to this "false determinacy." Judges, despite their denials, must be making up the law as they go along. The judges are influenced by their upbringing, personal prejudices, and all sorts of extralegal whatnot. Since judges can hardly cite these irrelevancies to support their judgments, they rationalize. Each ruling on a hard case is a verdict wrapped in legal sophistry. Those who want really to understand legal behavior should ignore judicial rationalizations and concentrate on the sociology and psychology of judges. There are no legal justifications, just predictions. Or so say the realists.

Everybody admits that judges *sometimes* base verdicts on external reasons. The legal realists believe that judges *normally* behave this way. The only point of drawing the distinction between internal and external reasons is to reflect the fact that judges give lip service to internal reasons. Thus realists bloat one side of the distinction between internal and external reasons. Ironically, critics of realism often wind up criticizing the internal/external distinction from the opposite end. Instead of bloating the category of external reasons, Ronald Dworkin (1977) bloats the category of internal reasons. In effect, Dworkin denies that there are absolute borderline cases. (Or, more carefully, he thinks that in mature legal systems, there is a non-overridable presumption that for the legal question at hand, there is an accessible answer.) The strategy for showing that all borderline cases are relative borderline cases is to expand the answering resource. Dworkin does this by making a vast range of theoretical considerations germane to the case at hand. He pictures the judge as trying to apply the best theory of law. Theories must be based on all the available evidence. Hence Dworkin's interpretive view opens the floodgates, washing many an apparent external reason into an internal torrent.

Judgments involving absolute borderline cases give the legal realists a beachhead. When law is working well, the beachhead is kept small. The beachhead is kept small by judicial discretion—but at the level of questions rather than answers. If the adjudicators are passive, accepting whatever question is posed, then they will often be forced to answer badly. If the adjudicators recognize the moral threat posed by vagueness, they will take actions to avoid borderline cases. Sometimes they fail and are forced to lie. But lying less is better than lying more.

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