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A LITTLE HELP FROM YOUR FRIENDS?

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When I was invited to participate in this symposium, I welcomed what I thought would be the opportunity to apply my views about the semantics and logic of vague language to the real-life problems of vagueness legal theorists worry about. I confess to having formed my ambition without a very clear sense of what jurisprudential problems might be illuminated by general theories of vagueness. To be sure, I was able to guess that a symposium on Vagueness and Law must have something to do with the dilemmas courts face when it is indeterminate how a legal dispute should be resolved. What I had not thought through was how philosophers like myself might help to illuminate those dilemmas by bringing to bear on them their own logico-semantical theories of vagueness. This was unfortunate because, having done a bit of homework, I have reached the conclusion that philosophical theories of vagueness, even if true, have nothing to offer jurisprudential concerns about vagueness. Once she is reminded of certain platitudes about vagueness, the legal theorist needs no further help from philosophers of language and logic. Let's see why this is so.

I. WHAT ARE THE LEGAL ISSUES OF VAGUENESS?

A

Ronald Dworkin's well-deserved prominence may lead one to suppose that one issue is whether there *are* cases where the law is indeterminate. But this is a non-issue if ever there was one. Virtually *every* concept is vague to some extent, and to be *vague* is just to admit the possibility of *borderline cases*, cases where it is *indeterminate* whether the concept applies. This in effect means that no matter what steps the courts take, no matter what laws or principles or policies are adopted, it is *always* possible for there to be borderline cases of those laws, principles, or whatever. For example, suppose that in its frustration with borderline cases, a court adopts the following policy: When in a civil suit it is indeterminate whether such-and-such law applies, then flip a coin; if it comes up heads, rule for the defendant; otherwise (if it comes up tails or lands on its edge), rule for the plaintiff. But then what about the

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case where the coin reaches the ground and apparently comes to rest on its tail side, only miraculously to pop up and flip over one second later? Not to mention its possibly being indeterminate whether a certain thing is a coin, a head, a tail, a flip, a defendant, or a plaintiff. There is simply *nothing* a court can do to eliminate the possibility of its being indeterminate what it should do. Let me, however, add a few comments by way of clarification.

- Virtually every statement is *vague* to some extent, but of course not every statement is *indeterminate*. Vagueness entails the *possibility* of indeterminacy.[1] The statement that Ally McBeal is thin and the statement that Roseanne is thin are both vague, but the former is determinately true and the latter determinately false.
- I have noticed that in the writings of Dworkin and other philosophers of law it is often simply assumed that if a statement is indeterminate, then it is neither true nor false. This assumption provokes two comments. First, whether or not it is true, it leaves unaffected the platitude that there is no escaping vagueness in the law, and hence the possibility of its being indeterminate whether a given law, precedent, principle, or policy applies. Whatever it means to say that something is vague, and hence admits the possibility of indeterminacy, the ubiquity of vagueness is a *datum* that any explication of vagueness or indeterminacy must accommodate in order to be correct. Second, it cannot be *assumed* that a statement's being indeterminate entails its being neither true nor false. One of the two big issues in the theory of vagueness is the question of what vagueness is, what it is for a concept or statement to be vague. Now, to be vague is to admit of borderline cases: The concept of a bald man is vague because there might be a borderline case of a bald man—there might, that is, be a man who is neither determinately, or definitely, bald nor determinately, or definitely, not bald. Thus, the question of how we are to explicate the concept of vagueness reduces to the question of how we are to explicate the concept of indeterminacy. On this question there is, among those who write on these matters, some dispute. Some theorists, e.g., *supervaluationists*, hold that if it is indeterminate whether Herbert is bald, then the statement that he is bald is neither true nor false. Other theorists, e.g., Roy Sorensen and Tim Williamson,[2] argue that the principle of bivalence—the principle that every statement is true or false—holds even for statements that are neither determinately true nor determinately false, since for them indeterminacy is a matter of a certain kind of irremediable ignorance. Still other theorists, such as myself, argue that it is indeterminate whether indeterminate statements have truth-values (see my paper "Vagueness and Partial Belief"[3]).
- The fact that there is no escaping the *possibility* of indeterminacy in legal matters does not imply that our courts have any serious *problem* of indeterminacy. The

1. This slogan requires interpretation. It's arguable that some vague statements—e.g., "If Herbert is bald, then Herbert is bald," "Herbert is bald and not bald"—are vague but necessarily determinately true or determinately false. It does, however, seem safe to say that vague contingent statements are always possibly indeterminate.

2. *See* Roy Sorensen, BLINDSPOTS (Oxford University Press, 1988) and Timothy Williamson, VAGUENESS (Routledge, 1994).

3. *Vagueness and Partial Belief*, 10 PHILOSOPHICAL ISSUES (2000), cited in the text as "Vagueness and Partial Belief."

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status of precedent in civil law often makes for determinate application of vague concepts whose application would otherwise be indeterminate, and, as Dworkin emphasizes, principles of moral equity may, and should, be used to give verdicts that would be hopelessly arbitrary if normative considerations were not invoked.

B

So another legal issue of vagueness is the extent to which indeterminacy is a *problem* for the courts. But philosophers of language and logic as such have no light to shed on this question, even if they come equipped with a correct philosophical explication of indeterminacy. For that explication will not yield surprising pronouncements about what in fact is, or is not, indeterminate. No correct philosophical account of indeterminacy can be expected to affect our application of vague concepts, for those applications come first and the explication is tested against them.

C

Granted, it might be said, there is no escaping the possibility that some legal statements are indeterminate. Nevertheless, there remains the question whether some legal statements are neither true nor false, and this *is* an issue for philosophers of language. Fair enough; the issue of whether indeterminacy precludes bivalence is a question for philosophers of language, but why should it be a question for either the courts or philosophers of law? Surely, indeterminacy itself is all that should matter, and nothing of legal consequence would follow from the revelation that indeterminate statements were neither true nor false, since even if borderline statements are true or false, it is clear that no one can know their truth-values. All that should be of relevance to legal theorists is the platitude that if p is indeterminate, then one cannot know either p or not-p.

D

It might seem that the sorites paradox has special implications for the law, and that it is to philosophers of language and logic that one should look for a resolution of the paradox. Timothy Endicott, in his forthcoming book, *Vagueness in Law*,[4] puts the legal problem in a way that may be restated as follows. Suppose there is a statute that prohibits playing music at a volume likely to cause serious distress to nearby residents. We can then have a spectrum of musical events such that, first, the deafening events at one end are definitely violations of the law while the barely audible ones at the other end are definitely not violations, and, second, there is no discernible differ-

4. VAGUENESS IN LAW (Oxford University Press, 2000).

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ence in degree of disturbance between the music in any pair of events that are contiguous in the spectrum. At the same time, a court must be able to justify its decisions, and this means that it ought not to rule differently in two cases when there is no relevant difference between them, and it seems there is no relevant legal difference between pairs of contiguous cases. It follows, unacceptably, that the fair court should rule either that all events in the spectrum are violations of the statute or that none are. Let's suppose there actually is such a sequence of cases before the court, the same judge presiding in each case. Her dilemma is clear: She is bound to rule certain cases to be, and certain others not to be, violations, but that entails that there must be two cases with no discernible relevant difference between them such that she finds one but not the other to be a violation of the statute. So what is the judge to do? Two comments: First, I do not see that this is any more of a dilemma than the dilemma legislators face when they make the legal drinking age twenty-one rather than the day before one's twenty-first birthday. Second, to the extent that it is a dilemma for the law, I fail to see how a philosophical resolution of the sorites will help. For example, the epistemic theorist of vagueness has it that there is a sharp cutoff in the foregoing sorites series of musical events but that it is impossible for anyone to know where it falls. How would knowing that that was the correct solution to the sorites help our judge?

E

Finally, what is apt to seem the most pressing legal issue of vagueness: What is the court to do when it is wholly indeterminate what it should do? But this is easy to answer. If it is wholly indeterminate what it should do, then the question posed can have no determinately correct answer. No doubt a better question is: What is the court to do when all laws, principles, and policies that have so far been recognized yield no determinate right answer to a legal dispute? This, however, is a normative question on which no thinker about vagueness has, per se, any special authority.

II. YOU TELL ME

For the reasons just given, I am tempted to conclude that the issues of vagueness about which legal theorists worry, qua legal theorists, are not issues on which they can expect help from the theories of philosophers of language and logic who worry about vagueness. In this regard I place in evidence my own "Vagueness and Partial Belief." What I now want to do is to give the gist of my theory of vagueness and then ask how, even if everything I say is true, it might be of use to legal theorists. I will not summarize my article, which you can read for yourself, but rather address its content from a slightly different angle.

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Paradox, Philosophical Problems, and the Sorites

A paradox is a set of propositions with the following feature: The propositions belonging to the set appear to be mutually incompatible, yet each proposition seems plausible when viewed on its own. When the basis for the plausibility is conceptual, the paradox poses a philosophical problem. Virtually all of the great philosophical problems—free will, meta-ethics, skepticism, the liar, mind/body, and so on—arise from paradoxes. The philosophical problem of vagueness arises, of course, from the sorites paradox, an instance of which is provided by the following derivation:

A person with $50,000,000 is rich.
For any *n*, if a person with $*n* is rich, then so is a person with $*n*−$1.
Therefore, a person with only $3 is rich.

This constitutes a paradox because it is evidently valid, its first premise is obviously true, its conclusion is obviously false, and its second premise—the *sorites premise*—seems true (How can you eliminate someone from the ranks of the rich by removing $1 from her fortune?).

Happy-Face Solutions and the Sorites

A *happy-face solution* to a paradox does two things. First, it identifies the odd guy out, the one whose plausibility is spurious. With respect to the displayed derivation, a happy-face solution would tell us either that the derivation is not really valid, that a particular one of its premises is not really true, or that its conclusion is not really false. Second, it explains why we have been taken in by the masquerader, and does so in a way that strips from it its patina of truth so that we are never again taken in by it. Traditional theories of vagueness are aiming for happy-face solutions to the sorites.

A common, although not inevitable, starting point, is that, *faute de mieux*, the sorites premise is not true, and for today's purposes I will take this response to be correct. But knowing that the sorites premise is not true hardly gives a happy-face solution, because we would still need to explain, and to explain away, its plausibility. Doing this requires saying what is wrong with the following argument for the sorites premise, an argument that comprises its own paradox:

1. There is no one-dollar cutoff between what suffices to make a person rich and what fails to suffice to make a person rich. That is, there is no particular number such that the proposition that *that number* is the cutoff is true.[5]

5. This is equivalent to saying that there is no numeral α such that the proposition expressed by $^{@}$Having $\$\alpha$ is sufficient for being rich but having $\$\alpha - \$1$ is not$^{@}$ is true, where $^{@}$ signifies corner quotes.

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2. If there is no such cutoff, then there is no *n* such that having $*n* is sufficient for being rich but having $*n* − $1 is not sufficient for being rich.
3. If there is no *n* such that having $*n* is sufficient for being rich but having $*n* − $1 is not, then for any *n*, if a person with $*n* is rich, then so is a person with $*n* − $1.
4. Therefore, for any *n*, if a person with $*n* is rich, then so is a person with $*n* − $1.

This argument itself constitutes a paradox: it is apparently valid, each premise, considered on its own, appears to be true, and yet we know its conclusion cannot be true.

Happy-face solutions that accept the *faute de mieux* response divide into two kinds: *semantic theories of vagueness* and *epistemic theories of vagueness*.

Semantic theories of vagueness are so called because they construe vagueness as a *semantic* notion; their most salient feature is that, according to them, indeterminate, i.e., borderline, propositions are neither true nor false. It is probably obvious to everyone that any full response to the sorites perforce carries with it an account of indeterminacy and, therewith, an account of vagueness. According to semantic theories, indeterminacy is partially characterized in terms of an indeterminate statement's having the semantic feature of being neither true nor false. The most popular and fully developed semantic theory of vagueness is *supervaluationism*, which achieved its classical statement in Kit Fine's 1975 paper "Vagueness, Truth and Logic."[6] According to supervaluationism, a statement is true just in case it is true under every admissible precisification, false just in case it is false under every admissible precisification, and neither true nor false just in case it is true under some admissible precisification and false under another. An admissible precisification is one that makes vague terms absolutely precise while both departing as little as possible from their actual meanings and respecting certain analytical relations between vague terms. A salient feature of supervaluationism is that it rejects bivalence while accepting excluded middle and the rest of classical logic. For consider the statement *that borderline Harry is bald or not bald*. Since Harry is a borderline case of baldness, neither the statement that he is bald nor the statement that he is not bald is true or false. But the instance of excluded middle, the statement *that Harry is bald or not bald*, is true, for in each precisification one of its disjuncts will be true, although, since the disjuncts are borderline, which one is true can vary from one precisification to another.

Likewise as regards the existential generalization:

$$n(\text{having } \$n \text{ suffices to be rich } \& \text{ having } \$n - \$1 \text{ does not suffice})$$

It is true in each precisification, since in each precisification there is a sharp $1 cutoff between what suffices for being rich and what fails to suffice, but

6. FINE, *Vagueness, Truth and Logic* (1975) 30 SYNTHESE 265.

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the location of the cutoff may vary from one precisification to another. In other words, the existential generalization is true, but there is no witness that makes it true. This observation tells us the supervaluationist's response to the argument for the sorites premise: She denies the second premise, since, according to her, the displayed existential generalization is true even though there is no particular number that makes it true.

Despite its ingenious approach to the sorites, supervaluationism is burdened with problems. First, it denies the standard semantics for connectives and quantifiers without accounting for why that semantics seems right to us, why, that is, it seems right that logical connectives like 'and' and 'or' are truth-functional and that true existential generalizations require witnesses, particular things in the ranges of their quantifiers which make them true. Second, there is the powerful objection Crispin Wright raises against all "third possibility" views, which I quote on page 14 of "Vagueness and Partial Belief":

> It is unsatisfactory in general to represent vagueness as any *determinate* status—a middle situation, inconsistent with both the poles (truth and falsity)—since one cannot thereby do justice to the absolutely basic intuition that vagueness presents as an indeterminacy about *which polar verdict applies*, not as a status inconsistent with both.[7]

Third, there is the objection I raise on pages 31 to 33 of my paper, which shows that supervaluationism entails falsehoods when applied to vague terms in intentional contexts.

Epistemic theories of vagueness accept bivalence and thus hold that indeterminate, or borderline, statements are true or false, although, they are further constrained to hold, no one can know the truth-value of an indeterminate statement. For these theories, vagueness is a certain kind of *ignorance*. Epistemic theorists will thus deny the first premise of the argument for the sorites premise. According to them, there really is a sharp $1 cutoff between the rich and the non-rich; it is just that no one can know where that cutoff falls. The premise seems true to us because we confuse an impossibility of *knowing* a truth-value with an impossibility of *having* a truth-value.

To many people epistemic theories seem incredible, and the reason they seem incredible is that they assume, first, that if there are sharp cutoffs in sorites sequences, they must be determined by our use of vague terms, and, second, that there is nothing in our use of vague terms to determine these sharp cutoffs. The epistemic theorist, in other words, owes an account of our irremediable ignorance in borderline cases that does justice to the ways we actually use vague language, and, despite the ingenious effort of Tim Williamson, one may doubt that this explanation has been provided.

7. Timothy Endicott independently raises the same objection in VAGUENESS IN LAW, *supra* note 4.

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The upshot, simplifying only a little, is that, by elimination, there can be no happy-face solution to the sorites, and vagueness is neither a semantic nor an epistemic notion.

An Unhappy-Face Solution

If the sorites fails to have a happy-face solution, then it has an unhappy-face solution, which is simply the denial of a happy-face solution. Having an unhappy-face solution does not put the sorites in bad company, since, as I have argued elsewhere,[8] it is doubtful that any of the famous philosophical problems has a happy-face solution (which is why so many of us feel frustrated by the excruciating pace of philosophical progress). In any case, we should expect more of a convincing unhappy-face solution than the mere denial of a happy-face solution. We should expect it to tell us what features of the paradox-generating concepts preclude a happy-face solution. We should also expect to be told whether the paradox admits of a *weak* or a *strong* unhappy-face solution. A weak unhappy-face solution says that a paradox-free concept can be devised which does the work we expected of the paradox-generating concept, whereas a strong unhappy-face solution says that no such replacement is possible. Alfred Tarski in effect argued that the semantic paradoxes admit of a weak unhappy-face solution. It is my view that the sorites admits only of a strong unhappy-face solution. To explain this, I need to show how vagueness is neither a semantic nor an epistemic notion but rather a *psychological* notion that is explicable in terms of a hitherto unnoticed kind of partial belief.

Vagueness As a Psychological Notion

I distinguish two kinds of partial belief. *Standard partial belief* (SPB) is that kind of partial belief that is normatively governed by the probability calculus in the way spelled out on the first two pages of "Vagueness and Partial Belief." Among the substantial things true of SPBs are:

1. SPB is the kind of partial belief we would have even if, *per impossibile*, our language were perfectly precise.
2. SPB is a measure of *uncertainty*.
3. SPBs generate corresponding likelihood beliefs. Thus, if Sally s-believes to degree .5 that she left her glasses in her office, then she thinks it is just as likely that she left them there as that she did not; she thinks, as she would say, that there is a fifty-fifty chance that her glasses are in her office.
4. Typically, if one s-believes p to some degree between 0 and 1, then one does not regard oneself as being in the best possible position to pronounce on

8. *Contextualist Solutions to Scepticism*, PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 317–33 (1995–6).

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> the truth of p, even if one has no doubts about the integrity of the evidence one has for or against p.

By contrast, *vagueness-related partial belief* (VPB) is not normatively answerable to the probability calculus; unlike SPB, VPB can in no way be identified with subjective probability. Moreover, none of the just-mentioned substantial things true of SPBs are true of VPBs:

1. We could not have VPBs if our language were perfectly precise; VPBs go hand-in-hand with vagueness. One could not have a vague language without VPBs, and having VPBs secures one's having a vague language.
2. VPB is *not* a measure of uncertainty. When one is confronted with what one takes to be a paradigm borderline case of a bald man, one does not take oneself to be *uncertain* as to whether or not the man is bald; that is resolved by one's taking him to be a borderline case of a bald man.
3. VPBs do not give rise to corresponding likelihood beliefs. If one v-believes that such-and-such to degree .5, one will *not* think there is a fifty-fifty chance that such-and-such, and if one v-believes that such-and-such to degree .7, one will *not* believe that it is somewhat likely that such-and-such.
4. If one v-believes p to any degree whatever, and one's epistemic circumstances are known by one to be ideal (in a way to be explained), then one will not feel that one, or anyone else, can get into a better epistemic position with respect to p.

Equipped with the notion of a VPB, one may (to a first approximation) explicate the notion of a borderline case in the following way.

First, for reasons made clear in my paper, I define the notion of a VPB* as a VPB formed under ideal epistemic conditions, where, roughly speaking, these are circumstances where one has certain knowledge of the facts on which the vague property in question supervenes in the way illustrated in "Vagueness and Partial Belief" by Sally's VPBs about Tom Cruise's baldness. Then we may say that

> x is to some extent a borderline case of being F just in case someone could have a VPB* that x is F.

It turns out to be surprisingly easy to show that this definition provides both a necessary and a sufficient condition for being a borderline case, but, not withstanding this, a question arises as to whether the definition really captures the *essence* of vagueness. For it is apt to seem that VPBs can at best *track* vagueness rather than *constitute* it. At this point in my paper I bring to bear my view of "pleonastic properties" and argue that, to use a metaphor of David Armstrong's, properties are mere shadows of predicates in a way that allows us to appreciate that VPBs do indeed constitute vagueness.

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VPBs and the Sorites

One who proposes, as I do, that the sorites admits of only a strong unhappy-face solution has three debts. First, he must explain what precludes the sorites from having a happy-face solution. Second, he must explain what the paradox-generating concepts are and identify those features of them which preclude a happy-face solution. Third, he must explain why the unhappy-face solution must be strong rather than weak.

I hold that the sorites premise is determinately false; what makes my solution unhappy-face is that it is indeterminate which of the premises of the argument for the sorites premise are not true. Specifically:

- It is indeterminate whether bivalence holds for borderline propositions, since it is possible to v*-believe that the proposition that borderline Harry is bald is neither true nor false. (This result is independently motivated by the very nature of the evidently irresoluble dispute between those who accept bivalence for borderline propositions and those who reject it. See V&PB, 18–19.)
- Premise (1) of the argument for the sorites premise presupposes that bivalence fails for borderline propositions, while premise (2) of that argument presupposes that it holds.
- Therefore, it is indeterminate whether premise (1) is true, and it is indeterminate whether premise (2) is true.

Turning to the second debt, and as I explain on page 21 of "Vagueness and Partial Belief," I locate the conceptual glitches that lead to the sorites in three sources. First, each vague concept (nearly enough) has an underived conceptual role that disposes us to judge certain things as paradigmatically falling under the concept, certain others as paradigmatically not falling under it, and, at the same time, disposing us not to recognize a sharp cutoff between those cases where the concept applies and those where it fails to apply. Second, the underived conceptual roles of our logical concepts and of truth dispose us to accept bivalence and classical logic, without providing any court of appeals for the resolution of the ineluctable clashes.

Finally, the issue of a weak versus a strong unhappy-face solution requires one to ask whether there are, or can be devised, concepts that will not lead to paradox yet do the work the paradox-generating concepts are expected to do. Well, we need concepts to think, and it is impossible, even in principle, to replace our vague concepts—which is to say, virtually every concept—with ones that are not vague. Anyway, to skip a story you can read, I argue, first, that there is no task for which replacement concepts are needed, and second, if there were to be a conceptual reform, it would entail a notion of truth that was either determinately bivalent or determinately non-bivalent, but which, in the context of vagueness, created serious problems either way.

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The Big Question

So there is my technical account of vagueness. Let's suppose it is determinately true. How would that affect the questions about indeterminacy with which legal theorists wrestle? To my chagrin, the only answer I can come up with is: It would not.

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