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SORENSEN: VAGUENESS HAS NO FUNCTION IN LAW[1]

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There is much in the paper that I agree with, much that I do not understand and am probably not competent to understand, and some which I am puzzled by. I will concentrate on the last. Both regarding puzzles, and regarding points of agreement and incomprehension, I will be selective and touch on only a few.

The main point I am puzzled by is the thesis declared in the title of the paper. Professor Sorensen seems to believe the following:

1. The law can be vague.
2. It can be more or less vague.
3. How vague it is can depend on deliberate decisions of its makers.
4. There are consequences to vagueness. More specifically, it is not the case that whether or not the law is vague has no consequences for the way legal institutions do and should function.

Given these propositions and a simple-minded understanding of function—i.e., that anything which has consequences, and which is deliberately controlled by people with a view to bringing about or avoiding those consequences, has a function—I am not sure what Professor Sorensen means by his thesis, because it seems to be refuted by his own views, unless he believes, and I do not think that he does, that lawmakers never intend to increase or decrease the vagueness of the law. Even that will not do, as his thesis seems to be not only that vagueness has no function but that it cannot have one.

Professor Sorensen's own understanding of a function is a touch more restrictive in one respect, though possibly less restrictive in others. He takes things to have a function only if they have beneficial effects that explain their presence. Therefore, to show that vagueness has a function, it will not be enough to show that its occurrence is controlled, within limits, by human decisions. This will show only that when people's decisions that control the degree of vagueness are undertaken with that as their purpose, the decision-

1. This is a comment on Professor Sorensen's paper presented at the workshop. I removed objections to parts of his paper not included in the published article above. But I have not included any new comments on the new material in the published version.

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makers believe that vagueness or its absence has beneficial consequences, not that they have them. But is it really credible that these beliefs are always wrong?

Professor Sorensen believes so. He thinks that vagueness arises because we choose to use vague terms for reasons other than their vagueness. How does he know, I wonder? Nothing in his paper rules out the possibility that people make a genuine mistake not about the occurrence of vagueness but about its beneficial properties. If they believe in them, would they not act on those beliefs? But let that pass.

Before I go any further, let me give voice to one disquiet. Professor Sorensen talks of the vagueness of words and expressions. But the vagueness his conclusion is about is the vagueness of the law. The law is stated in words and, most of the time, is created by the use of words. But it is wrong to conclude that, therefore, there is a relationship of direct replication between the vagueness of words and expressions and the vagueness of the law. It would have been more plausible to claim a direct relationship between the vagueness of utterances (understood as what was uttered) and the law, since the law is created through utterances. But even this is too simplistic a picture. The law is systemic, and each of its rules derives its meaning not only from the utterance that created it but from other parts of the law. As a result the vagueness of the words used may not transmit to the law, and other factors may make the law vague in ways that the expressions used in making it were not. This is not, of course, to deny that the vagueness of the words used in making the law has an impact on its vagueness or otherwise.

Having made this point, I will disregard it from now on.

So what arguments for the thesis are we presented with? At the conference Professor Sorensen relied on an argument, which I criticized, that has been omitted from the published paper, but no alternative reason for the thesis was presented in its stead. The thesis is asserted but not defended.

The middle part of the paper is designed to enlighten those who have mistaken beliefs about vagueness in the law because they confuse vagueness with generality, or underspecificity, or with belief in vagueness. One of the surprises of the paper is the unproblematic air with which Professor Sorensen implies that there is no surprise, no need for any explanation, if it turns out that false beliefs in vagueness have a function, but true ones do not. He returns to the argument with the claim that ignorance (and as you remember, he believes that all vagueness is ignorance) has no "relevant" function. I was quite looking forward to reading the argument, as it promised to refute the epistemic view of vagueness: Since ignorance does not have a function and vagueness clearly does, it follows that they are not the same. Unhappily I could not find any argument that ignorance has no relevant function. It clearly has many functions; and, never having been told what the relevant function is that it does not have, I have no idea whether Professor Sorensen's claim is justified or not.

I suppose that we get to the heart of the matter with the claim that

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vagueness cannot provide a basis for discretion. Unfortunately here again Professor Sorensen provides no argument for the claim.[2] Finding myself stumped by Professor Sorensen's brevity, all I can do is to indicate (I hope not too briefly) the reason for its rejection. One kind of discretion, or context of discretion, enjoyed by courts is the discretion to make law, either by repealing existing law, or by making a rule where there was a gap in the law. One case in which they have such discretion is where the law is vague.

Interestingly, the case for this conclusion is unaffected by the dispute between epistemicists and gapists regarding the correct account of vagueness. Where the law is vague, whether there is a gap in it or there is law that cannot be known, there may be—not always but sometimes—a case to make law that will be known and determined. Therefore, it is sensible—at least sometimes—that courts should have discretion to make law regarding borderline cases.

You may suspect—I hope that you will—that my argument reveals no real disagreement between Professor Sorensen's views and those of many legal scholars and legal theorists who accept arguments like mine. If so I have to confess that I am at a loss to explain how the appearance of disagreement emerged, that is, what made Professor Sorensen enunciate the claim under dispute. More interestingly, the question arises as to whether there is a substantial disagreement between him and theorists who believe that vagueness has a function. Their argument, and mine, can be stated by reference to the power to make law.

Making law, we say, is and should be a collaborative enterprise. Different aspects of the law are made by different institutions at different times, involving courts, congress, state legislatures, local authorities, administrative authorities, regulatory authorities, and more. It is important that the right bodies will contribute the right elements to the law, and that they should do so at the right time. Therefore, when wisely used, all means and devices that ration powers to make the law among public organs and that regulate the time for the use of such powers have an important function in the law. Vagueness is one source of discretion. As such it is a power-regulating device and therefore has an important function.

2. Yet again the argument included in the conference paper has been omitted, but no new one provided to replace it.

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