Legal Theory, 7 (2001), 379–385. Printed in the United States of America
Copyright © Cambridge University Press 1352–3252/01 $9.50

LAW IS NECESSARILY VAGUE

TIMOTHY ENDICOTT
Balliol College, Oxford

In fact, law is necessarily *very* vague. So if vagueness is a problem for legal theory, it is a serious problem. The problem has to do with the ideal of the rule of law and with the very idea of law: if vague standards provide no guidance in some cases, how can the life of a community be ruled by law? The problem has long concerned philosophers of law; the papers at this symposium address it afresh by asking what legal theory may have to learn from (or contribute to) work on vagueness in philosophy of language and philosophy of logic. Here I will not try to state the implications of vagueness for philosophy of law; I will try to set the stage by showing that vagueness is both an important and an unavoidable feature of law.

But I should emphasize that I will use the term "vagueness" as I understand it to be used generally in the other papers, in the sense set out in Dorothy Edgington's paper. So the claim is not that law is necessarily obscure or radically indeterminate. The claim is that a legal system necessarily yields a significant range of "borderline cases"—cases in which the application of the standards of the law is subject to doubt and disagreement.

We will see that it *is* possible to make precise laws. So it may seem that vagueness is a contingent feature of law that we could avoid by precise lawmaking. And it may seem that it would be desirable to do so, because precise laws bring us closer to the ideal of the rule of law.

I hope to persuade you otherwise in three short sections claiming (1) that lawmakers use vague laws because precision is not always desirable; (2) that because law is "systemic,"[1] enactments formulated in precise language do not always make precise laws; and (3) that law must perform functions that can only be performed by means of vague standards.

I. PRECISION IS NOT NECESSARILY GOOD

Law is vague because precision is not always useful in regulating communities, and lawmakers know that. It is true that precision offers certain benefits that are commonly associated with the rule of law—I will call them "rule-of-law benefits." Perhaps the major rule-of-law benefits of precision are that it reduces doubt and disagreement: (1) It tells people governed by law where they stand; and (2) It avoids legal disputes. Because of those two rule-of-law

1. As Joseph Raz calls it in his contribution to this issue.

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press

benefits, precision restricts the discretion of officials in the enforcement of the law.

The first rule-of-law benefit is a reason for imposing precise income tax rates rather than requiring taxpayers to pay, say, a substantial part of their income, or in proportion to their ability to pay and to the needs of the government. Income tax rates yield the second rule-of-law benefit as well, of course, but the main virtue of their precision is that it leaves the taxpayer in no doubt as to what tax is to be paid and gives no discretion to tax collectors.

The second rule-of-law benefit explains why lawmakers use precise blood-alcohol limits as a standard for the prohibition of drunk driving. Few people use the precise standard to guide their conduct precisely, but the level has the benefit of making it clear, in enforcement and adjudication, whether the law has been broken. So blood-alcohol limits, like tax rates, restrict official discretion.

But those virtues of precision are not general reasons to make laws precise. Every precise law incurs arbitrariness in virtue of its precision: Income taxes and blood-alcohol limits are examples. A good tax regime relates tax to ability to pay; a precise tax necessarily abandons that policy to some extent. Some drivers are affected by alcohol more than others; a blood-alcohol limit ignores that and, by doing so, it departs from its purpose of controlling a risk without unduly interfering with freedom. The precision of the limit detracts from the law's capacity to give effect to its rationale.

The precision of tax laws and blood-alcohol limits is undoubtedly justified in spite of their arbitrariness. That is partly because laws that give effect to their purpose in so many words (prohibiting, for example, driving that creates unreasonable risks) would incur other forms of arbitrariness by leaving it to enforcers and adjudicators to decide what is reasonable. To see that, we only have to think how a law imposing a duty to pay a reasonable tax would put people at the mercy either of the tax collectors or of the judges. The rule-of-law benefits of precision are genuine benefits but they always come at a price. The price may or may not be excessive. So precision is not generally an aim of legislation.

You may be thinking: "Yes, but the lawmakers *could* make all laws precise if they were misguided enough to accept the resulting arbitrariness." But I will argue in the next section that such a drive for precision would be doomed in any actual legal system by the *system's* own techniques for dealing with arbitrariness.

II. PRECISE FORMULATIONS DO NOT ALWAYS MAKE PRECISE LAWS

Laws are typically made by linguistic utterances.[2] Legal obligations and rights under contracts, wills, and other legal instruments are typically ex-

2. Statutes are the familiar example, but common-law systems of precedent often give legal force (in varying ways) to the judges' expression of their reasons for decision.

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press

pressed in language. And lawmakers and private actors can use precise language.[3] But the legal effect of their utterances depends on the law's techniques of interpretation. And aside from interpretive techniques, equity (in systems that distinguish equity from law) and the law's own equitable techniques may relieve parties from precisely formulated obligations or prevent the exercise of precisely formulated rights. Interpretive techniques and equitable powers of judges (and other officials) are only two among many ways in which the law's own techniques may give a vague effect to precise formulations.[4]

Note that there may be good reasons of principle for such techniques. Those reasons correspond to the reasons against precise lawmaking, identified in the previous section. Suppose that a lawmaker sets out to control traffic at an intersection by requiring cars to stop at a precisely marked line on the road when the traffic light is red. All the lawmaker's communications on the issue may be precise, but the effect on the law is not likely to be precise: Judges hearing a dispute are likely to find resources in the law to dispense drivers from the prohibition in cases of necessity, or duress, or on grounds of certain sorts of mistake. Those grounds are grounds of principle, each of which is vague. All grounds of principle are vague because all rely on general evaluative and normative considerations that themselves are vague.[5]

Precise utterances by lawmakers make precise laws only when the officials of the system have good legal reason to give them precise effect. By saying this, I do not mean that precise laws are impossible or even rare—that depends on the principles of the legal system. There may be very good reason, according to law, for officials to treat a precise blood-alcohol level as creating a uniform, precise, legal limit (and not, e.g., to create a vague exemption from its operation for people who can tolerate lots of alcohol). But the systemic nature of law means that a legislative drive for precision would face dim prospects: In the increasing arbitrariness it would bring, officials would increasingly find legal reason to tamper with it. Lawmakers have no reason to think that they can achieve an ideal of precision by using red lights.

You may be thinking: "Yes, but what if a whole *system* were dedicated to precision? It might be misguided, but sufficiently bloody-minded lawmakers could achieve precision, if they had the aid of sufficiently literal-minded officials." Even then, the drive for precision would be doomed.

3. At least, language as precise as "0.85% blood alcohol." I will not worry about the fact that such language is itself vague, because its vagueness is unimportant, and I will argue below that law is necessarily vague in important ways.

4. Others include duties and powers to reason by analogy, discretions of various kinds including judicial powers to make law, and common-law and statutory rules against, e.g., oppressive clauses in contracts.

5. I argue that general evaluative and normative terms (*and* legal principles) are vague in VAGUENESS IN LAW 126–131, 163–6 (2000).

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press

III. THE FUNCTIONS OF LAW REQUIRE VAGUE STANDARDS

Laws can be precise, but a legal system with no vague laws is impossible. The reason is that any legal system needs to regulate a *variety* of human activity in a *general* way. No decent traffic scheme can stop with blood-alcohol limits and traffic lights: it also needs prohibitions on dangerous driving. I will call such standards "abstract." Abstract standards are vague, and the law of a community necessarily includes abstract standards.

Generality in itself is not enough to make a standard abstract—blood-alcohol limits apply generally. But blood-alcohol limits are not abstract, because of the specificity of the consideration they appeal to. The blood-alcohol limit applies generally to a class, but that class (the class of people who have a certain proportion of alcohol in their blood) is uniform in a way that allows precision. A prohibition on dangerous driving is not merely general but abstract, because it regulates activities that do not share any such uniform feature that would allow precision. The important variations among the class of dangerous drivers (the class of people using a motor vehicle in a way that unreasonably causes a serious risk to others) make it impossible to specify the class in a way that allows precision. The point of a law against dangerous driving is to give the law the unspecific technique it needs for controlling behavior that varies in ways that make specific rules useless.

Traffic cannot be regulated without abstract standards. Traffic regulation rightly includes various precise standards (using, e.g., lines on roads and red lights), but the purposes of regulation can be achieved only if it also uses abstract standards—because it needs to regulate such a wide variety of things that people might conceivably do with cars.

Abstract standards are often made with (or can be stated in) extremely vague evaluative terms, such as "dangerous," "careless," or "reasonable." But they are also made using abstract descriptive terms that identify the conduct that is regulated. Although tax rates are typically precise, the tax base is generally described in vague terms such as "income." And legislators' definitions of "income" use abstract terms in order to avoid creating avoidance mechanisms through precise definitions that exclude economic activities that are similar to the central instances of income.

So far, it may seem that I am only repeating the point that *good* lawmaking is vague—which would certainly not show that law is necessarily vague. But now consider how far-reaching the need is for abstract standards in law.

A legal system regulates the life of a community. That is only possible if the law controls the use of force among members of the community, and controls the ownership and use of things, and exerts some control over family and commercial relations. These are necessary functions of law. Nothing that fails to regulate such things is a legal system. None of those things can be done without abstract standards. And law must allow forms of private ordering, giving legal powers to individuals to create and to assume rights and duties in ways that are liable to be vague.

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press

That set of claims about what law necessarily does strikes me, incidentally, as very abstemious. I am not concerned here either to work out a complete view of what law must necessarily do or to defend my abstemious suggestions. It does not matter if you wish to deny, for instance, that regulation of the life of a community necessarily includes regulation of something that can usefully be called "family" or "commerce," or that law necessarily allows for any private ordering at all. I will not reply to such objections because you can agree with my argument even if you will admit only that law must control the use of force among people in a community. If you deny that law must do that (saying, perhaps, that law may have any content), then you preclude yourself from distinguishing between the law of the United States and the rules of tiddlywinks, or the rules of the Rotary Club, or any other system of rules.

Consider, then, the abstemious claim that law must control the use of force: That cannot be done with precise standards. The variety of things that one person might do to another calls for control through abstract standards, because prohibitions on (and tort liability for) assault and other ways of causing personal injury cannot refer to the actions that are to incur liability, without abstracting from the variety of forms and contexts of human contact and imposing a standard that can be applied to them generally. Imagine a precise standard for assault: perhaps a prohibition on exerting more than 100 newtons of force on a human body. That would not even count as regulation of the use of violence because it would not distinguish between a ride in a car and a shooting. And if we were mad enough to set out to make precise laws that *would* count as regulating violence (specifying in precise terms all forms of contact with human bodies that do and do not count as assault), we would never succeed: (i) We would not be able to foresee the forms of violence that someone might conceive of that would lie outside our scheme; and (ii) The more comprehensive our precise set of definitions became, the more useless it would become both as a guide to individuals' conduct and as a guide to enforcement by officials. Long before our mad scheme of precise definition of violence against persons became even moderately comprehensive, it would become incapable of serving as a guide to conduct either of citizens in general or of officials. And if our scheme is incapable of serving as a guide to conduct, it is not law.

There is one final reason why law must be vague: Its regulation of the life of a community cannot proceed without holding *human beings* responsible for actions (such as commissions of offences, exercises of rights, exercises of power, etc.). And all general standards of causation and all general standards of responsibility for wrongs caused (such as intention, recklessness, etc.) are vague.

Even drink-and-drive law is vague, because it consists not only of a precise limit on blood alcohol but also of vague doctrines concerning what counts as a motor vehicle, and what counts as being in charge of it, and what counts

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press

as being responsible for being in charge of it. Traffic regulation includes much vaguer laws than the drink-and-drive laws, and a legal system includes laws that are vaguer than traffic regulation.

IV. CONCLUSION: HOW VAGUE IS A VAGUE LAW?

Law is necessarily vague because it necessarily uses (or can be stated in) abstract terms such as "reasonable" or "substantial." We should bear in mind that the fact that the law can be stated in such vague terms does not by itself mean that there are no clear cases—and in some areas regulated by vague standards, there may be nothing but clear cases. The number and the importance of borderline cases depend on context, and in some contexts even very vague laws will have few borderline cases or none at all. If the law requires electrical appliance manufacturers to use insulation of reasonable quality on electrical wiring, it may be the case that the only way to comply with the law is to use certain very specific substances in fairly precise minimum thicknesses. That is a fact about vagueness in general: It is clear how to divide the bald people in a room from those who are not bald, if there are no borderline cases in the room.

But there is bound to be *significant* lack of clarity in the application of vague laws for the same reasons that the regulation of communities requires vague standards. Because the things you can do with a motor vehicle vary so widely, the legal effect of an abstract standard is very different from the legal effect of the reasonableness standard on the electrical appliance manufacturer. There is bound to be a significant range of borderline cases for the application of a tort standard of reasonable care or a criminal standard of dangerous driving, because of the abstract nature of the standard.

When legal standards are vague, they are very vague. Let's call a standard "very vague" if there is, potentially, significant variation among borderline cases (the context determines whether that potential is realised). Let's call a standard "trivially vague" if there is no significant variation among borderline cases. Vagueness is trivial only when it is pegged to a precise standard: otherwise, vagueness always allows the possibility, depending on the context, for a significant range of borderline cases.

Lawmakers never lay down trivially vague standards. No legislature ever made it an offence to drive "with more than approximately 0.85% blood alcohol." The reasons not to use precise laws (in traffic regulation or the regulation of violence against persons) are reasons not to use almost-precise (that is, trivially vague) laws. A precise standard is always better, from the lawmaker's point of view, than a trivially vague standard, because it offers the rule-of-law benefits of precision and is not much more arbitrary than a trivially vague standard. Legal techniques such as *de minimis* standards may occasionally give a trivial vagueness to standards laid down in precise language—often for reasons that have to do with the law of evidence and the

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press

control of judicial process. Such forms of vagueness are not important because they do not yield a significant range of borderline cases. By contrast, there are very significant ranges of borderline cases for the application of the abstract standards that are needed for the regulation of the life of communities.

So law is necessarily very vague.

Law should not (and cannot) be reformed to pursue precision—or even to avoid significant vagueness. The reason is really the same as the reasons for which Dorothy Edgington says that we should not try to reform language to achieve precision: Law, like language, should not make arbitrary, pointless distinctions. And while many laws do make arbitrary, pointless distinctions, no legal system could succeed in committing itself wholesale to that sort of thing.

https://doi.org/10.1017/S135232520170403X Published online by Cambridge University Press