

# Philosophical Foundations of Language in the Law

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## The Value of Vagueness

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## 1. Introduction

How can it be valuable to use vagueness in a normative text? The effect is to make a vague norm, and vagueness seems repugnant to the very idea of making a norm. It leaves conduct (to some extent) unregulated, when the very idea of making a norm is to regulate conduct. A vague norm leaves the persons for whom the norm is valid with no guide to their conduct in some cases—and the point of a norm is to guide conduct. A vague norm in a system of norms does not control the officers or officials responsible for applying the norms or resolving disputes—and part of the value of a system of norms is to control the conduct of the persons to whom the system gives normative power.

In this chapter I will seek to resolve these puzzles, and to show that vagueness can be valuable to law-makers (because their use of it is valuable to the people to whom the law is addressed). If I am successful in doing that, it may seem that it is an evaluative conclusion that tells us nothing of the nature of vagueness in normative texts: I will simply have shown that it sometimes happens to be a good thing, and that some vague legal rules happen to be good rules. But in fact, I will argue, the value of vagueness does more than that to explain the role of vagueness in normative texts, and to explain the compatibility of vagueness with the ideal of the rule of law (an ideal that has analogues in all uses of texts to create or to communicate norms). Far from being repugnant to the idea of making a norm, vagueness is of central importance to law-makers (and other persons who craft normative texts). It is a central technique of normative texts: it is needed to pursue the purposes of formulating

such texts. Not all norms are vague. But vagueness is of central importance to the very idea of guiding conduct by norms.

I will start by explaining some important features of the normative texts I am considering, and explaining what it means for such a text to be vague (section 2). Then I will point out some varieties of vagueness commonly used in such texts (section 3). Precision in such texts is valuable in two ways: it has *guidance value* in offering a precise proposal for action to persons subject to a standard, and it has *process value* in controlling the system's techniques for applying the standard (section 4). Those values of precision raise the question I have mentioned already: how can it be valuable to use vagueness in normative texts? The crucial underpinning for an answer to that question is a view of the nature of arbitrariness in norms, and an associated principle that I call the 'normative principle' (section 5). Vagueness brings with it forms of arbitrariness, but there are ways in which vagueness averts other forms of arbitrariness that come with precision (sections 6, 7), and vagueness can be a useful, non-arbitrary technique for allocating power to officials (section 8), or for leaving decisions to private actors (section 9). A summary (section 10) recapitulates the value of vagueness in law, and a conclusion (section 11) points out reasons why the conclusions about the central importance of vagueness in law are important to an understanding of the significance and the role of normative texts in general. The normative principle I assert in section 5 is linked to the ideal of the rule of law and to the nature of law, for reasons which also have implications for understanding other, non-legal normative texts.

## 2. Legal instruments and legal standards

I will be concerned with a particular kind of normative text, which I will call a 'legal instrument', and a particular kind of norm, which I will call a 'legal standard'. A legal instrument is a normative text with a technical effect. By 'technical' I simply mean that the law itself has techniques for determining the effect of the normative text. The meaning and normative force of *all* normative texts depend in a variety of ways on the context in which they are communicated: if you are a teenager and your mother puts a note on the door of the refrigerator saying 'leave some pizza for your sister!', the effect of the normative text will be determined in subtle ways by a complex variety of understandings and expectations that arise from your relationship with your mother and your sister (and anyone else involved), and from the circumstances in which those relationships are situated (including everything from the role of pizza in the culture of your community to the economics of your

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family and your society that determine the abundance or scarcity of food in your household). I say that a legal instrument has technical effect because in law the complex contextual factors that contribute to the meaning of any normative text are to some extent regulated by the law itself. The term 'legal instrument' is meant as a reminder of that potential for self-regulation.

A legal instrument is vague if its language is imprecise, so that there are cases in which its application is unclear. I will speak of legal *standards* as vague in the same sense. Because of the technical effect of legal instruments, there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made. Law is systematic in the sense (among other senses) that the law itself gives legal effect to statutes (and contracts, wills, and other normative texts). Legal rules of interpretation may give a vague effect to a precise term in a legal instrument. For example, a doctrine excusing minor departures from notice requirements in civil proceedings gives a vague effect to precisely stated deadlines.<sup>1</sup> In general, the use of vague language in legal instruments makes vague legal standards.

So a vague legal standard clearly applies in some cases, and clearly does not apply in others, and there are borderline cases in which the linguistic formulation of the standard leaves its application unclear. We can take examples of both precision and vagueness from the English law concerning the care of children. By statute, it is an offense to cause a child or young person to be 'neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health' (Children and Young Persons Act 1933, s 1(1)). The statute defines 'child or young person' *precisely*, as referring to a person under the age of 16 years. But when is it lawful to leave a child at home, without supervision? Or when is it lawful to leave a child with a babysitter? And how old does the babysitter have to be? The statute states no ages. The act subjected all these questions to the vagueness of the terms 'neglected' and 'abandoned', and of the qualifying phrase, 'in a manner likely to cause him unnecessary suffering or injury'.

The result is 'communicative under-determinacy': if you are a parent, you may well wish to know when it is lawful to leave your child unattended, or with a babysitter (and how old the babysitter must be). The law offers itself as a guide to your conduct, but if you do turn to it for guidance, you will find less information than you might expect in the situation. It is not that the law is unintelligible: you can see quite clearly that leaving a newborn baby alone all day would count as neglect (and if you told a 5-year-old to babysit, it would still be neglect). Leaving a 15-year-old at home alone for a few hours

<sup>1</sup> I suppose that it is conceivable that such rules could give a precise effect to vague instruments, but it is hard to think of examples.

(or leaving an infant with a competent 17-year-old) is not neglect. But there will be cases in between, for which the text of the statute gives no determinate guidance.<sup>2</sup>

A voting age, by contrast, is precise: it determines, without borderline cases,<sup>3</sup> whether it is lawful<sup>4</sup> for you to vote.

### 3. Varieties of vagueness in legal instruments

Law-makers typically either avoid words like *child*, or give them stipulative, precise definitions like the definition in the Children and Young Persons Act. They define such terms, when they can, by reference to precise criteria, such as an age of majority. Speed limits and blood-alcohol limits are similar examples of the search for precision: if it is possible to measure speed, or blood-alcohol content, law-makers use speed limits and blood-alcohol limits rather than merely using vague rules such as the nineteenth century prohibition on driving a vehicle 'in a wanton or furious manner'.<sup>5</sup> But the search for precision is limited. Vague descriptive terms like *trade* are often used in tax statutes and other forms of regulation of classes of activity such as licensing regimes controlling hunting and fishing, or restricting activities in a park, or controlling uses of land. And a similar form of vagueness is unavoidable in the description of actions that constitute criminal offenses.<sup>6</sup>

Such forms of vagueness in descriptive terms are very important. However, the really extravagant (and very common) instances of vagueness in law are the general evaluative terms used to regulate diverse activities in a broad class. The requirements of reasonableness in various areas of tort law, contract law,

<sup>2</sup> Another complication of the legal effect of normative texts is that authoritative decisions as to the effect of the statute in disputed cases may well make the law precise where the text of the statute was vague, eg by holding that in some set of circumstances it was (or was not) neglectful to leave a 12-year-old at home. The effect of precedent itself is very commonly vague, in part for the same reasons that explain the linguistic vagueness of legal instruments. It is important to remember that vagueness is a feature of customary norms, and not only of norms formulated in language. But here I will focus on the linguistic vagueness of normative texts.

<sup>3</sup> Aside from generally inconsequential borderline cases arising from, eg (i) the uncertainties of proof arising from techniques for establishing a person's age, and (ii) any indeterminacies in the legal definition of a year, or a day, etc. Perhaps there are such indeterminacies in all normative texts, but I will not be concerned with them because they will often be trivial. The communicative indeterminacies arising from vagueness are typically very significant, as I will argue in section 3.

<sup>4</sup> At least, in respect of a person's maturity; there may of course be other rules determining the right to vote.

<sup>5</sup> UK Offences Against the Person Act 1861, s 35. The provision is still in force.

<sup>6</sup> For this reason, among others, legal systems necessarily include vague laws. It is necessary because no scheme of regulation that did not control such aspects of the life of a community would count as a legal system (Endicott (2001) at pp 377–83).

and administrative law are important examples of the very widespread use of extremely vague standards in legislation and the common law.

I hope it will be clear from this brief consideration of varieties of vague laws that vagueness in the sense of imprecision is not necessarily trivial. Indeed, law-makers generally avoid trivial vagueness; they never use trivially vague standards (such as 'about 18 years and 3 months old'). Legal instruments lack the hedging terms that we use in many contexts to give a fuzzy edge to assertions ('approximately', 'more or less', etc). Probably every legal system has what we might call hedging *techniques* that give a fuzzy edge to legal standards; one example is the variety of *de minimis* rules in common law systems, by which the law refuses to count trivial departures from some standards as breaches. Those are not interpretive techniques, but ways of controlling the effect of a text as described in section 2, above. But in the fashioning of legal instruments, precision is typically used when it is feasible, without any express hedging, and without any mention of such techniques.

Vagueness in legal instruments is generally far from trivial. When law-makers use vague language in framing standards, they typically use extravagantly vague language such as 'neglected' or 'abandoned' or 'reasonable'. The resulting vagueness in the law can generate serious and deep disputes over the principles of the standard in question. Because it may allow different, incompatible views as to the nature of the standard and the principles of its application (even among sincere and competent interpreters), it leads to the danger that its application will be incoherent. By that I mean that decisions made in purported application of the norm will not be intelligible as the application of a single norm—a standard that can regulate behaviour.

For these reasons, legal theorists sometimes deny that the law is vague at all when it uses such standards; they claim that the disputes are over *how to conceive* the standard, and are not affected by imprecision.<sup>7</sup> To see the mistake in that approach, consider more or less pure evaluative standards in law, such as a rule of tort damages that a successful plaintiff is to receive damages sufficient to make him or her as *well off* as if the tort had not been committed. Suppose that a successful plaintiff has suffered a moderately serious back injury. One dollar in compensation would not make him as well off as if the injury had not been caused (it would be an insult). A billion dollars would be excessive: it would exceed what is required to make the plaintiff as well off as if the injury had not happened. So how much does the legal standard require? It is quite true that disputes about the quantum of damages will be formulated

<sup>7</sup> The most striking proponent of this approach is Ronald Dworkin; he discusses 'concepts that admit of different conceptions' in *Taking Rights Seriously* (1977) at p 103, and denies that such concepts are vague in *ibid* at pp 135–6 and *Law's Empire* (1986) at p 17.

as competing conceptions of welfare. But the problem for understanding the law is not only that the appropriate principles of compensation in such cases are open to controversy, but also that there is no precise sum that the vague legal standard (on any conception) demands. And the two problems are linked. If one dollar is inadequate to do justice, adding another dollar will not (in any conception of welfare) meet the standard either. The result is the operation of the 'sorites' reasoning that fascinates philosophers of vagueness.<sup>8</sup> The vagueness of abstract evaluative terms such as 'neglect' and 'well off' is inextricable from their 'contestability'.

#### 4. The guidance value and the process value of precision

To understand the value of vagueness, it may help to start with something easier: the value of precision. It is important to see that a precise legal standard is *not* necessarily better than a vague one. But precision can undoubtedly be valuable in two related ways. First, is what I will call the '*guidance value*' of precision for persons subject to the rule: a precise standard may let people know their legal rights and obligations. Second, a variety of '*process values*' arise out of the fact that a precise standard can also guide officials.

The guidance value of precision can be more important than the process value of precision, or vice versa, depending on the context. The precision of an age of majority gives guidance both to potential voters and to election officials in the same way. A red traffic light (along with a white line painted on the road to mark the intersection), by contrast, gives valuable guidance to a driver (and gives considerable guidance to officials too—but officials are typically not in as good a position as the driver to assess the precise guidance it offers). A precise blood-alcohol level, on the other hand, is not very useful to a driver as a guide to his or her conduct. But the precision of the standard (as opposed, for example, to a vague rule against driving while intoxicated) has an important process value: a police officer with a breathalyzer can use the precise standard as a guide in deciding whether to restrain a driver and whether to prosecute. And the precision of the standard reduces potential litigation to trivial borderline issues (such as whether the breathalyzer reading is within a margin of error), or to collateral issues (such as fraud, or the reliability of the breathalyzer, or the compatibility of the rule with constitutional rights).

<sup>8</sup> And, incidentally, the sorites paradox, ie a 'proof' that no amount of compensation is adequate, and alternative proofs that no amount of compensation is inadequate—either of which would be absurd (Endicott (2000) at ch 5).

Both the guidance and the process values of precision are evident in the law concerning childcare. A parent deciding whether to hire a 13-year-old as a babysitter would be able to use a statute with an age limit to decide whether it is lawful to do so; under the Children and Young Persons Act, the parent needs to decide whether it would be 'neglect' (and may need to guess whether officials would count it as neglect). Officials considering prosecutions for neglect need to make similarly open-ended judgments that will lead to disputes and potentially to litigation—whereas a more precisely defined offense (eg an offense of leaving a child under 10 alone or in the care of a child under 14) would settle matters.

Note that many norms are addressed *to officials or institutions*. Procedural standards requiring that criminal proceedings be commenced within a reasonable time of a charge provide an example. Then the guidance value of precision in such a norm is the norm's value in guiding the official, and the process value is the norm's value in regulating a process (if there is one) for the control of the official's or the institution's action. And then a precise rule requiring, for example, that criminal proceedings be commenced within seven months of a charge, holds out a complex array of benefits at three levels: guidance benefit to the court in deciding when the proceedings may commence, a resulting guidance benefit both to prosecution and to defence in planning and preparation for the proceedings, and a process benefit to any reviewing court in deciding whether the criminal court complied with the law. All three benefits would be lacking in a vague rule that proceedings must commence 'within a reasonable time'.

Yet even in criminal procedure, law-makers very commonly make vague rules of just such a kind. If precision would offer the benefits we have seen, how can a vague standard be better than a precise standard? We may frame the general answer in terms of what I will call the 'normative principle', and the nature of arbitrariness in normative systems.

## 5. Arbitrariness and the normative principle

Arbitrariness is resistance to or absence of reason. There are as many varieties of arbitrariness as there are varieties of reason. By 'arbitrariness' in a norm, I mean that to some extent it lacks a reasoned justification, because it may be applied in a way that does not achieve the purpose of the norm. A norm is arbitrary in its application if its application is without a reason. The normative principle is opposed to arbitrariness. It is simply the principle that a norm is a reason for action: the point of a norm is to guide conduct for a purpose.

The reason for making the norm is to promote or to achieve the purpose; the norm itself is treated as a reason, or it is not treated as a norm at all. It is a consequence of this understanding of a norm that a normative text is a text formulated and communicated to express a reason for action. Normative texts have the general purpose (whatever other purposes they may have in particular instances) of guiding conduct.

To understand arbitrariness and normativity, it is important to see that a norm may be arbitrary in a variety of senses. Not all such senses are or even can be opposed to the normative principle. Consider the arbitrariness of linguistic rules. The rule that the word for tadpole in English is 'tadpole' is arbitrary (ie lacking in reason) in one sense, as linguists have often remarked: there *is no reason* a language ought to use those phonemes arranged in that order to refer to a tadpole ('renacuajo' or 'rumpetroll' would do as well). Yet at the same time, the rule and actions guided by it are *not* arbitrary in other senses. First, as with all norms of language, there is a good reason to have such norms for the use of words in such ways. That good reason is that it is actually necessary to do so to achieve the coordination that enables communication, self-expression, and all the other priceless benefits of having a language. Second, conduct guided by the norm is far from arbitrary because there is good reason for a particular speaker in a particular situation to go along with the customary norm for the sake of the same coordination that gives purpose to the rule itself. So in a sense it is arbitrary to call a tadpole a 'tadpole', and in another sense it is anything but arbitrary.

The 'arbitrariness' of linguistic rules, then, is no defect in them. But there are forms of arbitrariness that can be very defective features of rules. All badly crafted rules are arbitrary in one sense, because in one way or another they fail to pursue a purpose that justifies the imposition of a standard. Vague standards are not necessarily badly crafted. But they are arbitrary in the special sense that, in some cases, they give a decision-maker no reason for one decision rather than another. As a result, they leave scope to a decision-maker to apply them capriciously, in a way that diverges from their justification. For the same reason, they allow divergent decisions by different decision-makers, which means that part of the purpose of a standard (to achieve general regulation) is to some extent not achieved. It is important to remember in what follows that there are these (and other) various forms of arbitrariness, and that different forms of arbitrariness may be more important and more damaging in different circumstances.

The starting point for understanding the potential value of vague standards is to see that both vagueness *and* precision bring with them forms of arbitrariness.

## 6. The arbitrariness of precision

The Children and Young Persons Act could have specified a precise age below which a child may not be left unsupervised. But doing so would have incurred quite substantial forms of arbitrariness (for various reasons, and particularly because of the different capacities of children of the same age). A voting age is an example of a rule that incurs such a form of arbitrariness. Assume that the predominant purpose of a voting age is to ensure that people do not vote until they are mature enough to be competent to do so, and mature enough to be reasonably free from the danger of undue influence. Because some people reach the relevant forms of maturity earlier than others, the precise rule is bound to allow some people to vote before they are ready, or to prohibit some from voting after they are ready, or (much more likely) to do both. And the sharp dividing line between lawful and unlawful conduct means that the law will ascribe a very material difference (between having a vote and not having a vote) to an immaterial difference in age (some will be able to vote just because they are a day older than some who cannot vote). A trivial difference in age will make all the difference to the right to vote in a particular election.

So just because of its precision, the application of the standard is arbitrary in the sense that, to some extent, it runs contrary to its own rationale, and draws distinctions that are not justified by its rationale. However, relying upon a vague standard to achieve the same purpose, such as a rule allowing persons to vote when they are 'adult' or 'mature', would incur a different form of arbitrariness: such a standard would leave the question of whether a person may vote to the judgment of election officials (and perhaps to courts asked to resolve disputes), on grounds that are to some extent left to them, and not ruled by law. In the context of elections, of course, that discretion would bring with it a serious danger of abuse or corruption. Moreover, even if we could trust officials to make unbiased judgments of maturity, it is still much better for the law not to authorize the making of such judgments in controlling voting. While it would be quite appropriate for public officials to make judgments of maturity in hiring police officers, democracy requires an official indifference to the capacities of different voters, which means that it is better for public officials not to make such discriminations in controlling voting. The arbitrariness of the precise standard may itself have an important expressive function, signifying the community's refusal to draw invidious distinctions among persons.

So the use of a voting age, you might say, gives rise to far less arbitrariness than would the use of a vague entitlement to vote when mature. Legal control of voting is essential, but there is no precise way of allowing all and only the capable voters to vote.

But now consider the law on time limits for criminal process. There would be advantages in, say, a precise limit of seven months on commencement of proceedings. But here the arbitrariness of precision would be quite a serious defect because of the variations among types of prosecution. Seven months may be more than enough time (it may even be much too long) to allow for prosecution on a shoplifting charge. But it may be hopelessly too little time for the prosecution to prepare for a trial on charges of a major stock market fraud. And different precise time limits for different offenses would not eliminate the arbitrariness of precision, because a precise time limit would not recognize the important variations in the time that it is reasonable (because of the factual background) to spend preparing for trial on different instances of the same charge.

The challenge for law-makers is to determine whether, in a given scheme of regulation, the arbitrariness resulting from precision is worse than the arbitrariness resulting from the application of a vague standard. In some cases, such as the voting age situation, the answer is easy and the arbitrariness of vagueness would be a grave defect in the law. In others, such as the timing of criminal proceedings, the arbitrariness of precision may justify a vague standard.

To summarize the respective forms of arbitrariness that come with precision and with vagueness, consider the difference between the law of taxation and the law of spousal support after a breakdown in a relationship. Tax law generally uses precise rules requiring, for example, the payment of a precise proportion of income. That regime brings with it an important form of arbitrariness, because some people on a higher income are less easily able to carry the tax burden than some people on a lower income (who have a lower cost of living, or have more non-income resources). Assuming that the purpose of the tax is to share the burden of revenue in the community in a way that relates the burden to the ability of people to contribute, the arbitrariness of precision means that, to some extent, the tax cannot achieve its purpose. Tax codes often try to cope with that form of arbitrariness by detailed rules allowing deductions for persons with dependent children etc. Those techniques are quite justifiable, and in most current legal systems they are sophisticated. But while complex rules on deductions can reduce the arbitrariness of precision, they cannot eliminate it. Moreover, their complexity itself runs contrary to the normative principle, to some extent. That is, the complexity of the standards makes it difficult, to some extent, to use the standards as guides. It may necessitate paying a professional tax advisor, and in an extreme case it might become impracticable or quite impossible to use the tax code as a guide.

So why not use a vague tax: 'the taxpayer must pay a proportion of income that is reasonable in the light of the revenue needs of the government and the

taxpayer's circumstances'? Such a law would have what I will call the 'fidelity value' of vagueness: it would allow the officials applying the rule to act in a way that is faithful to the purpose of the law, by relating the burden of taxation to the individual conditions of individual taxpayers.

Such a law would, of course, be absurd and intolerable. First, tax assessment requires a huge bureaucracy as it is; one process value of precision is that it simplifies the assessment of tax. A vague tax would require a massive (and massively expensive) investment of official resources—which would run contrary to the revenue-raising purpose of the tax. Much more importantly, though, because of the way in which a vague tax would allocate decision-making power to the tax collectors (and to judges), it would leave taxpayers at the mercy of the officials. Taxation gives the best possible example of the value of precision in constraining the discretion of officials. The arbitrariness of precision is trifling compared to the arbitrariness that vague tax laws would subject us to.

Contrast the law of spousal support. A vague standard (such as that the wealthier spouse must pay a proportion of income that is reasonable in the light of the needs of the recipient spouse and the circumstances of the supporting spouse) would not be radically defective in the way that a similarly vague tax would be. The reason is partly that the danger of abuse by officials is less, and partly that justice between the spouses is consistent with a much more particular approach to their obligations.

## 7. Precision can be impossible

Precise standards are impossible when the law needs to regulate widely varying conduct with a general standard. The variety of ways in which children may be left more or less alone led to the vague standard of 'neglect' in the Children and Young Persons Act. While it would certainly be possible to set a minimum legal age for babysitters, it would not be possible to define precisely what it means to babysit. Does it include playing with the children while their dad is working upstairs? Or while he has gone to the shop on the corner, or is sleeping? The variety of ways in which a parent may be more or less in charge of the child and more or less absent make precise regulation impossible. And suppose that the parent is always uncontroversially present, but does not feed the child very well, or very frequently, or keep it very clean, or keeps it shut in its room or in a crib all the time, or much of the time. The daunting variety of things that a child needs from its parents corresponds to a wide variety of ways in which a parent may more or less neglect a child. The result is that no legal regulation can provide a precise guide to the

responsibilities and liabilities that the law imposes on parents. While the law could be made more precise (eg with age requirements for babysitters), there is no alternative to the vagueness of the terms 'neglected or abandoned' in the Children and Young Persons Act. For these reasons, the 'neglect' standard is similar to H.L.A. Hart's<sup>9</sup> prime example of what he called the 'open texture' of law: the standard of due care in negligence. The law uses a vague standard not merely because a precise alternative would involve greater arbitrariness, but because there *is no* precise alternative. No precise standard of care could generally prescribe the degree of care that is to be taken, both because of the variety of ways in which lack of care can cause risks to others, and because of the variety of interests that would be damaged by requiring excessive care.

Generally, we can say that precision is not even possible, let alone desirable, except in circumstances that allow a quantitative standard (such as, for example, a standard defining the thickness of a particular form of insulation required on a particular calibre of electrical wiring). In formulating building regulations, law-makers face an important set of decisions whether to impose detailed, precise standards, or broad, vague standards. In making or elaborating standards of negligence liability, precise standards are not even an option for law-makers because of the sheer, mind-boggling variety of ways in which people can create more or less unreasonable risks to other people.

In the childcare situation, it is very clear—in a sense—what a good legal regime needs to do: it cannot protect children from all harm, but it should aim to protect them from certain specially damaging harms that social welfare agencies and legal institutions are capable of identifying. The law must not interfere where the parents' methods are only eccentric; and even bad parenting is not in itself enough to justify interference—the law needs to interfere only with specially damaging harms. One reason is that the institutions of the law may not be effective at deciding what counts as bad parenting, and another is that interference will make things worse if it damages the relation between children and parents (there are probably other reasons too). I said that the criteria for a good legal regime are clear *in a sense*, because there is no precise way of setting precise standards that will meet the criteria for a good legal regime. So the purpose of the regulation itself requires vague standards.

The necessity of vague standards for general regulation of varied conduct explains why a decent scheme of regulation of parenting needs vague rules against neglect *as well as* precise rules determining the age at which a parent can no longer be held liable for neglecting a child. We could have a more or less complicated and detailed tax code or code of building regulations, but it

<sup>9</sup> Hart (1994) at p 132.



would not even be possible to create a code to list precise descriptions of ways of behaving toward children that are to be unlawful. So vagueness is sometimes necessary.

### 8. Vague standards delegate power in ways that may comport with the purpose of the law

The vagueness of the law of child neglect leaves wide discretion to social services officials to decide whether to take steps to protect a child. And the vagueness of the law also gives discretion to the courts, which have the final authority to decide any dispute between the officials and parents. It is not instantly apparent, in the law of child neglect, whether these allocations of power are good in themselves or are an unfortunate by-product of the need for vague standards.

A vague standard *may* be a useful way of imposing legal control without fully working out the rationale for the standard. Doing so allocates power to the decision-maker who has the responsibility to resolve disputes over the application of the standard. It may be worthwhile to do so for a variety of reasons, one of which is that common law judicial law-making may be a more effective way of developing just and convenient standards than legislation would be. So the Unfair Contract Terms Act 1977 used very vague standards ('reasonableness', defined as a requirement 'that it should be fair and reasonable... having regard to all the circumstances'<sup>10</sup>). The effect was to delegate to courts the power to determine the reasons for which limitation of liability clauses were to be permitted or not. Vagueness always has this power-allocation function, even when it is not the purpose for which a vague standard was adopted. So the allocation of power should itself be principled. The allocation of power by the vague standards in the Unfair Contract Terms Act is justifiable because of (i) the special expertise of the judges in developing norms of contract law; (ii) the common law doctrine of precedent, which gives them the capacity both to do so incrementally and to revise general rules that turn out to be damaging in particular unforeseen cases; and (iii) the process of the courts that allows the decision-maker to hear argument on behalf of both sides to a dispute. In developing the law of childcare, by contrast, those features of the courts are not so valuable. And there would be no justification at all for allocating power to courts to determine how old a person must be to vote.

<sup>10</sup> Section 11(3) and the 'Guidelines' in Sch 2.

Ironically, the potentially valuable power-delegation function of vagueness is a negative correlative to the process value of precision. That is, the process value of precision consists in *reducing* decision-makers' discretion, and yet there may be circumstances, as argued above, in which it is valuable to leave just such a discretion to decision-makers.

### 9. Vague standards can encourage desirable forms of private ordering that achieve the law's purposes

There is also a negative correlative to the *guidance* value of precision. It may be valuable (for a variety of reasons) to leave the persons affected by a rule uncertain as to its application. The Unfair Contract Terms Act reflects this aspect of the value of vagueness, too. Its vague standards not only delegate power to courts; they also affect a service provider who wants to protect himself from liability, by leaving him uncertain as to how far he can do so. The old law gave the service provider an incentive to construct the most complete exclusion of liability that he could persuade the customer to sign up to. The effect of the new, vague rule against unreasonable clauses is that the service provider has an incentive to seek creative alternatives to excluding liability (eg by advertising that he accepts liability and taking out insurance), or to find ways of making reasonable exclusions of liability that could not have occurred to the drafters of legislation. The uncertainty that arises from the vagueness of negligence law also gives private parties an incentive to avoid the creation of risks, or to contract out of liabilities in a way that will allocate the cost of the risk to the least-cost avoider of the risk.

Precise standards, by contrast, may chill that sort of creativity. A precise standard makes it possible to avoid liability by doing just exactly what is required and no more. If the private parties subject to the duty are in a better position than the law-maker to devise ways of avoiding harm to the persons to whom the duty of care is owed, a vague standard is to that extent preferable. In the law of childcare, there may be just such a benefit in the *lack* of a precise minimum age for babysitters (or a precise minimum age at which a child may be left alone without a babysitter). Within broad limits, the state has *not* claimed to set a norm for parents. To refrain from setting a precise norm in that way is to assign the responsibility for determining the capacity of a babysitter (or the capacity of children to look after themselves) to parents. A precise norm would to some extent take the responsibility away from the persons who ought to have it. Such an allocation of responsibility can itself promote the purposes for which the norm is made.



## 10. Summary

To understand the value of vagueness, we need to remember that both vagueness and precision *always* bring forms of arbitrariness with them: precision does so because it makes the application of the rule turn on a measure that cannot be perfectly commensurate with the purpose of the rule, and vagueness does so because it leaves the application of the standard to persons or institutions that may act capriciously. The guidance value and the process value of precision need to be reconciled with the arbitrariness of precision.

What is more, precision is very commonly simply impossible. And then, vagueness is valuable as a technique for achieving the general regulation of a widely varying range of conduct. Finally, even though it is true that vague standards allocate power to persons who may act capriciously, that allocation of power may suit the purposes of the law very well, when the persons to whom power is allocated are in a better position than the legislator to articulate and determine the standard (as long as they can be trusted not to be corrupt). And just as the process value of precision may be negligible beside the value of such an allocation of power, the guidance value of precision may be negligible beside the value of leaving private parties to order their relations in a way that obviates the mischief at which the law was aimed.

The arbitrariness of vagueness is that it leaves power to officials who may apply a standard capriciously, or to private persons who may use it for purposes contrary to the purpose of the standard. The corresponding *value* of vagueness is that it allows officials to apply a standard in a way that corresponds to its purpose, without the arbitrariness of precision. It also enables the regulation of activities that simply cannot be regulated with precision, and it can be a useful technique for allocating decision-making power and encouraging forms of private ordering that promote the purposes of the law.

We can sum up these values in the following table:

**Table 1.** Values of precision and vagueness

In relation to:	Precision has:	Vagueness has:
Persons subject to the rule	Guidance value	Private ordering value
Officials applying the rule	Process value	Power allocation value
Purposes of the rule	Constraint value	Fidelity value

## 11. Conclusion

If you agree with the claims I have made, you may think that it simply means that vagueness is not always a bad thing, and that it may happen to be useful. These are mere contingencies, and do not tell us anything about the nature of normative texts (except, of course, that they show that it is not a general truth about normative texts that they ought to be precise). But I think that the value of vagueness is a general principle of what Jeremy Bentham<sup>11</sup> called 'the science of legislation'—a general principle, that is, of the understanding of how to craft normative texts. The conclusion is that the use of vagueness in normative texts is a technique of central importance. While it always brings with it a form of arbitrariness that precision could avoid, that form of arbitrariness is often insubstantial. The value of vagueness means that law-makers need it for their purposes.

It would be absurd to make a general aim of formulating legal instruments without vagueness. That is not because it would be aiming too high (seeking a form of perfection that can never quite be reached). It would be aiming at something quite contrary to the project of framing norms to guide persons. That project requires constant attention to the 'compromise between being determinate and being all-inclusive'.

The rule of law *requires* vague regulation in every legal system. The rule of law stands against arbitrary government and against anarchy, and vague rules are essential techniques to oppose both arbitrary government and anarchy. A general refusal to use vague rules would lead to anarchy (by making it impossible to regulate, for example, the use of violence against persons). That is because some forms of regulation cannot be performed at all by the use of precise rules. And even where precision is possible, it can lead to arbitrary government (as it would in a community that used precise rules for the law of spousal support).

What can we say about normative texts in general? Every institution involving the use of normative texts has values analogous to the rule of law. When your mother writes a note to you on the fridge, those analogous values have some of the same import that they have in a legal system. A household may lack many of the techniques for government by rules that a state has—an obvious example is that your mother does not owe you a hearing before an independent tribunal if she suspects you of breaking her hairdryer. But it shares many of the most basic tenets of the rule of law (for example, the value of your mother listening to what you have to say before she jumps to

<sup>11</sup> Bentham (1843).

conclusions). Of course, that value may be flouted or ignored to some extent in your household, as it may be in your legal system. Then the normative principle (in your household or in your legal system) is not fully adhered to: the norms are not treated as guides to conduct. If you have rules at all in your household, and if your state has a legal system at all, then your household and your state share the value to be found in the making of norms capable of being followed, the faithful application of the norms according to their tenor, and the consequent upholding of expectations based on the norms. And to pursue all those purposes, vagueness is essential. It is not essential in every norm, because precise rules ('be home by 11 pm', 'speed limit 70') are often the best technique for regulation. But vagueness is an essential part of the science of the legislator, because the project of regulating the life of the community (in your household or your state) demands vague rules in some circumstances.

The normative principle (the principle that the point of a norm is to guide conduct for a purpose) underlies the rule of law, and analogous values in other normative systems and, in fact, in the use of normative texts in general, in quite unsystematic contexts. The principle is opposed to arbitrariness in norms, and arbitrariness arises both from precision and from vagueness in normative texts. So to stand against arbitrariness and in favor of principled, rule-governed conduct, the framers of norms must not generally avoid vagueness. They must be prepared to assess competing forms of arbitrariness, and to judge whether the forms of arbitrariness resulting from a vague norm are more or less damaging than the forms of arbitrariness that result from a precise norm. It is not a general proposition that normative texts should be vague; but the control of human conduct by rules tends to require vague regulation because of the arbitrariness of precision and the simple necessity of vagueness as an instrument for regulating so many forms of human conduct.

## 3

## What Vagueness and Inconsistency Tell Us About Interpretation

*Scott Soames*

### 1. Two kinds of vagueness

When signing up for insurance benefits at my job, I was asked, "Do you have children, and if so are they young enough to be included on your policy?" I replied that I had two children, both of whom were over 21. The benefits officer responded, "That's too vague. In some circumstances children of covered employees are eligible for benefits up to their 26th birthday. I need their ages to determine whether they can be included on your policy." She was right; my remark was too vague. The information it provided was insufficiently specific to advance our common conversational purpose.

However, it was not vague, or at any rate not too vague, in the sense in which philosophical logicians and philosophers of language study vagueness. Vague predicates—like 'old', 'bald', 'rich', and 'red'—are those for which there are "borderline cases" separating things to which the predicate clearly applies from those to which it clearly does not. When *o* is a borderline case for a predicate *P*, there is, in some sense, "no saying" whether or not the proposition expressed by 'he or she/it is *P*' (said demonstrating *o*) is true. According to some theories of vagueness, the proposition is undefined for truth, or untruth, and so cannot correctly be characterized either way. According to others, it is true or false—even though it is impossible, in principle, to know which. On still other theories, it is only partially true (or true to some degree). For present purposes we need not worry about which of these theories is correct, or which is most illuminating in discussions of the law. The present point is simpler. The problem with my remark to the benefits officer—the sense in which it was too vague—is not a matter of its susceptibility to borderline cases.

What I stated, on 10 December 2009, was that my two children were then both over 21 years old. That statement is true if and only if both were