Has Vagueness Really No Function in Law?

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When the United States Supreme Court used the expression "with all deliberate speed" in the case *Brown v. Board of Education*, it did so presumably because of its vagueness. Many jurists, economists, linguists, and philosophers accordingly assume that vagueness can be strategically used to one's advantage. Roy Sorensen has cast doubt on this assumption by strictly differentiating between vagueness and generality. Indeed, most arguments for the value of vagueness go through only when vagueness is confused with generality. Sorensen claims that vagueness – correctly understood – has no function in law *inter alia* because judges lie systematically when confronted with borderline cases. I argue that both claims are wrong. First, judges do not need to resort to lying when adjudicating borderline cases, and even if they had to, this would not render vagueness useless. Secondly, vagueness has several important functions in law such as the reduction of decision costs and the delegation of power. Although many functions commonly attributed to the vagueness of legal expressions are in fact due to their generality or other semantic properties, vagueness has at least these two functions in law.

1. What Is the Problem?

It is widely believed that vagueness plays an important role in law. Many jurists, economists, linguists, and philosophers claim that vagueness can be strategically used to one's advantage. So called strategic vagueness has been studied generally in communication (cf. Franke 2011 and de Jaegher 2011), but also specifically in contracts, verdicts and statutes (cf. Staton 2008 and Choi 2011).

However, it seems that in most (or even all) cases the utility of vague expressions is due to generality rather than vagueness. Roy Sorensen holds that no advantage whatsoever can be gained by using vague expressions due to their vagueness (cf. Sorensen 2001). Indeed, many arguments for the use of vagueness are convincing only if vagueness is (mis-)understood as generality. Thus, if one wants to show that vagueness – correctly understood – has a function, one has to make sure that the effects commonly attributed to vagueness are not in fact due to something else.

The primary aim of this paper is to show that there are cases in which we cannot attribute the intended positive effects of vague expressions to anything else than their vagueness. Also – as a secondary aim – I will argue that judges are not forced to lie because of vagueness.

2. What Is Vagueness?

Vagueness is usually characterized by three criteria (cf. Keefe 2000):

(C1) Borderline Cases

(C2) Fuzzy Boundaries

(C3) Sorites Susceptibility

For this paper's purposes, however, we will bracket out criteria (C2) und (C3) and focus on criterion (C1), since only allowing for borderline cases is universally accepted as a necessary

condition for an expression being vague. For instance, Paul Grice influentially defined "vagueness" by way of reference to uncertainty in borderline cases:

> To say that an expression is vague [is] to say that there are cases (actual and possible) in which one just does not know whether to apply the expression or to withhold it, and one's not knowing is not due to ignorance of the facts. (Grice 1989: 177)

Thus, we can say that an expression is vague if it admits borderline cases, where borderline cases are cases in which the expression neither clearly applies nor clearly does not apply. The most common examples of vague expressions given in philosophical contexts are "heap," "bald," "red," and in more legal contexts "vehicle" and "reasonable." An expression which is not vague is precise.

So far, everything said about vagueness is fairly uncontroversial. However, several theories of vagueness have been proposed none of which gained any reasonably wide acceptance in the philosophical community to count as the mainstream view. One theory of vagueness though managed to gain exceptionally little acceptance – this is the epistemic theory of vagueness defended by Roy Sorensen, which claims that vagueness is ignorance and that all borderline x of F are in fact either F or ¬F, but we cannot know. My objections against Sorensen's arguments are independent of any particular theory of vagueness, but his arguments can only properly be understood against the background of his epistemicism.

In contrast to vagueness, we can define generality by saying that an expression is general if it can be applied to a wide variety of cases, where the precise scope of "wide" is relative to some context or purpose. For instance, one could say that the expression "person" is general because it covers children, biology students, retirees, pianists, millionaires and every Tom, Dick and Harry. The opposite of generality is specificity.

In a nutshell, then, one can say that while vagueness is an expression's property of allowing for borderline cases, generality is an expression's property of applying to a wide variety of cases. Consequently, the properties of vagueness and generality are logically independent, that is to say that there are general and precise expressions as well as specific and vague ones. However, most ordinary language expressions are both vague and general, which presumably is one reason why people tend to confuse vagueness and generality so frequently and persistently.

3. What Are Borderline Cases?

We said that borderline cases are cases in which a vague expression neither clearly applies nor clearly does not apply. Now, we can distinguish between two kinds of borderline cases. Philosophers are usually interested only in the *possibility* of borderline cases. If some case is conceivable in which the expression in question neither clearly applies nor clearly does not apply, then the expression is vague.

In law, however, we generally want to minimise the occurrence of *actual* borderline cases. It is notable that only then it is meaningful at all to talk about more or less vague expressions. All vague expressions arguably admit indefinitely many possible borderline cases,[1] but they evidently differ considerably with respect to the number of actual borderline cases – real cases which in fact (in the actual world) are unclear. So, an expression can be more or less vague with respect to the number of actual borderline cases it generates, but not with respect to the number of possible borderline cases.

[1] Potential exceptions are expressions like "small natural number," which allow only a limited number of possible borderline cases.

Accordingly, we can distinguish between to kinds of vagueness:[2]

> An expression is **intensionally vague** if it possibly admits borderline cases.
>
> An expression is **extensionally vague** if it actually admits borderline cases.

There is a second very important distinction. According to Sorensen, some borderline cases depend on our epistemological access and can be resolved. These are relative borderline cases. Absolute borderline cases, in contrast, cannot be resolved and give rise to vagueness.

A judge can, for instance, sort all the documents, which are clearly relevant, on one pile, all the documents, which are clearly not relevant, on a second pile, and then leaving a pile of documents with all the unclear cases in the middle. First, she might continue to find one or another relative borderline case in the middle, which can eventually be decided. However, those cases that will remain in the middle after exhausting all epistemological means of the judge are absolute borderline cases.

Relative and absolute borderline cases can be defined as follows:

> **Absolute Borderline Cases**
>
> An individual x is an absolute borderline F iff given any means of answering "Is x an F?" x is borderline.
>
> **Relative Borderline Cases**
>
> An individual x is a relative borderline F iff x is borderline, but can be identified either as F or as not F given some answering resource.

This distinction is crucial for Sorensen, since he maintains that in law relative borderline cases have a function, while absolute borderline cases do not. He has the view that vague expressions can be useful because they – despite their vagueness – allow for (relative borderline) cases that are initially unclear, but can later be resolved in one way only.

In any case, based on Sorensen's distinction, we have to adjust our definition of vagueness such that an expression is vague if it possibly admits *absolute* borderline cases.

3. Do Judges Necessarily Lie?

Sorensen not only claims that absolute borderline cases are never useful, they also force judges to make groundless decisions and eventually to lie:

> Judges cannot discover the correct answer to a question about an absolute borderline case because no one can. […] The judge is not permitted just to confess his ignorance; the judge is obliged to answer. Therefore, he is obliged to answer insincerely. (Sorensen 2001: 400)

According to Sorensen, judges are lying when asserting verdicts on absolute borderline cases, since they cannot be justified in believing the truth of their assertions. Judges must decide cases that are brought before them, some of which are absolute borderline cases. Hence, judges must decide absolute borderline cases, which are by definition *undecidable*.

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[2] This distinction is due to Kit Fine, who based it on Rudolf Carnap's differentiation between an expression's extension and its intension: "A predicate *F* is extensionally vague if it has borderline cases, intensionally vague if it could have borderline cases." (Fine 1975: 266) Consequently, extensionally vague expressions allow cases that neither clearly belong to their extension nor clearly do not. Intensionally vague expressions, on the other hand, allow cases that neither clearly belong to their intension nor clearly do not.

I will now give a semi-formal reconstruction of his argument consisting of two parts. The first part establishes that necessarily judges cannot know statements about absolute borderline cases:

(P1) x is an absolute borderline F.

(P2) Nobody can know F(x) if x is an absolute borderline F.

(K1) Thus, judge J cannot know that F(x). (from (P1)-(P2))

This seems to be rather unproblematic. Nobody can know whether a statement about an absolute borderline case is true or false, not even a highly qualified judge. This is also plausible if one does not submit to Sorensen's background assumption that vagueness is ignorance, that is, to his epistemicism.

The second more problematic part of the argument seeks to establish that judges are necessarily insincere in absolute borderline cases:

(P3) Judge J's verdict is an assertion that F(x).

(P4) Judge J does not believe that F(x). (from (K1))

(P5) Judge J has the intention that some X ≠ J shall be led to believe that F(x).

(P6) Some Y lies with respect to F(x) if Y asserts that F(x), while not believing that F(x), with the intention that some X ≠ Y shall be led to believe that F(x).

(K2) Thus, judge J lies with respect to F(x). (from (P3)-(P6))

If we accept premises (P3) to (P6), we have to accept Sorensen's claim that judges necessarily lie when adjudicating absolute borderline cases. Thus, if we don't accept the conclusion, we have to dismiss one of the premises. Are all premises (P3) to (P6) plausible?

One might argue that premise (P4) is not entailed by conclusion (K1), since one can believe something without being able to know it. However, a judge who finds out that she cannot know the verdict should not believe it. So, premise (P4) is entailed by conclusion (K1) if it is assumed that the judge has a relative high standard of belief justification with respect to her verdict. It is not necessary to assume that the judge needs to actually know that she cannot know the verdict. The judge must only try hard enough and fail, in order to establish that she is not justified to believe it. Hence, the judge would not believe something she has grounds to think she does not know:

(K1) Judge J cannot know that F(x).

(S1) Judge J does not know that F(x).

(S2) Judge J is not justified to believe that F(x).

(P4) Judge J does not believe that F(x).

Thus, we should accept premise (P4) because judges have a particular high standard of belief justification. Of course, there are actual judges who neglect this standard; probably a lot of judges believe all sorts of things. But, one can hardly say that they do it systematically.

Maybe, then, the definition of lying which Sorensen uses is inadequate. In this case, premise (P6) should be rejected because having the intention to make someone else believe something one doesn't know is not sufficient for lying. Perhaps lying necessarily involves intentional deception. However, the argument can be restated with different premises (P5*) and (P6*) just as well such that:

(P5*) Judge J has the intention to deceive some X ≠ J such that X shall believe that F(x).

(P6*) Some Y lies with respect to F(x) if Y asserts that F(x), while not believing that F(x), with the intention to deceive some X ≠ Y such that X shall believe that F(x).

Then (K2) would still be entailed by the premises and the judge's verdict would count as lying. Yet a different definition of lying has been proposed by Jason Glenn:

> [W]hen one lies one deliberately states a negation of what they know (or think they know) to be the case. (Glenn 2007)

So understood, conclusion (K2) cannot be derived because in an absolute borderline case the judge does not come to knowledge at all. Consequently, she does not state its negation. However, this change in definition seems to suggest that some kind of insincerity on the part of the judge remains, and Glenn concedes that judges *bullshit* when adjudicating absolute borderline cases.[3]

This is a possible objection to Sorensen's argument. On one hand, though, this definition of lying is rather restrictive, ruling out cases in which one is asserting something one has good reason not to believe in order to deceive somebody else. Even if one might normally call this lying, the distinction to bullshitting is a useful one and perhaps one should change how one uses the expression "lying." On the other hand, we then would have to agree that judges systematically bullshit in absolute borderline cases which is only slightly more plausible than having them lying.

Luckily, there is an alternative; namely, one can reject premise (P3) and argue that judicial verdicts are not mere assertions of facts of the matter. They are surely speech acts asserting what the law in a particular case is, but they are also (equally surely) speech acts ascribing legal character to the facts found, declaring the institutional fact of guilt, and (in hard cases) creating new law (cf. Bernal 2007). Thus, verdicts are not true or false in the same way as descriptions or claims about the world are.[4]

In hard cases judicial verdicts are often both assertions of what the law is and advancements to existing law. Even though judge-made law is a controversial phenomenon (especially in Germany), judges are frequently quasi-lawmakers and their verdicts are not directly subject to truth or falsity. What the German Federal Constitutional Court or the United States Supreme Court decides is not only final in the sense that it cannot be appealed to, but also generally binding for future cases.

But also in clear cases, a judge's ruling is not just a literal application of the law. It is argumentation *inter alia* about which aspects of an expression's meaning are relevant in a particular case.[5] But this is neither fixed by semantics nor pragmatics. Judges can justify their decisions by bringing in linguistic and extra-linguistic as well as legal and extra-legal arguments. Vague legal expressions are highly multi-dimensional and it is not determinate which dimension prevails in a particular context.[6] Taking into account possible intentions of

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[3] Glenn follows Harry Frankfurt in his definition of "bullshitting:" "When one is bullshitting, the only thing that one deceives another about is one's attitude towards the mode of presentation of one's claims about a certain subject matter, and not the subject matter itself." (Glenn 2007; cf. Frankfurt 2005)

[4] This does not mean that verdicts are a kind of assertion without truth-value – as for instance Woozley suggested (cf. Woozley 1979: 30).

[5] Of course, legal expressions can attain quite different meanings than the ones of their everyday counterparts (cf. Poscher 2009). A precise threshold for legal age can be introduced to reduce absolute borderline cases. Because this is stipulated by the lawmaker, it might get in conflict with our vague everyday concept of maturity. Consequently, natural language and legal expressions often diverge in meaning.

[6] For instance, the expression "heap" is often considered to be one-dimensional; its application depends on the number of grains. But actually it is at least two-dimensional, as it depends also on their arrangement. Most legal expressions have indeterminately many dimensions.

the lawmaker or the purpose of the law can enable judges to honestly believe their verdicts to be justified, even when facing absolute borderline cases.

When adjudicating both clear and hard cases, judges usually give all relevant reasons of why a particular decision was reached. Insofar as there is any systematic deception when absolute borderline cases are concerned, a judge might try to implicate that her and only her decision was required by the law (cf. Bix 2003: 105). Hence, judges might decide absolute borderline cases relying on reasons which they actually believe to be conclusive, but objectively are not.

Based on similar considerations, Scott Altman argues that judges should be candid but not introspective:

> By candid, I mean never being consciously duplicitous. Candid opinions do not offer reasons judges know do not persuade them. By introspective, I mean critically examining one's mental states to avoid any self-deception or error. (cf. Altman 1990: 297)

Thus, judges can honestly and sincerely decide absolute borderline cases, even if the law does not require any particular verdict because of its vagueness. The vagueness of the law does not force judges to abandon candor, but it might require a certain abstinence of introspection.

In conclusion, Sorensen's argument for judicial insincerity is unsound because premise (P3) neglects the pragmatic, legal, and argumentative aspects of the judge's speech act when adjudicating a (borderline) case.[7]

4. Has Vagueness Really No Function in Law?

Sorensen's main argument against a positive function of vagueness in law can be reconstructed in this very straightforward way:

(P1) Vagueness is ignorance.

(P2) Ignorance has no (relevant) function in law.

(K1) Thus, vagueness has no (relevant) function in law.

Premise **(P1)** is, given the huge community of non-epistemicists, (at least) highly controversial. The vast majority of vagueness theorists is convinced that vagueness is (some kind of) semantic phenomenon. However, vague expressions create uncertainty on whether to apply them in borderline cases, and the view that there is a single right answer to every legal question is not as controversial as ordinary language epistemicism is (cf. Dworkin 1978).

Premise **(P2)** seems to be somewhat problematic as well. Job applications are often anonymously submitted because of unconscious bias. It usually allows for better judgement of the job applicant's abilities not knowing his or her name, age, gender, appearance or place of birth. The judge's judgement of the accused can be similarly biased. Thus, ignorance can facilitate fairer and less biased judgements. However, this kind of ignorance is strikingly different from the kind of irremediable ignorance Sorensen associates with vagueness, since in the former case it is ignorance of certain seemingly relevant, but effectively irrelevant facts that are unknown. Hence, vagueness related ignorance can hardly be said to play any relevant role in these kinds of circumstances.

Based on these considerations, should we accept Sorensen's conclusion that vagueness has no relevant function in law? Can we refute his claim only by proving epistemicism wrong? In

[7] If premise (P3) is rejected, premise (P4) cannot be defended either. Even though judges should have high standards of belief, if verdicts are not simple assertions, they can gather convincing reasons for a particular one such that they come to justifiably believe it to be determined by the law, while in fact it is not. Thus, one could after all dismiss step (S2) of the argument from (K1) to (P4).

fact, I think that one can reject Sorensen's conclusion without committing oneself to any particular view of vagueness. The reason is that not even an epistemicist should accept premise **(P1)** as it is put forward in the argument. Generally the term "ignorance" implies that there is something to know that one is ignorant of. But even if there is a fact of the matter in absolute borderline cases (as epistemicists claim), nobody could possibly know it – according to Sorensen, not even God. Hence, vagueness is not simply ignorance, and premise **(P1)** must be rejected.

I will now positively argue that vagueness has a (relevant) function in law by focusing on an example which Sorensen himself used in his argumentation and Jamie Tappenden originally introduced to the philosophical debate for an argument against epistemicism (cf. Tappenden 1994). If my argument is successful, the contrary conclusion that vagueness has a (relevant) function in law together with premise **(P2)** entails that vagueness is not ignorance. First, however, I will point out what functions of vagueness I have in mind.

Sorensen's argument against the value of vagueness in law focuses primarily on the role of the judge, while neglecting the role of the legislator. The creation of absolute borderline cases can effectively be used by the legislator to reduce decision costs and save time for more important issues (cf. Poscher 2012). The use of vague expressions in law seems to allow some questions to remain open, while giving general guidance. In absolute borderline cases judges and authorities have the requisite discretion to decide either way – precisely because there is nothing to be found or to be known. Lawmakers delegate power to judges and authorities who are often confronted with situations they had no time to consider or simply did not foresee. Even if this brings potential arbitrariness on behalf of the judge when exercising discretion and deciding hard cases, it reduces arbitrariness on behalf of the lawmakers when setting unjustifiable precise thresholds (cf. Endicott 2005).

Vague expressions evidently possess the functions pointed out above. However, it could be the case – as Sorensen pointed out – that these functions are due to other (coincident) properties of vague expressions than their vagueness. Consequently, I will argue now that neither relative borderline cases nor generality could possibly achieve these functions and, hence, it must be absolute borderline cases, i.e. vagueness proper, that provide for them.[8]

Sorensen claims that the "relative borderline cases are doing the work and the absolute borderline cases are epiphenomenal" (Sorensen 2001: 397). The case *Brown v. Board of Education* 349 U.S. 294 (1955), which Sorensen cites to support his claim, was the follow-up of the United States Supreme Court case *Brown v. Board of Education* 347 U.S. 483 (1954), in which the Supreme Court declared state laws unconstitutional that established separate public schools for black and white students.

When the Supreme Court ruled the second *Brown* case in 1955, it could not know how long and difficult the desegregation process would be, so it did not want to decide immediately. That is why it used the infamous expression "with all deliberate speed." Sorensen takes the Court's decision as evidence for the deliberate use of relative borderline cases in the task of power delegation. Future courts are confronted with cases one by one and can gather much more information about each of them than the Supreme Court could generally. Future courts can then easily sort the clear cases and the relative borderline ones and decide them individually, while the absolute borderline cases would be an unavoidable and unwanted by-product. Since what use would it be to facilitate absolute borderline cases in which there is a fact of the matter but no one can ever find out about it?

[8] Of course, there are other potentially functional properties of vague expressions than being general, having relative borderline cases and having absolute borderline cases. However, so far in the philosophical discussion only generality and relative borderline cases have been suggested as functional properties which might be confused with vagueness.

This is where I think Sorensen's epistemicism leads him and us (if we believe him so far) astray. When the Supreme Court decided that schools must be integrated with all deliberate speed, it really could not anticipate how long it would take even progressive schools under the best possible circumstances. For this reason, it used a general and vague expression, deciding on an indeterminate and longish time period. As Sorensen admits, "the Supreme Court coped with borderline cases of 'all deliberate speed' by waiting them out" (Sorensen 2001: 396). While the expression's generality provided wide applicability, its vagueness gave a margin of discretion to schools. This discretion cannot be given by relative borderline cases. Theoretically, the Court could have ascertained all relative borderline cases in advance. Thus, assuming that there were no absolute borderline cases, all subsequent cases would have had only one correct way to decide them and the Court would have known it beforehand. But this is not what the Court had in mind; it wanted to provide some flexibility to account for unforeseen cases, varying circumstances and political hindrances. As Chief Justice Earl Warren expressed it:

> There were so many blocks preventing an immediate solution [...] that the best we could look for would be a progression of action; and to keep it going, in a proper manner, we adopted that phrase, *all deliberate speed*. (Scheiber 2007: 17)

In contrast to generality and relative borderline cases, absolute borderline cases leave some questions actually open. If the ruling would have made use of generality or relative borderline cases alone, the more regressive and conservative schools might have been let to integrate with the objectively slowest allowed speed, which was certainly not what the court wanted to achieve – only absolute borderline cases can account for unforeseen cases and varying circumstances because only they effectively delegate power.

Sorensen's argument can also be presented in a different way. Hrafn Asgeirsson interprets it as claiming that the delegation of power is valuable only if the delegates are in a better position to resolve a borderline case than the delegator (Asgeirsson 2012). But in absolute borderline cases no one is by definition in *any* position to resolve them. Consequently, the delegation of power by way of absolute borderline cases is not valuable.

Asgeirsson rejects Sorensen's claim, however, by arguing that the delegation of power is valuable even if the delegates are not in a better position to resolve a borderline case than the delegator. He agrees with Sorensen that absolute borderline cases prompt judicial discretion and that this discretion is due to an implicit or explicit change in question. In an absolute borderline case one asks not whether some x is F, but whether some x should count as F.

Asgeirsson, then, goes on to argue that this question changing discretion prompted by absolute borderline cases is valuable by pointing out that "being in a better position" does not need to be understood solely epistemically; that the delegator is in a better position to resolve a case than the delegates does not necessarily mean that she has better knowledge than them. Instead, one should understand "being in a better position" as having better tools to find the answer or having lower decision costs. Then it becomes evident that a judge deciding an actual (absolute borderline) case has in fact usually better resources and more information about the particular case than the lawmaker. Hence, it can be sensible for the lawmaker to enact a vague law that reduces her own decision costs and gives discretion to the judges who can decide actual (absolute borderline) cases more individually and less costly.

From this argument it becomes obvious that both Sorensen's argument for the necessary insincerity of judges and the one against the function of vagueness in law share the same misleading conception of what verdicts are. In both cases, it is assumed that verdicts are mere assertions of what the law is, while for every case there is a (legal) fact of the matter. Only then it makes sense to talk about judges not being in a better (epistemic) position to decide the case than the lawmaker. Once we have done away with this conception and accepted that

verdicts in absolute borderline cases are real decisions because there is no question to be answered, we will see that vagueness has a function in law.

But even if one is not convinced by my view of what verdicts are and sides with Sorensen on this point, it should have become clear that the United States Supreme Court intentionally chose the vague phrase "with all deliberate speed" *inter alia* to allow judges to decide particular cases at their discretion, and the intentional use of this phrase cannot be explained by any other phenomenon than its vagueness.

5. What Is the Lesson?

In summary, judges do not need to resort to lying when ruling absolute borderline cases because the speech act of delivering a judgement is not a mere assertion and is, thus, not directly subject to truth and falsity.

One can argue that judges invoke Dworkinian principles when adjudicating absolute borderline cases, and there is a single right answer, though it is not determined by the relevant laws alone (cf. Dworkin 1978). The vagueness of legal expressions demands then the application of Dworkinian principles, which provide flexibility inasmuch as they presumably change over time, but not by giving judicial discretion. One can also argue, along Hartian lines, that there are various right answers in an absolute borderline case, even though none is the single true one (cf. Hart 1961). In this case, judges have real discretion, since they can use legal and extra-legal principles, welfare considerations, moral and ethical beliefs, and many other reasons. Both positions are compatible with the arguments for the value of vagueness presented in this paper, although a Dworkinian framework would require some adjustments.

The arguments I have made are also compatible with Sorensen's epistemicism as well as with any other theory of vagueness. Independently of one's own approach to vagueness it should have become evident that vagueness has a relevant function in law because it can be (and actually is) used by lawmakers in order to reduce decision costs and to delegate power by giving discretion. This deliberate use of vague language can neither be explained by reference to the generality of the language nor to its allowing merely relative borderline cases.

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