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THE RELEVANCE OF PHILOSOPHICAL THEORIES OF VAGUENESS TO LEGAL INTERPRETATION

I argue for the following Irrelevance Thesis: it is irrelevant to legal interpretation which specific philosophical theory of vagueness is to be preferred. In order to establish this thesis, I give a survey over the most prominent theories of vagueness, analyse the role that vagueness plays in legal interpretation, and point out why this role is independent from whatever theory of vagueness is actually correct. I also discuss recent accounts from Scott Soames and Stephen Schiffer, who both claim to deduce norms for legal interpretation from specific accounts on vagueness.
Keywords: vagueness, legal interpretation, sorites paradox, Scott Soames, Stephen Schiffer.

1

Legal interpretation is the indispensable art of extracting from legal texts directions to decide legal cases. It is an art because legal texts, like many others, are usually not perfectly precise; it is indispensable because deciding legal cases without reasonable recourse to some common statute would almost inevitably lead to a violation of the old legal principle to treat like cases alike.

One source of imprecision in legal texts is the linguistic phenomenon that philosophers call *vagueness*. Roughly, vague expressions are those that admit of borderline cases. The expression 'river', for example, is vague since there are not only watercourses that clearly are rivers and watercourses that clearly are not, but also those of which we cannot say whether they are rivers or rather brooks or runnels. It is unimportant here whether those borderline cases are actual or merely possible. Even if there actually were, due to some peculiar coincidence, only watercourses that are clearly large enough to qualify as rivers or too small to even be considered as such, 'river' would still be vague. An essential characteristic of vague expressions such as 'river' is that no further inquiry, neither linguistic corpus research nor geographical field study, could provide us with information that would enable us to categorise borderline cases unequivocally; there simply seems to be no fact of the matter regarding whether or not some borderline case of a river is a river. Hence a law that, for instance, prohibits polluting rivers is imprecise as to whether it prohi-

Аннотация. Автор выдвигает и отстаивает «тезис о неуместности»: для толкования права не имеет значения, какой именно философской теории неопределенности следует отдавать предпочтение. Чтобы обосновать этот тезис, следует рассмотреть широко известные теории неопределенности, проанализировать роль, которую неопределенность играет в толковании права, и показать, почему эта роль не зависит от того, какая теория неопределенности действительно верна. Автор также обсуждает современные публикации Скотта Сомса и Стивена Шиффера, авторы которых утверждают, что нормы для толкования права можно вывести из конкретных позиций касательно неопределенности.

Ключевые слова: неопределенность, толкование права, парадокс «Куча», Скот Сомс, Стивен Шиффер.

bits polluting borderline cases of rivers as well – a fact of which legal interpreters should be aware.

Philosophers have long been puzzled by vagueness and the so-called *sorites paradox* it gives rise to (see below), and have come up with various theories to resolve the paradox and explain the nature of vagueness. As vagueness complicates the application of legal statutes to specific cases, it seems plausible that different philosophical theories of vagueness suggest different ways of interpreting legal texts. In other words, which theory of vagueness is correct *prima facie* appears to have significant effects on how judges should decide cases.

While it is certainly important for legal interpreters to understand what vagueness is, and what the differences between vagueness and similar indeterminacy phenomena are[1], I will argue in this essay that it is irrelevant to legal interpretion which specific philosophical theory of vagueness is to be preferred. In order to establish this *Irrelevance Thesis*, I will first state the sorites paradox and explain, very briefly, how the most prominent theories of vagueness attempt to deal with it (section 2). I will then analyse the role that vagueness plays in legal texts and the problems it causes; and this analysis will motivate the Irrelevance Thesis (section 3). In the literature on vagueness and law, however, several authors claim to deduce norms for legal interpretation from specific accounts on vagueness. Two recent attempts in that direction, one from Scott Soames, the other from Stephen Schiffer, will be given closer scrutiny in the second half of this essay (sections 4 and 5). My conclusion will be that Soames's and Schiffer's lines of argument do not disprove the Irrelevance Thesis.

2

The phenomenon of vagueness is closely related to the sorites paradox, or the paradox of the heap ('sorites' comes from the Greek *soros* meaning 'heap'). Imagine a million grains of sand. They obviously form a heap. Consider the principle that

(A) If a specific number n of grains of sand forms a heap, $n - 1$ grains of sand form a heap as well.

(A) is certainly highly plausible: one single grain cannot make all the difference between a heap and something too small to be a heap. Applying (A) to our heap of sand, however, we can deduce that a million minus one grains of sand also form a heap. Applying (A) again, we can deduce that a million minus two grains of sand also form a heap. Applying (A) a million times, we can deduce that zero grains of sand also form a heap – a preposterous conclusion, to say the least. Thus, repeated application of a highly plausible principle, (A), leads to an absurd result. This is the sorites paradox.

Possible ways to avoid the conclusion include the following. Vagueness, I said, is the potential of linguistic expressions to admit of borderline cases. Proponents of *epistemic theories* deny that there are real borderline cases at all. They argue that our inability to decide whether a some midsize accumulation of sand qualifies as a heap is not due to its being a real borderline case of a heap but due to our epistemic restrictions that make it impossible for us to find out whether or not

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[1] See [1. P. 31–56], for an overview.

it really is a heap–\–although there is, according to epistemicists, a relevant fact of the matter. For instance, the world might be such that all accumulations of sand that consist of more than 231493 grains form a heap, and all accumulations that consist of 231493 grains or less do not form a heap (although we are not in the position to know this). Epistemicists differ with regard to what would determine such a fact; according to the most prominent variant, it is our use of linguistic expressions[1]. The most important disadvantage of epistemic theories is their evident implausibility; their most important advantage is that they enable us to preserve classical logic. To see the latter, assume the sentence 'This is a heap' refers to an apparent borderline case of a heap of sand. If epistemicism is wrong, the sentence is neither true nor false, contrary to what classical logic assumes.

Defenders of *three-valued theories* bite exactly this bullet and claim that there must be, in addition to *true* and *false*, a third truth value, *neither*, that enables us to deal with borderline cases[2]. Regarding the sorites paradox, three-valued theorists, like epistemicists, deny (A); unlike epistemicists, however, they are able to replace it by

(B) If *n* grains of sand form a heap, *n* − 1 grains of sand do not form a non-heap, i.e. something that clearly is not a heap; they rather form either a heap or a borderline case of a heap.

In other words, three-valued theorists suggest that the plausibility of (A) derives from the plausibility of (B): we feel that the *n* − 1 grains of sand must form a heap as well because we overlook the possibly of their forming a borderline heap. Once we have substituted (A) by (B), however, the sorites reasoning is blocked.

Against such a three-valued theory, one can object that it is not only plausible to suppose that there is a sharp boundary between heaps and non-heaps, but also to suppose that there are sharp boundaries between heaps and borderline heaps and between borderline heaps and non-heaps. In addition to borderline cases, there seem to be borderline cases of borderline cases (and borderline cases of borderline cases of borderline cases, and so on *ad infinitum*). This is the phenomenon of *higher-order vagueness*, which is not adequately accounted for by three-valued theories.

Advocates of *degree theories* seek to make up for this disadvantage by postulating not three but uncountably many truth values, which we can identify with the real numbers in the closed interval from 0 to 1, where 1 is to be thought of as *true* and 0 as *false*[3]. We can then ascribe truth values whose difference is close but not equal to 0 to propositions like those that *n* grains of sand form a heap and that *n* − 1 grains form a heap. In doing so, we allow for a much smoother transition of truth values as reflected in (B), but still escape the sorites reasoning (we still deny (A)). There are, however, two major disadvantages: it is counterintuitive that there should be so many truth values; and it is counterintuitive that there should be sharp boundaries between definite heaps (truth value 1) and less than definite heaps (truth value <1) and between definite non-heaps (truth value 0) and less than definite non-heaps (truth value >0).

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[1] The most prominent variant of epistemicism is defended in [2]; for a different variant, see [3].
[2] See e.g. [4] for a particular implementation of this idea.
[3] For different variants of degree theories see [5] and [6].

Perhaps the most popular answer to the sorites puzzle is *supervaluationism*, a specific three-valued theory[1]. Supervaluationists hold that if something is a heap according to every reasonable precisification of the vague expression 'heap', it truly is a heap; if it is a non-heap according to every reasonable precisification of this expression, it truly is a non-heap; and if it is a heap according to some but not all reasonable precisifications, it is a borderline case of a heap. Here, a reasonable precisification is a way of classifying borderline cases as either cases of application or non-application by drawing a sharp boundary at some arbitrary point of the borderline area. As (A) is wrong according to each such precisification, (A) is considered to be wrong simpliciter, so that we avoid the absurd conclusion of the sorites argument. However, there is no smallest possible heap, that is, there is no n such that n grains of sand form a heap and $n - 1$ do not. For each precisification fixes the boundary at a somewhat different location, so that it is not true of any n that it is the smallest number of grains in a heap. As a result, while (A) is false (and (B) as well), we do not have, according to supervaluationism, a sharp boundary between a heap and a non-heap.

Contextualism offers a completely different strategy. In one context, for instance, 231493 grains of sand may be rightly said to form a heap, and in another not. Contextualists hold that such context shifts even occur while one considers a sorites series[2]. If one takes 231493 grains to form a heap, one should reason, given (A), that 231492 grains also form a heap. However, when one goes on to the next step in the chain of arguments that together establish the absurd conclusion, one is not forced, according to contextualism, to assume as a premise that 231492 grains form a heap, because one can take the context to be slightly different now.

The sorites paradox is certainly the most fascinating and colourful problem that vagueness induces. But this does not mean that vagueness is always soritical. Whether an object is a borderline case of some vague expression need not depend on one or more definitely identifiable dimensions (such as the number of grains) along which one can vary size or number; it may instead depend on how similar this object is to paradigm cases of the relevant kind, that is objects to which the expression clearly applies. To give but one example: whereas such different activities as football and Scrabble are both perfect examples of games, we can easily imagine procedures that are borderline cases of games; and there is no meaningful sorites series that links such procedures to football or Scrabble or any other paradigm game[3].

3

Let us return from this overly brief survey of philosophical theories of vagueness to legal interpretation again and note that, for several reasons, legislators should not in general avoid using vague expressions in legal texts. Most importantly, legislators can use vague terms to delegate power to the courts by enlarging their scope of discretion. For example, if instead of specifying a definite speed limit, the law only prescribes that people should drive at a reasonable rate of speed, it effectively puts it in the hands of police officers and courts to decide whether or

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[1] The *locus classicus* for supervaluationism is [7].
[2] See [8] for such a theory.
[3] In [9. P. 189–196], I analyze this non-soritical kind of vagueness – which Alston seems to have in mind when he speaks of combinatory vagueness [10. P. 219] – in greater detail.

not a particular driver should be ticketed. This in turn may be advantageous because it often depends on the details of a specific case whether something is harmless and should be tolerated (the same speed may be reasonable in sunshine but not in a snowstorm); and as these details are only known to the officials who have to decide the case but not to the legislators, giving more discretion to the officials may lead to better verdicts.

As a welcome side effect, we would get people to engage in practical deliberation. For instance, if there were no precise speed limit, people would be forced to consider which particular speed is reasonable in a specific situation and hence, so the hope goes, would drive more sensible than when they are guided by some official speed limit.

Other values of vagueness include that vagueness allows for a faster development of intentions, and that it helps to avoid decision costs. Here is one example for both: Assume that the state wants to regulate the output of some toxic chemical, and that there are, up to now, no scientific studies available concerning the output of which quantity is safe. By passing a vague law, which forbids the output of, say, 'a dangerous amount' of this chemical, lawmakers would clarify their intention and in fact restrict the output of the chemical, even if they are not, or not yet, able to specify the quantity that is in fact dangerous. They would leave this for future research, and, in doing so, would also avoid the costs, both pecuniary and procedural, to determine an appropriate and non-arbitrary threshold value[1].

Although legislators may have good reasons to use vague terms in law texts, judges and courts face a problem when they are confronted with such vagueness: what should they do in borderline cases? Timothy Endicott illustrates the scope of this problem by his famous example of the million raves [1. P. 57]. Imagine a law that prohibits playing music in public at a volume that causes serious distress to the local residents. Imagine further one million rave organizers, who all played the same music under the same conditions, but at different volumes. The first played it incredibly loud, so that it clearly caused distress to the neighbours. The second played it imperceptibly less loud then the first, the third imperceptibly less loud then the second, and so on to the one millionth rave organizer, who played the music at a barely audible volume that clearly annoyed nobody. If all these rave organizers are charged with violating the law, who should be convicted and who should be acquitted?

Given that the first rave organizer should obviously be convicted and the one millionth obviously be acquitted, it appears reasonable for a judge to arbitrarily determine a specific volume that lies somewhere in the borderline area of distressing loudness and convict all those who played music louder than this. As a consequence, however, there are two rave organizers who play music at an almost identical volume, one of which is convicted and the other acquitted. Hence, the principle to treat like cases alike is violated.

The example also shows why resolution principles fail. Resolution principles such as 'the plaintiff cannot succeed in a case in which the application of the law is indeterminate' are supposed to give guidance in borderline cases. Yet because of higher-order vagueness, there is no fact of the matter as to where clear cases end and borderline cases begin. In the case of the million raves, there is no determinate

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[1] See e.g. [11] for an overview over the functions that vagueness has in law.

borderline area of illegal raves, so that it is indefinite in which cases we should apply a resolution principle that tells us how to handle borderline cases. As Endicott outlines, the failure of resolution principles indicates that there is, contrary to what Dworkin's famous *right answer thesis* implies, no single right answer concerning how a judge should decide the one million rave cases [1. P. 63–72].

I am citing the case of the million raves as well as the functions vagueness may have in legal texts in order to point out an essential difference between philosophical and legal concerns with vagueness. From a legal point of view, we are concerned with how we should deal with vagueness. Legislators should be conscious of potential sources of indeterminacy in general and vagueness in particular, and should use vague language deliberately to the extent they want to give discretion to the courts; judges should be careful to notice where they are purposefully or unintentionally given room for discretion and use it to decide cases in a sensible and fair manner. Moreover, both legislators and judges should be aware that, due to the pervasiveness of vagueness in natural languages, it is virtually impossible to guarantee that the law always determines what a court should do in specific cases.

From a philosophical point of view, we are interested in which theory of vagueness works best; that is, which theory balances costs and benefits in the best possible way. Is it worth abandoning classical logic in order to save principle (A), or some variation of it? Which theory can handle higher-order vagueness in a convincing way? How central is the role of the sorites paradox for the philosophical analysis of vagueness? Whatever the answers to such and similar questions are, they do not affect our usage of vague terms; they merely explain it. Theories of vagueness such as supervaluationism or contextualism are not normative: they do not prescribe or recommend any specific way of acting. In contrast, what a court should do in case of indeterminacy (that is, if there is no single right answer in a specific legal case, even if all relevant laws, principles, policies etc. have been taken into account) is a normative question; among other things, the usage of vague terms in legal texts must be brought into agreement with the way they tend to be interpreted by judges and legal scholars. The normative question that arises in legal contexts cannot be answered by the purely descriptive solutions philosophical theories of vagueness have on offer. This is the reason why the latter are irrelevant to legal interpretation.

As we have seen, a judge who is confronted with the million rave cases has to make an at least partially arbitrary decision: she has to draw a line between cases that contravene the law against playing loud music in public and those that do not. Although the series of the one million raves is structurally similar to a sorites series, philosophical solutions to the sorites paradox are of no help to the judge. Assume, first, that epistemicism is correct and that there is, contrary to appearance, one right answer as to where the line should be drawn. As this answer cannot be known, however, all that even a philosophically informed judge can do is to draw the line where it appears most appropriate (but see also section 4). Assume, second, that three-valued theorists are right and that it is neither true nor false of some rave organizers that they broke the law. Given legal bivalence – the fact that laws are taken to either apply or not apply, actions to be either legal or illegal, defendants either guilty or innocent – judges always have only two options[1]. Thus, even when

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[1] For arguments in favour of mitigating legal bivalence see the recent work of Kolber, in particular [12] und [13].

confronted with what appears to be a clear borderline case of a law-breaking rave organizer, our judge has to either convict or acquit him; and again, she should choose the option that she deems most appropriate. The same holds if we assume, third, that degree theories are right, or forth, that supervaluationism is correct. In both cases, the judge cannot profit from how those theories interpret the occurrence of borderline cases, because she is not allowed to neither convict nor acquit any rave organizer. Things appear slightly different if we, fifth, assume contextualism. The judge could then at least cite a context shift as a justification for treating two adjacent cases unalike. However, as contextualism does not provide more information than other theories as to where exactly the line should be drawn, and can just as little as those theories contribute to upholding the principle that like cases are treated alike, it is just as irrelevant for lawyers whether it is true.

In a similar fashion, which theory of vagueness is true is irrelevant for legislators who consider using vague terms for the purposes described above. What might make the use of vague terms advantageous is nothing more special than their vagueness; it is not, for example, the potential fact that vague statements are neither true nor false, or that their truth is context-dependent.

These considerations establish my Irrelevance Thesis, according to which it is irrelevant to legal interpretation which specific philosophical theory of vagueness is to be preferred.

What is *not* irrelevant for legal contexts is what characteristics vagueness has and what problems it generates. It is easily possible for a philosophically informed legal scholar such as Endicott to argue on the basis of a sorites-inspired series of very similar cases that, given legal bivalence, judges cannot in general decide like cases alike (and it is possible to use this, as Kolber does, in an argument to the point that vagueness suggests abandoning legal bivalence). Or we can, as again Endicott shows, use the phenomenon of higher-order vagueness in an argument against Dworkin's single right answer thesis. I myself use the (not uncontroversial) fact that vague terms in our natural languages are generally non-soritically vague to argue that *if* lawmakers wish legal language to be in line with natural language, they should avoid precisifying ordinary vague expressions–they should then, for instance, abstain from defining a child as a person who is not older than, say, fourteen, even if they make repeated use of the expression 'child' in their texts (see [9]). All these vagueness-based and law-affecting arguments are in perfect accordance with the Irrelevance Thesis, since they make only use of general features of the phenomenon of vagueness, but not of particular philosophical accounts to this phenomenon.

4

In his 2012 paper *Vagueness and the Law* [14], Scott Soames argues that lawmakers can only make use of the power-delegating function of vagueness if the epistemic theory of vagueness (as described by Williamson in [2]) is wrong. As Soames's thesis links a specific theory of vagueness with a particular way of dealing with it in legal contexts, it presents, if true, a counterexample to my Irrelevance Thesis. But is it true?

Soames stresses the importance of delegating power to courts: courts are sometimes better positioned to decide cases, since they know the specific contexts of the cases and can thus easier assess whether a certain action is in accordance

with the rationale of the law. As an illustration, Soames cites Hart's famous example of the rule *No vehicles in the park!* and lets us imagine two scenarios. In the first one, traffic noise and air pollution caused by cars and motorcycles affect the quality of the park visitor's recreation experience. In the second scenario, overcrowding caused several accidents in the past involving motorcycles, bicycles, and pedestrians. Plausibly, officials should decide that such borderline cases of vehicles as bicycles or skateboards fall under the ban for vehicles only in the second but not in the first scenario, because bicycles, skateboards etc. cause harm only in the second scenario and should therefore be prohibited only there. As the rule *No vehicles in the park!* is by itself indeterminate about whether e.g. bicycles or skateboards are included as well, it enables officials to regard them as vehicles in one scenario but not in another, depending on what is reasonably required in the particular circumstances. Or so Soames thinks.

More generally, it appears that lawmakers should – and in fact do – use vagueness in statutes and constitutional clauses to put courts in the position to utilize their extra knowledge. According to Soames, this way of proceeding is in perfect harmony with what he calls the 'partial-definition/context-sensitive theory' of vagueness (henceforth the PD/CS theory; we need not bother ourselves with the details of this theory here and can simply regard it as a specific variant of a three-valued theory); if, to the contrast, epistemicism is true, lawmakers cannot use vagueness to enlarge the courts' scope of discretion. Therefore we seem to have the following interdependence: On the one hand, philosophical arguments for or against the epistemic theory have effects on what lawmakers could do with vagueness; on the other hand, the alleged empirical fact that lawmakers indeed regard it as valuable to be able to delegate power to the courts by using vague language is a reason for us to consider the epistemic theory wrong.

From what Soames writes, we may distinguish two different reasons for his claim that epistemicism does not allow us to delegate power by using vague terms in the same way as, for instance, the PD/CS theory[1]. The first reason is that epistemicists, as they believe that there is a determinate and context-independent boundary, must reject context-sensitivity, whereas PD/CS theorists believe that the context of an utterance can sometimes help to remove at least part of the vagueness of an expression (this is the 'CS' in 'PD/CS'). Hence, PD/CS theorists can, but epistemicists cannot, reasonably be of the opinion that, due to their knowledge of the relevant contexts, courts are better positioned to decide cases.

This reason overlooks that courts are better positioned not (or not only) because they can interpret vague expressions better, but (also) because it is easier for them to assess how the intentions of the lawmaker could best be fulfilled in legally indeterminate cases. In the vehicles case, it is not the context-sensitivity of the word 'vehicle' that puts the judges in a better position than the lawmakers, but their knowledge of what is required in a specific situation. Even if the word 'vehicle' had the same borderline cases in every context, judges would still be in a better position to further the rationale of the law.

Soames's second reason is that he takes the range of cases within which courts can exercise discretion to be smaller if epistemicism holds. This is because epistemicists, who believe that there always is a linguistic fact of the matter as to

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[1] In addition to this claim, there are several assumptions, some of them implicit, that underlie Soames's argument. See [15] for an overview as well as an extended discussion of one of them.

whether some predicate does or does not apply to an object, first have to exhaust all available linguistic evidence before they are allowed to base their decision on whatever appears to be the rationale of the law, whereas PD/CS theorists, who believe that linguistic evidence is normally insufficient to determine whether a specific vague expression applies to an alleged borderline case (this is the 'PD' in 'PD/CS'), can in general directly draw on the rationale of the law to determine what to do in an alleged borderline case. Soames seems to think that epistemicists, but not PD/CS theorists, must acknowledge that the linguistic evidence enables judges to categorize, in an uncontroversial way, at least some of the cases that appear to be borderline as either cases of application or cases of non-application. For instance, while both bicycles and skateboards may be regarded as borderline vehicles, bicycles appear to be more similar to paradigm cases of vehicles than skateboards, which suggests that we should take them to be vehicles *tout court* (according to Soames). As a consequence, they should be banned in both of our scenarios.

Soames thus believes that if there is a sharp boundary, even if it is of unknowable location, the range of cases that appear to be borderline even after close examination is somehow smaller than otherwise. I believe this is a confused understanding of what a borderline case is. With regard to apparent borderline cases of a vague expression, we are in no position to tell whether this expression does or does not apply to them. The reason might either be that we cannot find out what the fact of the matter is (as epistemicists suppose), or that there is no fact of the matter (as other theorists assume). Yet even if we assume that epistemicism is true, it does not follow from this characterization that borderline cases that are located near one end of the borderline area – the 'application end', say – are likely to fall under the expression, whereas other borderline cases located near the other end of the borderline area are likely not to fall under it. To deduce this, we had to assume, first, that we can localize the borderline area sufficiently well, and second, that each admissible precisification of the vague expression is equally likely to be correct. But we have no reason to consider the second proviso true, and higher-order vagueness suggests that the first is false.

Endicott's case of the million raves may serve to illustrate my point. For one thing, it is as hopeless to determine the borderline area of cases that cause distress to the local residents as it is to determine a sharp cut-off point. In particular, when we fix on one case that appears to be borderline, we just cannot say whether it is closer to the one or closer to the other end of the borderline area. What we can say is that a borderline case in which the music is played slightly louder than in another borderline case is closer to a clear case of an illegal rave than this other case. But we cannot deduce from this that the first borderline case is close to clear cases of violation of the law. Similarly, in Soames's example, even if bicycles are really more similar to paradigm vehicles than skateboards, they might still be more similar to paradigm non-vehicles than to paradigm vehicles. Higher-order vagueness prevents us from justified judgements to the point that they are almost vehicles.

For another thing, suppose we had, *per impossibile*, idenitified a borderline area of exactly one thousand raves. What reason do we have to suppose, for instance, that the one hundred loudest of them are probable cases of violation of the law as well? This would be the case if each of the thousand raves had an equal probability of being the first legal one. But we cannot assume this without further

argument. It might easily be that it is, for some funny reason, much more likely that the first legal rave is one of the ten (or five, or two) loudest borderline cases than one of the following 990 (or 995, or 998).

I conclude that Soames's argument for the thesis that epistemicists cannot make use of the power-delegating function of vagueness in the same way as PD/CS theorists can is not sound. Even if there is a sharp but unknowable boundary, this does not have any consequences for the way lawmakers or judges could deal with borderline cases. Not knowing where the boundary is located is, for all practical purposes, the same as assuming that there is none.

5

Stephen Schiffer originally maintained, in his 2001 paper *A Little Help From Your Friends?* [16], what I have called the Irrelevance Thesis. Although he convincingly defends the arguments he gave there in his 2016 paper *Philosophical and Jurisprudential Issues of Vagueness* [17] against Kent Greenawalt's objections (see [18]), he suggests 'that there is a way technical philosophical work on vagueness may be relevant to understanding what judicial interpretation can and can't be' [17. P. 30]. Schiffer then sketches a theory of meaning that is motivated, among other things, by observations on vagueness, and argues that a specific doctrine of legal interpretation, namely textualism, is hardly compatible with this theory of meaning and should therefore be abandoned.

The type/token distinction is essential to Schiffer's theory of meaning. If I utter the sentence 'The rain is beating on the windows' when I am in Paris, and later utter the sentence 'The rain is beating on the windows' when I am in Dublin, have I then uttered the same sentence twice? Yes and no. I uttered the same sentence *type* in Paris and in Dublin, but I uttered different sentence *tokens*. A sentence token is one concrete utterance, by word or letter, of a sentence; it normally consists of sound waves or dispersions of ink on paper. A sentence type, on the other hand, is an abstract object of which a token is an instantiation. Talk about sentence identity is ambiguous between talk about type identity and talk about token identity. (The same holds *mutatis mutandis* if we consider not sentences but other objects).

To further complicate matters, there is an intermediate category. In a way, the sentence 'The rain is beating on the windows' on the last page of my copy of Beckett's *Molloy* is the same sentence token as the sentence 'The rain is beating on the windows' on the last page of your copy of Beckett's *Molloy* – in contrast to the sentence 'The rain is beating on the windows' in the first line of the second chapter of my copy of *Molloy*, which clearly is a different token of the same type. However, as different copies of a book are different tokens of the same abstract book type, a specific sentence that occurs at the same location in each copy is, as a part of an abstract object, itself abstract, and thus only a *semi-token* (as I will call it here for simplicity's sake).

Different tokens of the same sentence type need not have the same truth value; it might have rained in Paris but not in Dublin. Similarly,

(C) Different tokens of a vague expression need not give rise to exactly the same borderline cases.

For instance, when some park official uses the word 'vehicle' in Soames's first scenario, it probably has different borderline cases than when an official uses

it in Soames's second scenario.[1] (Different semi-tokens, however, always have the same borderline cases.) Moreover,

(D) Speakers and their audiences do not know what exactly the borderline cases of a specific vague expression's token are, or what determines them.

It follows from the observations (C) and (D), according to Schiffer, that only tokens and semi-tokens but not types of sentences that contain vague expressions can be said to have a definite meaning.

(C) and (D) together pose a problem for textualism. *Textualism* (or *originalism*, as it is called when applied to constitutional interpretation) holds 'that jurists should take the law promulgated by a text to be determined by, and only by, "the meaning the text had when it was created"' [17. P. 41]; the part that Schiffer put in quotes refers to similar formulations by Scalia, the major proponent of textualism; see e.g. [19] and [20]. Alternatives to textualism hold that, for example, moral norms, policy principles or the meaning the text has at the time of interpretation should be considered as well. What makes textualism more problematic than these alternatives (or at least those of them that do not refer to *the* meaning of a text) is that if textualism is to have any chance of being correct, 'the meaning the text had when it was created' must refer to the propositional content expressed by the sentence tokens produced by the authors of the texts (in the extended sense of 'token' [referred to as 'semi-token']), and that is a content that is constrained but never determined by the meanings of the tokened sentences. [17. P. 42.]

As passages in legal texts that are difficult to interpret often contain vague expressions, and as it follows from (C) that only the tokens and semi-tokens of sentences containing vague expressions can be said to have a definite meaning, the prase 'the meaning the text had when it was created' can only refer to such a token or semi-token. Because of (D), however, we cannot extract from the relevant tokens and semi-tokens the exact location of the borderline area of some relevant vague expression. Hence it is not reasonable to regard 'the law promulgated by a text to be determined by, and only by, "the meaning the text had when it was created"'.

As Schiffer correctly concedes, we do not need (C) and (D) in order to see that textualists rely on an unduly naive understanding of meaning, according to which the exact wording of a law statute plus some knowledge about the historical development of the relevant concepts determines what verdict should be given on a legal issue. He emphasizes, however, that (C) and (D) should make us recognize the extent of legal indeterminacy with which judges would have to cope if textualism were the relevant doctrine of legal interpretation [Ibid. P. 45].

I am not sure whether this last claim is incompatible with the Irrelevance Thesis at all. Be that as it may, I want to stress – and maybe Schiffer would agree – that whether or not textualism is a plausible doctrine does not in any way depend on whether or not Schiffer's theory, according to which tokens are the primary bearers of meaning, is right. For assume that textualism were true. In deciding whether or not a certain law applies to a specific case, a judge then has to concentrate on 'the meaning the text (of this law) had when it was created' and hence relies on her competence as a speaker and her knowledge of the historical developments of the relevant concepts. If she forms the opinion that the law clearly applies or clearly

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[1] We assume here, as Schiffer does, that epistemicism is false.

does not apply, she should decide accordingly; if she remains unsure, all that she can do is invoke other reasons on which she could base her decision. Nothing in this story hinges on whether or not she acknowledges Schiffer's theory of meaning. If Schiffer is right, textualists will probably be surprised by how often focussing on the meaning of the text does not yield a clear verdict; and Schiffer's theory could explain to them why this is the case. Put differently, legal practitioners encounter a phenomenon, namely the troubles to unanimously identify the meanings of texts containing vague expressions, that requires both explanation and a way to deal with it. It is the apparent occurrence of the phenomenon, and not Schiffer's explanation of it, that shows that textualism is of restricted applicability, and this in turn can be used as an argument against textualism in general. The presumed explanation for the phenomenon, on the other hand, neither implies whether or not lawmakers and judges should agree to follow a restricted version of textualism – that is, focus primarily on what they take to be the original meaning of a legal text and invoke other principles and methods of interpretation only if this does not help to decide the case—nor what other principles and methods should play a major role in legal interpretation. What holds for theories of vagueness holds for theories of meaning as well: they only explain linguistic phenomena, but do not suggest specific ways of using words or interpreting vague expressions.

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THE RELEVANCE OF PHILOSOPHICAL THEORIES OF VAGUENESS TO LEGAL INTERPRETATION

The paper presents a careful analysis of an application of different philosophical theories of vagueness to legal interpretation. The author argues for the following Irrelevance Thesis: it is irrelevant to legal interpretation which specific philosophical theory of vagueness is to be preferred. In order to establish this thesis, we should distinguish between conceptual clarifications about the nature of vagueness and related phenomena on the one hand and various philosophical theories of vagueness on the other. With regard to many of those clarificatory matters (which the author takes to include specifications about the differences between semantic vagueness and similar phenomena such as ambiguity, generality, and pragmatic vagueness), philosophers widely agree with each other; controversies here mainly arise about how to best define different kinds of vagueness. The situation is different when we consider distinct philosophical accounts on vagueness, such as supervaluationism, contextualism, and degree theories; here, it is a matter of much controversy which theory is to be preferred. The author argues that, while knowledge of what precisely vagueness is bears importance for anyone who works with legal texts, the question of which philosophical theory can best explain vagueness has surprisingly little impact on legal interpretation. For this purpose it is necessary to survey over the most prominent theories of vagueness, to analyse the role that vagueness plays in legal interpretation, and to point out why this role is independent from whatever theory of vagueness is actually correct. The author also discusses recent accounts from Scott Soames and Stephen Schiffer, who both claim to deduce norms for legal interpretation from specific accounts on vagueness. That leads the author to the conclusion: what holds for theories of vagueness holds for theories of meaning as well, namely, they only explain linguistic phenomena, but do not suggest specific ways of using words or interpreting vague expressions.