Vernünftiger Umgang
mit unscharfen Grenzen

Vagueness in Law

New York, March 21-23, 2013

Thursday, March 21

14.00 Paul Boghossian *Welcome*

14.15 Geert Keil / Ralf Poscher *Introduction*

14.30 Andrei Marmor *Varieties of Vagueness in the Law*

The main purpose of this essay is to articulate the different types of vagueness, and related linguistic indeterminacies, that we find in statutory language and to explain their different rationales. I argue that the various normative considerations involved in employing vague terms in legislation depend on the kind of vagueness in question. I show that while some cases of vagueness in law are concerned with fairly standard problems of borderline cases, other are not. I also argue that semantic vagueness can be distinguished from conversational vagueness, which we also find in law, and that vagueness in law should be clearly distinguished from cases of ambiguity and polysemy.

15.10 Adam Kolber *Commentary on Andrei Marmor's Talk*

16.00 Stephen Schiffer *Philosophical and Jurisprudential Issues of Vagueness*

Philosophical and jurisprudential issues of vagueness are different, so why expect philosophical theories of vagueness to be relevant to issues of vagueness in law? In many respects, philosophical theories aren't relevant. This talk lists some of the ways they may be relevant and gives some indication of how they may be relevant. Vagueness, we'll see, has some profound effects on meaning that bear on judicial interpretation.

16.40 Andree Weber *Commentary on Stephen Schiffer's Talk*

17.45 Frederick Schauer *Vagueness, Open Texture, and Defeasibility in the Rule of Recognition and the Sources of Law*

Virtually all philosophical discussions of vagueness presuppose that there is a particular word, phrase, or sentence whose vagueness (or not) is at issue. But law presents a special case. In law, it is often not clear, or is often contested, as to exactly which words, phrases, or sentences will govern, or whether there are second-order rules (including closure rules) affecting the interpretation of the first-order rules. When this is the case, vagueness in the choice of words to interpret, or vagueness in the second-order rules, presents different issues. These different issues, closely connected with philosophical issues of open texture and defeasibility, make the topic of vagueness in law especially problematic.

Friday, March 22

9.30 Delia Graff Fara *The Vagueness of Racial Categories*

As the boundaries between different races get more and more blurred over time, laws and practices that depend on there being distinctions between races become harder and harder to implement. In this talk I describe how the interest-relative theory of vagueness applies to this phenomenon and gives us further insight into it, thereby concurrently providing support for interest relativism.

11.00 Diana Raffman *Vagueness, Divergence, and Disagreement in Philosophy and the Law*

Because the literatures in philosophy and the law include many distinct linguistic phenomena under the rubric of 'vagueness', philosophers of language and legal theorists may sometimes talk past each other. Several distinctions may be helpful in determining which of these phenomena are, and which are not, operative in legal language. I will begin by arguing that so-called soritical vagueness, viz., the kind of vagueness that appears to generate a sorites paradox, is defined at least in part by arbitrary divergences among competent speakers in their applications of a given term. By 'arbitrary' I mean that these divergences – as opposed to genuine disagreements – are not resolvable by appeal to any argument (reasons, justifications) in the nature of the case. I will then contrast soritical vagueness, thus understood, with a variety of phenomena often cited as forms (or characteristics) of vagueness, including open texture, essentially contested cases, faultless disagreement, and multi-dimensional or "extravagan" vagueness (Endicott 2011). Lastly I will consider several discussions in the legal-theoretic literature that may receive new interpretation in light of this exercise.

11.40 Matthias Kiesselbach *Commentary on Diana Raffman's Talk*

14.00 Ralf Poscher *Interpretation, Construction and Vagueness in Law*

According to a long standing distinction in legal scholarship there are two ways jurists react to vagueness in law: interpretation and construction. The distinction between legal interpretation and legal construction is not only analytic, but is supposed to be of doctrinal relevance. For some areas of the law – like constitutional or administrative law – it has been argued that legal construction shall not be exercised by the courts but rather by

other branches of government. The distinction would suggest finding a two-step-procedure in the application of the law: first interpretation, than construction. But we don't. Neither court rulings nor legal opinions nor scholarly doctrinal articles are generally written or read this way. The talk addresses this curious state of affairs in three steps: First, it gives an analytic account of the distinction that explains why jurist over the centuries came to think that interpretation and construction are two different kinds of activities to handle vagueness in law. Second, it explains why the distinction is not so clear cut as the analytical reconstruction might suggest. The blurring of the boundaries will clarify why legal practice does not employ a two-step-strategy to handle vagueness in law. Third, the talk will hint at some doctrinal arguments that might be developed from the analysis of the first two parts.

15.30 Lawrence Solum *Originalism and Constitutional Construction*

This paper investigates the role of constitutional construction in so-called "New Originalist" theories of constitutional interpretation. The paper maps the terrain of contemporary constitutional theory, arguing that "originalism" is a family of constitutional theories organized around two ideas: (1) the fixation thesis (meaning is fixed at the time a provision is framed and ratified), and (2) the constraint principle (legal content should be constrained by communicative content). New Originalist theories add two further ideas: (1) the public meaning thesis (communicative content of the constitution is explained by a theory of public meaning), and (2) the interpretation construction distinction (interpretation discovers meaning, construction determines legal effect). The paper then ties the notion of the "construction zone" to vagueness, and argues that the construction zone cannot be eliminated by interpretation, arguing against the McGinnis-Rappaport claim that "original methods" can liquidate all or almost all ambiguity and vagueness.

17.00 Brian Bix *Vagueness and Political Choice in Law*

Vagueness has been a subject of ongoing interest to legal practitioners and legal theorists; the interest is natural, given that law is a matter of interpreting and applying texts – whether statutes, constitutions, administrative regulations, contracts, wills, or trusts – and uncertainty in the meaning or application of language raises obvious issues about legal interpretation, legal reasoning, and the roles and limits of different legal actors. In many of the earlier papers on the topic of vagueness and the law, the focus had been, properly, on explicating to a legal audience the nature of vagueness, its many variations, the differences between vagueness and other forms of language-based uncertainty (like ambiguity), and some if the immediate implications of vagueness for legal decision-making. This paper will offer a somewhat different focus: looking at the role of vagueness and other forms of indeterminacy within a larger context of legal reasoning and decision-making, emphasizing in particular the way that legal actors properly ignore or override semantic meaning in their interpretation and application of (vague and ambiguous) terms in legal texts.

Saturday, March 23

9.30 Lawrence Solan *In Search of Vagueness: Pernicious Ambiguity in American Contract Law*

If I say that I "consent to your terms", I can mean that I consent to terms *a-n*, which you have proposed. But I also can mean that I consent to your terms, whatever they are, even if I don't know what they are. Philosophers of language sometimes call the first reading "transparent" and the second reading "opaque." The phenomenon occurs with many verbs. Transparency is a graded adjective. Something can be more or less transparent in the smallest increments, creating the possibility of sorites paradox situations for borderline cases. The possibility of uncertainty resulting from such vagueness is often considered a threat to rule of law values. But in this situation, it would be a welcome relief from the law offering judges too few choices.

As commercial life has become more commodified, opaque consent has become more the norm, with the result that consent is often given in total ignorance of what has been proposed. The fact that verbs such as *consent* are ambiguous in the way described above licenses judges to apply standard contract doctrines, developed more than a century ago with the assumption of transparent consent, to situations involving opaque consent. A sensible option – requiring some transparency in contract formation – is not available, because we do not conceptualize consent as being on a continuum with respect to the degree of transparency – vagueness and all – but rather as ambiguous between two readings that allow judges insufficient flexibility in developing contract doctrine to evolve sensibly in response to changes in commercial practice.

11.00 Jeremy Waldron *Clarity, Thoughtfulness and the Rule of Law*

One form of indeterminacy which is commonly called "vagueness" stems from the use of value predicates like "reasonable" and "excessive" in the law. This indeterminacy is not true vagueness in the philosophical sense, but it is interesting for legal philosophy nonetheless. A case can be made that the use of such predicates represents a distinctive way of guiding action – a mode of guiding action that may be more respectful of intelligent agency than the use of more determinate predicates in legal rules. They allow law to be thoughtful. But the case against using value-predicates is that it may be difficult to align of coordinate the self-application of these norms with their secondary application by law enforcement officials and judges. They work best where there is substantial reasons to expect such alignment, worst where there is good reason not to.