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## Introduction

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What do loitering, constitutional law, and decision theory have to do with each other? The question was raised by Gordon Getty in a bus driving through the Tauber Valley in Bavaria in 1991. The Gruter Institute, which is dedicated to the study of law and behavior,<sup>1</sup> explored the answers at a one-day conference held at the University of California at Berkeley's law school in November 1992.<sup>2</sup> The title of the conference, *Void for Vagueness*, refers to the doctrine that excessively vague statutes, which appear to be laws, are really unconstitutional invitations to officials to exercise discretion. Courts have used this doctrine to strike down various statutes, especially ordinances that forbid loitering.<sup>3</sup> When applying this doctrine, courts must define the boundary between the rule of law and the will of officials.

Imprecise language in statutes creates problems of discretion and compliance. Officials enjoy wide discretion in enforcing vague statutes and citizens do not know what they must do to comply. Courts usually respond to a vague statute by interpreting it. Judicial interpretation supplies the precision required to reduce official discretion and direct citizens. For example, the Federal Trade Commission Act prohibits "unfair or deceptive acts or

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1. The founder and director of the Gruter Institute is Dr. Margaret Gruter, whose pioneering book on law and ethology, *Law and the Mind: Biological Origins of Human Behavior*, was published by Sage Publications in 1991.

2. Three papers were presented that do not appear in this volume: Tom Tyler, *Void for Vagueness: A Social Psychological Perspective*; Michael McGuire, *Why Are There Laws Against Loitering? An Evolutionary Biological Interpretation*; and Arthur S. Kling, *Ambiguity, Brain Function, and Behavior*.

3. For a discussion of cases that involve these ordinances, see Robert Post's article, *infra*.

practices in or affecting commerce,"<sup>4</sup> but does not specify what business practices are unfair or deceptive. The courts have clarified the meaning of this clause by interpreting the statute since the clause was added in 1938.<sup>5</sup>

Sometimes, however, courts respond to a vague statute by striking it down rather than interpreting it. This is often the case with anti-loitering ordinances and other laws that affect social order. In his paper, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, Robert Post observes that the degree of vagueness in statutes cannot always explain why courts strike them down selectively. Post concludes that vague statutes are struck down when they provide officials with power to punish individuals who deviate from social norms inappropriately imposed on everyone in society. For example, the court may strike down an anti-loitering statute that permits officials to impose middle class standards of behavior on "undesirables" who do not share middle class norms. Thus, courts use vagueness doctrine as constitutional shorthand for a substantive analysis of whether officials may impose a given norm upon all citizens.

Post's account exposes a fault-line in several decades of legal scholarship, specifically the tension between community welfare and individual rights. According to utilitarian tradition, the welfare of one person can be added to another's; the higher the sum, the better the policy. In contrast, rights-based theories hold that law should protect the liberty of individuals to deviate from the group. To protect the individual's liberty, the rights of individuals must circumscribe the pursuit of the community's welfare. Post concludes that the void for vagueness doctrine constrains officials who intrude upon individual liberty while pursuing community welfare.

Jeremy Waldron applies the philosophy of language to the vagueness doctrine in a paper entitled *Vagueness in Law and Language: Some Philosophical Issues*. Philosophers use the phrase "contestable concepts" to describe words that are necessarily vague because disagreement is central to their use. These words frame moral and intellectual debates in society. To illustrate, people often agree that business practices should be "fair," but disagree about which practices are fair or unfair. The lack of clarity in the term "fair" encourages society to continually examine what business behavior is acceptable.

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4. 15 U.S.C. § 45(a)(1)-(2) (1988).

5. Act of Mar. 21, 1938, ch. 601, Title XI, § 1107(f), 52 Stat. 1028. For discussion and collection of cases addressing unfair or deceptive practices, see Bruce I. McDaniel, Annotation, *What Constitutes "False Advertising" of Food Products or Cosmetics Within §§ 5 and 12 of the Federal Trade Commission Act*, 50 A.L.R. FED. 16 (1980); Bruce I. McDaniel, Annotation, *What Constitutes "False Advertising" of Drugs or Devices Within §§ 5 and 12 of the Federal Trade Commission Act*, 49 A.L.R. FED. 16 (1980); Romualdo P. Eclavea, Annotation, *Advertising "Free Trial" of Merchandise as Deceptive Act or Practice or Unfair Method of Competition Violative of § 5(a)(1) of Federal Trade Commission Act*, 26 A.L.R. FED. 795 (1976); Jane C. Avery, Annotation, *Use of Fictitious Collection Agency to Coerce Payment as Unfair or Deceptive Practice Prohibited by § 5 of Federal Trade Commission Act*, 25 A.L.R. FED. 390 (1975).

Waldron explains that contestable concepts play an important role in statutes. They indicate topics of disagreement within the legislature that should be debated in society. Vague statutes provoke discussions about moral and political disagreements and their possible solutions. These discussions can lead to the enrichment of society and, because they often take place in the courts, to the refinement of legal concepts. Statutes that provoke rather than resolve debate make sense to a legal theory in which lawmaking legitimately occurs outside the legislature. Vagueness keeps the law alive in court, whereas precise legislation arrests the judicial development of a contested concept. The courts may be better suited than the legislature for resolving disagreements between the Business Roundtable and the AFL-CIO about "unfair" business practices.

Gillian Hadfield's paper, entitled *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, also concludes that vagueness can have value. Consider the difference in incentive effects between a precise rule and an uncertain rule. A precise rule typically induces people to conform exactly to the legal standard in order to avoid liability. Conversely, uncertainty may cause people to overcomply with the presumptive standard in order to allow for a margin of error in its application. Hadfield uses this economic theory as a starting point for her analysis of vague laws. Although vagueness in a statute can cause overcompliance, it also results in a greater diversity of behavior than a more precise law. Exact conformity to the legal standard is desirable when the legal standard is set at the best level for everyone subject to it. If, however, a precise rule imposes the wrong standard, it will induce precisely the wrong behavior. Finding the ideal legal standard can require more information than is available to the legislature. Vagueness has value because it encourages diversity of behavior, which contributes to the continual refinement of the law by providing the necessary information.

In exploring both the value and cost of vagueness, Hadfield draws a parallel between lawmaking and contracting. Just as contracting parties may find the cost of anticipating all possible contingencies prohibitive, so legislatures may find the cost of determining the optimal standard for everyone's behavior prohibitive. Relegating determination of the optimal standard to administrative agencies and courts may save costs. On the other hand, legislators may exploit vagueness strategically to protect their own careers, just like contracting parties might omit terms to protect private information. Hadfield calls for an explicit recognition and weighing of such costs and benefits in the development of vagueness theory and doctrine.

The commitment to core theory and method differs in these three papers, but the results complement each other. Waldron and Hadfield use different approaches to conclude that vagueness keeps a statute alive, and Post points out that a statute's growth must not intrude upon the constitu-

tional rights of individuals. Together, these three theories help to distinguish objectionable from benign vagueness in law as understood by modern American courts. For example, vague laws against loitering encourage people to probe for the boundary between community standards and individual rights, whereas precise rules may leave scope for threatening behavior that drives people from public places. Participants in the *Void for Vagueness* conference were inspired by its demonstration that theorists from different behavioral sciences can talk to each other about legal issues. Describing several views of the cathedral can help us to comprehend the whole edifice.