David Lanius: Strategic Indeterminacy in the Law,

Oxford University Press, 2019

When David Lanius wrote "Has Vagueness Really No Function in Law?" in 2013, he probably could not imagine that in 2019 he would write a book in which he rejects his main thesis in that paper. We cannot understand the importance of Lanius's book, *Strategic Indeterminacy in the Law* (SIL), without considering the history of the debate on vagueness in law. In the last 20 years, many philosophers have argued that semantic vagueness (i.e. being susceptible to sorites paradox) has a valuable function in the law. Some even believed that the intuition concerning the value of vagueness in the law is so strong as to settle some perennial problems beyond philosophy of law – namely, that it decided the preferable theory of vagueness in language. One of the few philosophers who opposed this idea was Roy Sorensen who argued that "Vagueness has no function in Law" (2001). His proposal was not appreciated until recently. After years of careful considerations, however, fewer people argue for the functionality of semantic vagueness in the law these days, and several philosophers have argued that vagueness, properly understood, has no function in the law. SIL is the most precise, the most comprehensive and the first systematic work in this line of thought.

SIL is a remarkable work with several noticeable qualities. Lanius explains that scholars have used the term "vagueness" in several senses, which has caused confusion in establishing the role of sorites-susceptibility in the law. To end this confusion, Lanius differentiates between the different concepts that the term "vagueness" has referred to in the literature and proposes new terms to be associated with each of them. One of the motivations for writing this review is to remind the scholars that after SIL they do not have any excuse or justification for conflating or lumping together the different concepts in the topic (such as polysemy, semantic vagueness, generality, etc.) and for using their associated terms confusedly or

arbitrarily. Furthermore, SIL bursts many bubbles and discourages researchers to engage in some projects that once were considered promising. However, it opens the door to a world of new problems that have never been discussed. I hope to pinpoint some of these research problems in this review.

The first chapter systematizes the different forms of indeterminacy in language. It differentiates between three forms of indeterminacy: semantic indeterminacy, conversational vagueness, and pragmatic indeterminacy. Semantic indeterminacy is divided into ambiguity and semantic vagueness. The most relevant form of ambiguity is polysemy, which happens when an expression has two or more (related) senses of one lexical meaning. Semantic vagueness stems from the sorites-susceptibility of the expression. The most important form of conversational vagueness is generality. Finally, pragmatic indeterminacy relates to the unclarity of implicatures, speech acts, implicitures, and standard-relativity.

It has to be noted that the term "semantic vagueness" refers to the phenomenon that has been discussed under the title of vagueness in philosophy of language, not the source of vagueness. The source of "semantic vagueness" can be ontic, epistemic, semantic, or any combination of these accounts. SDL remains neutral about the preferable theory of vagueness. The discussions are relevant irrespective of the source of vagueness. The use of the term "semantic" in referring to the phenomenon, however, may sometimes confuse readers.

The first chapter provides the first comprehensive taxonomy of indeterminacy in language. This chapter can be a perfect introduction for any undergraduate course that needs a discussion about the different forms of fallacy and equivocation, irrespective of whether the rest of the book is relevant to the coursework. Meanwhile, the most important function of the first chapter for the rest of the book is to show that semantic vagueness is but one of many forms of indeterminacy. Like Copernicus whose categorization of the earth as one of the planets that revolve around the sun undermined the philosophy that exaggerated the importance of the earth, Lanius's categorization of sematic vagueness as one of the many forms of indeterminacy invites us to question the idiosyncratic attention that semantic vagueness in the law has attracted in the recent decades.

The second chapter discusses legal utterances. The main question of this chapter is whether the legal content of legal utterances is identical with (or constituted by) the linguistic content of the utterances, the thesis that is known as the Communication Theory of Law (CTL). Lanius explains that philosophers and law scholars in the debate on vagueness in the law used to take CTL for granted. However, several scholars have recently challenged CTL. The idea that the legal content of legal utterances is *not* identical with (or constituted by) the linguistic content of the utterances undermines the relevance of semantic vagueness (and indeterminacy in the language in general) to legal considerations. The rejection of CTL, therefore, serves the thesis that Lanius wants to defend.

Lanius examines the arguments that have been proposed against CTL. He contends that these arguments are not plausible. He explains that the apparent bifurcation between the legal and the linguistic contents stems from equating the linguistic content with *what is said*. Nevertheless, the linguistic content is more than *what is said* in most legal cases. After refuting the arguments against CTL in the literature, Lanius proposes a new argument (the argument from Theoretical Disagreement) which he regards as the knockout blow for CTL.

I do not have the space to examine the plausibility of the argument from Theoretical Disagreement here. Nonetheless, I doubt that the second chapter *needs to* reject CTL to serve its role in defending the idea that linguistic indeterminacy is less relevant to the law than commonly assumed. The fact that the linguistic content is not equal with *what is said* and that we need a complex procedure of legal interpretation to extract the linguistic content implies that the indeterminacy of *what is said* does not necessarily entail the indeterminacy in the linguistic content. As the debates around the significance of vagueness in the law concerned the indeterminacy of *what is said* (in the laws, verdicts or contracts), Lanius does not need to reject CTL to assert that the sematic vagueness in legal utterances usually does not render the linguistic and the legal content of the law indeterminate.

The third chapter of SIL is the application of the first chapter to concrete legal cases. Most of the cases Lanius discusses were considered to be examples of semantic vagueness in the literature; however, they

turn out to be indeterminate due to other forms of indeterminacy at closer examination. While some scholars attributed the indeterminacy in some of these cases to other linguistic phenomena like generality and multidimensionality, Lanius is the first who generalized their arguments and systematized the attribution of legal indeterminacy to different phenomena. The third chapter (in association with the first chapter) hence entails that philosophers of law and language need to focus more on other forms of indeterminacy – like polysemy, generality, and standard-relativity – that appear to be more relevant in the legal discourse than semantic vagueness is.

In addition, the scholars who criticized the attribution of legal indeterminacy to semantic vagueness in the literature have not shown a positive case in which the indeterminacy is due to semantic vagueness. Therefore, the readers could not know what semantic vagueness is like in concrete legal cases. Lanius fills this gap by discussing *White City Shopping Center v. PR Restaurants* as a case of semantic vagueness in the law. I invite the advocates of the functionality of semantic vagueness in the law to stop discussing cases like *Hart's "vehicle" example, "Any deliberate speed" in Brown v. Board of Education,* etc. to support their claim (since other forms of indeterminacy do the trick in these cases) and to focus on *White City Shopping Center v. PR Restaurants* (or any original case of semantic vagueness in the law) to examine their accounts. If vagueness has a function in the law, they have to show the function in this case.

In the fourth chapter, Lanius uses the tools of signaling games to examine the potential application of linguistic indeterminacy. He explains that people can use generality and ambiguity to facilitate communication when conflicting interests would otherwise preclude it. This situation is especially relevant to the law, as the legal utterances are addressed to heterogeneous audiences with different interests.

The fourth chapter models the application of the different forms of indeterminacy in the interaction between the *sender* of a message and its *receiver*. The action of the receiver ultimately determines the utility for both participants. The model works well for conversational vagueness, ambiguity, and pragmatic indeterminacy. It demonstrates when these forms of indeterminacy are useful and when they are detrimental for communication. However, the model does not demonstrate the role of semantic vagueness in such

interactions. The examples proposed in the relevant section (*Section 4.4.1*, page 197) are no applications of semantic vagueness, as the indeterminate messages discussed in this section are not indeterminate due to sorites-susceptibility. In addition, this section models semantic vagueness as a form of noise in communication. Nevertheless, as Lanius suggests, there is doubt whether the concept of noise can capture the nature of semantic vagueness. Therefore, this chapter invites new research on the topic: there is room for further development of the game-theoretic models of (legal) interactions when semantic vagueness is involved. Such research can examine and address the second worry of Roy Sorensen in "Vagueness has no function in law," namely, that semantic vagueness may cause or facilitate insincerity in communication.

The fifth chapter of SIL explains that linguistic indeterminacy can be used strategically in the law. Lanius observes five functions of indeterminacy: (1) indeterminacy can facilitate compromise, (2) indeterminacy can decrease overinclusiveness and underinclusiveness, (3) indeterminacy can reduce information and drafting costs, (4) indeterminacy can be used as double-talk, and (5) indeterminacy can improve compliance. Lanius discusses these functions in the three paradigmatic kinds of legal interactions: The enactment of laws, rendering verdicts, and the formation of contracts. The analysis of contracts is especially notable, as most of the works on the topic focused on the other two. Lanius shows that in all the three categories, the desirable functions are due to polysemy, generality, and pragmatic indeterminacy – not semantic vagueness.

SIL pays less attention to the question of who enjoys the functions of indeterminacy in the law and who suffers from them. It discusses the negative consequences of using indeterminacy when they are used unconstitutionally or in inappropriate circumstances. However, even using indeterminacy in appropriate circumstances sometimes has detrimental effects to certain people. For instance, when Lanius discusses "Deniability and Saving Face" as a function of indeterminacy in *Brown v. Board of Education*, he explains that the indeterminacy was desirable for the court, as it ensured the obedience and masked the oppositions. However, it is not clear if it was also desirable for the legislative system as a whole, the society, and

especially, for the group of people who are affected by the law mostly, namely, African-Americans (which in turn may consist of different sub-groups that are influenced differently).

Does the proper use of indeterminacy bring about an optimal utility (like a Nash equilibrium) for the different stakeholders? Maybe. Nevertheless, neither SIL nor any other work on the topic have examined this claim so far. Lanius, however, has developed a game-theoretic approach in chapter (4) that can be useful for analyzing this issue. I hope that researchers expand this approach and use it to examine the legal cases of chapter (5) (or similar legal cases) to illuminate the influence of indeterminacy on the utility of each stakeholder.

As someone who has spent some years studying vagueness and indeterminacy in the law, I find SIL a fascinating work that addresses some of the prevalent worries in the topic. The book shows a full engagement with the opinions and the ideas of almost all major figures who participated the debate in the last 20 years. I recommend the book to anyone who is interested in philosophy of law and philosophy of language, especially the ones who are interested in studying the relation between law and language. I highly recommend reading the *Summary and Conclusion* at the end of the book for the ones who do not have time to read the whole work. It perfectly summarizes the main ideas in the book and it is one of the most insightful pieces in the whole literature of vagueness and indeterminacy in law.

References:

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