Strategic Indeterminacy in the Law

David Lanius (2019)

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Reviewed by Hesam Mohamadi[1]

When David Lanius wrote "Has Vagueness Really No Function in Law?" in 2013, he probably did not imagine he would write a book six years later rejecting the main thesis of that paper. We cannot understand the importance of Lanius's *Strategic Indeterminacy in the Law* (*SIL*) without considering the history of the debate on vagueness in law. Over the last twenty years, many philosophers argued that semantic vagueness (specifically the Sorites fallacy-based view that points along a semantic continuum cannot be distinguished) has a valuable function in the law. Some have even maintained that our intuitive approval of vagueness in law is so strong as to settle theoretical debate on vagueness in language going beyond the philosophy of law. (As an example, see Soames, 2012). One of the few philosophers to take a different position was Roy Sorensen, whose proposal, encapsulated in the title of his paper "Vagueness Has No Function in Law" (2001), was little appreciated until a recent turn away from support for the functionality of semantic vagueness in law. Several philosophers now maintain that vagueness, properly understood, has no legal function. *SIL* is the most precise, the most comprehensive, and the first systematic work to cast doubt on the legal utility of semantic vagueness.

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SIL is a remarkable work with particular qualities. Lanius explains that scholars have used the term "vagueness" in several senses, thereby confusing our assessment of the role of Sorites-susceptibility in the law. To end this confusion, Lanius differentiates between the different concepts to which the term "vagueness" has referred and proposes new terms to associate each concept with. One of the motivations for writing this review is to remind scholars that we henceforth have no excuse for conflating the different concepts habitually deployed in this field (such as polysemy, semantic vagueness, generality, etc.) or for using associated terms confusedly or arbitrarily. *SIL* discourages projects that assimilate semantic phenomena that are properly distinct from vagueness. But in doing so, it opens the door to a world of new problems that have not yet been discussed.

The first chapter systematizes distinct forms of indeterminacy in language, differentiating three: semantic indeterminacy, conversational vagueness, and pragmatic indeterminacy (p. 60). Semantic indeterminacy is divided into ambiguity and semantic vagueness. One of the most relevant forms of ambiguity is polysemy, which arises when an expression has two or more (related) senses for one lexical meaning (pp. 18-21). Semantic vagueness stems from the Sorites-susceptibility of an expression (pp. 21-38). The most important form of conversational vagueness is generality (pp. 38-44). Pragmatic indeterminacy relates to the unclarity of implicatures, speech acts, *implicitures*[2], and standard-relativity (pp. 44-52). Providing a comprehensive taxonomy of indeterminacy in language, the first chapter's most important function is to show that semantic vagueness is but one of many forms of indeterminacy. Like Copernicus, whose categorization of the earth as just one of the planets that revolve around the sun undermined geocentric philosophy, Lanius's categorization of semantic vagueness as one of many forms of indeterminacy in the law

[2] Bach's (1994) term for a position between an explicature and implicature.

invites us to question the extravagant attention that semantic vagueness has attracted in recent decades.

The second chapter discusses legal utterances. The main question addressed is whether their legal content is identical with (or constituted by) their linguistic content, as the Communication Theory of Law (CTL) (p. 62) postulates. Lanius explains that philosophers and law scholars in the debate on vagueness in the law took CTL for granted until recent challenges to it (pp. 62-63). Lawrence Solum, for instance, pointed out that the First Amendment of the U.S. Constitution is considerably richer than its communicative content, since "speech" in the term "freedom of speech" applies to behavior that would not be considered speech in communicative analysis (Solum, 2013, p. 501). The idea that the legal content of legal utterances is *not* identical with their linguistic content undermines the legal relevance of semantic vagueness in language. Such rejections of CTL serve the thesis that Lanius wants to defend. He, therefore, examines arguments that have been proposed against CTL and, finding them implausible, contends that the apparent bifurcation that scholars have identified between legal and linguistic content stems from equating the linguistic content with *what is said* (pp. 103-106). Nevertheless, linguistic content is more than *what is said* in most legal cases.

Meanwhile, the gap between *what is said* and the linguistic content is enough for undermining the legal relevance of semantic vagueness in the language. Lanius rejects the equation of legal content with *what is said* by arguing from the standpoint that linguistic content is not equal to *what is said* (pp. 116-121). So irrespective of whether the legal content and the linguistic content are identical (as the supporters of CTL advocate) or the legal content and the linguistic content are not identical (as the opponents of CTL argue), *what is said* is not identical with the legal or the linguistic content. As a result, while *what is said* is indeterminate, its linguistic and the legal

content may not be, and so it is misleading to assume that semantic vagueness in law derives directly from the indeterminacy of legal utterances themselves.

In the third chapter, Lanius applies the systematization of indeterminacy proposed in the first chapter to concrete legal cases. Most of the cases discussed have been treated in the literature as examples of semantic vagueness; however, they turn out on closer examination to be indeterminate due to other forms of indeterminacy. While several scholars have attributed the indeterminacy in some of these cases to other linguistic phenomena like generality and multidimensionality (namely Asgeirsson, 2015), Lanius is the first to generalize their arguments and systematize the attribution of legal indeterminacy to other phenomena. In association with the first chapter, this one contends that philosophers of law and language need to focus more on forms of indeterminacy other than semantic vagueness that appear more relevant to legal discourse, such as polysemy, generality, and standard-relativity.

Even though scholars who have criticized the attribution of legal indeterminacy to semantic vagueness have left readers in the dark about what semantic vagueness constitutes in concrete legal cases, Lanius fills this gap by discussing *White City Shopping Center v. P.R. Restaurants* as a case of semantic vagueness in the law (pp. 143-147). The issue in this case was whether burritos are sandwiches. Lanius explains that the terms 'sandwich' and 'burrito' are not ambiguous. In fact, it seems that the court and the sides of the dispute had the same definitions for these terms (Ibid). Nor does the problem stem from the polysemy of the terms, as "the issue was not which sense of 'sandwich' was the salient one but which dimensions of 'sandwich' were most relevant" (p. 145). Lanius argues that the problem is that burritos are borderline sandwiches, meaning that it is not clear that they are sandwiches, nor is it clear that they are not sandwiches. Therefore, *White City Shopping Center* can be seen as a suitable *case study* for examining the function of semantic

vagueness in law. Scholars can take one of three positions on the role of semantic vagueness in *White City Shopping Center*: 1) disagree with Lanius' claim that the indeterminacy of this case is due to semantic vagueness; 2) maintain that indeterminacy in this case is due to semantic vagueness and has a valuable legal function; or 3) accept that indeterminacy in this case is due to semantic vagueness while disputing its legal functionality. Distinguishing these positions may in turn help to uncover whether semantic vagueness can in fact serve a valuable legal function.

In the fourth chapter, Lanius uses signaling games to model potential applications of linguistic indeterminacy. He explains that people can use generality and ambiguity to facilitate communication when conflicting interests would otherwise preclude it (p. 170). This situation is especially relevant to the law, as legal utterances are addressed to heterogeneous audiences with different interests (pp. 64-75). The chapter models the application of 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 of the communication. Lanius offers the example of a politician saying, "I oppose taxes that hinder economic growth" (p. 208). It is possible to interpret this assertion as general opposition to taxes because they hinder economic growth, or as opposition only to taxes the asserter believes will hinder economic growth. The politician might hope that everyone will take on the first interpretation, thereby using indeterminacy to communicate what she could not have communicated unequivocally – that she opposes taxes. The model works well for conversational vagueness, ambiguity, and pragmatic indeterminacy (the example shows a function of ambiguity). However, the model does not demonstrate the role of semantic vagueness in such interactions. As Lanius suggests, there is doubt whether the model can capture the nature of semantic vagueness (p. 200). Therefore, this chapter does not conclude the debate on semantic vagueness; rather, it invites new research on the topic:

there is room for further development of the game-theoretic models of the interactions when semantic vagueness is involved. Such research could examine the second worry raised by Roy Sorensen in "Vagueness has no function in law," namely, that semantic vagueness may cause or facilitate insincerity in communication (Sorensen, 2001).

The fifth chapter explains that linguistic indeterminacy can be used strategically in the law. Lanius observes five functions of indeterminacy: (1) indeterminacy to facilitate compromise; (2) indeterminacy to decrease over-inclusiveness and under-inclusiveness; (3) indeterminacy to reduce information and drafting costs; (4) indeterminacy used as double-talk; and (5) indeterminacy to improve compliance (p. 288). Lanius discusses these functions in the three paradigmatic kinds of legal speech acts: the enactment of laws, rendering of verdicts, and formation of contracts (p. 217, p. 244, and p. 263, respectively). The analysis of contracts is especially notable, as most literature on the topic focuses on the other two. Lanius shows that in all three categories, the desirable functions are due to polysemy, generality, and pragmatic indeterminacy – not semantic vagueness.

Although *SIL* discusses the negative consequences of indeterminacy when it is used unconstitutionally or in inappropriate circumstances, the book pays less attention to the negative consequences of indeterminacy when its presence seems justifiable. This is an important issue because while indeterminacy may benefit some, it may harm others. For instance, Lanius discusses "Deniability and Saving Face" as a function of indeterminacy in *Brown v. Board of Education (1955)*. In *Brown*, the U.S. Supreme Court decided that public schools should be desegregated. However, the court's concern for compliance was high, since, on the one hand, they expected resistance against any determinate decision on this topic; and on the other hand, it was essential that whatever the court ordered should be obeyed (p. 260). Therefore, a determinate decision

required suppressive measures to break down any act of resistance. The court, therefore, ordered the segregation be done "with all deliberate speed." Lanius explains that the indeterminacy encoded in "with all deliberate speed" was desirable *for the court* as it ensured obedience, inasmuch as there was no disobedience blatant enough to call for suppression. However, it is not clear if the indeterminacy was as desirable for the legislative system as a whole, for society, and especially for the group of people most affected by the law, namely African-Americans (a group consisting of sub-groups who might in turn be affected differentially).

Does the proper use of indeterminacy bring about an optimal utility for different stakeholders (for instance, all the social groups influenced by the ruling in *Brown*)? Neither *SIL* nor any other work on the topic has approached this question. Lanius, however, develops a game-theoretic approach in Chapter 4 that promises to be useful for analyzing this issue. I hope that researchers will expand on 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 different stakeholders.

I find *SIL* a fascinating work that addresses some of the prevalent worries in the field. The book engages deeply with the opinions and the ideas of many major figures to have participated in the debate in the last two decades. The book can be useful for anyone who is interested in philosophy of law and philosophy of language, especially those interested in studying the relation between law and language. For those who do not have time to read the whole work, I recommend the *Summary and Conclusion* at the end of the book. This perfectly summarizes the main ideas in the book, and is one of the most insightful pieces in the entire literature on vagueness and indeterminacy in law.

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