LEGAL INDETERMINACY IN CONTEXT

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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The Ohio State University
2006

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ABSTRACT

The debate in legal theory over whether judges’ decisions are adequately constrained by law is predicated on a more fundamental issue, namely, whether law is indeterminate. In short, if the law has “gaps”, then judges might be permitted to use discretion to settle cases calling for an application of the indeterminate law. In the debates over legal reasoning and legal indeterminacy, an even more basic issue is often overlooked, however: what is the source of legal indeterminacy?

Three theorists have offered descriptions of alleged “gaps” in law by emphasizing three distinct sources of those gaps. Oliver Wendell Holmes is committed to an ontic approach, focusing on the systemic “gaps” inherent in a system requiring judges to determine law by finalizing it. H.L.A. Hart offers a semantic approach, focusing on the linguistic “gaps” in legal terms that exhibit an “open texture”. Ronald Dworkin offers an epistemic approach to account for what others take to be indeterminacy in law, describing the alleged legal “gaps” as judicial uncertainty in locating and applying relevant political principles to determine law in difficult cases.

Philosophers have also taken ontic, semantic, and epistemic approaches to describing the similar phenomenon of vagueness. None of these accounts seems satisfactory, however. In response, contextualist theorists have offered an alternative approach. In particular, Stewart Shapiro has recently described vagueness within the
context of an ongoing conversation. Vagueness, on this view, is described as borderline cases of open-textured terms that give evaluators discretion to decide those cases either way.

Since Shapiro and Hart both employ Friedrich Waismann’s notion of “open texture” to describe vagueness and legal indeterminacy (respectively), a reconstruction of Hart’s theory on contextualist grounds is in order. The reconstructed view of Hart, termed “legal contextualism,” describes legal indeterminacy, not as a semantic defect of open-textured terms, but rather as a borderline case in which judges have the discretion to apply or not to apply open-textured terms in settling disputes. Legal contextualism answers the main arguments against Hart’s initial theory. Legal contextualism also suggests a starting point for the indeterminacy debate—confusion over the suppressed systematic ambiguity of the term “law”.

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Dedicated to my mother and father, Warren and Delores Anderson, who instilled in me the value of education, and to my wife, Sue, who supported me in pursuing it.
ACKNOWLEDGMENTS

I am grateful to each member of my dissertation committee. My adviser, Dan Farrell, was the consummate advocate, consistently encouraging and steadfastly supporting me. Without his unflagging concern, his tireless enthusiasm, and his insightful comments, this dissertation would not have been completed. My co-adviser, Stewart Shapiro, provided not only the theoretical focus for my thoughts about Hart and legal indeterminacy, but also a stimulating academic environment. His dialectic skill is surpassed only by his generosity. Professor Don Hubin provided many helpful stylistic and substantive suggestions that helped me to clarify the arc of the overall project. I thank you all.

I also wish to thank Justin D’Arms, Graduate Studies Committee Chairman, and Debra Blickensderfer, Graduate Secretary for the Philosophy Department, who consistently and confidently guided me in all things administrative.

I wish to thank my friends and family members who, through their unselfish act of listening to me blather on about things for which they could not have cared less, encouraged me more than they might realize. Chief among them are Chris Ebert, Kyle Timken, Dr. Wayne Nicholson, and Dr. Paul Hailey.

Finally, I wish to thank my high school teacher, Mr. Robert Uritis, who formally introduced to me to philosophy as a subject of serious study.
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CHAPTER 1

LEGAL INDETERMINACY AND ITS SOURCES

Nearly thirty years ago, the English legal philosopher, H.L.A. Hart, diagnosed what he took to be the primary problem in American jurisprudence.¹ Hart claimed that the American theorists’ intense scrutiny of adjudication—the process of judicial decision-making—had distorted their perceptions and, therefore, their descriptions of law. According to Hart, this judge-centric view of law had polarized legal theory. In America, law was either a “Nightmare” or a “Noble Dream”.

The writings of Oliver Wendell Holmes, Jr. contained the incipient Nightmare view of law. Holmes had claimed—against the natural law theorists of his day—that law was not some “brooding omnipresence in the sky”.² Law was not, in other words, a set of eternal principles of human conduct that judges had merely to discover and to apply to actual cases. Moreover, even if law could be divined from principles of natural law, Holmes argued, judges would not be able to apply those principles to the facts of real cases using logical methods alone.³ Judges would have to rely on their own life experiences, at least as much as the accepted rules of inference, to appropriately settle

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² Southern Pacific Co v. Jensen, 244 U.S. 205, 222 (1917).
³ Oliver Wendell Holmes, Jr., The Common Law, ed. Mark DeWolfie Howe (Boston: Little, Brown and Company, 1963), pp. 1-2: “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”
legal disputes. Because judges could neither discover nor deduce all the specific legal principles necessary to decide actual legal cases, judges would have to settle those cases practically, based on whatever information they deemed relevant.

It did little good, then, for theorists to argue about legislative terms, moral principles “behind the law”, or anything other than the opinions courts issued. For Holmes, the law could not be viewed as fixed until a court announced an opinion finalizing it. The job of lawyers and legal theorists, Holmes claimed, was to make the best prediction about what law on a particular issue would be once a court ruled on it. Holmes contended that the “prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.”

A number of American legal theorists, known collectively as Legal Realists, took Holmes as their forebear, expanded his “prediction theory of law”, and established it as the most prevalent view in the American legal academy. Holmes had argued that judges made law and that law could not be considered final until courts made it. The Legal Realists argued that Holmes’s view of adjudication meant that the only law a society had was judge-made law. Everything else—legal principles, administrative rules and

4 Oliver Wendell Holmes, Jr., “The Path of the Law”, 10 Harvard Law Review 457 (1897), p. 457: “The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”

5 Id., p. 461.

6 The realist label is confusing here. The “realism” of the Legal Realists is not meant to be taken as philosophical “realism”; indeed, the view would be opposed to philosophical realism because it embraces indeterminacy. This group of theorists saw themselves as offering a more realistic (i.e., practical and empirical) view of adjudication in the American legal system than had previously been offered.

7 See, for example the Epilogue to Laura Kalman, Legal Realism at Yale, 1927-1960 (Chapel Hill: University of North Carolina Press, 1986): “We are all realists now”. The statement has been made so frequently that it has become a truism to refer to it as a truism.”

8 Typical is this quote from Felix S. Cohen, “Transcendental Nonsense and the Functional Approach”, 35 Columbia Law Review 809, 828 (1935): “In brief, Holmes [has] offered a logical basis for the redefinition of every legal concept in empirical terms, i.e., in terms of judicial decisions. The ghost-world of
regulations, even duly enacted statutes—were considered to be not law, but rather sources of law. The lawyers’ job, on the Legal Realist view, was to catalog the applicable sources of law, as well as the related factual scenarios and overriding social policies that a judge might consider relevant in issuing an opinion. The better job a lawyer did in tracking these “inputs” to the judicial decision (including, on some views, the judges’ psychological, political, and personal predilections), the better prediction the lawyer could make about what the law would be.

The Legal Realist version of Holmes’s prediction theory of law is what Hart termed “the Nightmare” view of law. The Legal Realist claim was that a society had no law until a judge decided—for whatever reasons she deemed appropriate—what the law was. The judge was granted broad discretion and was permitted to take into account all kinds of relevant (including extra-legal) data in order to settle legal disputes. The Legal Realist theory of law therefore implied an arguably anti-liberal principle that, at any given moment in a nation’s history, there would be very little law constraining the conduct of its officials, including its judges. The Legal Realist theory also implied an

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9 Hart recounts that some Legal Realists bore a “tough-minded instance that to understand law all that mattered was what courts did and the possibility of predicting this, not what paper rules said and not the reasons given by judges for their decisions.” See “The Nightmare and the Noble Dream”, p. 977. In keeping with his “prophecy” metaphor for law, Holmes similarly referred to the sources of law, to this “body of reports, of treatises, and of statutes”, as “the oracles of law”. See “The Path of the Law”, p. 457.

10 See generally Lon L. Fuller, “American Legal Realism”, 82 University of Pennsylvania Law Review 429, 432 (1934).

arguably anti-democratic principle that judges—as solitary, and primarily unelected, government officials—have the exclusive power and unchecked authority to make law.  

Hart attributed the opposite pole in American legal theory—“the Noble Dream” view of law—to Ronald Dworkin. In the mid-1970s, Dworkin was at work revising andreviving natural law theory. Although Dworkin did not posit eternal principles of human conduct from which valid social laws must be derived, he did hold that every legal case presented a legal question that had, at least in principle, a “single right answer”. On Dworkin’s view, a judge is responsible for locating the principle of political morality which best justifies that answer and then applying it correctly to the legal question presented in the case at hand. Hart labeled Dworkin’s view of law a “Noble Dream” because it purported to solve the perennial problem of how to determine law so as to adequately constrain the discretion of judges by describing the legal practice as a kind of utopia, a noble realm in which every legal issue has a unique correct answer.

Hart’s proposed remedy for the diagnosed problem of theoretical extremes was an intermediate theory of adjudication. The Nightmare view of law implied that judges had broad discretion in deciding cases because there were no (or, at least, very few) right  

12 So-called “Critical Legal Scholars” (CLS) in the American legal academy exploited and expounded these anti-liberal and anti-democratic views of law from the late 1970s to the early 1990s. The main target for CLS was the liberal notion of the “rule of law” in which the conduct of government officials was said to be constrained by law and not by their will. Joseph W. Singer, in “The Player and the Cards: Nihilism and Legal Theory”, 94 Yale Law Journal 1 (1984) describes the CLS attitude as follows: “Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral. This view of the legal system raises the possibility that there are no rational, objective criteria that can govern how we describe that system, or how we choose governmental institutions, or how we make legal decisions.” CLS argued that the legal system was radically indeterminate and that those in power could use the law to justify whatever decision they wanted. By most accounts, CLS died out as a movement in the legal academy because it drastically overestimated both the occurrence and the effect of the indeterminacy of law. See Jules L. Coleman and Brian Leiter, “Determinacy, Objectivity, and Authority”, 142 University of Pennsylvania Law Review 549 (1993). In particular, it does not follow that, because the law has “gaps” with respect to particular kinds of cases, the entire legal system is sufficiently indeterminate to eviscerate the “rule of law”.  

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answers to legal questions. The Noble Dream view of law claimed, on the other hand, that judges had very little (if any) discretion in deciding legal cases because there were right answers to all (or nearly all) legal questions. Hart claimed that the unexciting truth lay between the two extremes: in some cases, there is no right answer, and judges have discretion in deciding one way or the other; in other cases, there is a right answer, and judges do not have such discretion.

Hart distinguished his view from those of Holmes and Dworkin in terms of their proposed theories of adjudication, of how each theorist believed judges reason (and should reason) in deciding cases. Dworkin argued, however, that a more basic issue drove the distinction among the three theories of adjudication. Dworkin claimed that the distinction between his theory and those of Hart and Holmes was that, whereas Hart and Holmes assumed that law was, in certain cases, indeterminate, Dworkin’s theory made no such assumption. The contested issue over judicial reasoning—whether, and to what extent, judges’ decisions were constrained by law—was predicated on the theorists’ answer to the question of legal indeterminacy; namely, whether the law has “gaps” that judges may use their discretion to fill. If the law has “gaps”, as Hart and Holmes apparently assumed, then judges might be permitted to use their discretion (in potentially different ways consistent with a variety of possible constraints) to fill them. However, if the law does not have “gaps”, as Dworkin has consistently claimed, then there would be

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no judicial discretion (apart from, perhaps, the extremely limited discretion to locate and
to apply all available relevant legal resources) in resolving apparently unsettled cases.¹⁴

In this ongoing debate, however, there is an even more fundamental issue than
whether the law has “gaps”, and that is—to what may those “gaps” be attributed?¹⁵ Put
simply, the fundamental issue is what is the primary source of “gaps” in the law?

Holmes, Hart, and Dworkin are committed to different answers to this basic question.¹⁶
Moreover, their different approaches to the question of what causes legal “gaps” drive
depending on their respective theories of legal indeterminacy and legal reasoning.

An example can be used to illustrate how Holmes, Hart, and Dworkin have (at
times unwittingly) traded on a distinction among three different sources of the alleged
“gaps” in law. Assume that a jurisdiction has passed an ordinance that prohibits the
operation of a vehicle in a public park.¹⁷ Assume also that the courts in that jurisdiction
have held that an automobile is a vehicle for purposes of the statute, but that roller skates
are not a vehicle. A judge is presented with the case of a person riding a bicycle through
a public park. The legal issue in the case is whether a bicycle is a vehicle for purposes of
the statute. If the judge determines that a bicycle is a vehicle, then the bike-rider will be
convicted. If the judge determines that a bicycle is not a vehicle, then the bike-rider will
be acquitted.

¹⁴ On the inter-relatedness of judicial discretion and legal indeterminacy, see Dworkin’s “The Model of
¹⁵ Put the other way round, in terms of determinacy, instead of indeterminacy, this most fundamental issue
is what determines (or fixes) the law. In Dworkin’s terms, the issue is what makes propositions of law
true? See his “Introduction” to The Philosophy of Law (Oxford: Oxford University Press, 1977), hereafter
“Introduction”, p. 5.
¹⁶ This will be taken up in what follows in Chapter One.
¹⁷ Hart’s famous “vehicle” case was introduced prior to the publication of The Concept of Law, in
In this case, there appears to be a “gap” in the law that must be filled by a judicial determination. There are (at least) two ways in which one might describe this apparent indeterminacy in the law. First, one could argue, as Hart did, that the primary source of legal indeterminacy is the textual imprecision of legal language. Hart argued that the “open texture” of the terms of law creates “gaps” which judges are empowered to fill.18 The statute above does not, by its own terms, specify that a bicycle is a vehicle. Since the term “vehicle” has not been sufficiently specified by legislators, judges are permitted limited discretion to fill the linguistic “gap”. A second way of describing the “gap” in the above example is not in terms of the language of the statute, but rather in terms of the way our legal system is organized. Holmes, for example, contended that our legal system could not provide a determinate answer to a legal question—such as whether a bicycle is a vehicle—unless and until a judge rendered a decision determining the law for that case. Unlike Hart, then, Holmes attributed the lack of legal finality prior to the event of the judicial decision as the cause of legal indeterminacy. Because our system does not permit the law to be determined prior to a judicial decision, law was, for Holmes, more broadly indeterminate. Judges, on Holmes view, had wide discretion to fill inherent systemic “gaps”.19

Dworkin contends that law contains neither linguistic nor systemic “gaps”, and that what appears to Hart and Holmes as indeterminacy is merely judicial uncertainty. Judges are, at times, unsure as to what the best decision is in a particular case. In the vehicle case, the judge may be uncertain as to whether a bicycle should or should not be

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18 For a fuller discussion of Hart’s view, especially as a “semantic” approach to describing the causes of legal indeterminacy, see section 1.2 below.
19 For more on Holmes’s view as an “ontic” approach to accounting for legal indeterminacy, see section 1.1 below.
considered a vehicle for purposes of the statute. However, Dworkin argues, judicial
uncertainty is perfectly consistent with legal determinacy.\textsuperscript{20} In short, just because a judge
does not know the correct answer to a legal question does not mean that there is no
correct answer. Dworkin argues that principles of political morality are always available
for judges to use in determining the “single right answer” to each legal question and that,
therefore, neither the imprecision of legal language nor the vagaries of the legal system
causes “gaps” in the law.\textsuperscript{21}

The vehicle-in-the-public-park example illustrates that Holmes, Hart, and
Dworkin are committed to distinct views of what causes legal indeterminacy. Holmes
prefers what may be termed an \textit{ontic} approach, describing the apparent indeterminacy of
law in terms of systemic “gaps”. Hart argues that legal indeterminacy is a product of
linguistic “gaps”, an approach which may be (and has been) described as \textit{semantic}.
Dworkin offers what may be considered an \textit{epistemic} approach; he argues that law is not
indeterminate and that what may appear to be a “gap” in the law is nothing more than the
uncertainty judges tend to experience when deciding a difficult case.

It is this distinction among the three approaches taken to describing what
allegedly causes legal indeterminacy that best distinguishes the rival theories. Those
three approaches—ontic, semantic, and epistemic—to accounting for the predominant
\textit{source} of legal indeterminacy will be set out and described more completely in the three
sections that follow.

\textsuperscript{20} Dworkin, in \textit{A Matter of Principle} (Cambridge, MA: Harvard University Press, 1985), hereafter \textit{AMP},
p. 120, provides a literary analogy to make this point: “It may be uncertain and controversial what that
right answer is, of course, just as it is uncertain and controversial whether Richard III murdered the princes.
It would not follow from that uncertainty that there is no right answer to the legal question, any more than it
seems to follow from the uncertainty about Richard that there is no right answer as to the question whether
he murdered the princes.”
\textsuperscript{21} For a fuller discussion of Dworkin’s theory, see section 1.3 below.
1.1 The ontic approach

An ontic approach to describing indeterminacy generally focuses on the contribution the world makes in creating the observed phenomenon. An ontic approach to describing the indeterminacy of subatomic particles, for instance, would offer a description of the nature of the particles themselves (e.g., Einstein) as opposed to a description of what we can know about the nature of subatomic particles (e.g., Bohr).\textsuperscript{22}

Ontic indeterminacy is the view that indeterminacy originates in the world (as opposed to in the mind or in the language used to represent reality). In the macroscopic world, an ontic approach to indeterminacy will focus on the so-called vagueness of “things”,\textsuperscript{23} objects like clouds or mountains that seem to have no precise point at which they begin or end.\textsuperscript{24}

An ontic approach to describing legal indeterminacy would start with a description of law as an object, a human institution. The ontic theorist offers a description of the nature of law—what the institution of law is—in a way that would permit instances of cases that present legal questions lacking single right answers. The way this has been accomplished is to emphasize the apparent “gaps” in the contours of legal systems. For instance, the natural law theorists, following Aquinas, famously argued for a necessary connection between law and morality based on the assumption that law’s apparent “gaps” could be “filled” by the principles of morality from which the


\textsuperscript{24} A description of vague objects will be presented below in section 2.3.
legal rules were derived. 25 The natural law (from which human law, to be valid and binding upon the conscience of citizens, was derived) provides the principles of reason necessary to guide the conduct of citizens and officials. 26

In more recent years, gaps in the law have been discussed in terms of the truth values of propositions of law. “The ontological question,” as Ronald Dworkin sees it, is “In virtue of what can propositions of law be true?” 27 The age-old discussion of “gaps in the law” has been reformulated as a discussion of truth-value gaps in legal propositions. In cases of suspected legal indeterminacy, the proposition of law is not susceptible to the typical truth value assignment of either “true” or “false”. In such cases, an indeterminate truth value must be assigned (or so it is argued). This “third value” theory of legal propositions is the preferred way of discussing legal indeterminacy in American law schools, particularly among American Legal Realists and Critical Legal Scholars. 28

Aristotle’s famous case of the sea battle, in de Interpretatione 9, provides the backdrop for the “truth-value gap” description of legal indeterminacy. Aristotle argued that, although propositions about present or past events must necessarily be true or false, “when the subject, however, is individual, and that which is predicated of it relates to the

25 “We must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of details, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude, by reason of certain obstacles…and as to knowledge…” Aquinas, Summa Theologica, Question 94, Article 4.
28 The “third value” theory explanation of legal indeterminacy has been vociferously attacked by American’s most famous legal theorist, Ronald Dworkin. For a statement of “the argument from realism” as the argument that indeterminate statements imply a third category of indeterminate truth values and for Dworkin’s most cogent argument against it, see his “Is There Really No Right Answer in Hard Cases?”, 53 New York University Law Review 1 (1978).
future, the case is altered.” Take the proposition that a sea battle will occur tomorrow. The day after tomorrow, the proposition will either be true or false, because a sea battle either will or will not have taken place. Today, however, the proposition that a sea battle will occur tomorrow is neither true nor false. Statements about the occurrence of future events do not have a determinate truth value, Aristotle argued, because the future is subject to the element of chance, an element that provides “real alternatives” in future events.

Aristotle is not arguing, however, that the sea battle (or any future event) neither will take place nor will not take place. To argue in that manner, would be “to take up a position impossible to defend.” The future event either will take place or it will not take place. The corresponding proposition about the future event either will be true or will be false. Aristotle is arguing only that the truth value of a proposition about a future event is not decidable until the event proposed actually occurs or fails to occur. The occurrence of the future event determines the truth or falsity of the considered proposition.

The American philosopher, Charles Sanders Peirce, systematized Aristotle’s thoughts on the sea battle case. Peirce developed a triadic logic based on Aristotle’s discussion of future contingencies. For Peirce, the former dyadic logic and all of its semantic rules held for propositions of Actuality, propositions about existent facts. However, propositions of Possibility, including propositions about future events, required an augmentation of dyadic logic. In particular, Peirce assigned a third truth value to statements of Possibility, statements about events which might or might not occur. Peirce

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30 Considerations of vagueness aside. See Chapter Two below.
described this third category as containing propositions of the form S is P, but which have “a lower mode of being such that it can neither be determinately P, nor determinately not-P.” For Peirce, then, we cannot say whether a proposition about the future is determinately true or determinately false. Or, as Aristotle put it: “we cannot say determinately that this or that is false, but must leave the alternative undecided”.

For Peirce’s colleague in the celebrated Metaphysical Club, Oliver Wendell Holmes, Jr., employed these ideas in formulating what has become known as the “predictive theory of law”. Holmes argued that propositions asserting what the law is were akin to propositions about whether future sea battles would occur. Law, for Holmes, could not be reduced to the statutes and other court precedents within a jurisdiction. Holmes claimed that such legal rules were motives for judges to decide one way or the other in a given case. On this view, statutes and pronouncements are only sources of law; the law on a particular matter is determined exclusively by the judge:

It must be remembered… that in a civilized state it is not the will of the sovereign that makes lawyers’ law, even when that is its source, but what a body of subjects, namely, the judges, by whom it is enforced say is his will.

Since the judge has the final word on what the law is in a particular jurisdiction, it makes little sense, in Holmes’s view, to afford the status of “law” to precursors like statutes. For Holmes, all law (properly so called) is judge-made law. Statutes, precedent,

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32 De Interpretatione, 19a32-39. The “traditional view” of this passage is that Aristotle is here rejecting, or at least modifying, the assumption of bivalence. Of course, the traditional view is not without its detractors. See, for instance, Gail Fine’s “Truth and Necessity in De Interpretatione 9”, History of Philosophy Quarterly 1, no. 1 (January 1984): 23-47.

33 For the conceptual link between Peirce and Holmes, see Max H. Fisch, “Justice Holmes, the Prediction Theory of Law, and Pragmatism”, in Peirce, Semeiotic, and Pragmatism, pp. 6-18.

custom, public policy, and, even, principles of political morality may be used by practitioners to predict how judges will rule; i.e., what the law on a given issue will be.\textsuperscript{35}

Holmes’ future-directed description of law is what underwrites his famous slogan that the legal practice should be concerned with nothing more than “the prophecies of what the courts will do in fact.” On Holmes’ view, lawyers are social scientists whose main task is to gather enough information via studying the “sources of law” to make predictions about what a court will decide—i.e., about what the law will be. Holmes assumed that the state of the law at any time prior to the event of the judicial decision is amorphous and indeterminate. Any proposition of law asserted prior to the judicial decision is subject to the same analysis that Aristotle gave to future contingents and that Peirce gave to statements of real possibility. Since a judge may decide either way regarding any proposition of law, propositions of law are indeterminate until the future event, the event of judicial decision, occurs.

Holmes’ predictive theory of law assumes an ontic approach to legal indeterminacy. Lawyers can only predict what law courts will make. Until the court makes law, propositions of law on the issue before the court are indeterminate. Neither lawyers nor their clients can state determinately which of the alternatives—Plaintiff wins or Defendant wins, for instance—will come about. The indeterminacy is not due to an imprecise description of the law provided in statutes and prior court precedents. Neither is the indeterminacy due to a lack of information on the part of the lawyer (or even the

\textsuperscript{35} Holmes’s view as propounded by his followers, the American Legal Realists, has been characterized as “America’s Dominant Theory of Law” in terms of four related tenets: 1) legal theorizing facilitates social engineering through law; 2) the theory of law is essentially instrumental; 3) the theory of legislation and legal reasoning are essentially empirical; and 4) the concept of law must be described form the viewpoint of the practitioner as essentially predictive. See Robert S. Summers, “Charles Sanders Peirce and America’s Dominant Theory of Law”, in Peirce and Law, ed. Roberta Kevelson (New York: Peter Lang Publishing, 1991, pp. 153-162.
judge) which might create uncertainty as to which party in a case should win. The indeterminacy on Holmes’ view is due to the amorphous state of the law prior to the judicial decision, to the unsettled nature of the “sources of law” which can be clarified only by the future judicial decision itself.

Holmes’s ontic approach to legal indeterminacy, as assumed by his predictive theory of law, has been widely influential in American jurisprudence. Holmes’ predictive theory of law, whether countenanced as a means of “social engineering” or as the consistent development of a kind of “pragmatic instrumentalism”, has given birth to what has been called our nation’s most important indigenous jurisprudential movement of the past century: Legal Realism. For this reason, American lawyers and law professors tend to approach the problem of the indeterminacy of law as Holmes did, in terms of ontic indeterminacy—the systemic “gaps” inherent in a system that depends on future court decisions to determine the outcomes in unsettled cases.

1.2 The semantic approach

The “gaps” inherent in a legal system might not be attributable to the ontic indeterminacy of the system itself. The language law uses, rather than the future-directed system of case resolution by courts, might be the source of law’s indeterminacy. On this view, the language used in legal statutes and precedents is sufficiently imprecise to require courts to clarify the application of certain legal terms to actual cases. The court

decision would clarify the meaning of the terms used in a statute—for instance, the statutory term “vehicle” as applied to the case of riding a bicycle in a public park—and would, by its decision, determine that meaning for the current case and future similar cases.

This so-called “semantic” approach to the dealing with the problem of legal indeterminacy may have been introduced by H.L.A. Hart. In his landmark book, The Concept of Law, 39 Hart argued that law consisted of legal rules, authoritative norms that a society uses to guide the conduct of fellow citizens and officials. Hart’s general theory was that law existed when a society enacted not only primary rules of obligation to guide the conduct of citizens, but also secondary (higher-order) rules of obligation to guide officials in properly identifying, changing, and applying the primary rules. Roughly, the primary rules of obligation are the society’s set of authoritative proscriptions and permissions enacted in order to guide the conduct of its citizens; the secondary rules of obligation are the society’s set of authoritative pronouncements directing officials how to run the legal system. 40 According to Hart, the elements of a legal system, the primary and secondary rules, exhibit an “open texture”. Hart provided a model of rules that distinguished between two kinds of cases in which a given rule might apply—core cases, in which application is clear, and penumbral cases, in which application is unclear:

All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly


40 The detail of Hart’s general theory of law is omitted here in order to proceed directly to his “open texture” of law. Hart’s description of law as the union of primary and secondary rules can be found in COL, pp. 79-99.
applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or ‘open texture’.  

Hart’s conception of “open texture” is not limited to his description of legal rules. Hart attributes the open-textured nature of legal rules to the language with which the rules are composed. It is because rules “involve recognizing or classifying particular cases as instances of general terms” that they exhibit an open texture.

Hart’s vehicle-in-the-public-park case might make his position on the open texture of legal language clearer. The statute involved in that case might read something like “Operating a vehicle in a public park is prohibited.” Hart is not arguing here that, because the statutory statement is fashioned in the form of a rule, the statute is open-textured. Hart is not arguing, in other words, that the nature of the legal rule qua rule creates an indeterminate application. Moreover, Hart is not providing, as some have suggested, an updated form of Wittgenstein’s ‘rule-following’ considerations as those considerations apply to the “language” of law. Hart is arguing rather that, because the statutory statement employs the open-textured term “vehicle”, the application of the

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41 COL, p. 123. The use of “certain” and “doubt” in the above quote have caused some theorists to believe Hart is putting forward an epistemic account of legal indeterminacy. I think this view is incorrect and put forward an alternative reconstruction of Hart in Chapter Four, below.


43 See Bix’s excellent summary of the way Wittgenstein’s remarks about rule-following in Philosophical Investigations, sections 143-242 (New York: MacMillan Press, 1968), hereafter Philosophical Investigations, especially section 143-242—or, more precisely, Saul Kripke’s famous restatement of Wittgenstein’s argument in his Wittgenstein on Rules and Private Language (Cambridge, MA: Harvard University Press, 1982)—have been used by recent legal indeterminists to argue for the radical position that, to the extent that there is no consensus within the legal community on how a legal rule should be followed, there is no law available to govern conduct. This means, for the radical theorist, that there is no “rule of law” in modern legal societies (where, of course, there is precious little consensus on many legal issues), but only judicial (i.e., political) fiat. LLLD, Chapter 2.
statute to some cases will be unclear. The open-texture of the language used in the legal rule permits the indeterminate application of the legal rule in those cases falling within the rule’s “penumbra”.\textsuperscript{44}

Hart borrowed much of his account of the open-textured nature of rules from a colleague at Oxford University, Friedrich Waismann. In his paper “Verifiability”,\textsuperscript{45} Waismann described “open texture” not as a feature of legal propositions, however, but as a feature of scientific statements. Waismann argued that nearly all empirical concepts exhibit an “open texture”, a feature that makes it impossible to define those concepts with absolute precision.

Take, for example, the empirical concept (and what we might now call a “natural kind”) ‘gold’. Waismann argued that, although it may appear that a common concept like ‘gold’ is definable with absolute precision, the appearance is deceiving. It is true that scientists have given us a set of distinctive experimental criteria by which to determine whether a particular metal is gold. There are recognized chemical tests that can be performed. There are also tests that can be performed to determine whether the subject metal emits radiation in the recognized spectrum and distinctive pattern of gold. It is possible, however, that a particular metal that looks like gold and meets all the chemical tests for gold might emit a different kind of radiation than the one expected for gold.

\textsuperscript{44} Confusion over whether Hart’s open-texture thesis should be applied generally to all, not just legal, language continues to spur unnecessary debate. Three decades after the publication of The Concept of Law, Hart clarified his assertion that ‘open texture’ was a feature of language generally, not only of rules, in private correspondence: “I certainly did not think I was saying something applicable only to the language of statutes or rules or statutory interpretation etc. My view was (and is) that the uses of any language containing empirical classificatory general terms will, in applying them, meet with borderline cases calling for fresh regulation. This is the feature of language called ‘open texture’”. LLLD, at 24, letter from Hart, dated 7/16/91.


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This bare possibility is sufficient, argues Waissman, to demonstrate that our concept of ‘gold’ cannot be defined with absolute precision:

We can never exclude altogether the possibility of some unforeseen situation arising in which we shall have to modify our definition. Try as we may, no concept is limited in such a way that there is no room for any doubt. We introduce a concept and limit it in some directions; for instance we define gold in contrast to some other metals such as alloys. This suffices for our present needs, and we do not probe any farther. We tend to overlook the fact that there are always other directions in which the concept has not been defined.\(^46\)

The open texture of empirical concepts makes it impossible to define those concepts with complete precision. In turn, the inability to completely define the concepts employed in making empirical statements renders a conclusive verification of those statements impossible. Since ‘gold’ cannot be defined with absolute precision, the statement “That metal is gold” cannot be conclusively verified. Because empirical concepts cannot be completely defined, we cannot describe completely all the possible evidence that would be needed to make a sentence employing that concept true or false:

Open texture is a very fundamental characteristic of most, though not all, empirical concepts, and it is the texture which prevents us from verifying conclusively most of our empirical statements. Take any material object statement. The terms which occur in it are non-exhaustive; that means that we cannot foresee completely all possible conditions in which they are to be used; there will always remain a possibility, however faint, that we have not taken into account something or other that may be relevant to their usage; and that means that we cannot foresee completely all the possible circumstances in which the statement is true or in which it is false. There will always remain a margin of uncertainty. Thus the absence of a conclusive verification is directly due to the open texture of the terms concerned.\(^47\)

So, for Waismann, the goal of complete verification of empirical statements is frustrated by the open texture of the terms used in those statements. The open-textured nature of

\(^{46}\) “Verifiability”, p. 120.
\(^{47}\) “Verifiability”, p. 127.
the terms used in a sentence anticipates the unforeseeable, and potentially relevant, conditions which might bear on our evaluation of the sentence’s truth or falsity. We will remain uncertain, in some cases, whether the statement employing the open-textured term is true or false.

Waismann offered his initial description of “open texture” in the context of verificationism, and, in particular, as an argument against the phenomenalist enterprise of reducing material object statements to sense data statements. However, the concept of “open texture” need not be limited to the historical debate over the possibility of verifying empirical statements. The feature of “open texture” is present in other concepts and in other contexts. Waismann later acknowledged that “open texture” was a general feature of all concepts, not just “empirical” concepts. In *The Principles of Linguistic Philosophy*, Waismann claimed that no concept, irrespective of context, satisfies the demand of complete precision. “No concept”, contended Waismann, “is outlined in such a way that there is no room for any doubt”.

Here Waismann is not disparaging the notion that no concept can be completely specified. He is arguing, rather, that our language must be organized in such a way that we can adequately respond to common circumstances and routine practices. We do not provide for all possible ways in which the concept of ‘gold’ could be specified because, for the most part, our recognized tests suffice to determine, for our present purposes, that a subject metal is gold. We do not arrange our tests in anticipation of a never before seen, albeit possible, event that a test sample of metal—one that meets all our other tests for gold—might emit a different form of radiation. If circumstances arose that would

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49 *Id.*, p. 223.
make us alter our concept of ‘gold’, we could do so. The new concept would take into
account, for instance, the newly discovered wavelengths of radiation emitted by the
putative gold sample. We wait, though, until such extreme circumstances require us to
change our concept, instead of attempting to take into account all the possibilities at the
outset. We devise a concept that is good enough to fulfill its current purpose and then
augment it when circumstances require an adjustment.

Language is, in this respect, like law, according to Waismann:

The laws of any age are suited to the predominant characteristics,
tendencies, habits and needs of that age. The idea of a closed system of
laws lasting for all time, and able to solve any imaginable conflict, is a
Utopian fantasy which has no foundation to stand upon. In actual fact
every system of law has gaps which are, as a rule, noticed and filled out
only when they are brought to light by particular events.50

Neither language nor law can be so completely specified so that all doubt is removed, so
that all possibilities are anticipated. The “open texture” of language allows for concepts
to be more completely specified should the appropriate circumstances arise. The “open
texture” of law allows for gaps in available legal resources to be filled should those gaps
be “brought to light by particular events”.

Hart seized upon Waissman’s notion of “open texture”, especially as it related to
the broader contexts of language and law. In The Concept of Law, Hart provided a model
of legal rules that illustrated their “open texture” and accounted for the “particular
events” that might bring the “gaps” in open-textured legal rules to light. Hart argued, as
did Waissman, that although the gaps in law could be filled as circumstances arose, the
gaps could not be completely filled to take into account all relevant potential
circumstances. To the extent that Hart believed that law has gaps, he upheld the

50 Id., p. 76.
indeterminacy of law. To the extent that he believed that law’s gaps could be filled as circumstances required, he may be considered a moderate (as opposed to a more radical Legal Realist or Critical Legal Scholar type of) indeterminist.

A summary of Hart’s argument, as a semantic approach to legal indeterminacy, might run as follows. Natural languages are open-textured. Societies use natural languages to form legal rules to communicate standards of behavior to citizens and officials. Since the legal rules are comprised of natural language terms, the legal rules will consist of open-textured terms. To the extent that legal terms in rules are open-textured, the rules will have borderline cases. At the borderline, evaluators (typically judges) will be uncertain as to whether the rule applies so as to settle the case because the application of the rule at the borderline will be indeterminate. On the other hand, in clear cases, the application of the rule will be determinate. At the core of the rule, evaluators—judges, in legal cases—will be certain as to how the rule applies so as to settle the case.

So, for Hart, the “open texture” of a term used in a legal rule permits the indeterminate application of the rule in a borderline case. A legal system that employs legal rules will be indeterminate to the extent that the legal rules permit indeterminate applications. These borderline cases will not have predetermined “right answers”. The judge will be given the task of “filling in the gap” that the open-textured term permits. The legal gap will be filled by the court’s decision in applying the rule to the borderline case. For instance, the judge might determine that “vehicle”, in Hart’s example, does not include bicycle. In that case, riding a bicycle in the public park would not fall in the penumbra of the legal rule. The judge may decide, on the other hand, that “vehicle”
should include bicycles. In that case, the rule will be (informally) amended to include bicycles—along with other clear cases of “vehicle”—within the core meaning of the rule.

Since Hart’s “open texture” thesis arguably permits a judge to determine the meaning of a word used in a legal rule, his approach to describing legal indeterminacy (in borderline cases) has been termed “semantic”. Many of Hart’s followers and several of his detractors have either assumed or argued that Hart’s account of legal indeterminacy has a semantic basis. The assumption (which certainly seems to be the majority view) is that Hart’s “open texture” description of legal language requires judges to determine the meaning of open-textured legal terms.

The semantic approach to describing legal indeterminacy (including the majority view of Hart) would accept all of the following statements: 1) language is open-textured; 2) rules using open-textured language do not provide a determinate meaning in borderline cases; 3) a judge must exercise discretion to provide a meaning for the open-textured term in a borderline case; and 4) once the judge provides the meaning for the term in a borderline case, the term’s meaning is settled for future cases. The semantic approach describes the “gaps” inherent in law (because inherent in the natural language law employs) as gaps in meaning.

53 The reconstructed version of Hart in Chapter 4 will follow Shapiro’s contextualist account of vagueness (outlined below in Chapter 3) and will describe the open-textured nature of language in terms of a predicate’s indeterminate extension, rather than its indeterminate meaning. For this reason, I will be rejecting the majority view of Hart’s theory of open texture as a semantic approach. This will permit me (in Chapter 5) to offer a better response to Dworkin’s attacks on Hart’s theory.
1.3 The epistemic approach

The ontic and semantic approaches to legal indeterminacy describe the role of judges in deciding cases as gap-fillers, authoritative government officials whose task it is to create law in cases when the available legal resources fail to determine a unique correct outcome. The epistemic approach, on the other hand, would describe the phenomenon of legal indeterminacy as a kind of institutional illusion. Appearances to the contrary, the law is not indeterminate, either due to its dependence on future judicial decisions or to its open-textured language. The law is, in fact, determinate, the epistemicist might argue, because there is a sufficient set of available legal resources to answer any question presented by any legal case. Although judges may at times be uncertain as to what the “right answer” in a particular case might be, that does not mean that the law itself—either the extant legal system or the language of law—is in any way indeterminate. Judges’ epistemic difficulties in discovering the correct outcome in hard cases do not imply that the question presented by the case has no right answer.

Ronald Dworkin has consistently maintained that there are right answers to questions of law, even in hard cases, throughout his long career. Dworkin’s argument for this conclusion is multi-layered and nuanced. His initial position on right answers has been defended and expanded, although not substantially amended, over the past four decades. Since his arguments have taken shape over the length of his academic career, and since his position on legal determinacy has been exceedingly influential (as both a foundation and a foil), an extensive presentation of Dworkin’s account is necessary.54

54 Another reason for providing a fuller account of Dworkin’s views on indeterminacy is that the account will be utilized below, in Chapter 5, as the main rival against a contextualist view of legal indeterminacy.
The reason for positing single right answers to all legal questions is straightforward. Our system appears to be based on the notion that parties to lawsuits have pre-existing rights to which a judge gives countenance with her decision. The judge is typically not viewed as granting new rights and responsibilities to the parties with her decision. The judicial decision merely makes official the rights and responsibilities the litigants had upon entering the courthouse. If this were not the case, and judges were routinely granting new rights with their decisions, then the rights and responsibilities in those cases would have to be applied retrospectively to the litigants. In such cases, the court would in effect be making new law to be applied retroactively. This would arguably run afoul of some basic provisions of American law, including, for instance, the proscription against enacting *ex post facto* legislation.

Dworkin appeals to principles of political morality to fill the “gaps” in the law created by Hart’s rule-centric theory. In Dworkin’s view, principles are not necessarily reduced to writing; they are not necessarily a part of the codified law. Principles are nonetheless sources of law that can be used to decide hard cases. Dworkin’s example of how principles can be used to decide cases is the New York case of *Riggs v. Palmer*.55

In *Riggs*, the issue was whether a man who murdered his grandfather could still inherit under the terms of his grandfather’s will. Pursuant to the Statute of Wills—the law of intestate distribution in New York at the time (1889)—the murdering heir would get his allotted share of his grandfather’s will. The *Riggs* Court, however, held that the heir could not lay claim to the property of a relative he murdered because general,

fundamental maxims of law precluded such a result. In particular, the equitable principle that “no man should profit from his own wrong” worked to nullify the provision of the grandfather’s will that would have given the murderer his share. Although the codified law governing distribution of property via a validly executed will specifically stated that the murderer should receive his inheritance, the court followed the broader legal principle that a person should not profit from his own wrongdoing in order to divest the murdering relative of his anticipated (and validly executed) bequest.

Dworkin uses *Riggs* to illustrate that no written proposition of law, no rule that existed at the time of the decision, could have justified the actual outcome of the case. The proposition upon which the court based its decision was a proposition that had never been incorporated into a legal text, a statute, or a prior judicial decision. It was an abstract legal principle. Nonetheless, the principle that no person should profit from her own wrongdoing was available as a legal resource for the judges. The principle was afforded by a line of cases that stretched beyond the rules codified by the Statute of Wills. The principle was broader, and more fundamental, than the rules meant to be interpreted by the case. There was, therefore, no gap in the law which the judges were required to fill by an unconstrained exercise of discretion. Rather, the court rightly used the bedrock principle—a norm that existed prior to the decision in question—to decide the case.

*Riggs* demonstrates how Dworkin’s “right answer thesis” is conceptually linked to his “rights thesis”. The rights thesis may be stated succinctly: “even when no settled rule
disposes of the case, one party may nevertheless have a right to win.”56 The bare fact that, in hard cases, judges (and lawyers and litigants) may be uncertain as to what those rights are, or as to what the scope of a known rights is, does not mean that the right to prevail does not exist prior to adjudication. Since litigants have pre-existing rights, “it remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively”.57 The “right answer” for Dworkin is the answer that gives countenance to the litigants’ existing rights. In hard cases, an appeal to principle is required because, by definition, an application of the relevant rules will not decide the case. Indeed, as Dworkin sees it, we cannot make sense of the litigants’ claims to rights (including the right to prevail) without positing pre-existing principles in hard cases. Appeal to a background principle of political morality justifies the court’s coming to the “right answer” in the case.

The *Riggs* case provides an example of how principles justify “right answers” in hard cases. Considering the rule in *Riggs* (the Statute of Wills), the murderer is required to get his share of the victim’s will. As long as the will is properly enacted, its provisions are to be given legal force. To permit otherwise would be to permit supplanting the testator’s desire with the court’s desire. However, to allow murderers to kill family members and remain beneficiaries under a will seems like the wrong decision. Dworkin claims that judges need not be stuck with blindly applying the legal rule in this case. The broader principle prohibiting benefiting from one’s own wrongdoing permits a new interpretation of the rule. The Statute of Wills, when read in the context of the broader

56 Ronald M. Dworkin, “Hard Cases”, in *TRS*, p. 81. Whether “may…have a right to win” appropriately underwrites anything like a “right answer” thesis has been a perennial point of contention.
57 *Id.*
background principle, determined the “right answer” in the case. As Dworkin states it, “the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills, and in this way justified a new interpretation of that statute.” The new interpretation, the right answer, is justified with respect to, and in the context of, the background principle.

So, in Dworkin’s view, there is a single right answer to every legal case because, even in hard cases (such as Riggs), the law, as properly interpreted, will determine a result. Legal texts, such as statutes, cannot determine a result in every case. The proper interpretation of rules in light of broader background principles permits a determinate result in every case. Admittedly, Dworkin is resting much of his “right answer thesis” on the notion of “proper interpretation”. To effectively ground the “right answer thesis” on the proper interpretation of legal principles, Dworkin must provide both a descriptive account of what role interpretation plays in adjudication and a normative account of what interpretative strategy should be followed in order to make the resulting interpretation “proper”.

In “hard cases”, judges cannot merely apply a rule to a fact pattern and determine the outcome. The defining characteristic of a hard case in the Hartian sense is that there is no legal rule to apply to the case to yield a “right answer”. In such cases, Hart said, the applicable legal rules “run out”. The relevant law contains a “gap” through which the current hard case, absent judicial interstitial legislation, will fall. Dworkin believes that the Hartian view of hard cases is too limited. Dworkin has argued that principles of political morality act as background assumptions against which rules and other legal

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sources must be read. Judges must look not only at the rule in question but also at the
line of cases employing similar rules (i.e., precedent), relevant statutes, and background
principles to provide an interpretation of the rule whose application determines the
outcome of the case correctly.

For Dworkin, there is no such thing as a gap in the law, a lack of legal rules that
can be applied in a specific case. On the contrary, there may be a glut of principles lying
dormant within the available legal resources. The judge’s duty is to winnow the correct
principle from the available materials to provide the unique right answer to the legal
question posed. To decide which of the available principles the judge should use in the
case, the judge must provide an interpretation of the rule within its legal context. This
process of judicial interpretation is, for Dworkin, the key to understanding “right
answers” in legal theory.

To provide an account of the role interpretation plays in adjudication, Dworkin
analogizes law with literature. Law is like literature, Dworkin argues, in that both
disciplines are inherently interpretive. In literature, “an interpretation of a piece of
literature attempts to show which way of reading (or speaking or directing or acting) the
text reveals it as the best work of art.”59 Similarly in law, argues Dworkin, “judges
should decide hard cases by interpreting political structures of their community…by
trying to find the best justification they can find, in principles of political morality, for the
structure as a whole.”60 The point of literary criticism is to offer interpretations of
literary devices and techniques that make an individual work the best (i.e, the most

59 Ronald M. Dworkin, “How Law is Like Literature”, reprinted in A Matter of Principle (Cambridge, MA:
60 Ronald M. Dworkin, “‘Natural’ Law Revisited”, 34 Univ. Fla. L. Rev. 165, 165 (1982), hereafter NLR, emphasis in the original.
aesthetically pleasing) it can be. The point of judicial decision-making is to offer interpretations of legal cases that make the law the best (i.e., the most morally justified) it can be.

Dworkin realizes that there are some limitations in the analogy between literature and law. For example, the role of the judge is not strictly analogous to that of the literary critic. A literary critic does not alter the work interpreted. The literary critic analyzes, but does not author. On the other hand, a judge must be both analyst and author. He must interpret the novel as it comes to him, but he must also create a new chapter in the same style.

To tighten the analogy between literature and law, Dworkin posits an artificial form of literary work he calls the “chain novel”. In a chain novel, a series of authors is given the task of writing a novel one chapter at a time. Each of them has a duty “to create, so far as they can, a single unified novel.” The first author pens the first chapter and passes it on to the next author in the series. Starting with the second author, each person must take into account the literary devices, techniques, and themes of the chapters preceding their own. The job of each author in the chain novel is to make the overall work the best it can be, given the literary constraints placed upon them by earlier writers.

Dworkin argues that the interpretive attitude documented in the chain novel metaphor provides a direct analogy to the interpretive attitude of judges deciding legal cases. The so-called “chain of law” describes the setting and following of precedent in complex legal societies such as the United States. Appellate judges are presented with a case. The case presents a legal question for which the judge must provide an answer.

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61 *NLR*, p. 167.
The legal question places the appellate judge in a position similar to that of the chain novelist. To answer the question, the judge must decide between two interpretations of the relevant precedent on the issue, the “chain of law” the judge is presented with. The judge must make a decision on which interpretation makes the practice of law—considered as a unified and integrated whole (that Dworkin calls “law as integrity”\(^{62}\)—the best it can be.

As in the chain novel metaphor, judges provide interpretations in cases by looking to former decisions and relevant values. For judges, the former decisions are actual legal decisions proffered by earlier judges. The values judges consider in rendering a legal decision are not values of aesthetic quality, but rather values of political morality, such as justice, fairness, and equality. Like the chain novelists, the appellate judges formulate a working theory of the correct interpretation of the issue presented to them, a theory that contains two distinct, but interrelated dimensions: formal constraint and substantive choice.\(^{63}\) An appellate judge’s decision is constrained by the formal requirements of the legal system, including norms regarding consistency with prior decisions. (The well known rule of *stare decisis* is one such norm in the Anglo-American common law system.) A judge is also permitted, in cases where the formal constraints of the legal system do not seem to determine a unique correct answer, to choose the interpretation “which is “substantively” better, that is which better promotes the political ideals he [the judge] thinks is correct.”\(^{64}\) In such cases, the judge is like the “early novelist” who must choose an interpretation based on a variety of competing values in order to make the

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\(^{62}\) See, for example, his discussion in *LE*, pp. 225-275.

\(^{63}\) *NLR*, pp. 170-171.

\(^{64}\) *NLR*, p. 171.
serial novel the best it can be. The judge must decide, based on the principles employed in his preferred political theory, which interpretation of the law makes the law, on the whole, the best it can be.

Dworkin’s analogy between literature and law provides a description of judicial decision-making in modern legal systems. Dworkin’s theory of adjudication is not meant to be exclusively descriptive, however. His theory of adjudication is also normative. Dworkin does not want to provide only a description of the interpretive attitude judges take in deciding cases. He also wants to prescribe what a “proper” interpretation of the law might consist in.

To delimit what a proper interpretation of law is, Dworkin provides an interpretive strategy called “constructive interpretation”. Dworkin argues that interpretation of a work of art (such as a novel) or of a social practice (such as law) is essentially concerned with attributing purpose to that practice. The purpose attributed to a play, for instance, is not the purpose intended by the author, but rather is the purpose constructed by the interpreter. The strategy of constructive interpretation is “a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”

This does not mean that the interpreter’s creativity in constructing a purpose for a practice is unconstrained. The history of a practice, the shape of an object, or the content of a concept constrains the available interpretations one can, in good faith, impose. The constraint on interpretation is quite meager. It states only that interpretation must begin with the object (the text, the painting, the practice) to be interpreted. Within that loose constraint, an interpreter of a

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65 LE, p. 52.
given social practice “proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify.”

The interplay between constraint and creativity is important in Dworkin’s theory of constructive interpretation. He provides more detail on the method of constraint and creativity in terms of his famous dimensions of interpretation, “fit” and “value”. The dimension of fit provides a constraint on interpretation. Fit is backward-looking. It requires the interpreter to consider the object or practice to be interpreted. For an author in a serial novel, the text must be acknowledged. The author cannot adopt an interpretation of the novel that he believes no similarly situated author, based on the literary devices and themes employed in the text to date, would give. This does not mean that an interpretation must fit every bit of the text. It does mean, however, that the proposed interpretation “must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor.” The interpreter may find that no interpretation suffices; he may find that any interpretation he could give is inconsistent with the bulk of the material supplied to him. This will, however, be a very rare occurrence. (Indeed this must be an extremely rare occurrence because in such cases there would be no “right answer”.) More typically, the interpreter will find that no single interpretation fits the bulk of the text, but more than one does. In this case, the second dimension of interpretation requires him to choose between eligible readings.

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66 Id.
67 LE, p. 230.
The second dimension, the dimension of value, requires an interpreter to “judge which of all eligible readings makes the work in progress best all things considered.”

Whereas the first interpretive dimension of fit imposed formal and structural constraints on interpretation, the second dimension of fit requires a substantive choice on the part of the interpreter. The interpreter must consider the work in light of substantive aesthetic (and all other relevant) values to determine which interpretation of the work (of art or literature) is best. The second dimension is, in this respect, forward-looking. The interpreter is attempting to make the work as a whole the best that it can be in the realization that the work will have to be continued by the next serial author. Judges, as legal interpreters, are constrained in their judgments by the practice of law. Legal practice assumes that judges will follow established lines of precedent and will provide intelligible interpretations of existing codes, statutes, ordinances, and constitutional provisions. Judicial interpreters are then given the task of making the law “the best it can be all things considered” by providing an interpretation of the legal question presented that upholds the most basic values promoted by the legal system. These values are contained in principles of political morality. So, the political value of “equal respect and concern” (on Dworkin’s view) provides a correct interpretation of a contested case in

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68 LE, p. 231.  
69 NLR, p. 171. Arguably, permitting a substantive choice may, on its own, defeat the “no right answer” thesis.  
70 Since Dworkin relies on principles of political morality to justify right answers to legal questions, he must also argue for the objectivity of morality. For his arguments about the objectivity of morality, see his “Objectivity and Truth: You’d Better Believe It”, Philosophy and Public Affairs 25 (Spring 1996): 87-139. Dworkin consistently maintains that his view of objective morality does not commit him to a version of metaphysical realism (contra skeptical critics). Dworkin presents a cognitivist theory of morality in which moral statements may also be made true or false by the practice within which the statements are asserted. This view is quite contentious, however, because the argument Dworkin has provided for a cognitivist moral theory owes much of its structure to Simon Blackburn’s non-cognitivist account of morality. See Blackburn’s “Response to Dworkin's 'Truth and Objectivity: You’d Better Believe It', Brown University Electronic Article Review Service, http://www.brown.edu/Departments/Philosophy /bears/9611blac.html.
which, for instance, the family of a terminally ill patient is asking a court to read into the Constitution’s right to privacy the right to assisted suicide.  

Thinking about hypothetical legal cases can help flesh out Dworkin’s theory of constructive interpretation. Suppose a judge is offered two competing interpretations of the same statute. The statute prohibits operating vehicles in a public park in Paris, the Bois de Boulogne. The question is whether a bicycle should be classified as a “vehicle” for purposes of the statute. The city is arguing that bicycles should count as vehicles and that the defendant should be found guilty. The defendant is arguing that bicycles should not be considered vehicles. The judge has no way of determining, based on formal constraints, which interpretation is correct. No legal provision, no element of legal practice, argues in favor of either side. The judge must look to the purpose for which the statute was enacted. Given these facts, Dworkin offers two competing interpretations:

One says “The purpose of this statute was to protect against the corruption of fumes and noise; the bicycle creates neither.” The second interpretation: “The purpose of this statute was to guard against the quiet of the park being disturbed by motion.” In this case, if you accept the first interpretation, the bicycle may come in; if you accept the second, the bicycle may not come in. Does anyone think that we can’t choose between these two interpretations simply by asking the following question: given popular opinions and needs at the time the statute was enacted, given what is [sic] regarded, widely regarded, as sensible public aims, can there be any doubt that the first offers a better interpretation? 

Since “all things considered” the first interpretation is better than the second, the legal question whether a bicycle is permitted in the park has a “single right answer”: yes. The

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statutory purpose provided by the better interpretation of extant public values is the
“available legal resource” that determines the correct answer to the legal question.

Dworkin’s “right answer thesis” relies heavily on his notion of the correct political theory, because one’s political theory introduces one’s political principles. Dworkin has famously advocated as the primary principle in liberal societies the right to “equal respect and concern”. Dworkin realizes that one’s political theory drives one’s notion of what is a right answer in a particular legal case. Indeed, Dworkin argues that it is the contested conceptions of these principles that accounts for the disagreement witnessed between persons arguing about legal right answers. In short, disagreement between and among legal adversaries is not about the correct interpretation of statutes, for instance, but rather about how principles, such as liberty or equality or market efficiency, should be interpreted in order to decide the case correctly.

Dworkin argues that what theorists have intuited as linguistic indeterminacy about law is actually an argument over the contested political values supporting the justification of the respective interpretations of law. Hence, Dworkin’s move from rules to principles, from application to interpretation, arguably sidesteps the theoretical concern about law’s indeterminacy. Dworkin’s right answer thesis, interpreted in this manner, is that the proper interpretation of relevant principles of political morality determines a right answer, even in hard cases.

73 Dworkin’s fullest statement of this bedrock principle of political morality is provided in Sovereign Virtue: The Theory and Practice of Equality (Cambridge, MA: Harvard University Press, 2000).
74 A contrasting political theory that might provide different “right answers” to legal questions would be one justifies judges’ decisions on grounds of economic efficiency. See, for example, Judge Richard A. Posner, The Economics of Justice (Cambridge, MA: Harvard University Press, 1981).
1.4 The continuing problem

We are left with three viable approaches to describing legal indeterminacy in terms of the primary source of that indeterminacy: two accounts of legal indeterminacy based on either an ontic or a semantic source of “gaps”, and one account of legal determinacy based on an epistemic explanation for what has been (incorrectly) perceived as “gaps”. These accounts have been employed and developed by three rival groups of theorists: Holmesian “legal realism”, Hartian “legal positivism”, and Dworkinian “naturalism”, respectively. This three-way debate has continued throughout the last half of the 20th Century and shows no sign of waning. Moreover, no fourth alternative account of legal indeterminacy has been proposed in response to resolve (or to ameliorate) the continuing debate.

The three proposals are not inconsistent with one another. A theorist might accept some form of pluralism with respect to the account of legal indeterminacy in which one portion of the legal process exhibited ontic indeterminacy, one portion exhibited semantic indeterminacy, and yet a third portion exhibited epistemic indeterminacy. A pluralist account—one which described legal indeterminacy as caused by a combination of sources—has not been put forward by legal theorists, however, for at least two reasons. First, it is not obvious how such an account might be presented. It seems that the phenomenon of legal indeterminacy is the same whether it is observed, for instance, in enacting a law (in which semantic indeterminacy might be a preferred description) or in deciding a case (in which epistemic indeterminacy might be the preferred description). Second, each of the accounts of legal indeterminacy is tied to a more general rival theory.

75 However, refer to Chapter 6, below, for a possible approach toward making distinctions between and among legislation, adjudication, and other practices within a broader legal system.
of law. Indeed, each of the three accounts of indeterminacy bears the mark of the legal theory in which it has been placed.\footnote{This may be stated even more strongly. One could argue that each of the three rival legal theories presupposes its particular account of legal indeterminacy. This would account for an impasse among the three rival legal theories based on the inescapable question-begging that goes on with presenting one’s imbedded account of indeterminacy. For a parallel description regarding the difficulty of presenting a neutral account of vagueness, see Shapiro, Stewart, \textit{Vagueness in Context}, (Oxford: Oxford University Press, 2006), hereafter \textit{Vagueness in Context}, Chapter One.} Therefore, each of the three accounts is taken as a rival, comprehensive account of the phenomenon of legal indeterminacy.

The presentation of the three rival views of legal indeterminacy suggests a kind of trilemma in which there appears to be only three theoretical options, none of which seems independently satisfactory.\footnote{The parallel suggestion of a trilemma among theories of vagueness was presented by Crispin Wright’s “Vagueness: A Fifth Column Approach”.} The epistemic account renders the seemingly commonplace phenomenon of legal indeterminacy a mystery, solvable only by the proposal that judges might lack access to the determinate answers that actually exist in the cases that come before them. The ontic account of legal indeterminacy unduly narrows, and therefore distorts, legal theory to include only judge-made law, thereby counter-intuitively transforming legislation into non-law. The semantic account of legal indeterminacy artificially restricts the concept of law to its textual ascriptions and the meanings that can be garnered from those texts.

The approach for this dissertation is to avoid the perceived trilemma by providing an alternative account of legal indeterminacy. This fourth view of legal indeterminacy will take as its starting-point the parallel problem of vagueness in the philosophy of language. Chapter Two will provide a discussion of the historical problem of vagueness and its three main descriptions. As with the discussion of legal indeterminacy, the
primary accounts of vagueness are ontic, semantic, and epistemic. As with the discussion of legal indeterminacy, the three accounts of vagueness also anticipate a trilemma.

Chapter Three will provide a new contextualist approach to solving the problem of vagueness and avoiding the apparent trilemma of the three historical approaches. The contextualist approach to vagueness avoids the problems engendered by the ontic, semantic, and epistemic approaches by describing the phenomenon of vagueness not in terms of the meaning of vague expressions, but rather in terms of the extensions of those expressions prescribed by the language use of competent speakers within a given community. Stewart Shapiro has provided this contextualist approach and has based it on the concept of the “open texture” of language as introduced by Friedrich Waismann.

As has already been recounted, Waismann’s “open texture” of language was also employed in legal theory by H.L.A. Hart. Chapter Four will apply the “open texture” approach to vagueness provided in Chapter Three to Hart’s theory of the “open texture” of legal rules. The reconstructed version of Hart will then be used to provide a contextual (and non-semantic) account of legal indeterminacy.

Chapter Five will defend the proposed Hartian contextualism against rival accounts, especially Dworkin’s influential theory of law. The resulting update of the famous Hart-Dworkin debate is meant both to solidify the contextual view of legal determinacy and to illustrate how Dworkin’s influential account of determinacy may be rejected.

Finally, Chapter Six demonstrates the broader perspective that Hartian legal contextualism provides and argues that an as yet hidden systematic ambiguity, beyond contextual vagueness, has contributed to the theoretical impasse among legal theorists
attempting to provide an account of legal indeterminacy. The ambiguity in law is not lexical ambiguity, in which precise terms are used in various substantive areas of law in different ways. Rather, the proposed systematic ambiguity is based on the idea that different stages of the legal process create distinct strata in which the language of law is used in different ways by the various communities of competent legal “speakers”. As with much of this dissertation, the influence of Waismann—in this case, his discussion of “language strata”—pervades.
PARALLEL APPROACHES TO THE PROBLEM OF VAGUENESS

The problem of legal indeterminacy centered on a discussion of so-called “hard cases”. These cases present legal questions that do not appear to have a single right answer. Take Hart’s example of a statute prohibiting vehicles in a public park. The question is whether a bicycle is a vehicle for purposes of the statute. An automobile seems like a clear case that would be prohibited by the statute. Roller skates appear to be a clear case falling outside the purview of the statute. In this context, an automobile is clearly a vehicle, and roller skates are clearly not vehicles. The bicycle, however, is not clearly a vehicle or a non-vehicle. Whether a bicycle is a vehicle in this case is a legal question that does not appear to have a single right answer.

The problem of hard cases can be expressed in terms of the so-called “propositions of law”78 that are presented as legal issues in those cases. In the “vehicle” case, the proposition of law would be that a bicycle is a vehicle (for purposes of the statute). The question in hard cases is whether that proposition is true or false. Again, in easy cases, such as those involving cars or roller skates, the answer seems obvious. The

78 I follow Dworkin in his use of this technical term. For Dworkin, a “proposition of law” is a statement asserting or denying certain relevant rights or duties on behalf of parties to a legal dispute. For instance, the proposition of law that a bicycle is a vehicle under Hart’s proposed statute is an assertion of the right (by the bicycle rider) that he is permitted to ride his bicycle in the park. Propositions of law may be either true or false—on Dworkin’s account—or may be true, false, or (otherwise) indeterminate—on others’ accounts.
proposition of law that a car is a vehicle is true. The proposition of law that a pair of roller skates is a vehicle is false. In the case of the bicycle, on the other hand, it is not apparent which truth value—true or false—one should assign. It is not apparent, in other words, whether the proposition of law that a bicycle is a vehicle for purposes of the statute is true or false.

The three approaches to legal indeterminacy offer different methods of describing and dealing with alleged legal indeterminacy. The ontic approach claimed that legal indeterminacy originates in the world, in the states of affairs common to legal systems that vest a court with authority to determine one way or the other any case that comes before it. On the ontic approach, any case that comes before an appellate court for adjudication is a hard case, a case in which the outcome is not determined by the available legal resources. The ontic approach offered a description of indeterminate propositions of law in hard cases: indeterminate propositions of law are covered by a third truth value, Indeterminate, between True and False. The semantic approach described legal indeterminacy as a kind of linguistic imprecision. On the semantic approach, hard cases are cases that present questions employing open-textured terms, terms which permitted courts discretion in further specifying what the terms mean when applying the relevant statutes to new cases. On the semantic view, propositions of law in easy cases may be considered either true or false, whereas propositions of law in hard cases might be neither true nor false.\(^79\) The epistemic approach described legal indeterminacy not as indeterminacy either in the legal system or in legal language, but

\(^79\) And again, this may lead to a solution involving a third truth-value. The distinction between the ontic and semantic approaches to the indeterminacy of law is what each approach counts as an appropriate source, as opposed to the appropriate resolution, of indeterminacy.
rather as a kind of uncertainty. On the epistemic approach, there was no such thing as a hard case in which a judge was permitted to use discretion to “make” new law. The epistemic theorist charged the judge with the duty of applying extant principles of political morality to fill the alleged “gaps” in the law to decide the case in the correct fashion. On the epistemic view, all propositions of law are, at least in principle, true or false.

The theoretical problem exhibited by these three approaches to legal indeterminacy is that taken together they suggest a trilemma. The three theories seem to exhaust all the theoretical options. Either legal indeterminacy is a real phenomenon or it isn’t. Epistemic theorists argue that it is not a real phenomenon and that judicial uncertainty is the true cause of what most theorists describe as legal indeterminacy. The ontic and semantic theories argue that legal indeterminacy is a real phenomenon that originates either in the world (i.e., in some feature of the legal practice or system) or in the words we use to describe the world (i.e., in legal language). There seems to be no viable fourth option. And, unfortunately, as was proposed at the end of Chapter One, none of the three options is independently persuasive.  

Since the mid-1970s, philosophers have been engaged in a parallel attempt to describe and to deal with the phenomenon of vagueness. The problem of vagueness centers on so-called “borderline cases”, cases that involve propositions that appear to be neither true nor false. Over the past three decades, the philosophers attempting to

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80 A combination of them might be, however. A theorist might argue that, instead of there being one primary source of legal indeterminacy that the several posited sources of vagueness all contribute, in different ways, to there being “gaps” in the law. However, this pluralistic approach toward describing legal indeterminacy has not been forthcoming.

81 Although the two debates were contemporaneous, the vagueness debate arose seemingly independently of the Hart-Dworkin debate over legal indeterminacy.
describe and to deal with vagueness have segregated into three distinct approaches: an ontic approach, a semantic approach, and an epistemic approach. The ontic and semantic approaches acknowledge vagueness and attempt to provide methods for dealing with it. The epistemic approach denies the phenomenon of vagueness and describes the phenomenon in terms of uncertainty. Moreover, the three distinct positions suggest a trilemma, one which calls for a fourth alternative that is, unfortunately, not apparent.

The three similar approaches—ontic, semantic, and epistemic—to describing and dealing with legal indeterminacy and vagueness suggest parallel methods of accounting for the phenomena. To develop more fully the parallel between legal indeterminacy and vagueness, a fuller treatment of the history and research on vagueness must be provided. Unfortunately, providing a neutral description of vagueness, one which does not beg the question in favor of one or more proposed accounts, has proved difficult. Indeed, the most difficult task in providing an adequate account of vagueness might be in describing what vagueness is. Although a complete and neutral description of vagueness may not be possible, an acceptable description of vagueness must give an account of at least three related features. In general, vague expressions 1) are susceptible to the Sorites Paradox, 2) lack any sharp boundaries, and 3) generate borderline cases.

The Sorites Paradox has been used as a first approximation to describe the phenomenon of vagueness. Theorists have reasoned that a predicate’s susceptibility to the Sorites Paradox makes it at least a candidate to attribute vagueness to it. Although

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82 This parallel appears to be as yet undeveloped by philosophers of law or of language.
83 See Rosanna Keefe, *Theories of Vagueness* (Cambridge: Cambridge University Press, 2000), hereafter *Theories of Vagueness*, pp. 6-11. Of course, many philosophers would deny that certain of these elements are necessary for vagueness. The list is provided in order to set forth what are generally taken to be central features of vagueness.
the paradox has figured in most recent attempts to describe vagueness, it has ancient roots. The puzzle is attributed to Eubulides of Megara, a contemporary and rival of Aristotle. In its original form, the puzzle consisted of a series of questions about “heaps.” It seems clear that one grain of sand does not make a heap. But does adding a second grain of sand make a heap? It appears that it does not. What about a third grain? It appears that no matter how many grains of sand are added, one by one, to the collection of grains, a heap never results. And, of course, that conclusion is absurd. At some point, there will be a heap. The problem is that, although it is clear that at some point a heap exists, it is not clear at any point that a heap exists.

The Sorites Paradox can be reversed. Assume you have a heap of sand. Now take one grain of sand away. Is the result a heap? Of course, it is. Take away another grain of sand. A heap remains. But, continuing in this same manner, if a heap remains after each grain of sand is removed, then, at the end of the process, there will be a heap consisting of only one grain of sand. And, of course, that conclusion is absurd. A heap of sand could not consist of one grain.

Heaps are not the only subjects permitted by the Sorites Paradox. A related argument (called the falakros) considers baldness. Certainly a man with a full head of hair is not bald. Pull one of his hairs. Is he bald? He certainly is not. Pull another hair. Is the man bald? No. It seems that the removal of one hair is never sufficient to render the man bald. Once again, by completing this process (of hair-pulling and reasoning), one is left with the absurd conclusion that a man with no hairs on his head is not bald. The bald is non-bald.

The reasoning involved in this puzzle can be formalized. Modern theorists have tended to symbolize the Sorites Paradox in a conditional form as follows:

\[ \begin{align*}
  F_{a_0} \\
  F_{a_0} & \supset F_{a_1} \\
  F_{a_1} & \supset F_{a_2} \\
  \vdots \\
  F_{a_i} & \supset F_{a_{i+1}} \\
  \vdots \\
  F_{a_n} 
\end{align*} \]

This argument represents a series of \( n \) applications of a valid rule of inference in classical logic, modus ponens (MP), for arbitrarily large \( n \). Assume that \( F_{a_0} \) represents a person with zero hairs on his head, a case of clear baldness. Next assume that if a person with zero hairs on his head is bald, then a person with one hair on his head (\( F_{a_0} \supset F_{a_1} \)) is bald. Both of these assumptions seem beyond reproach. However, from the two assumptions and an application of MP, we may infer that a person with one hair on his head is bald (\( F_{a_1} \)). By continuing to apply MP at each stage of the argument, we may infer that a man with two hairs on his head is bald (\( F_{a_2} \)), a man with three hairs on his head is bald (\( F_{a_3} \)), and, eventually, a man with \( n \) hairs on his head is bald (\( F_{a_n} \)), no matter how large \( n \) is.

Because the logic employed in generating a sorites series seems unimpeachable (few philosophers attack modus ponens), attempts to solve the paradox have focused on the major premise, the inductive step. In terms of the original sorites case, this would

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85 The paradox has also been presented using the form of mathematical induction. Although the two different ways of setting up the paradox permit some nuanced analytical distinctions, those distinctions are irrelevant to what follows here.
amount to the conditional claim that if you cannot make a heap with \( n \) grains of wheat, then you cannot make a heap with \( n + 1 \) grains of wheat. In short, to deny the major premise one must propose that (somewhere in the series) there is a sharp cutoff at which, for instance, a particular grain of wheat will actually make the collective a heap.

Unfortunately for this strategy, however, the second recognized feature of vague predicates like “heap” is that they do not exhibit such sharp cut-offs. There is no sharp boundary between heaps and non-heaps, between baldness and non-baldness, between small and non-small. Stated generally, with respect to vague predicates, there is no exact point at which Fs become not-Fs. Therefore, theorists who would avoid the Sorites Paradox by denying the inductive premise must provide 1) an account of sharp boundaries for vague predicates which also 2) explains why vague predicates do not appear to have sharp boundaries.

Analyzing vagueness in terms of a predicate’s lacking sharp boundaries instigates a shift in perspective from the analysis of vagueness in terms of the Sorites Paradox. The Sorites Paradox focuses on the underlying continuum generated by the inductive step. The imperceptible subtraction of hairs one-by-one (for instance) leads inexorably to the paradoxical conclusion that a clearly hirsute person is bald. The focus on a predicate’s boundaries, on the other hand, focuses on vague concepts’ failure to classify in the way other concepts do.

Take for instance the general, non-vague concept “bird”. Whether something may be classified as a bird is determined by whether it may be placed in the class, Aves. If we are unclear as to whether a feathered, winged vertebrate is a bird, then we can consult learned treatises or ask researchers to determine if that species counts as a bird.
whether, in other words, it has been (or may be) selected for membership in the class, Aves. Because classes (and sets) have sharp boundaries, membership in the class is an all-or-nothing proposition. Either this feathered, winged vertebrate is a bird or it is not. The general term “bird” is not vague because it generates sharp classificatory boundaries.

Vague concepts do not generate sharp classificatory boundaries. Take “bald” again as a paradigm case of vagueness. It is clear that some persons are bald. Some persons have no hairs at all on their heads. It is also clear that some persons are not bald. Some persons’ heads are completely covered by hair. So, at the extremes of a sorites continuum, “bald” seems to classify, as would a general term, individuals into two distinct categories. However, the similarity with general terms ends as one proceeds toward the “middle” of the sorites series. As one moves hair-by-hair toward cases of persons who have some, but not much, hair on their heads, the question of classification into “bald” and “non-bald” groups becomes difficult. To use current examples: although it is clear that Ving Rhames is bald, and it is clear that Howard Stern is not bald, it is not at all clear whether someone with an advanced receding hairline, such as Kelsey Grammar, is bald or not.

The classification of persons in the “middle” of the sorites series is not only difficult, it is impossible. Assume that it takes 14,001 hairs on one’s head to render him bald.

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87 R.M. Sainsbury has argued that vague concepts do not generate boundaries at all, much less “sharp” boundaries. See his “Concepts without boundaries”, an Inaugural Lecture, given at King’s College London, November 6, 1990, hereafter “Concepts without boundaries”, reprinted in *Vagueness: A Reader*, pp. 251-264.

88 Controlling for the arrangement of those hairs, as well.
non-bald. Ving Rhames has, say, 0 hairs. He is bald. Howard Stern has, say, 30,000 hairs. He is certainly not bald. The question is, at what point, at what number of hairs, does the transformation from bald to non-bald occur? Given considerations of the inductive step of the sorites analysis, the number of hairs at which one may be classified as non-bald is impossible to determine. Since the addition or subtraction of hairs along the series can make no difference to our determination of whether a particular person is bald or not (i.e., there is no perceptible difference brought about by any \([n, n + 1]\) ordered pair), there is no place along the series where a classificatory border can be erected. Another way of stating this is that there are no “sharp cut-offs” in the sorites series. There are, in other words, no “sharp boundaries” for vague concepts.

The focus on the lack of sharp boundaries provides an important perspective from which to analyze some vague expressions. There are some cases of vagueness that may not be susceptible to soritical analysis but which may be susceptible to a so-called “fuzzy boundary” analysis. Examples of these non-soritical cases of vagueness are those underscored by Wittgenstein’s notion of “family resemblance” \(^89\). There are some terms, such as “game”, that cannot be sharply defined in terms of criteria or classification. Poker, chess, and marbles may all count as games but may have more features different than they have in common. Some games test one’s skill. Others rely on luck. Some games are competitive. Others are cooperative. Some games may be played alone. Others must be played with colleagues. The idea is that, although the meaning of the expression “game” is readily grasped, the meaning is not grounded on a precise definition based on specified criteria. The concept of “game” (as well as “religion” and others)

exhibits a type of vagueness that is not susceptible to soritical analysis because the concepts involved do not exhibit “little by little” additions or subtractions that lead to paradox. Examples of this distinct kind of vagueness fail to draw distinct classificatory boundaries. Their classificatory boundaries are, in other words, “fuzzy”. The vagueness of these concepts is more readily captured by the notion that they exhibit vagueness due to their lack of sharp boundaries.

Sorites susceptibility and the lack of sharp boundaries are related, but distinct, features of vagueness. A complete account of vagueness must address both features. This means that a complete account of vagueness will have to describe and deal with concepts like “bald” whose vagueness is attributed to sorites susceptibility and concepts like “game” whose vagueness is attributed to the lack of sharp boundaries.

The need to accommodate both the soritical and “fuzzy boundary” features of vagueness has motivated the current description of vagueness in terms of “borderline cases”. The widely accepted formulation of vagueness is that an expression is vague to the extent that it has borderline cases, cases in which, roughly, it is unclear whether the expression applies. The description of vagueness in terms of borderline cases addresses both the soritical and the fuzzy boundary nature of vagueness. A borderline case of “bald” is a case in which it is unclear whether “bald” applies (e.g., the case of Kelsey Grammar). All the cases in which the number and arrangement of hairs do not clearly count as either bald or non-bald are borderline cases. Moreover, having fuzzy boundaries is closely related to having borderline cases. Indeed, another way of describing the lack
of a sharp boundary between, say, bald men and non-bald men would be to claim that the “fuzzy” region of the predicate “bald” is occupied by borderline cases of baldness. 90

The troublesome issue for recent philosophers of language has been how to provide an adequate (and neutral) characterization of borderline cases. Take as a paradigm case of vagueness the predicate “bald”. Now ask whether a certain person, say, Kelsey Grammar, is bald. Given clear cases of baldness (including Ving Rhames) and clear cases of non-baldness (including Howard Stern), the question is whether Kelsey Grammar is bald. It would not be correct to say that Mr. Grammar is bald. Nor would it be correct to say that Mr. Grammar is not bald. Mr. Grammar appears then to be neither bald nor non-bald. So, Kelsey Grammar might count as a borderline case of baldness.

It is unclear what is being proposed, however, in saying that Mr. Grammar appears to be “neither bald nor non-bald”. Past descriptions of this case run into immediate difficulty. Assume that the proposition to be considered may be expressed in the general form, $\Phi$ is bald. $P$ may be taken to denote “bald”, and $a$ may denote Kelsey Grammar. So the specific proposition under consideration, $Pa$, is Kelsey Grammar is bald. The proposal that Kelsey Grammar denotes a borderline case of baldness is that Mr. Grammar is neither bald nor non-bald. We could say, generally, that the object denoted by $a$ is a borderline case of $P$ if it is neither true that $Pa$ nor true that $\sim Pa$. Some philosophers, however, 91 hold that this formulation of borderline cases leads to contradiction when coupled with the generally accepted T-scheme: it is true that $\Phi$ if and only if $\Phi$.

90 It is a live issue as to whether predicates with borderline cases must always lack sharp boundaries. See, for example, Rosanna Keefe and Peter Smith, “Introduction: theories of vagueness”, in Vagueness: A Reader, p. 3, fn. 3.
91 Including Crispin Wright. See his “Vagueness: A Fifth Column Approach”.

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Other philosophers have invoked operators like “definitely” in their definitions of borderline cases. In this case, the object denoted by \( a \) is a borderline case of \( P \) if it is neither definitely true that \( P a \) nor definitely true that \( \neg P a \). The difficulty then becomes how to define “definitely”. Different theorists have different conceptions of what the operator means. Each of the conceptions has little in common with the others. Each of the conceptions seems to beg important questions in favor of one’s preferred account. For this reason, progress on accurately and neutrally defining the notion of “borderline case” has been slow.

The problem in defining “borderline case” is that the definition seems inextricably tied to a theorist’s preferred account of the source of vagueness. Take another example of a borderline case: “red”. Certain reddish-orange patches (patches in the midst of a color spectrum between red and orange) are taken to be borderline red. There appear to be three distinct approaches one could take to describing the case of borderline redness.

One might attribute borderline redness to the indeterminacy of the world, namely, the color spectrum. On this view, the ontic approach to vagueness, there is no fact of the matter as to whether the red-orange patch is either red or orange. So we are uncertain as to whether the proposition “this color patch is red” is true because there is no fact that would make it true. This means that the sentence “This patch of color is red” is neither true nor false. Bivalence, the principle that a proposition is either true or false, does not hold on the ontic account of borderline cases (and therefore vagueness). Ontic

\[92\] For a discussion of the definitely operator in this context, see Shapiro, *Vagueness in Context*, pp. 2-5.
indeterminacy requires an adjustment in logic (typically the adoption of a logic employing three, not two, truth values) to accommodate the rejection of bivalence.\textsuperscript{93}

The semantic approach to vagueness might also require a rejection of bivalence to account for borderline cases. The semantic approach attributes borderline cases to the imprecise way we assign meanings to predicates. The source of vagueness on this account resides not in objects (like the color spectrum) but rather in our linguistic representations of those objects. This approach to vagueness typically requires an adjustment in semantics to accommodate for a particular type of linguistic imprecision.\textsuperscript{94}

The epistemic approach to vagueness attributes borderline cases not to indeterminacy in the world or to imprecision in our language, but rather to our own (excusable) ignorance. The lack of clarity surrounding borderline cases, the uncertainty we feel in dealing with borderline cases, is attributable solely to our limitations as finite cognitive creatures. We describe certain cases as borderline because we cannot perceive at what point, for instance, “red” becomes “orange”. On the epistemic view, no logical or semantic adjustments must be made. Propositions about borderline cases, such as “This region is red”, are either true or false, we just can never be certain which.

Current philosophers studying the phenomenon of vagueness tend to frame their arguments in terms of borderline cases. Expressions are vague, it has been widely agreed, to the extent that they admit borderline cases. One’s description of borderline cases, however, turns on an account of how those borderline cases originate. This means that one’s preferred account of the sources of vagueness, the origins of borderline cases,

\textsuperscript{93} See section 2.3 below.
\textsuperscript{94} See section 2.2 below. Supervaluationism, for instance, rejects bivalence, but accepts the law of excluded middle (LEM).
drives many of the distinctions between and among current theorists on vagueness. Whether statements about borderline cases are always true or false (whether we know it or not), are true or false based on further specification, or are indeterminately true or false depends largely upon what approach one takes to singling out the source of vagueness. It is to those three approaches we now turn.

2.1 The epistemic approach

The epistemic view of vagueness is that there is an actual fact of the matter whether a certain number of grains is a heap or not, but that humans are not in a position to discover it. Vagueness is explained in terms of our epistemic shortcomings, our inability to access some crucial information about borderline cases. As one of the philosophers who has advocated the epistemic approach has put it, “ignorance is an essential feature of borderline cases.”

The epistemic theory of vagueness does not hold that the ignorance involved in sorites problems can be explained. Ignorance is not being used by epistemicists as a pejorative term, but rather as an explanation for why the Sorites Paradox forces us toward an allegedly contradictory conclusion. The epistemic view of human ignorance asserts only that we are not the kinds of creatures who can discern at what point, for instance, baldness becomes non-baldness. Humans do not know—because we cannot know—where the sharp cutoffs in the sorites continua lie.

Epistemicists posit a sharp, yet indiscernible, cutoff between baldness and non-baldness. This means that, on the epistemic view, there is a sharp semantic boundary

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95 Williamson, Vagueness, p. 201.
between baldness and non-baldness, between heaps and non-heaps. Borderline cases are problematic, then, only because we remain in doubt about the actual point in the sorites series at which the predicate’s extension (e.g., the cases which correctly count as “bald”) becomes the predicate’s anti-extension (e.g., the cases which correctly count as “not bald”). Epistemicists holds that vagueness is to be explained not by the absence of determinately referring terms or determinately true or false propositions, but rather by our ignorance of where the determinate semantic boundaries are. Borderline cases, on the epistemic view, illustrate only our knowledge “gaps”, in other words, not any underlying metaphysical or linguistic “gaps”.

Epistemism purports to solve the Sorites Paradox by denying the second (major) premise, the inductive step. The imperceptible slide from non-baldness to baldness, for instance, is halted at a particular point. At a particular point in the sorites series, say, at Hair #14,000 (and thereafter down the series), the extension of the predicate “bald” is correct. So, in effect, the major premise—that at every point of the underlying continuum the basis step must be maintained as true—is defeated. At a particular point in the series, there is a sharp (but unknowable) boundary between non-baldness and baldness. In this manner, epistemicists commit themselves to the existence of sharp boundaries—albeit a boundary that cannot be known by the evaluators or anyone else—to solve the Sorites Paradox.

One of the side benefits of the epistemic view is that epistemicists can be realists about ontology. Epistemicists contend that there is a fact of the matter about borderline cases, say that Kelsey Grammar is bald. The proposition, “Kelsey Grammar is bald,” can therefore be assigned a determinate truth value. It is not that the world is indeterminate
or that language is irredeemably imprecise in borderline cases. It is not that sharp cutoffs in sorites series do not exist. It is just that we cannot know where the sharp cutoffs are.

Epistemicists also can employ the methods of classical logic and semantics to analyze vague expressions. Under the epistemic theory (as opposed to several other rival views), the principle of bivalence holds. Any proposition, even one about borderline cases, is either true or false. Any predicate, even a vague one, has a determinate extension. The only problem, as evidenced by the Sorites Paradox, is that human knowledge is limited to the extent that it can recognize precisely under what circumstances vagueness has (in reality and unbeknownst to us) been removed in what we refer to as borderline cases. For these reasons, a few theorists have been attracted to the epistemic explanation of the Sorites Paradox. It appears to be a conservative, and somewhat commonsensical, solution to vagueness problems.

2.2 The semantic approach

Most theorists describe borderline cases in terms of some form of linguistic imprecision. On these theories, our language is the origin of vagueness. Because our language fails to determine the extension of “bald”, for instance, in borderline cases, there is a “truth value gap” present in borderline cases. Although the sentence “Ving Rhames is bald” is true and the sentence “Howard Stern is bald” is false, the sentence “Kelsey Grammar is bald” fails to be either definitely true or definitely false. Because no

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96 Roy Sorensen and Timothy Williamson are the main defenders of the epistemic view of vagueness. See, for instance, Sorensen’s characterization of the evaluation of borderline cases as involving “hidden boundaries”, or unknowable “sharp cutoffs” (such as the precise second during which Buddha became a fat man) in his Vagueness and Contradiction, Oxford: Oxford University Press, 2001), hereafter Vagueness and Contradiction.
definite truth value assignment—neither true nor false—can be made in such borderline cases, propositions using vague terms in such cases present substantial truth value gaps.

There have been two primary methods of addressing truth value gaps in borderline cases. The most popular semantic approach has been supervaluationism (SV). SV holds, roughly, that vagueness is a form of extreme ambiguity in which many precise concepts that resemble one another are analyzed as a single vague concept. The SV method of dealing with vagueness is to remove the hidden ambiguity underlying vagueness by disambiguating all of the suppressed ambiguous statements. Once logic is applied to the properly disambiguated statements, it becomes clearer which propositions in a sorites series, for instance, are true, false, or borderline. The second most popular semantic approach, the “multi-value” (MV) approach, posits more than two values of truth to deal with borderline statements. MV analyzes borderline statements with respect to a third category of truth between truth and falsity. The “middle” category of truth may be a single value, in which the logic is called a three-value theory, or may entertain an infinite number of values. In an infinite-valued or “fuzzy” logic, the values assigned represent the values of probability that the statement in question is true. Fuzzy logic would permit statements such as “It is more likely true than not that Kelsey Grammar is bald.” Three-value theories, on the other hand, give the same value—indeterminate—to all statements that are neither definitely true nor definitely false.

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97 Kit Fine, "Vagueness, truth and logic," *Synthese* 30 (1975): 265-300, hereafter Fine, “Vagueness, truth and logic”; reprinted in *Vagueness: A Reader*, pp. 119-150. Because ambiguity and vagueness are often distinguished as distinct features of a natural language, Fine’s description of vagueness in terms of ambiguity has been rejected by some supervaluationists. See, for example, Keefe, *Theories of Vagueness*, pp. 156-159.
Supervaluationism is an attempt to adapt van Fraassen’s supervaluation semantics\textsuperscript{98} to the Sorites Paradox to eliminate vagueness. The method assumes that vagueness is attributable to semantic defects, in particular, semantic indecision. SV holds that, in borderline cases, “we have not troubled to settle which of some range of precise meanings our words are meant to express.”\textsuperscript{99} Since, in borderline cases, there is a range of imprecise meanings we have not settled, there is a truth value gap for propositions made about those cases.

On a supervaluationist view, borderline cases are cases to which the predicate neither definitely applies nor definitely does not apply. So, in the case of Kelsey Grammar, the predicate “bald” neither definitely applies nor definitely does not apply. The positive extension of a predicate (e.g., the extension of “bald” to Ving Rhames) is given by those objects (Mr. Rhames and others) to whom the predicate definitely applies. The negative extension (e.g., the extension of “not bald” to Howard Stern) is given by those objects (Mr. Stern and others) to whom the predicate definitely does not apply. The remaining borderline cases constitute the predicate’s penumbra. On this view, predicates in borderline cases must be sharpened, their extensions determined, in order to address concerns about vagueness. The method used to accomplish this is called “precisification.”

Precisification is the method by which fuzzy predicates are replaced in a proposition by precise counterparts prior to logical analysis. The assumption is that, for any proposition, there must be at least one way of making its terms completely precise so

\textsuperscript{98} Bas van Fraassen, “Singular terms, truth-value gaps, and free logic”, \textit{Journal of Philosophy} 63 (1966): 481-495.

that the proposition may be given a classical truth value. This is accomplished by stipulating a value for a particular state of affairs within a soritical series that would determine a sharp cutoff. For instance, we might stipulate for the vague predicate “bald” that 14,000 hairs is the precise point at which the predicate applies. So, if Kelsey Grammar has 14,000 hairs on his head, then he is bald. If Mr. Grammar has 14,001 hairs on his head, then he is not bald.

Next, SV universally quantifies over all legitimate ways of making the predicate sharp. This is accomplished by taking into account all the previously precisified sentences. As noted, there is a constraint on this second step of quantification. The universal quantification must be over all “legitimate” ways of making the predicate sharp. This constraint ensures that the process of precisification does not change the term’s meaning (even if it does change the term’s extension) in its transformation from vagueness to precision. To be “legitimate,” the quantification over the initially vague predicate must respect all clear extensions (as well as clear anti-extensions) of the predicate as understood by the speakers of the pre-sharpened vague term. The process of making terms more precise does not change the term’s meaning but is, rather, a change in the way those who have taken part in precisification will employ the sharpened expression thereafter.

The method of making vague predicates precise requires not only a sharpening of the predicates and their application to states of affairs, but also a retooling of the concept of truth attributed to those “sharpened” statements. A vague statement will be called “super-true” if it is true in all its precisifications, true no matter how the vague term is

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100 Keefe, *Theories of Vagueness*, p. 167.
101 Keefe, *Theories of Vagueness*, p. 156.
sharpened, true, in other words, in every context in which the predicate can legitimately be extended. To assert a vague sentence, then, is to assert all of its precisifications.  

Supervaluationism’s unique conception of truth (as “super-truth”) requires an adjustment in logic. In particular, the SV approach denies the principle of bivalence, thereby permitting truth-value gaps, while retaining the remaining relations and laws of classical logic. The acceptance of the law of excluded middle and the rejection of bivalence renders the supervaluation semantics no longer truth-functional.

The result is a non-bivalent logic that permits, for instance, true disjunctions neither of whose disjuncts is true. Say that the sentence, $p$, is “Mr. Grammar is bald” and that the sentence, $r$, is “Mr. Grammar is not bald.” Neither $p$ nor $r$ is true, under the supervaluationist theory. However, the disjunction—either $p$ or $r$—is true. It is the case, under this view, that Mr. Grammar is either bald or not bald. The same non-classical features are exhibited in supervaluational conjunctions. The supervaluational conjunction of $p$ and $r$, above, is false. Not only the connectives, but also the semantics of quantifiers, are nonstandard under the supervaluational theory. A universally quantified sentence may be false, even though none of its instances is false. Moreover, an existential quantification can be true even in the absence of true instances. 

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103 SV rejects the universally quantified premise of the sorites argument ($\forall n (F_a \supset F_{a,n+1})$), but accepts the truth of its negation: $\exists n (F_a \& \neg F_{a,n+1})$. This move is what permits the supervaluationists’ “line drawing” solution to the Sorites Paradox. However, the acceptance of the truth of $\exists n (F_a \& \neg F_{a,n+1})$ (arguably) does not commit the supervaluationist to the existence of a sharp boundary between, say, baldness and non-baldness. The claim is that there is a point in each precisification where baldness and non-baldness can be discriminated. This is not the claim that there exists a line of demarcation between baldness and non-baldness. The latter claim commits one to the existence of a particular sharp cutoff, one of the purported mistakes in the epistemic theory. The former claim commits one only to a stipulated sharp cutoff within each precisification, a cutoff that varies with the number of precisifications used to sharpen the predicate in question. Unlike epistemicism, then, SV is (at least arguably) not committed to the existence of sharp boundaries.
SV’s employment of a non-bivalent logic permits its purveyors to pursue the same course as epistemicists in rejecting the Sorites Paradox, namely, the denial of the inductive step, but without committing itself to the existence of sharp boundaries. This general semantic approach is also used by theorists who employ a different strategy in addressing the problem of vagueness. Whereas supervaluationists maintain two values for truth and expand the notions of “true” and “false” to permit application to borderline cases, the so-called “multi-value” theorists posit more than two truth values with which to analyze borderline cases. The alternative logicians posit a semantic solution to a problem they diagnose either as logical (in most cases) or ontological (in the cases, to be discussed below in section 2.3, of those who admit fuzzy objects, such as clouds, or fuzzy states of affairs, such as future contingents).

SV posited a non-truth-functional logic in response to the Sorites Paradox. Theorists in the alternative logic tradition posit other non-classical logics to deal with borderline cases. The general approach is to posit a truth-value between “true” and “false” to deal with sentences that are neither determinately true nor determinately false. An indeterminate truth value is assigned to those sentences that cannot be assigned the values “true” and “false”. Given the falakros example of the sorites problem, “Ving Rhames is bald” is true, “Howard Stern is bald” is false, and “Kelsey Grammar is bald” is indeterminate.

There are different ways of describing the indeterminacy of the “middle” truth-value. The first alternative logic proposed was a three-valued logic, a logic that described indeterminacy as a distinct truth value akin to, and between, truth and falsity. Vague sentences can be divided into those that are true, those that are false, and those that are
indeterminate. However, unlike the supervaluationist semantics, the connectives in the resulting three-valued logic are all defined truth-functionally. There are many approaches to solving the Sorites Paradox based on a three-valued logic, each differing by the notion of validity adopted or by the rejection of certain logical principles, such as the law of excluded middle. A standard way of representing the truth-value assignments for such three-value theories is to assign values of 1 for “truth”, 0 for “falsity”, and ½ for “indeterminacy”.

A three-valued approach to sorites problems avoids paradox by assigning vague predicates in borderline cases to the third truth-value. Indeterminacy in borderline cases means that not every case in the soritical series must be assigned a value of “true” or “false”. The major premise is denied because there is a cutoff—although not a sharp one—between the true basis step and the false conclusion.

Another way of describing indeterminacy between truth and falsity is to permit an infinite number of truth-value assignments for the “middle” value. Instead of a three-valued logic, this would be termed an infinite-valued logic. The system known as “fuzzy logic” is such an infinite-valued system. In fuzzy logic, truth is represented as 1, falsity is represented as 0, and the degrees between truth and falsity are represented by the real numbers between 0 and 1. The real numbers between 0 and 1 designate the degree of truth matching the degree of vagueness of the vague statement. So, the argument goes, just as baldness comes in degrees, so does the truth of sentences predicating baldness. As one moves incrementally from, say, baldness to non-baldness (i.e, from clear truth = 1 to clear falsity = 0), the truth-value assignments descend through the descending order of

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104 This is not the case for all such theorists, however. See, for example, Dorothy Edgington, “Vagueness by degrees”, in Vagueness: A Reader, pp. 294-316, who proposes a fuzzy, rather than a three-valued, logic.
real numbers. The conditional major premise of the sorites argument is not overall true to
degree 1. Starting from a true basis step, tiny, but increasing, departures from clear truth
at each step result in a clearly false conclusion.

2.3 The ontic approach

The motivation for the three-valued approach to dealing with borderline cases
may have come not from a preferred semantic account of vagueness, but rather from a
suppressed metaphysical commitment.\textsuperscript{105} The metaphysical commitment is that there are
things (items, objects, states of affairs) in the world that are the source of vagueness. On
this ontic approach to vagueness, vagueness is the lack of precision in the boundaries of
objects, a lack of precision that generates borderline cases.

A frequently cited paradigm case of a vague object is a cloud. A cloud is an
object. We can refer to this or that item in the sky as a cloud. We can classify such items
into categories, such as cumulous clouds and cirrus clouds. We can even make weather
predictions based on the number, type, and arrangement of clouds in a given area at a
given time. However, when we try to define the contours of a particular cloud, we are at
a loss. Determining where a cloud begins and the sky surrounding the cloud ends, is a
difficult matter. On the ground it seems clear that there is a well-defined whitish item in
the midst of a field of blue sky. However, if one were to observe the cloud from within,
say while riding in an airplane, it would be difficult, perhaps impossible, to determine at
what point the cloud ceased to be. A sorites series is presented by this example. If one

\textsuperscript{105} See Williamson’s \textit{Vagueness}, p. 12, regarding Aristotle’s rejection of bivalence for future contingencies,
along with the related discussion above in section 1.1.
traveled molecule by molecule from the middle of the cloud outward, one could not
determine at which point in the trip the statement “This is part of a cloud” became false.

The concept of ontic vagueness is not limited to objects that display their
penumbras so overtly. Some have claimed that objects as solid as mountains are vague.
Mount Everest is a favorite example. It is unclear where Mount Everest begins and
where its environs end. There is no line of demarcation that sets off the-land-that-is-the-
mountain from the-land-that-is-its-surroundings. Arguably the situation generates a
sorites series. Since there is no clear point at which Mount Everest begins, there is no
precise point at which the proposition “This is Mount Everest” is rendered true. It seems
that there will be borderline cases of Mount Everest somewhere, say, between the first
base camp and the town below.

The ontic approach to vagueness is a minority view. On most accounts,
vagueness originates with our representations of reality, not with reality itself.
Epistemicists hold that our mental representations create vagueness problems.
Semanticists hold that our imprecise linguistic representations create vagueness. On
these approaches, vagueness, as a phenomenon, is due to our ineffective ways of
representing the world through our thoughts or through our language. And, since we can
only deal with philosophical problems such as vagueness by means of thinking and
speaking, we can only describe philosophical problems in those terms. In short, even if
reality—objects, things, states of affairs—were not vague, our representations of them
would be. Therefore, the epistemic and semantic theorists claim, the phenomenon of
vagueness must be addressed in terms of either our (albeit faulty and incomplete) mental
or linguistic representations.
The solution that best matches the ontic approach to vagueness, for the minority of theorists who wish to back it, is a three-valued semantics for logic. In particular, these theorists have postulated a third truth value of Indeterminate between True and False to better handle borderline cases.106 This does not mean, of course, that the ontic approach to describing vagueness and the formulation of a many-valued semantics to deal with vagueness are necessarily linked. Theorists need not postulate vague objects to propose a many-valued semantics.107 Nor does it mean that ontic vagueness may not be dealt with in terms of other kinds of semantics. Vagueness theorists with metaphysical motivations, however, have tended to couple the ontic approach with a three-valued semantics for logic.108

2.4 The continuing problem

Over the past three decades, the three types of approach to describing and addressing the phenomenon of vagueness —epistemic, semantic, and ontic—have become firmly entrenched. Although new methods have emerged, the methods seem devoted to establishing one of the three preferred approaches. The result has been a kind of fragmentation (and a lack of progress) in the field of research.

107 This should be obvious given the statement above in section 2.2 that semantic theorists also employ a three-valued solution to account for borderline cases.
108 Peirce, Lukasiewicz, and Tye are examples. Charles Sanders Peirce’s introduction of a third truth value to deal with chance as a universal force (which he dubbed “tychism”) marks the first linking of an ontic approach to vagueness and a many-valued semantics. Jan Łukasiewicz followed with a three-valued theory motivated by concerns of free will. He thought that fatalism could be avoided only if future contingents could be assigned a third truth value. See Williamson’s *Vagueness*, pp. 102-103. Michael Tye’s approach to vagueness, grounding a three-value theory on the existence of vague sets, is a more recent example of the metaphysical motivation of a three-valued logic. See Tye’s “Sorites paradoxes and the semantics of vagueness”.

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The problem, as Crispin Wright observes, is that the three approaches constitute a trilemma. Either borderline cases exist or they do not. The epistemic approach argues that borderline cases do not exist because there are sharp, but unknowable, cut-offs to any soritical series.\textsuperscript{109} The semantic and ontic approaches argue for borderline cases either because such cases exhibit substantial truth value gaps or because the cases exhibit an underlying indeterminacy in the states of affairs described by the cases. In other words, if borderline cases exist, they originate either in language or in the world. So, there seem to be only three alternatives to describing borderline cases\textsuperscript{110} and, unfortunately, none of them is independently persuasive.

Although the epistemic approach appears, at first blush, to be a straightforward response to the phenomenon of vagueness, an initial concern is that it is counterintuitive. In rejecting the inductive premise of the sorites argument, the epistemic view commits itself to the existence of a sharp cutoff for every soritical predicate or proposition. In doing so, the epistemic view fails to do justice to our experience of vagueness. The Sorites Paradox exerts an intuitive pull because the existence of sharp boundaries for soritical expressions is so implausible. The epistemic approach posits the existence of sharp boundaries, flouting intuition and positing something close to a linguistic miracle, namely, that seemingly imprecise predicates like “bald” actually classify all cases completely and precisely into two categories (in this case, right down to the explicitly numbered hair). In its proposed solution to the Sorites Paradox, epistemicism saves the

\textsuperscript{109} Technically, epistemicists redefine the term “borderline” so that it is uncertain whether a borderline case is true or false, rather than indeterminate that a borderline case is true or false. See Roy Sorensen, \textit{Vagueness and Contradiction}, Chapter 1.

\textsuperscript{110} Again, it might nonetheless be possible to describe borderline cases, and therefore, vagueness, as a combination of these three alternatives. Such a theory has not been offered, however.
laws and inferences of classical logic, but only at the (exceedingly great) expense of our ability to know—and to be guided by—the sharp cutoffs it posits for borderline cases.

The semantic approach to vagueness is also troublesome. In particular, so-called “higher-order vagueness” is a problem both for SV and MV. Higher-order vagueness (HOV) is, roughly, the vagueness of higher-order predicates, such as “borderline bald”, that correspond to ordinary vague predicates, such as “bald”.\(^{111}\) HOV is a threat for SV because the theory is built on the notion of higher-order “legitimate” or “admissible” sharpenings of ordinary predicates. The meaning of “bald” will not allow one to precisify it so that only those persons with 10 or fewer hairs count as bald. The clearly (i.e., determinately) bald people must be those who are bald on all “legitimate” or “admissible” precisifications. But “legitimate” and “admissible” are as vague as any of the vague predicates we’ve been considering. A sorites problem could be set up using the predicate “legitimately (or admissibly or clearly) bald” as easily as one could be generated for “bald.” Because there is no precise means of determining which sharpenings are admissible, there is no precise means of determining on which sharpenings a true statement is made super-true. The process of precisification, a process employed to generate a broader notion of truth (i.e., super-truth) to resolve sorites problems, generates vagueness in the meta-language. Vagueness in the object-language (about baldness, for instance) has become vagueness in the meta-language (about, for example, “admissible” or “legitimate” cases of baldness).

HOV is a threat to MV as well, because the indeterminate realm between truth and falsity does not present a precise cutoff between, for instance, baldness and non-baldness. Multi-valued logics present a set of numbers defining a boundary between clear cases (1 and 0) or borderline cases (½ in three-valued logics, the infinite series of real numbers in fuzzy logic). But it is not clear that a system of logic with three values responds to sorites problems better than one with two values. Indeed, a third boundary seems to inject more vagueness into the system than was evidenced in the original problem. A triadic system of logic increases the two boundary original problem (vague statements are either true or false) to a three boundary problem (vague statements are either true or false or indeterminate). An infinite system seems to increase the problem infinitely.

Another problem specific to degree theories is the counter-intuitive notion of degrees of truth. An explanation is needed for why we should accept something other than our standard, intuitive notion of assigning truth-values in an all-or-nothing fashion, rather than in degrees of more-or-less. Moreover, there is no clear way of determining how numerical truth-values can be rendered as anything close to our common notion of truth-value assignments. Moving from assignments of truth and falsity to numerical designations based on assignments of the probability of truth requires a justification that has not yet been provided.

A separate difficulty for SV, apart from the threat of HOV, is that it is not at all clear that the required claim that “truth is super-truth” is warranted. The two types of truth and their two concomitant forms of validity appear to be quite different. One fundamental example of the difference in the two languages is that the inference rules in
each are different. For this reason, truth seems to be quite a different notion than super-truth. And, if there is equivocation over the two forms of truth used by the supervaluationists, it is not clear that their proposed method for solving the sorites problem is coherent.

The equivocation over types of truth, coupled with the threat of HOV leads to a double-headed problem for supervaluationists. If truth is super-truth, HOV results, and the attribution of truth values in the meta-language is indeterminate. The new truth values that are assigned to propositions in the meta-language (based on “legitimate” sharpenings) are as vague as the related propositions in the object-language. On the other hand, if truth is not super-truth, then the SV theory is not effective in solving the Sorites Paradox. The positing of super-truth and super-falsity, with their concomitant non-bivalent logic, is the course supervaluationists took to solve the paradox in the first place.

Wrights’ proposed trilemma—that the epistemic, semantic, and ontic accounts of vagueness seem to be both collectively comprehensive and yet individually inadequate—is not difficult to avoid, however. The trilemma can be escaped, according to Wright, by positing a fourth approach to describing vagueness. In recent years, theorists have attempted to provide this fourth approach by trying to capture the notion of linguistic vagueness not in terms of semantics, but rather in terms of pragmatics. The focus is on language use, rather than on the meanings to be ascribed to linguistic expressions. The pragmatic approach to describing and dealing with vagueness focuses on how

112 This list of theorists does not include Wright, however, who has instead proposed what he calls a “broadly epistemic conception of borderline cases”. See his “Vagueness: A Fifth Column Approach”, p. 105.
communities use language and how language users are deemed competent within those communities, particularly in evaluating so-called “borderline cases” of vague predicates.

One recent form of pragmatic approach has been called “contextualism” because it attempts to provide a context within which one can better describe and deal with the phenomenon of vagueness. The “contextualist” approach is not the SV appeal to context, however, in which truth was characterized as “truth in all (legitimate) contexts”. The contextualist approach to truth might be characterized instead as “truth in a context”. 

Since, on the contextualist view, truth is considered relative to a particular context, the contextualist theories differ depending upon the theorists’ preferred contextual focus.

The next chapter outlines contextualism as a fourth alternative to avoid Wright’s perceived trilemma and illustrates the common (yet, at times, dissimilar) approaches to vagueness that have been characterized as being “contextualist”. Stewart Shapiro’s recent description of vagueness as being attributed to the “open texture” of language is provided as a theory that takes as its appropriate context the conversational shifts that occur when speakers make assertions (and retractions) in borderline cases. Shapiro’s theory is provided not only as a means of avoiding the trilemma of vagueness, but also as a framework (to be provided in Chapter Four) for resolving the parallel trilemma of legal indeterminacy.
CHAPTER 3
THE CONTEXTUALIST APPROACH TO VAGUENESS

Recently a group of loosely affiliated theorists known as “contextualists” has attempted to describe vagueness in a way that avoids the problems of the epistemic, semantic, and ontic accounts. Contextualists approach the problem of vagueness not in terms of the imperceptible additions or subtractions of, for instance, grains of wheat, but rather in terms of the ever-shifting contexts within which an observer must make judgments about a soritical series. The contextualist account of vagueness attributes the problems associated with extending vague predicates in borderline cases to the evaluative contexts that continually shift throughout the borderline area.

Take our paradigm case of a vague predicate “bald.” The non-contextualist theorists focused on the point in the series at which baldness “became” non-baldness. The epistemicists claimed that there was such a point, but that it was unknowable. The semanticists claimed that there was not such a point and that a truth-value gap existed that required a change in logic or semantics to accommodate it. The ontic theorists claimed that things like men’s head-states could not be defined precisely and that such indeterminacy in the world created indeterminacy in the language we use to represent it.

The contextualists, on the other hand, focus on the observers who are required to make judgments about whether a particular man is bald or not. According to contextualism, the correct attribution of baldness depends in part on the situation in
which the observer finds herself. The situation, the context of the judgment to be made, contributes\textsuperscript{113} to the correct extension of vague predicates like “bald”. To the extent that the correct application of vague terms depends on the circumstances in which the term’s application is evaluated, vague terms are said to be context-dependent.\textsuperscript{114}

The claim that vague terms are context-dependent is, in one sense, uncontroversial. It is widely acknowledged that the extensions of vague predicates vary with what may be called the “external” context, including factors such as comparison class, paradigm cases, and contrasting cases.\textsuperscript{115} Assume (based on an example borrowed from Delia Graff) that Jack is both a philosopher and a Microsoft executive. Let’s say that Jack’s annual income is $150,000. If we are discussing philosophers, we can truly say “Jack is rich.” If we are discussing Microsoft executives, we can truly say “Jack is not rich.” No contradiction follows from these assertions. It does not follow that Jack is rich and Jack is not rich is true. The predicate “rich” varies between the two comparison classes of philosophers and Microsoft executives. To make the variation explicit to the two classes, “rich” might mean “rich for a philosopher” in the first instance and “rich for a Microsoft executive” in the second instance. So, in this example, the correct application of the predicate “rich” varies with the varying comparison classes.

Contextualists argue that the extension of vague predicates also varies with another kind of context, one that varies not with external classes or cases, but rather with the context of evaluation. Assume that all external contexts are held fixed, as with the

\textsuperscript{113} In some relevant way, as described more fully below in Sections 3.1 and 3.2.

\textsuperscript{114} Since the evaluative judgments are made by “speakers” of a given natural language, the notion of context-dependency may also be described as relative to the context in which the vague expression is “uttered.”

\textsuperscript{115} Shapiro, Vagueness in Context, pp. 32-33.
paradigm case of vagueness, “bald”. Assume also that a person is asked to render a verdict in each successive case of a sorites series of men exhibiting head-states from clearly non-bald to clearly bald. The person must make a judgment one way or the other in each successive case, either bald or non-bald. And, by hypothesis (given the sorites series), the successive head-states of the subjects cannot be distinguished. Adjacent pairs of heads will appear the same. The contextualist intuition is that, as one progresses through the sorites series, as one judges whether two adjacent pairs are sufficiently similar, one is unaware of a subtle shift in the context of the evaluation. While one focuses on the evaluative task of discriminating between a series of adjacent pairs (of heads), the background context in which the series of judgments is being made shifts. Contextualists argue that this shift in evaluative context\(^\text{116}\) permits a shift in the predicate’s extension, a shift that explains many of the problems experienced with accurately describing the phenomenon of vagueness.

The difficulty in discerning between different evaluative contexts seems to be inherent in the original Sorites Paradox. The difficulty has been described in terms of a hypothesized feature of vague predicates—namely, their tolerance. Tolerance, in this sense, is the propensity for certain predicates “to tolerate marginal changes in the parameters decisive of their application.”\(^\text{117}\) In the original Sorites Paradox, for example, the evaluator is asked to consider whether if \(n\) grains constitute a heap, then \(n + 1\) grains

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\(^{117}\) Raffman, “Vagueness without Paradox”, at 41.
also constitute a heap. The evaluation proceeds via a comparison of adjacent pairs in the series \((n\) and \(n + 1\)), adjacent pairs which are, by definition, indistinguishable. So the predicate “heap” must apply to the case of a pile with \(n + 1\) grains if it applies to a pile with \(n\) grains. The marginal change of one additional grain of wheat cannot alter the continued application of the predicate “heap”. The predicate “heap” is, in other words, tolerant, at least in borderline cases.

The key to understanding the contextualist approach is in recognizing the evaluative aspect of tolerance. Although tolerance seems to be a propensity of vague predicates themselves, one might consider tolerance to be a matter of judgment. Crispin Wright, for instance, has described tolerance as any degree of positive change in a concept denoted by a predicate that is “insufficient to alter the justice with which [it] is applied.”\(^{118}\) This suggests that insignificant changes in tolerant predicates like “bald” do not affect the correct judgment of a person attempting to apply the predicate in a given case. So, in the borderline area between baldness and non-baldness, the predicate “bald” does not compel a particular verdict. In the borderline area, in other words, an evaluator cannot make a mistake in the use of language by assigning either the extension of the predicate (e.g., “bald”) or, on some theories, its anti-extension (e.g., “non-bald”).\(^{119}\) On this contextualist view, then, evaluators would have discretion in judging borderline cases, a discretion based on the context-dependency of tolerant (including vague) predicates.


\(^{119}\) See, for example, Soames’ \textit{Understanding Truth}, Chapter 7, and Shapiro’s \textit{Vagueness in Context}, Chapter 1.
The context-dependency of tolerant predicates, on the contextualist view, is best visualized using the “forced march” version of the Sorites Paradox.\(^\text{120}\) This version of the paradox is framed in terms of the judgments to be made by a competent speaker proceeding step by step along a sorites series for a vague predicate. Suppose we are presented with a series of fifty-one piles of wheat grains. Each pile in the series contains one grain less than the pile to its left. The rightmost pile contains 51 grains. We have a strong intuition that this pile, presented alone, is a heap. In other words, the 51-grain pile is in the definite extension of the vague predicate, “heap”. On the far left, is a “pile” containing 1 grain. One grain does not make a heap. Therefore, the leftmost case in the series is definitely not in the extension of the vague predicate “heap”. Now, starting with the rightmost pile (pile 1, containing 51 grains), we make progressive judgments in the following form:

(a) If pile 1 is a heap, then pile 2 is a heap.

(b) If pile 2 is a heap, then pile 3 is a heap.

(c) Etc.

(d) Etc.

(n) If pile 49 is a heap, then pile 50 (containing 1 grain) is a heap.

As we are presented with each conditional in the series, the two piles are sufficiently similar\(^\text{121}\) to cause us to interpret “heap” to count the current case as a heap only if the prior one is a heap. Such is the nature of tolerance. But what may be missed as we progress through the series of conditionals is a subtle change in the context of the

\(^{120}\) See, for example, Terrence Horgan, “Robust vagueness and the forced-march sorites paradox”, in *Philosophical Perspectives, 8: Logic and Language*, ed. J.E. Tomberlin (Atascadero, CA: Ridgeview Press, 1994), pp.159-188.

\(^{121}\) Or “saliently similar”, to use Graff’s terminology.
evaluation as we judge cases throughout the series, from clear cases of the predicate, through the entire borderline region, and through the clear non-cases of the predicate.122

To track the change in evaluative context, we must change the set-up of the problem from a “forced march” analysis to a “pair-wise” analysis. The “forced march” analysis is categorical; it considers each case individually and demonstrates the pervasive effect of tolerance throughout the sorites series. The “pair-wise” analysis, on the other hand, is comparative; it considers each case relative to the case immediately adjacent to it in the sorites series. The “pair-wise” analysis shows how, irrespective of the effect of tolerance, the inductive premise may be demonstrated false.123

Consider the sorites series again, this time as a series of adjacent pairs. Cases #1 and #2 are evaluated; then cases #2 and #3 are evaluated, and so on. This “pair-wise” evaluation continues throughout the series. The contextualist argument is that, at some point in the series (i.e., in the borderline area), there will be a member of an adjacent pair that need not be evaluated in the same way as its adjacent member.124 Raffman sets up the sorites series in a conditional form utilizing a different notation (e.g., “that\textsubscript{1}”, “that\textsubscript{2}”, etc.) to illustrate the different properties of each item (in this case, each successive heap) in the series as follows:

(1) That\textsubscript{1} is a heap.

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122 Diana Raffman, “How to understand contextualism about vagueness: reply to Stanley” Analysis 65 (2005), pp. 244-248, hereafter “Reply to Stanley”.

123 The description of the contextualist account of vagueness as involving an analytical distinction between categorical and comparative set-ups of the sorites problem is due to Stewart Shapiro. See his Vagueness in Context, pp. 25-26.

124 Raffman, “Reply to Stanley”, p. 246. Although Raffman offers this set-up as a counter to Stanley’s assertion that contextualism is based on an unwarranted commitment to analyzing vague predicates as indexicals, the specific context of the argument is not important here. The generic conditional form Raffman puts forward in the paper is quite helpful in providing an analysis of vagueness in terms of evaluating adjacent pairs.
(2) If that\textsubscript{1} is a heap, then that\textsubscript{2} is a heap.
Etc.
(24) If that\textsubscript{23} is a heap, then that\textsubscript{24} is a heap.
(25) If that\textsubscript{24} is a heap, then that\textsubscript{25} is a heap.
Etc.
(51) Therefore, that\textsubscript{50} is a heap.
For the argument to go through to its paradoxical conclusion, each sentence “that\textsubscript{i} is a heap” must take the same truth-value throughout. For example, in both premises (24) and (25), “that\textsubscript{24} is a heap” must be true for the inductive premise to be true. Raffman denies the inductive premise of the Sorites Paradox by proposing that, at some set of premises in the borderline area, the context of evaluation shifts so that, for instance, “that\textsubscript{24} is a heap” may be true in premise (24) but false (or indeterminate) in premise (25). This would stop the argument from going through to paradox without violating the principle of tolerance that adjacent pairs in a soritical series cannot be judged differently. The remaining question for the contextualist is what kind of evaluative shift can explain a change in truth-value from one conditional to the next in borderline cases without violating the principle of tolerance.

3.1 Psychological contextualism

Diana Raffman has argued that the change in context is a change in the speaker’s mental state.\textsuperscript{125} In particular, Raffman has claimed that certain changes in verbal dispositions would permit a truth-value switch in the premises asserted in some

borderline cases. As the speaker proceeds through the “pair-wise” evaluation described above, she will be disposed to judge as borderline-heaps some of the piles she previously judged as heaps. The new dispositional state provides a new psychological context in which to evaluate pending cases. The contextual shift permits an evaluative shift. As Raffman explains, “it’s by shifting to a new dispositional state, by shifting to a new context, that the speaker is able to switch predicates in the sorites series.”

Tolerance requires that a competent evaluator not give different verdicts to two adjacent pairs in a sorites series simultaneously. So, if the evaluator judges pile #24 to be a heap, then she must also judge pile #25 to be a heap. If asked to judge pile #24 and pile #25 at the same time, the evaluator will judge both as being heaps (or non-heaps as the case may be). Raffman contends that this simultaneous judging of adjacent pairs constitutes one psychological state, namely, the dispositional state to judge the adjacent pairs the same. As long as the evaluator remains in the same dispositional state, she will judge adjacent pairs the same. In Raffman’s terms, adjacent members of the sorites series are category-identical. Since adjacent members are category-identical, the sorites argument will appear to go through; there will appear to be no instance of the inductive premise that is false.

This does not mean, however, that the inductive premise, taken as a whole (as a series of conditionals and intervening iterations of modus ponens, for instance), is true. As was suggested above, there is another dispositional state an evaluator could take, namely, a categorical, rather than a comparative, state. This dispositional state—one

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126 Raffman has recently abandoned contextualism in favor of what she calls an incompatibilist approach. See her “Borderline Cases and Bivalence”, *The Philosophical Review* 114, no. 1 (2005): 1-31. It is unclear, however, how much of the contextualist picture she would reject to put forward her incompatibilism.
127 Raffman’s “Reply to Stanley”, p. 247, emphasis in the original.
which requires a series of evaluations of single cases—might allow, in the borderline area, an evaluative “jump”. At some point in the series, the evaluator “jumps” from a judgment of *heap* to a judgment of *non-heap*. By hypothesis, the jump will occur somewhere in the borderline area.\(^\text{128}\) The precise location (in the series) of the evaluative jump is not important. But we are certain, since the evaluator is a competent speaker of the language, that the evaluator will not assign the predicate “heap” to every case in the series.

Assume that the evaluative jump occurs at pile #36. The evaluator in the “forced march” is forced to render a verdict, *heap* or *non-heap*, and she calls pile #36 a *non-heap*. If the evaluator is then asked to judge pile #35, she will wish, due to tolerance, to withdraw her former verdict. She will feel compelled to call pile #35 a *non-heap*, now that she has called pile #36 a *non-heap*. The effect of tolerance will spread backward throughout the series, compelling the evaluator to retract several of her former judgments. But, of course, at some particular case, she will stick to her guns and will claim, say, pile #19 is definitely a *heap*. This starts the “spread” back up again through the borderline cases. What is occurring here, according to Raffman, is that when the evaluator “jumps”, she moves to a new psychological state. The jump marks a category shift consisting in a shift of perspective in which the new category instantaneously “spreads backward” along a string of the preceding patches. In other words, the new category…is what I shall call “fluid”: it expands backward, instantaneously, to embrace some of the patches that formerly lay in the range of its competitor…Thus the category shift is not a local phenomenon; rather, it is spread across some portion of the series, so that a string of [cases] shifts this category together. In this way, [adjacent pairs] can be category-different without jeopardizing…the

\(^{128}\) Raffman’s description of the borderline area is slightly different than that of others, including Shapiro. But for these purposes, the distinction does not matter.
continuity of the series, for they are never category-different at the same time.”

The category shift does not occur in clear cases, only in borderline cases. At the borderline, the dispositional shift is, according to Raffman, akin to a Gestalt switch. Take the familiar example of the duck-rabbit. The same series of lines (the ones constituting the duck-rabbit drawing) permit two different ways of seeing the picture: seeing the duck and seeing the rabbit. This is what happens, with only slight variation in the sorites series. We can see borderline cases either way. The dispositional shifts in those cases demonstrate why we perceive no discontinuities in the sorites series. We do not perceive discontinuities in the sorites series because we undergo perceptual shifts in the borderline cases of vague predicates. Because we do not realize our perceptual context is shifting, we feel that the inductive premise must be correct.

For Raffman, the contextual shift in the evaluator’s psychological state at jumps in the series explains the intuitive pull of the inductive premise. The contextual shift also provides a means of escaping the paradoxical conclusion of the Sorites Paradox. Evaluators may judge certain cases in borderline areas as non-heaps (for instance) without contradicting themselves regarding prior judgments of heaps. When compared to case #25, case #24 may be called a non-heap. However, when compared to case #23, case #24 might be called a heap. The contextual shift inherent in judging the series in terms of adjacent pairs permits evaluators to acknowledge that certain individual cases may be called either heaps or non-heaps. The correct extension of the predicate in a borderline case depends on the evaluator’s dispositional state at the time.

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129 Raffman’s “Vagueness without Paradox”, pp. 50-51, emphasis in the original.
130 The sorites series adds or subtracts imperceptibly case-by-case. The result is the same as in the duck-rabbit example, but the duck-rabbit picture does not change at all.
Delia Graff presents a similar contextualist account of vagueness. For Graff, the correct extension of a vague predicate depends on what the evaluator’s purposes are. Assume that Jones is making instant coffee. A sorites series is anticipated by this example if we also assume Jones starts with one grain of coffee. Certainly, one grain of coffee dissolved in a mug of water is not coffee. Jones continues to “make coffee”, adding grain upon grain to his mug of water. If, at every step, he is asked whether the resulting blend is coffee, Jones will feel compelled to answer in the negative. Every added grain adds only imperceptibly to his brew; so, in classic sorites fashion, we come at some point to a clear case of coffee via reasoning which permits only individualized cases of non-coffee. Graff reasons that other concerns go into the judgment of whether a particular case constitutes coffee. For example, if Jones is trying to stay awake to study for a final exam, his judgment that a particular instance is coffee may come much farther down the series than if he did not have that purpose for making coffee. Graff argues that whether a difference in a sorites series makes a significant (or salient) difference is a function of our interests.

Typically, we have an interest in efficiency. We need to make decisions, even in cases that occur in the borderline region of vague predicates. Graff argues that, in such cases, we use a rough cost-benefit analysis to determine what course of conduct—say in stopping the grain-by-grain addition of coffee to a mug of water—to take. Where two cases are extremely similar (and, in particular, if they are adjacent pairs in a sorites series) and we are actively considering them, the cost of discriminating between them usually outweighs the benefit in discriminating between them. Typically, then, the two

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131 See her “Shifting Sands”. Graff limits her account to a special case of vague terms: vague adjectives.
cases are the same for present purposes. However, in circumstances where the benefit of discriminating between adjacent pairs outweighs the cost of discriminating between them, we will judge them to be different. At the point where Jones believes the amount of caffeine contained in a particular case is sufficient, Jones will call that case coffee, even though all preceding cases were non-coffee. The context shift that permits a “break” in the sorites series is the shift in the relative interest of the evaluator.

So, for Graff, the extensions of vague predicates are determined by what counts as significant for a particular evaluator at a particular time. Jones’s evaluation of whether “it’s coffee yet” will change based on his changing purposes, either to wake up in the morning (say) or to stay awake all night to study. Graff, like Raffman, describes the context-dependence of vague predicates in terms of the evaluators’ psychological states. Unlike Raffman, however, Graff’s account is relative to the evaluators’ shifting interest, not to their ever-shifting perceptual (or dispositional) states.

3.2 Conversational contextualism

Unlike his fellow contextualists, Raffman and Graff, Shapiro does not adopt a psychological approach to describing vagueness. The pragmatics of a natural language, not the psychological states of that language’s speakers, is Shapiro’s focus. Shapiro’s general strategy is to explain evaluative jumps in soritical series in terms of shifts in conversational context. Shapiro argues that the shifts in conversational context do not violate the principle of tolerance, because the conversational context in which one judges

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132 For Graff, this accounts for the intuitive pull of the Sorites Paradox’s inductive premise.
133 Soames also pursued this approach in Understanding Truth, Chapter 7. Shapiro’s theory, as based on the notion of open-texture, may be viewed as broader than Soames’ account, however. Soames’ theory does not encompass non-soritical versions of vagueness. Shapiro’s does.
Fa is different than the conversational context in which one judges not-Fa. The continually shifting conversational contexts permit speakers of a natural language to judge either way without censure in borderline cases. In his new book, *Vagueness in Context*, Shapiro provides a model-theoretic account of vagueness grounded in his description of borderline cases and the features of natural language that give evaluators (or, as Shapiro calls them, “judges”) full discretion in using vague expressions in that language.

Shapiro begins his account by stating what he takes to be a truism: competent users of a language determine the meaning of the language’s expressions. We decide what terms such as “water”, “bird”, and “bald” mean. It may be true that the world also has a role to play in fixing the meaning of some of our terms. Indeed, what it means to be bald, for instance, depends to some extent on the number and arrangement of hairs on our subject male’s head. However, the word “bald” refers to individual cranial states not because of the way the world is, but rather “because of the activities of speakers of English in this world”.

The interrelation of facts in the world and practices of speakers in determining the meaning of a word or phrase in a natural language can be expressed in terms of a “determinately operator”. Shapiro employs the technical term ‘determinately’ as proposed by McGee and McLaughlin: where F is a monadic predicate in a natural language, to say that an object a is determinately an F “means that the thoughts and practices of speakers of the language determine conditions of application for…F, and the

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134 Although there is a long-standing problem of determining who “we” are. The problem of “relevant competent subjects” is discussed in terms of legal indeterminacy below in Chapter 6.
facts about \( a \) determine that these conditions are met.”^{136} In general, then, a sentence is
determinately true when two conditions are satisfied: 1) speakers’ thoughts and practices
in using the language have established truth conditions for the sentence, and 2) non-
linguistic facts have determined that these conditions are met.

Cases in which these two conditions are not met are borderline cases, cases in
which our practices and the non-linguistic facts do not determine whether a given
sentence’s truth conditions have been met. More precisely, an object \( a \) is a *borderline
case* of a predicate \( F \) if \( a \) is not determinately an \( F \) and is not determinately a non-\( F \).

Shapiro, following McGee and McLaughlin, classifies the case of \( Fa \) as being
“unsettled”. Unsettled cases are Shapiro’s focus in describing vagueness.\(^{137}\) The
description of an unsettled case is therefore crucial to Shapiro’s overall account.

Take the familiar soritical series between bald and non-bald. Ving Rhames is
determinately bald. Howard Stern is determinately not-bald. Kelsey Grammar is neither
determinately bald nor determinately not-bald. Kelsey Grammar is an unsettled case of
baldness. Say “bald” is expressed as a general predicate, \( P \), and \( a \) is taken as a case being
considered for baldness. Kelsey Grammar presents a case somewhere in the middle of the
series between bald and non-bald, say \( a_j \). Since “bald” is a predicate in English, a natural
language, and \( a_j \) is in its range of applicability, our “thoughts and practices in using the
language have established the truth conditions for” the sentence \( Pa_j \). This does not mean,
however, that non-linguistic facts have determined that the existing truth conditions have
been met. Shapiro holds to the contrary:

\(^{137}\) Although he admits that being an unsettled case may not be sufficient for vagueness. See *Vagueness in Context*, p. 43.
My premise is that despite this, the (presumably) non-linguistic facts have not determined that these conditions are met. Moreover, language users have established truth conditions for \(~Pa_j\), and those conditions have not been met either. As far as the language has evolved to date, \(Pa_j\) is still open. The sentence is “unsettled”.

In unsettled cases, non-linguistic facts have not determined the truth conditions of sentences for whose terms our linguistic practices have supplied the meaning.

Shapiro’s second premise is that the unsettled nature of borderline cases entails the freedom to assert \(Pa_j\) and the freedom to assert \(~Pa_j\) “without offending against the meanings of the terms, or against any other rule of language use”. In other words, in unsettled cases, competent speakers can assert either a sentence or its negation without altering the meaning of the relevant vague term. For example, in Kelsey Grammar’s case, competent speaker of English could assert either that Mr. Grammar was bald or that Mr. Grammar was not bald without changing what we mean by “bald”. Shapiro states this premise generally as the open-texture thesis: “the rules of language use, as they are fixed by what we say and do, allow someone to go either way.”

Shapiro explicitly borrows the name and the idea behind his open-texture thesis from Friedrich Waismann. Waismann first presented the notion of open-texture as a general description of all empirical concepts. He argued that every empirical concept is open-textured in the sense that a new case could always be thought of that could not be taken into account under the general description. So, for Waismann, “gold” was open-textured because it always remains possible to conceive of something that could be classified as gold that would fall outside of our current conception. Because our

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139 Id., p. 10.
140 Id.
linguistic rules could not cover all the possible cases of gold—and, for that matter, any other empirical concept—Waismann argued that such concepts exhibited “open texture”. The terms used to describe these concepts—“gold”, for instance—exhibited an open texture to the extent that established meanings and non-linguistic facts permitted a judgment—either gold or not-gold—either way.

Shapiro’s usage of Waismann’s initial idea of “open texture” focuses more on the person asked to render a verdict about an unsettled case than about the concept under scrutiny. Shapiro’s open-texture thesis is a description of what competent speakers of a natural language are permitted to do in unsettled cases. The thesis is that competent speakers can decide either way, to assert $P_a$ or to deny $P_a$, without offending against the meaning of the terms used or against the relevant non-linguistic facts. This does not mean that speakers will always be conscious of their freedom. In some instances, persons might feel obliged, even in unsettled cases, to decide one way or the other. For example, a person might feel compelled, even in an unsettled case, to assert $P_a$ and then (without retracting $P_a$) to assert $\neg P_a$. Moreover, a person might feel compelled to assert $P_a$ and (without retracting $P_a$) to assert $\neg P_a'$, where $a'$ is only marginally different from $a$.

The last constraint on judgment within borderline areas is due to tolerance. Remember that, on the contextualist view, the principle of tolerance is the primary way to account for the soritical series. Tolerance mandates that if a person competently judges as $P$ one of two objects that differ only marginally in the relevant respect, then the person cannot judge the second object as anything other than $P$. So, for instance, if a person competently judges a person with 14,000 hairs as bald, then the person cannot
competently (without retracting her prior verdict) judge a person with 14,001 hairs as not-bald. The tolerance of the predicate “bald” gives the paradox its strong intuitive pull.

The principle of tolerance also provides Shapiro with a key to avoiding the contradiction implicit in the sorites series. Consider the case of baldness again. Suppose that \( a \) and \( a' \) are cases of persons whose heads differ only marginally in the amount and arrangement of hair. It would offend against the principle of tolerance for a person to judge \( a \) differently than \( a' \) (without first retracting \( a \)). However, it is compatible with the principle of tolerance to judge \( a \) as being bald and to leave the case of \( a' \) unjudged either way.\(^{141} \) So, assume a person is challenged to complete the “forced march” with respect to baldness. The person judges \( a \) to be bald and is then required to make a decision about the next case, \( a' \). The person can satisfy tolerance either by judging \( a' \) to be bald or by judging \( a' \) to be not-bald and then retracting his previous judgment that \( a \) is bald.\(^{142} \) The open-texture thesis is the premise that the meaning of the word “bald” and the non-linguistic facts allow this option.

The open-texture thesis allows a realm of discretion for speakers in unsettled cases. Open-texture permits competent speakers of a language to decide unsettled cases either way. The thesis also points to a context within which vague expressions may be evaluated. The option of deciding the case either way is constrained by the conversational context in which the speaker finds herself. A person’s freedom to assert that \( Pa \) and, without retracting that assertion, assert \( \sim Pa' \) (where \( a \) and \( a' \) are only marginally different in the relevant respect) is constrained by the conversation in which

\(^{141} \) It would violate tolerance to decide to leave \( a' \) unjudged. See Vagueness in Context, pp. 8 and 23.

\(^{142} \) Shapiro, Vagueness in Context, p. 12.
the assertions are being made. Standards of baldness\textsuperscript{143} change as the conversational context changes. Rogaine advertisers and police sketch artists might make drastically different judgments as to what baldness consists in. The judgment might depend on the relevant conversation class. Generally, then, if a case is unsettled, one’s freedom to assert or deny \textit{Pa} depends on the conversational situation one is in.

Shapiro employs David Lewis’s influential account of a conversational score\textsuperscript{144} to describe the relevant conversational contexts and to provide a mechanism to permit and to track speakers’ assertions and retractions in unsettled cases. Lewis begins by comparing conversations with baseball games. In a well-run baseball game, there is a score at every stage. By \textit{score} Lewis means a septuple of numbers designating the number of 1) visiting team runs and 2) home team runs during 3) the first or second half of a 4) particular inning, with a batter having a certain number of 5) strikes and 6) balls, and the batting team having a certain number of 7) outs.

Based on this \textit{score}, four kinds of rules could be codified. There would be rules specifying how the score may change based on the players’ behavior and the score at any given stage. Along with these \textit{specifications of the kinematics of score}, Lewis postulates a second sort of rule: \textit{specifications of correct play}. These rules tie correct play to the score at any stage of the game. What is correct play after two strikes, for instance, is different than what is correct play after three strikes. The score of the game at any stage determines what correct play is. Moreover, what is not deemed incorrect play by these

\textsuperscript{143} Like standards for flatness, in Unger’s famous case. See Peter Unger, “There are no ordinary things”, \textit{Synthese}. 4 (1979): 117-154.

rules is correct play. Apart from these two constitutive rules of baseball, there are two regulative rules. The two regulative rules are the directive requiring correct play and the directive requiring score. The first regulative rule directs players to behave at all stages of the game so that play is correct. The second regulative rule directs players to attempt to make the score evolve in certain directions. Each team must try to increase the number of runs they have while trying to limit the number of runs the other team has.

There are two ways to determine the score at any stage of a baseball game. One is to construct definitions based on the specifications given. In this manner, we might define a score function as “the function from game-stages to septuples of numbers that gives the score at every stage”. The specifications of the kinematics of score tell us in what way the score function evolves. So the score function is defined as the function that evolves in that particular way. If the kinematics of score are well-specified, then there is only one function that evolves in the proper way. Once we have defined the score function, we have thereby defined the score at any stage of the game. The second way of determining the score—apart from appealing to constitutive rules—is to look at the scoreboard. On this second view, the score would be, by definition, whatever the scoreboard says it is.

The problem with the second view is in clarifying which scoreboard is to be used. Lewis suggests several possibilities: the visible scoreboard with its array of lights, the invisible scoreboard in the umpire’s head, or the many scoreboards in the heads of the players, fans, and announcers to the extent that they agree. The point here is not to

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146 Coincidentally, Lewis calls this second approach to determining the score the baseball analogue of “legal realism”. *Id.*
choose which scoreboard is acceptable for determining score once and for all. Lewis wants to show that, when we appeal to scoreboards, the status of the specifications of the kinematics of score has changed. Those specifications were constitutive rules akin to definitions. On the scoreboard view of keeping score, “they are empirical generalizations, subject to exceptions, about the ways in which the players’ behavior tends to cause changes on the authoritative scoreboard.”

The distinction between score as a set of constitutive rules or as a set of empirical generalizations does not bother Lewis with respect to baseball. Either analysis may be used. However, with respect to conversations, neither of the two alternatives will be appropriate in describing the analogous case of keeping score in a conversation. Lewis offers a third approach, a middle way, to describe conversational score.

Lewis provides several points of analogy between baseball scores and conversational scores. First, baseball scores and conversational scores have as components abstract entities. The components of baseball scores are numbers; the components of conversations are “sets of presupposed propositions, boundaries between permissible and impermissible courses of action, or the like.”

Second, correct play in both baseball and conversations depends on the score at any given stage. “Sentences depend for their truth value, or for their acceptability in other respects, on the components of conversational score at the stage of conversation when they are uttered”. Not only sentences, but also the constituents of an uttered sentence, including names and

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147 Id., p. 166.
148 Id.
149 Id., p. 167.
predicates, may depend on the conversational score for their intension or extension.

Third, score evolves in a rule-governed way:

If at time $t$ the conversational score is $s$, and if between time $t$ and time $t'$ the course of conversation is $c$, then at time $t'$ the score is $s'$, where $s'$ is determined in a certain way by $s$ and $c$.\textsuperscript{150}

Fourth, conversationalists may wish to steer certain components of the conversational score in certain directions. Their attempts may be cooperative, as in most conversations, or may be in conflict, as in the special cases of debate or courtroom advocacy.

Lewis argues that these similarities between baseball score and conversational score cannot be expressed in terms of either constitutive rules or empirical generalizations. Although either of these might have sufficed to determine a baseball score, neither tactic works to determine conversational score. It seems impossible to narrow down the many candidates for the score function to one because the rules specifying the kinematics of conversational score are seriously incomplete. Moreover, it is difficult to say in a non-circular way what the mental representations that comprise the conversationalists’ scoreboards are.

The third approach to defining conversational score is a middle way, drawing on both the previous alternatives:

Conversational score is, by definition, whatever the mental scoreboards say it is, but we refrain from trying to say just what the conversationalists’ mental scoreboards are. We assume that some or other mental representations are present that play the role of a scoreboard, in the following sense: what they register depends on the history of the conversation in the way that score should according to the rules.\textsuperscript{151}

\textsuperscript{150} Lewis, “Scorekeeping”, p. 167, \textsuperscript{151} Id.
So the mental representations of the conversationalists are registered throughout the history of the conversation. What is registered on this conversational record plays the role of score for the conversation. The conversational record is a kind of running database of the sentences that are uttered during the conversation. The conversational database is continually updated, with items added and removed by the participants as the conversation develops.

The conversation need not be consciously evolving according to the rules of correct language use. The rules of correct play for conversations depend, at least to some extent, on the behavior of the participants. The behavior of conversationalists tends to determine what correct play is. Lewis explains this tendency in terms of rules of accommodation. Unlike baseball, language games have rules of accommodation that make correct the play that occurs, if possible. In baseball, for instance, the batter cannot walk to first after three balls. His behavior of walking to first base on three balls does not somehow make his behavior correct. However, in language games, the conversational score often changes due to the conversational behavior of one (or both) of the participants. There is a rule of accommodation at work: conversationalists who wish to communicate need to understand one another. This makes conversation (by and large) a cooperative exercise. This cooperative behavior by conversationalists has an effect on conversational score. The score has a tendency to evolve as is required to make whatever occurs during the conversation count as correct.

Another rule of accommodation affecting conversational score is that, by altering the conversational context, a speaker may change the relevant standards of precision.

\[152\] Shapiro, *Vagueness in Context*, p. 13.
Say that my twelve-year-old son and I are doing his homework. He asserts that the three major religions founded in the Middle East—Judaism, Christianity, and Islam—all worship the same God. If I accept his assertion, perhaps based on my understanding that my son means “the God of Abraham” as “God”, then his assertion goes on our conversational record. Our behavior—his making an assertion, and my accepting it—affects the conversational score. The score has the tendency to evolve so that what we say is regarded as correct. But assume that the next day, my son informs me that his teacher told him his original answer was wrong. Since each of the major religions accepts a different set of Holy Scriptures, adheres to distinct religious observances, and harkens to the voices of different prophets, the religions cannot be worshipping the same God. My son is convinced that his first assertion, the one to which we initially agreed, was incorrect. He is now convinced that the three religions do not worship the same God, even if the same historical account can be used to track the origins of each of the religions. Lewis claims that the standards of precision for our two conversations are different. The standards of precision for the second conversation are higher. Whereas it was acceptable under the lower standards of precision for the three major religions to be viewed as worshipping the same God, that assertion is not acceptable under the higher standards of precision (as raised by the information provided by my son’s teacher).

Lewis argues that under lower standards of precision some sentences may be “true enough” for purposes of the conversationalists. That would have been the case with my son and me during our first homework session. However, given the information provided by my son’s teacher, the standards of precision were raised so that, during our second homework session, the assertion that the three major religions worshipped the same God
was not true. Although the statement was “true enough” in its original context—during our first homework conversation—the statement was not true in the second context. What my son asserted at our second homework session required a raised standard of precision, a higher standard against which the initial statement was no longer “true enough”.

It is important to note that my son did not offer contradictory statements. His assertion during the first homework session—that the three major religions worshipped the same God—was “true enough” in that context (under low standards of precision). His contrary assertion during the second homework session—that three major religions do not worship the same God—was “true enough” in that later context (under higher standards of precision). The shift in conversational context assumes a change in conversational score. The first score permits the first assertion ($p$). The second score permits the second assertion ($\neg p$). This is no more contradictory, according to Lewis, than “It is morning” said during the morning contradicts “It is evening” when said during the evening.

Lewis claims that, in general, rules of accommodation specify that the boundaries of the permissible range of conduct in a conversation shift to make whatever is said about them true. He offers the following general scheme for rules of accommodation for conversational score:

If at time $t$ something is said that requires components $s_n$ of conversational score to have a value in the range $r$ if what is said is to be true or otherwise acceptable; and if $s_n$ does not have a value in the range $r$ just before $t$; and if such-and-such further conditions hold; then at $t$ the score-component $s_n$ takes some value in the range $r$.\(^{153}\)

The application of this general scheme for rules of accommodation for conversational score to the specific phenomenon of vagueness is at the core of Shapiro’s recent work.

Shapiro argues that vagueness may best be described in terms of relativity to a conversational context. Conversational context includes the environment and subject matter of the conversation, as well as the implicit and explicit comparison and contrasting classes (e.g., short for a basketball player) and paradigm cases (e.g., “bald” for vagueness). The conversational context also includes the entire history of the conversation, including not only what has already been said, but also the presuppositions, assumptions, and agreements (explicit or tacit) of the participants. This is what Shapiro takes to be the conversational record (or score, in Lewis’s terminology) at time $t$.

The conversational record is a theoretical device used to make sense of ordinary discourse. It is a posit, not an entity. The record is a running tally of the conversation as it proceeds. The conversational score changes with each addition or subtraction from the conversational record. The record, as a kind of running database, is continually updated. Items are added when asserted and accepted as “true enough”. Items are removed “when the topic changes, when what is agreed to or some presupposition comes into question, or when some of the participants change their minds about items that are on the record”.  

Additions or deletions may occur rapidly, either between conversations or within the same conversation. Due to this continual flux, the conversational score may be difficult to discern at every stage. The additions and subtractions to the score might be changing continually.

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To track the ever-changing nature of the conversational record as it relates to the assertion and retraction of vague statements, Shapiro offers a “conversational variant” of the forced march sorites. Suppose 2000 men are lined up in a row. The first is Ving Rhames, a clearly bald man. The last is Howard Stern, a clearly non-bald man. The hair of each man in the series between Rhames and Stern differs only slightly (and perhaps imperceptibly) in number and arrangement.

Suppose that two persons are talking about this interesting series of men arranged from a paradigm case of baldness to a paradigm case of non-baldness. These participants in a conversation are asked to pass from Ving Rhames up the series, man by man, and are asked to offer a verdict on each: Is this man bald, yes or no?\textsuperscript{155} Being competent speakers of English, the two conversationalists agree on their verdict of Ving Rhames: he is bald. They also agree that the second of the 2000 men is bald. Eventually, they will come to a man—or group of men—whose baldness state is “unsettled”. In this borderline region, although the thoughts and practices of language have established truth conditions for statements about baldness and about non-baldness, the non-linguistic facts have not determined that the truth conditions have been met. Nevertheless, Shapiro claims, the conversationalists in this forced march exercise will continue, for a while, to call the men bald as they move through the borderline area. If they call man $n$ bald, then they will probably call man $n + 1$ bald because, by hypothesis, they cannot tell the two heads apart by virtue of the number and arrangement of hairs on their respective heads.

The open-texture thesis anticipates this outcome. Open-texture permits the two participants in the conversation to go either way in “calling” borderline cases without

\textsuperscript{155} Forced bivalence is only a convenience. The example could be set up in other, but messier, ways. \textit{Id.}, p. 18.
offending against the meaning of “bald” or the facts presented by the consecutive male heads in the soritical series. The conversationalists’ language competence is not jeopardized by their calling persons in the borderline area either bald or not bald.

The conversationalists’ verdicts are being placed on the conversational record as they are made. In the borderline area, this means that propositions like “Man #923 is bald” and “Man #924 is bald” are placed on the record. Moreover, the principle of tolerance requires both of these borderline statements to go on the record. By hypothesis, there is no discernible difference between the number and arrangement of hairs on man #923 and the number and arrangement of hairs on man #924. So the conversationalists’ competent judgment of man #923 as bald requires them either to judge man #924 as bald, or to retract their previous judgment that man #923 is bald.

We can change the set-up of the problem to offer a “pair-wise” analysis. If any adjacent pair in the series were simultaneously presented to the conversationalists, we can assume that they would agree either that both men were bald, or that both men were not bald. The nature of the series (as governed by the principle of tolerance) requires this outcome. Lewis’s description of changing standards of precision explains it. The conversationalists are likely to see man #924 as bald if they have just judged man #923 to be bald because each verdict changes the conversational score. Each change in conversational score changes the standard of precision for the next verdict. In the case of man #924, the questions is, based on the standard of precision (as evolved from consecutive verdicts of man #1 through man #923), is the proposition “Man #924 is bald” “true enough” to pass as acceptable within the context of the conversation. As one approaches the borderline cases, and even within the borderline area, the answer to this
proposed question will be in the affirmative. The standards for accepting the same verdict of baldness will compel a similar verdict in the next (indistinguishable) case.

Because the conversationalists are competent speakers of the language, however, we can assume that they will not go through the entire 2000-man series applying the same verdict. They will not reach man 2000 and call Howard Stern bald. Eventually, at some point, someone will balk at calling a particular man in the series bald. Given the “forced march” instruction, at some point then, the participants in the conversation will levy a verdict that a certain man is not bald. This “jump” from a verdict of baldness to a verdict of non-baldness will occur at some point during the “forced march”. Different participants might feel compelled to jump at different points in the series. The same participants might feel compelled to jump at different points in the series if they are forced to “march” from bald men to non-bald men in one trial and in the reverse direction in a succeeding trial. Although the point of the jump cannot be determined (given the nature of the series), we are certain that, at some point, the jump will occur.

The question is whether the evaluative jump, wherever it occurs, violates the principle of tolerance. Shapiro argues that it need not. Suppose that the conversationalists place “Man #924 is bald” on the conversational record. Then, since their verdicts are being forced, they decide to place on the record “Man #925 is not bald”. The principle of tolerance is not violated by this “jump” because the principle can be applied in both directions. In declaring man #925 to be not bald, the conversationalists implicitly deny that man 924 is bald. This is not a contradiction. It simply means that the conversational context has changed. With the implicit denial that man #924 is bald, the proposition formerly placed on the conversational record—“Man #924 is bald”—is
removed. There is no contradiction because at one time in the conversation man #924 was judged bald, and, at another time in the conversation, man #924 was judged not-bald. In the spirit of Lewis, then, this is no more contradictory than saying “It is morning” is true in the morning but false in the evening. The shifting context of the conversation permits the affirmation and the denial of the same proposition without contradiction.

The shifting context of the conversation (as forced by tolerance) also produces the phenomenon of “backward spread”. If, in the case above, “Man #924 is bald” comes off the record, then, consistent with the principle of tolerance, so does “Man #923 is bald”. “Man #922 is bald” also comes off the record. The series of removing formerly accepted verdicts from the conversational record continues for an unspecified—and unspecifiable (given the nature of the series)—number of cases. There is no precise boundary where the removal of former pronouncements must stop. Indeed, once a certain limit is approached, say, man #915, then the prior verdict of baldness will be affirmed. Of course, this reverses the principle of tolerance again, and the verdicts of baldness change back again, going back up the series, for a while. The continual fluctuation of verdicts in the “forced march” case renders the content of the conversational record in borderline cases a vague matter.\textsuperscript{156} The number of borderline cases on the conversational record cannot be specified.

The conversational record is a device that demonstrates how, and to what extent, language users have control over predicates’ extensions. In borderline cases, the meaning of predicates may be determined. Even in borderline cases of “bald”, we know what “bald” means. However, in those cases, the appropriate extension of the predicate “bald”

\footnote{156 Shapiro, \textit{Vagueness in Context}, p. 21.}
is unclear. The extension of the predicate is not determined by semantics or by non-linguistic facts. Which cases count as cases in which “bald” is properly applied depends, to some extent, on what conversational context one is in. The ever-shifting conversational context, including the “backward spread” adverted to in the forced march case, demonstrates the indeterminacy of borderline cases. In the context of a conversation involving a borderline case, say, “Kelsey Grammar is bald”, the proposition is not determinately true. In response to rival accounts of determinacy, Shapiro proposes that “the borderline cases of a vague predicate that have been decided in the course of conversation not be included in what fixes determinate truth”.  

Shapiro’s theory is based on the idea that competent users of a language to some extent determine the correct use of that language. He therefore seeks a semantics for vague expressions that is based on pragmatics:

Each language user is beholden to the group, and his or her use must at least largely conform to that of other language users. Otherwise, there would be no communication which is, after all, the point of this enterprise (or at least one of the central points of it). The extensions and perhaps even the meanings of the vague terms are tied up with the proper display of this skill, and with the ability of speakers to coordinate their usages to each other in conversations.

So, for Shapiro, the extensions of vague terms must be analyzed in terms of how the competent speakers of a language use them.

Shapiro uses Raffman’s Thesis B as a construct for demonstrating the link between competent users of a language and the appropriate extensions of that language’s vague predicates. Raffman’s Thesis B is a biconditional for vague predicates:

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157 Shapiro, Vagueness in Context, p. 32.
158 Id., p. 37.
(B) An item lies in a given category if and only if the relevant competent subject(s) would judge it to lie in that category.

The biconditional is material. Once the class of relevant competent subjects has been adequately specified, a chicken-and-egg problem arises. An item appropriately categorized because competent subjects so categorize it, or do competent subjects categorize an item in a particular way because the item lies in the given category? The first reading of (B) is a claim about the extension of a given predicate (i.e., an item lying in a given category). The claim is that the judgment of relevant competent subjects determines whether, and to what extent, the predicate is to be extended. The second reading of (B) is a claim about what it is to be a competent subject. The claim is that, to be competent, one must judge in accordance with the determinate extensions of a given predicate.

The second reading of Thesis (B) may be the more familiar. Take for example a case involving mathematics:

A number is prime if and only if competent subjects would judge it to be prime.

The claim here is not that competent judges somehow, by their judging, make a number prime. The claim is that subjects will be deemed competent only if they assign the predicate “prime” to the correct set of numbers most of the time. On this reading, competent judges track the truth; their judgments do not somehow constitute the truth.

Shapiro calls this second reading of Thesis (B) the Socrates reading.

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160 Shapiro, *Vagueness in Context*, p. 38.
162 Shapiro, *Vagueness in Context*, p. 38.
The label harkens back to the dialogue between Socrates and Euthyphro. Socrates agreed for the sake of argument that something is loved by the gods if it is pious. In Shapiro’s terms, Socrates accepted that the gods’ love *tracked* the things or actions that could be appropriately deemed pious. Euthyphro argued, however, that something is pious if it is loved by the gods. Euthyphro believed that the gods’ judgment *made* something pious. For Euthyphro, the judgment of some relevant competent subjects (namely, the gods) constituted what was pious.

The *Euthyphro* reading of Thesis (B)—the first reading given above—similarly claims that relevant competent subjects (namely, competent users of a language) constitute how a predicate is to be extended in a given case. Take one of Wright’s examples of Thesis (B):

* A story is funny if and only if competent subjects would judge it to be funny.

In this case, competent subjects might be those with normal senses of humor who understand the language enough to understand the story. It is plausible, then, that the judgment of those competent subjects is somehow constitutive of funniness. Humor is, it seems, judgment-dependent. What makes a story funny is that (relevant competent) people judge it to be funny.

Shapiro argues that Thesis (B) is at least largely correct for a vast range of predicates, vague or not, and that the two different readings of (B) can offer insight into the distinction between borderline cases and clear cases. Take our paradigm vague predicate “bald”. Thesis (B) for this case would read:

* A man is bald if and only if competent subjects would judge him to be bald.
In this example, it would be relatively easy to determine whether someone is a competent judge. If the person understands the language and can accurately perceive (under normal conditions) the number and arrangement of hairs on the man’s head, then the person is a competent subject. The question is whether, as applied to this particular man, the Socrates reading or the Euthyphro reading of Thesis (B) is appropriate.

Shapiro (following Raffman) argues that the Euthyphro reading of Thesis (B) is appropriate in borderline cases. The subject’s judgment that the person is bald makes true the proposition “This man is bald.” The device of conversational score demonstrates how the evaluator’s judgment of baldness constitutes the correct application of the term “bald” to the borderline case. Since neither the linguistic practices nor the non-linguistic facts determine whether the extension of the predicate “bald” applies in borderline cases, the judgment of the participants in the conversation place the proposition “Man #X is bald” on the record. Their placement of the proposition on the record makes it true, or at least, “true enough” in that conversational context (a context that could change rapidly). Competent users of the language determine the truth of borderline statements by placing them on the conversational record. The conversationalists’ judgment determines the extension of the predicate to that case. As Shapiro puts it,

> [s]ince by open-texture, borderline cases can go either way, the judgements of otherwise competent subjects determine whether the man is bald in the relevant conversational (or psychological) context...Every vague predicate is judgement-dependent in its borderline area (at least).\(^\text{163}\)

In clear cases of this predicate, however, the picture is different. In clear cases of baldness, the judgments of competent subjects do not determine whether a man is bald. It

\(^{163}\) Shapiro, *Vagueness in Context*, p. 40.
is true that Ving Rhames is bald. My judgment of his baldness must track the truth of the proposition. In other words, it appears that vague predicates in clear cases should be given the Socrates reading of Thesis (B). This may not be the case for some vague predicates. However, as a rule of thumb for dealing with most vague predicates in clear cases, the Socrates reading appears permissible.

Unlike the extension of predicates generally (and of vague predicates in clear cases), the extension of vague predicates in borderline cases is judgment-dependent. This conclusion drives Shapiro to present a different logic and a different semantics for dealing with vague predicates in borderline cases. The rest of his book is devoted mainly to presenting a model-theoretic account of how to reason using vague terms. The general lesson regarding vague terms in borderline cases should not be lost in the formal details, however. Shapiro summarizes his philosophical position by referring to a popular allegory:

When Alice objected to Humpty Dumpty’s claim that his words mean just what he chooses them to mean, he replied that it is a question of who “is to be master”. Surely, our sympathies here are with Alice. Individual speakers are not “masters” of the meanings (or intensions) of the words they use, independently of the thoughts and actions of the wider community of language users (up to the compelling points in Davidson [1986]). But in the borderline region, individual, competent speakers are indeed “masters” of the extensions of vague terms. Humpty Dumpty is right in this limited domain.

Alice and Humpty Dumpty remind us of four main points in Shapiro’s account of vagueness. First, the appropriate way to describe and to deal with vague predicates is to

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164 As Shapiro acknowledges. See *Vagueness in Context*, pp. 40-43.
165 As Raffman contends. See Raffman, “Vagueness without Paradox”, p. 44.
166 Shapiro, *Vagueness in Context*, p. 43, emphasis in the original.
focus on their extensions, not their meanings. On this view,¹⁶⁷ vagueness might be characterized as having the same meaning while having different extensions.¹⁶⁸ Second, the correct use of vague expressions is determined, at least in the borderline regions, by competent speakers of the language. In the borderline region, competent speakers determine the extensions, the applications of vague predicates. Third, the open-texture of vague terms permits competent judges to determine the correct extensions of vague predicates. Open-texture allows competent judges in some contexts to go either way in borderline cases. This discretion is not based on consensus, however, nor does it imply that the judges’ decisions are unconstrained. Fourth, conversational score is the device, the mechanism, which enforces tolerance of vague terms and records the consistency of competent use.

Each of these features of Shapiro’s account of vagueness may be used to reconstruct H.L.A. Hart’s similar account of the indeterminacy of law. As has been noted (above in Chapter One), Hart also employed Waismann’s notion of “open texture” to solve pressing theoretical problems. In Hart’s case, however, Waismann’s description of empirical statements was used to describe the phenomenon of legal indeterminacy as a function of the “open texture” of the language of law. The next chapter provides a reconsideration of Hart’s use of “open texture” as a means of providing a contextualist approach to legal indeterminacy.

¹⁶⁷ A view shared with the supervaluationist account.
¹⁶⁸ This description of vagueness has also been provided relative to legal indeterminacy. See, for example, Timothy Endicott, Vagueness in Law (Oxford: Oxford University Press, 2000), hereafter Vagueness in Law, p. 54.
The contextualist approach to vagueness offers a way out of the apparent trilemma created by the entrenched ontic, semantic, and epistemic accounts (presented and developed in Chapter Two). Contextualism solves the Sorites Paradox by permitting evaluative jumps within the borderline areas of vague predicates. These jumps create a break in the sorites series, so that the argument does not go all the way through to its paradoxical conclusion. Contextualism also explains the intuitive pull of the (false) inductive premise. As we evaluate adjacent pairs, tolerance compels us to judge them the same way. Hence, there is no instant of adjacent pair comparison in which the inductive premise fails to be true. The evaluative context shifts as we make our series of evaluations. The shifting context of evaluation permits a shift in the extension of vague predicates. In the borderline area, vague terms are context-dependent. The context-dependence of vague terms may be caused by psychological factors, including dispositional shifts (Raffman), or shifts in one’s interests or evaluative focus (Graff). Shapiro has recently argued that, whatever the underlying cause, there is an observable behavioral effect on speakers’ judgments, an effect that can be enforced and tracked as speakers’ conversations evolve.
A contextualist approach to legal indeterminacy could provide a means of avoiding the proposed trilemma presented by the entrenched legal theories of Holmesian “legal realism”, Haritan “legal positivism”, and Dworkinian “legal interpretivism” (as presented and developed in Chapter One). Legal contextualism would account for the indeterminacy of legal decision-making by describing what happens when judges make decisions in borderline cases, in cases where it appears that competent judges may faultlessly decide for one party or the other. The contextualist account must also provide a description of judicial decision-making using soritical terms and open-textured terms.

The distinction between soritical terms and open-textured terms is important. Many theorists (including some vagueness theorists\(^\text{169}\)) believe that sorites-susceptibility is necessary for vagueness. The argument in the legal context would be that, unless a legal term generates a sorites series, it is not amenable to treatment as an analogue of vagueness. Hart’s famous example of a ‘vehicle’ is a case that has been rejected by some theorists, because it is a general, rather than a vague, term.\(^\text{170}\) The argument continues that most terms are, like ‘vehicle’, general and not vague, and that therefore no vagueness analysis, even if offered as a parallel solution, is responsive to the alleged problem of legal indeterminacy. In this manner, vagueness-type arguments have been rejected out of hand as explanations of “gaps” in the law.

Shapiro’s account of vagueness helps here. Shapiro does not argue that sorites-susceptibility is necessary for vagueness. Indeed, he rejects that notion. His reliance on

\(^{169}\) See, for example, Soames, *Understanding Truth*, Chapter 7.

\(^{170}\) See, for example, Roy Sorensen, “Vagueness has no function in law”, *Legal Theory* 7, no. 4 (2001): 385-415, hereafter “Vagueness has no function in law”. Sorensen’s argument appears to rest on his premise, stated on p. 407, that “contrary to the intimations of Ludwig Wittgenstein, family resemblance is a mode of generality rather than a form of vagueness”. So, for Sorensen, non-soritical terms in legal rules—such as “vehicle”—are general. As such, they do not generate borderline cases and, therefore, do not appropriately trigger vagueness analysis.
the open-textured nature of vague terms demonstrates that his view will encompass even non-soritical versions of vagueness. For Shapiro, if a term generates a borderline case of applicability, it is a vague term. So, although a term like ‘vehicle’ may not generate a sorites series (it would be difficult to see how one-by-one additions or subtractions to ‘vehicle’ would be accomplished), it does generate borderline cases of applicability, as H.L.A. Hart demonstrated. Since Shapiro’s account is meant to handle all such borderline cases, his account may not be rejected ab initio as a framework for addressing legal indeterminacy.

4.1 Consensus and “open texture”

There may be an immediate concern with using Shapiro’s account of vagueness as a framework for describing legal indeterminacy, however. Shapiro’s account relies on Lewis’s theoretical device of “conversational score” to track the evaluative jumps competent speakers make in the course of a conversation. Whether something is added to or removed from the conversational record is a matter of agreement. Shapiro explains how the device works:

Items get removed when the topic changes, when what is agreed to or some presupposition comes into question, or when some of the participants change their minds about items that are on the record. Since the participants in a conversation may be mistaken about what has been agreed to and what has not, they may be mistaken about what is on the conversational record. Normally, this sort of thing gets cleared up in due course, if it turns out to be important, except perhaps in some intractable philosophical dispute. In most cases, once confusion about the score ensues, either consensus on some presuppositions is reached, or the participants take the disputed item off the record.\footnote{Shapiro, Vagueness in Context, p. 13.}
It appears, then, that the conversationalists must achieve consensus to add or remove contested items from the conversational record. The concern is that the participants’ reliance on agreement to add or remove items from the conversational record would subject any position based on Shapiro’s account to the argument Ronald Dworkin has famously termed the “semantic sting”.

Dworkin levels the “semantic sting” argument against any theorist who argues (or assumes) that the meanings of propositions of law are determined by consensus. For Dworkin, the meanings of propositions of law are determined by their truth-values, not by the agreement of others, including professionals involved in the practice of law. The contrary argument, that legal practitioners determine, by consensus or via convention, the truth-values of legal propositions, fails for a very simple reason, according to Dworkin: in so-called “hard cases”, legal practitioners do not come close to agreement on the truth-values of contested propositions of law. Disputes entail non-agreement.

Dworkin argues, however, that the litigants in hard cases are disputing the same legal concepts, even if their individual conceptions of those concepts vary widely. Take the recent United States Supreme Court case, *Atkins v. Virginia* as an example. In *Atkins*, the legal concept at issue was whether the 8th Amendment’s proscription against cruel and unusual punishment prohibited the execution of mentally retarded criminals. The parties in the case—the State of Virginia and the defendant’s attorneys—were

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172 Dworkin presses this argument against both “criterial” and “natural kind” accounts of law. See his *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), hereafter *Justice in Robes*, pp. 223-240, and the text below—in the introductory section of Chapter 5—discussing the book and the reinvigorated “semantic sting” argument.

173 Shapiro similarly holds that there is a lack of consensus in borderline cases. A reconstruction of Hart on the foundation supplied by Shapiro will permit this conclusion and will, therefore, evade Dworkin’s argument against so-called “semantic” theories of law.

debating the same concept—namely, “cruel and unusual” punishment—without expressing agreement about what the law regarding that concept was. For Dworkin, this example (and the many other appellate cases like it) illustrates a simple fact: law—and, in particular, the meaning of propositions of law—cannot only be a matter of agreement. Therefore, a theory that describes law solely in terms of what is agreed to (either by social convention, as arguably Hart’s “pedigree” test for determining valid law did, or by judicial fiat, as arguably the “predictive” test of Holmesian legal realism did) is impoverished. On such accounts, Dworkin argues, there is too much that is considered law that is not accounted for. Moreover, on such accounts, there is no explanation of how, in contested cases, lawyers can be disagreeing about the same legal concept. If law is restricted to that which is agreed upon, then how can lawyers ever disagree about propositions of law? Dworkin concludes that, as a description of legal practice, any account of law-by-consensus (including, on Dworkin’s assessment, Hart’s theory of law) must fail.175

Dworkin’s “semantic sting” argument has been widely debated and has been almost universally rejected.176 In particular, it is unclear whether any theorist, and in particular H.L.A. Hart (Dworkin’s primary target), ever held a view of law that could be “stung” semantically. Arguments against Dworkin here are beside the point, however, because an account of legal indeterminacy based on Shapiro’s usage of a conversational record does not presuppose a view of law based on consensus. Indeed, Shapiro’s point in

175 It is also what motivates Dworkin to offer his view of constructive interpretivism as an alternative. Of course, the argument that interpretivism is the only account that may be offered in response to the “semantic sting” argument is far-fetched. Dworkin does not make it. The present account assumes that another alternative may be offered.
176 Nicos Stavropoulos’ “Hart’s Semantics”, in Hart’s Postscript, pp. 59-98, aside.
adoption the device of conversational score is to demonstrate that, although there may be wide agreement on clear cases of vague expressions, “in the borderline area, competent users do not come close to consensus.”

Take the case of baldness again. Competent speakers of the language will judge clear cases of baldness and non-baldness the same way. Ving Rhames will be judged as bald. Howard Stern will be judged as non-bald. These assertions will be presupposed by the persons engaging in the conversation. In such clear (or paradigm) cases, a challenge to the appropriateness of the judgments would result in a challenge to the evaluator’s competency with English. In short, anyone who would claim that Howard Stern is bald would not be using the English term “bald” correctly. The same cannot be said for borderline cases of baldness. Somewhere in the middle of the continuum between baldness and non-baldness, there will be cases in which competent speakers will not be able to agree on whether the predicate “bald” may be extended correctly. Whether Kelsey Grammar is bald may be one of those cases. The competent speakers of the language may decide that Mr. Grammar is not bald. In that case, the proposition “Mr. Grammar is not bald” goes on the conversational record. This affects other cases in the series, however, because the standards of precision for correctly using “bald” have increased. Those cases lying very close to Mr. Grammar’s, say cases #975 through #978 in the initial series of 2000 men, may be exceedingly difficult to judge due to those higher standards of precision. This may mean that the intervening cases will be left unjudged. Shapiro argues that this conclusion is just about forced by the principle of tolerance:

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177 Shapiro, *Vagueness in Context*, p.44.
At any time, some of the baldness states will have to be left unjudged. Perhaps they can get to a point where they have done a maximal amount of judging. Suppose, for example, that they judge every man from #1 to #974 to be bald, and they judge every man from #979 to #2000 to be not bald. Moreover, suppose that they cannot make a judgement about any of #975 through #978 without either violating tolerance or jumping and thus retracting some of their previous judgements. Such is the nature of the series.\footnote{Shapiro, \textit{Vagueness in Context}, p. 24.}

Unjudged borderline cases demonstrate that, at least in the cases of soritical predicates, competent evaluators may not be able to judge one way or the other. In such cases, of course, evaluators do not come close to achieving consensus. In these borderline cases, as opposed to clear cases, the judgments of the competent evaluators, as they are placed on the conversational record, \textit{make} the judgments true. And, as long as the judgments stay on the record, they will remain true in the given conversational context (with all of its assumptions and presuppositions, including its standards of precision).

We can briefly apply Shapiro’s analytical framework to Hart’s famous vehicle-in-the-park case.\footnote{More extensive application of Shapiro’s framework to Hart’s theory of law follows in sections 4.3 through 4.5.} Assume that a particular jurisdiction’s legal statutes and judicial decisions constitute its conversational record at any given time. Assume that cases of trucks and cars have already been established on the record as vehicles. Assume also that cases of roller skates and wheelchairs have been established on the record as non-vehicles. By hypothesis, these are clear cases of vehicles and non-vehicles for purposes of the statute as encoded on the conversational record. The case of a bicycle comes before the courts. How is a competent judge, an assumed competent speaker of legal
language in the jurisdiction, to decide the case? Assuming, as Hart does (and as Shapiro might), that the term “vehicle” is open-textured, the judge may, as a competent evaluator, faultlessly decide either way. Once the judge decides, however, the judgment is placed on the jurisdiction’s conversational record. The judgment that a bicycle is a vehicle for purposes of the statute will go on the record and will not be withdrawn until another saliently similar (to use Graff’s terms) case requires it to be removed from the conversational record so that consistency of judgment within the jurisdiction may be maintained. For these purposes, a mini-bike may not be sufficiently similar (given its noisy motor) to remove the bicycle judgment from the conversational record. However, a more similar object, such as a moped, might be.

The details of applying Shapiro’s framework to Hart’s initial concept of law will have to be worked out. Section 4.3 through 4.5 below will provide this analysis. However, before presenting a reconstruction of Hart in light of Shapiro’s account of contextual vagueness, a final argument against a vagueness-oriented view of legal indeterminacy must be considered. The argument against using vagueness to describe legal indeterminacy is that legal indeterminacy, unlike vagueness, is not a linguistic phenomenon. Since Shapiro’s account appears to offer a linguistic account of vagueness (the argument goes), any account of legal indeterminacy based on Shapiro’s views will not address the alleged legal phenomena.

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180 This is an excellent, but alternative, description of how the well-known principle of *stare decisis* works. See the discussion below in Sections 4.5 and 4.6.
4.2 Legal indeterminacy and vagueness

Vagueness-based accounts of legal indeterminacy are fruitless, it as been argued,\(^{181}\) because vagueness is a linguistic phenomenon and legal indeterminacy is not. Most vagueness theorists argue that vagueness is primarily about words.\(^{182}\) The problems attributed to vagueness are to be attributed to predicates like “bald” or fuzzy nouns like “heap”. We have trouble specifying with a single word all of the cases our intuitions tell us should be covered by that word. We run into paradox if we (understandably) attempt to extend the vague predicate to borderline cases. Vagueness, on this view, is due to our failure to represent cases precisely enough using certain (vague) terms. Legal indeterminacy, it may be argued, is not attributable to imprecise terms, however. The indeterminacy of law is, on this view, attributed to the background political values being argued in contested cases.\(^{183}\) Although law uses language as a medium, it cannot be reduced to the words it employs. Law is about rights, duties, and relationships, not about texts. To focus on the language of law is to miss the political values, and even the socially approved violence\(^{184}\) of the law. For this reason, it is argued, linguistic solutions to legal problems are wrongheaded. And, in particular, a linguistic account of vagueness cannot provide an adequate account of legal indeterminacy.

The argument has a major flaw. Employing a linguistic analysis of vagueness to the problem of legal indeterminacy does not entail the reduction of the practice of law to

\(^{181}\) See, for example Ronald Dworkin’s “Is There Really No Right Answer in Hard Cases?”, 53 NYU Law Review 1 (1978).

\(^{182}\) Setting aside, of course, the ontic and epistemic views for now.

\(^{183}\) Dworkin and CLS theorists agree with this analysis. However, Dworkin uses it to argue that law is determinate in the face of ever-changing political contexts. CLS uses it to argue that law is radically indeterminate and is a mask obscuring the political contentions roiling beneath its calm exterior.

\(^{184}\) Punishment for crimes might be an example. For a broader theory of law as a justification for socially-approved violence, see Robert M. Cover’s “Violence and the Word”, 95 Yale Law Journal 1601 (1986).
the words employed in that practice. It may be true that the law’s purpose—or at least one of its purposes—is to establish rights and duties among citizens and officials. It may nonetheless be false that legal indeterminacy is attributable to disputes over the political values ensconced in those rights and duties. Take the Atkins case again. That case stands for the legal proposition that mentally retarded criminals cannot be executed for their crimes. The proposition of law gives rights to mentally retarded criminals. They have the right not to be executed. It gives duties to state legislators and to prison officials. They may not enact, and may not enforce, laws which would result in the execution of mentally retarded criminals. The question remains, however, what counts as “mentally retarded” for purposes of the proposition of law announced in the Atkins case.

If IQ score is used as the primary factor in determining mental retardation, a sorites series can be generated. Starting with an IQ of 30, ask whether that person is mentally retarded. Certainly she is. Now ask whether a person with an IQ of 31 is mentally retarded. Again, the answer is yes. The intuitive pull of the inductive premise of the Sorites Paradox drives us to the paradoxical conclusion that a person with an IQ of 200 is mentally retarded.

Even when distinct categorical “bands” are placed on the IQ continuum, vagueness concerns remain. Say that a distinction can be made between “profundely mentally retarded”, “severely mentally retarded”, and “moderately mentally retarded”. Based on this categorical division, a person is profoundly mentally retarded if she has an IQ of between 10 and 30, severely mentally retarded if she has an IQ between 31 and 50, and moderately mentally retarded if she has an IQ between 51 and 70. The problem here is that the boundaries between the categories are arbitrarily drawn. Just as there is no
(other than arbitrary) sharp cut-off between mentally retarded and not-mentally retarded, there is no (other than arbitrary) sharp cut-off between being (for instance) severely mentally retarded and being moderately mentally retarded. Overlaying categorical “bands” on the IQ continuum does not help resolve vagueness concerns.

Even when public policy might require a “sharp cutoff” of the IQ continuum (what legal scholars might call a “bright line rule”), vagueness problems exist. Many States assume that the upper level for being classified as mentally retarded is an IQ of 70. This does not mean, however, that a person with an IQ of 69 is automatically classified as mentally retarded. Certain other factors including social development and individual adaptability might also play a factor. These added evaluative dimensions serve only to make the distinction between mentally retarded and non-mentally retarded less distinct. Added to these different evaluative dimensions are other factors that make assigning a sharp cut-off virtually impossible. Different States require the consideration of different IQ levels as maximums for being classified as mentally retarded, different IQ tests for the designation of mental retardation, and different relevant developmental factors in the evaluation of mental retardation. Based on the sorites series generated by IQ scores and on the panoply of evaluative tools that could be used to classify someone as mentally retarded, the full range of the rights and duties announced in Atkins are currently unspecified. In other words, even though the political values announced by Atkins are clear, the application of the proposition of law announced in Atkins is unclear. It is not clear what future cases count as mental retardation for purposes of the (true) proposition of law that mentally retarded criminals cannot be executed for their crimes.
It might be argued that *Atkins* is an anomaly. Certainly mental retardation as evaluated in terms of IQ score is a singular case. Surely few other contested cases can generate such vagueness problems. But this argument would be unfounded. Several landmark decisions of the U.S. Supreme Court generate the same soritical series. After *Roe v. Wade*, we were left with the question of precisely when the third trimester of pregnancy began so that the State’s right in protecting the fetus’ life might override the mother’s right to choose to continue pregnancy. Even when the standard later changed\(^{185}\) to accommodate one cut-off (viability of the fetus), instead of two (three trimesters of pregnancy), we were left with the question of at what point, at what instant of the fetus’s life, viability occurred. A similar question remained after court-imposed school desegregation: At what point, at which individual in the member-by-member addition to the minority class, is desegregation accomplished? Even the most basic rights for criminal defendants present problems of application in borderline cases. At what point during a trial is the 6\(^{th}\) Amendment right to counsel violated due to appointed counsel’s incompetence? At what point during the questioning of a suspect is that person in custody so as to trigger the 5\(^{th}\) Amendment right against self-incrimination? At what point during questioning after a routine traffic stop does a driver consent (and thereby waive 4\(^{th}\) Amendment rights) to the search of his car’s passenger compartment? In these cases, the question is not whether the political rights and duties provided by the 4\(^{th}\), 5\(^{th}\), and 6\(^{th}\) Amendments are being contested. The question is whether, given those rights and duties, the concepts of “competence”, “custody”, and “consent” apply in the particular cases. There will be some clear cases of incompetence or custody or consent. However,

in some cases, especially the hard cases that wend their way through the appellate court system, there will be borderline cases of these concepts. Judges will have to determine whether and how the concepts are to be applied in the borderline cases.

Legal indeterminacy is attributable, at least in large part, to the language of law. Legal language is sufficiently open to permit judges to determine how certain terms should be applied in some cases. H.L.A. Hart described this feature of legal language as its “open texture”. Legal language, like any natural language, permits language users some discretion in determining how it will apply in certain cases. Hart claimed that the open-textured nature of language gave judges discretion to apply legal rules in cases falling outside the rule’s core, but within the rule’s penumbra. Legal indeterminacy is, on Hart’s view, only moderate. In the penumbra of legal rules, the rules are indeterminate. Only in the penumbra do judges have discretion to make law.

Shapiro similarly claims that competent language users determine the extensions of open-textured terms, but only in borderline, unsettled, cases. In Shapiro’s account of vagueness, competent speakers, like Hart’s judges, have discretion in determining how vague terms are to be applied. Because he employs Waismann’s notion of “open texture” in giving competent users of natural languages discretion to determine unsettled cases, Shapiro appears to account for vagueness in much the same way Hart accounts for legal indeterminacy. A reconstruction of Hart’s theory of law in terms of Shapiro’s account of

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186 The claim here is not that Shapiro uses Waismann’s notion of “open texture” faithfully. He does not. Waismann’s view of the “open texture” of language may be limited to his discussion of verificationism and his specific arguments against logical positivism. The claim here is that both Shapiro and Hart borrow Waismann’s phenomenon of the “open texture” of linguistic terms to serve a similar purpose. Shapiro and Hart employ Waismann’s notion of “open texture” to argue for a particular description of indeterminacy—linguistic indeterminacy in borderline cases—that permits “judges” (either duly-elected judges, in Hart’s case, or evaluative “judges”, in Shapiro’s case) discretion to decide those borderline cases either way.
vagueness may help in shoring up Hart’s account of legal language as well as in providing a more detailed account of legal indeterminacy as a distinct phenomenon.

4.3 Hart’s account of “open texture”

Hart’s legal theory, as set forth in The Concept of Law, is famous for its focus on law as a system of legal rules. Hart claimed (generally) that law was present in a society when there was a union of primary and secondary rules of obligation. This theory of when law is present in a society has, unfortunately, obscured Hart’s different discussion about the nature of law. Hart described law—whenever it was present in a society—as exhibiting an “open texture”. Hart’s position on law’s “open texture” was not limited to his discussion of law-as-rules, however. Simply put, Hart was not arguing specifically that law-quas-rules is open-textured; he was arguing generally that the language employed by law—like any other natural language—is open-textured. As was discussed above in Chapter One, Hart’s detractors have unwarrantedly discounted Hart’s views on the indeterminacy of law and the concomitant discretion judges have to determine law in hard cases because they have mistakenly assumed that Hart was promoting the open texture of legal rules, rather than the open texture of legal language.

Ronald Dworkin’s initial attack on Hart’s theory\(^{187}\) rested on this mistaken assumption. Dworkin set out Hart’s argument in something like the following (very rough) form:

\begin{align*}
\text{P1} & \quad \text{Law consists of legal rules.} \\
\text{P2} & \quad \text{Legal rules are stated in linguistic terms.}
\end{align*}

P3  The meaning of linguistic terms is determined solely by language.

P4  Language is open-textured.

C1  Therefore, linguistic terms are open-textured.

C2  Therefore, legal rules are open-textured.

C3  Therefore, law is open-textured.

Dworkin resisted the conclusion that law is open-textured by attacking P1 and P3. Law consists of principles as well as legal rules (~P1). Unlike rules, principles do not derive their meaning from language—as expressed in terms of an agreement among “competent speakers” in the relevant linguistic community of how the terms constituting principles ought to be used—but from the prevailing political morality of the community (~P3). Therefore, even if legal rules were open-textured, the conclusion that law is open-textured is not warranted (~C3). Since Hart did not take into account the prominent place of principles in law, and since Hart grounded his theory in semantic agreement (P3), rather than in shared political values, his conclusion that law is open-textured could be rejected.

Of course, Dworkin’s contrary conclusion is only as strong as his attack on the listed premises. And, as has been argued by many theorists (and to some extent above in Chapter One), the attacks on P1 and P3 are weak. Hart can (and in his Postscript acknowledged that he did) include principles—as well as standards and other norms188—in his overall theory. So, the bare fact that law contains principles as well as rules is not fatal to Hart’s argument about law’s open texture. Moreover, Hart’s argument need not be viewed as being grounded in a semantic theory that depends solely on language and, in  

188 COL, p. 124.
particular, on the consensus of the relevant legal/linguistic community, to determine the meaning of legal terms in all cases. Indeed, there is much textual evidence that Hart believed, as Shapiro has recently argued, that such consensus is neither necessary nor expected in hard (Hart)—or borderline (Shapiro)—cases. And this is not the only point of contact between the accounts set forth by Hart and Shapiro. As will be described below, Hart’s account of legal indeterminacy is, in many respects, a precursor to Shapiro’s account of vagueness.

Hart describes law as a communicative enterprise. Law communicates general standards of conduct to individuals who are held responsible for understanding the standards and for acting in accordance with them. The law communicates the standards of conduct in general terms—referring to classes of persons, acts, or circumstances—so that individuals may readily apprehend those standards as applying to them and relate those standards to their own acts and circumstances. It is law’s communicative function (rather than the putative media of legal communication, including rules, principles, and standards) that best describes law’s nature. Hart’s discussion of law’s open texture begins with this affirmation: “If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist”.

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189 Or, in Dworkin’s terms, the “agreement about the conditions of which, if true establish the truth of” propositions of law. See his “Introduction”, p. 8.
190 This connection was not made explicitly by Shapiro, possibly because, although he recognized a heavy debt to Hart’s mentor, Waismann, Shapiro was not familiar with Hart’s theory applying “open texture” to law.
191 COL, p. 124.
Two devices are typically chosen to communicate a community’s standards of behavior via law: legislation and precedent. Legislation communicates general standards of conduct by “explicit general forms of language”. Legislation states community standards in broad classificatory terms, such as “No person shall purposely cause the death of another” or “Every person shall pay the appropriate amount of income tax.” Precedent, on the other hand, communicates standards of conduct “by example”. Precedent also communicates standards of conduct, but by demonstrating those standards as they are applied to individual cases. Both legislation and precedent may be open-textured, Hart argues, but may be so in different ways.

Legislation can be open-textured in one of two ways. Legislation may be open-textured to address spheres of conduct in which the features of individual cases vary in unpredictable ways. In such cases, a legislature must set up very general standards and delegate to an administrative, rule-making body the task of fashioning rules to meet the varying types of cases. Take, for instance, the government regulation of certain work standards. The legislature may mandate that the industry charge only a “fair rate” for the products it manufactures. The administrative body, based on its own inquiry into the facts of the particular industry, specifies by regulation what is to count as a “fair rate” for that industry. The administrative body will not have to hold a hearing on every case that comes before it, however, because even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them. Some extreme cases of what is, or is not, a ‘fair rate’…will always be identifiable ab initio. Thus at one end of the infinitely varied range of cases there will be a rate so high that it would hold the public up to ransom for a vital service, while yielding the entrepreneurs vast profits; at the other end there will be a rate so low that

192 COL, p. 125.
it fails to provide an incentive for running the enterprise. Both these in different ways would defeat any possible aim we could have in regulating rates. But these are only the extremes of a range of different factors and are not likely to be met in practice; between them fall the difficult real cases requiring attention.\textsuperscript{193}

In such cases, a kind of sorites series is generated. There is an “infinitely varied range of cases” involved with determining what a “fair rate” is. One could imagine starting at one cent and asking whether the rate were fair, then adding another penny and asking if that rate were fair, etc., etc., until a paradoxical conclusion was reached. Although the range is infinitely varied, at the two extremes, there is no need for the administrative body to determine whether the general standard applies. At the extremes, what counts as a fair rate or as an unfair rate is determined. The administrative body does not have discretion to decide otherwise in such clear cases. However, “between” those extremes, between the clear cases, the administrative body must determine what counts as a “fair rate” in the given case. In the borderline cases, the administrative body must exercise discretion in applying the standard because “there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found.”\textsuperscript{194} It is not possible in borderline cases to determine beforehand what a “fair rate” is. In the borderline area, the administrative body’s decision determines what a “fair rate” is.

Legislation may, therefore, be considered open-textured to the extent that it permits governmental bodies to decide either way in the borderline areas of a sorites series what counts as an appropriate extension of a term (such as “fair rate”). Legislation may be considered open-textured in another way. Sometimes a legal predicate’s meaning

\textsuperscript{193} COL, p. 131.
\textsuperscript{194} Id., p. 132.
has been determined by practice and by non-linguistic facts and yet the predicate’s extension has not been completely determined. This may occur when the variety of possible cases that might “fall under the legal rule” is too great. An example is found in tort law with the standard of due care in negligence cases. Sanctions can be imposed on persons who fail to take reasonable care to avoid inflicting injuries on others. But the variety of cases in which a person could have a lapse in due care is enormous. Indeed, the same activity may have different standards of care, depending on the context (including the circumstances and the relationship between the parties) in which the activity took place. A physician is held to a higher standard of care than a non-medical professional in performing life-saving CPR on an unconscious person. A homeowner is held to a higher standard of care for avoiding the injuries of a person she has invited into the home than a person who shows up unannounced. For these relationships and their concomitant standards of care, the meaning of “due care” is determined by legal practice (e.g., the relevant tort law principles) and by the non-linguistic facts (e.g., whether a person is a physician, whether a person is an invitee). For the variety of other cases that may fall under the “due care” doctrine, however, the application of the rule, the extension of the doctrine, is undetermined.

There are wide areas of conduct, however, which may be successfully controlled by legislation without the need for further determination. For these areas of conduct, the fringe of open texture is relatively narrow. Take for instance the killing of another person:

We are in a position to make a rule against killing instead of laying down a variable standard (‘due respect for human life’), although the circumstances in which human beings kill others are very various: this is
so because very few factors appear to us to outweigh or make us revise our estimate of the importance of protecting life. Almost always killing, as it were, *dominates*, the other factors by which it is accompanied…

In the case of “homicide”, the meaning of the term (causing the death of another human being) and the non-linguistic facts (X-person causing Y-person’s death) dominate other considerations which might make more uncertain the scope of the term’s application. Although ‘homicide’ is open-textured, the fringe of openness, the breadth of the rule’s penumbra, is exceedingly narrow. There are many clear cases of homicide and relatively few unclear cases of homicide.

Finally, in some areas of conduct, the “fringe” of open-texture in legislation may be non-existent. There are some “paradigm, clear cases” in which the application of legislation is determined. In such cases, the exercise of discretion would not be appropriate. A judge would not be free to decide either way. Take the vehicle-in-the-park case again. Certainly, if the case of a car is settled, then the case of an SUV (typically a larger, heavier, noisier means of conveying persons) should be settled as well. And, as long as the purpose of our statute remains the same, namely, to protect the peaceful environment of the park, these clear cases of “vehicles” will be decided against their operators.

So, in Hart’s view, the law communicates general standards of conduct to persons within a jurisdiction by means of legislation and according to general terms. To the

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195 COL, p. 133.
196 There could be borderline cases of causing someone else’s death. For instance, if two persons assault a third person, and the victim dies, it may be unclear whether Defendant A or Defendant B caused the death so as to be culpable of homicide.
197 COL, p. 129.
extent that language is general, legislation will be general. To the extent that legislation is general, it will admit of two kinds of cases: clear cases (cases in which the legislation settles the case) and hard cases (cases in which the legislation does not settle the case). In hard cases, the open-textured terms of the legislation permits an another official or authoritative body—such as the administrative body in the “fair rate” example—to exercise discretion so as to determine how the legislation applies to the case. The “hardness” of hard cases is not, however, attributed to the uncertainty of the official or authoritative body in applying open-textured terms. Hard cases are hard (or unsettled) because the open-textured nature of the language of law (as expressed in legislative rules or principles or otherwise) renders the law indeterminate in such cases.

For Hart, judges are in the same position as the administrative body in the “fair rate” example. Cases come before judges because there is a legal question presented by the cases that has not been settled. Litigants are coming to court to settle the question so that the relevant law can be applied (or not applied) to their case.

Typically, the legal question presented permits the litigants to request a judge to sharpen (i.e., to make more precise) an open-textured legal term. The requested sharpening might require the term to apply in the case; it might also require the term not to apply in the case. For instance, in the case of the vehicle in the public park, the driver of a moped would want his case to fall in the anti-extension of the legal term “vehicle” so as to avoid culpability. The city would be arguing that the case of the moped should fall in the extension of the legal term “vehicle” so as to successfully prosecute the moped driver.

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198 The relation between generality and vagueness will be taken up momentarily.
To the extent that the legal term is open-textured and the case before the court is unsettled (i.e., falls in the borderline area), the judge who rules on the case has discretion to decide either way. Prior to the court’s decision, the law is incomplete.\textsuperscript{199} Hart clarifies this point in his Postscript to \textit{The Concept of Law}:

My view advanced in this book is that legal rules and principles… often have what I call frequently ‘open texture’, so that when the question is whether a given rule applies to a particular case the law fails to determine an answer either way and so proves partially indeterminate. Such cases are not merely ‘hard cases’, controversial in the sense that reasonable and informed lawyers may disagree about which answer is legally correct, but the law in such cases is fundamentally \textit{incomplete}: it provides \textit{no} answer to the question at issue in such cases. They are legally unregulated and in order to reach a decision in such cases the courts must exercise the restricted law-making function which I call ‘discretion’\textsuperscript{200}.

Because legislation is open-textured, further decisions must be made in borderline cases to determine the application of legislation to those cases. But, as Hart argues, there is typically more than one way to make a law. Legislation is one. Precedent is the other. Precedent is court-made law. In the case presented above, the court’s exercise of discretion in the borderline case will result in a judgment. The judge’s decision on how the legal term should be extended to the case before her makes law on that issue for that jurisdiction.

\textsuperscript{199} This may create some difficulty in assigning responsibility to the moped driver after the judicial determination. If the law in borderline cases is incomplete, then, arguably, at the time of the alleged criminal act, the moped driver was not breaking a law. To hold the moped driver criminally responsible for non-criminal behavior would seem to go against prevailing principles of justice in any modern legal society, including the U.S. Constitution’s proscription against ex post facto laws. Dworkin has pressed this argument against Hart (and anyone who would hold that laws are not, in some way, determinate). Hart’s response is that, in borderline cases, judicial law-making is not unjust: the reason for regarding retrospective law-making as unjust is that it disappoints the justified expectations of those who, in acting, have relied on the assumption that the legal consequences of their acts will be determined by the known state of the law established at the time of their acts. This objection, however, even if it has force against a court’s retrospective change or overruling of clearly established law, seems quite irrelevant in hard cases since these are cases which the law has left incompletely regulated and where there is no known state of clear established law to justify expectations.” \textit{COL}, p. 276.

\textsuperscript{200} \textit{COL}, p. 252, emphasis in the original.
The judge has discretion to decide either way in such borderline cases. The judge’s decision is not unconstrained, however. Although the court makes law by deciding borderline cases, the court also must, to the extent possible, follow the prior decisions of courts in that jurisdiction. For instance, if last year in the same jurisdiction, Judge A decided that a moped was a vehicle for purposes of the statute, then Judge B is not (all things being equal) free to decide otherwise. In this manner, Judge B’s discretion is limited by relevant precedent. Judge B’s discretion might also be limited by other considerations, including rules of statutory construction, local rules, and other systemic considerations. A rough way of stating the judge’s position in borderline cases is this: the judge has discretion to make law in borderline cases, but she must follow existing law as she does so. Hart puts it this way:

If in such cases the judge is to reach a decision...he must exercise his discretion and make law for the case instead of merely applying already pre-existing settled law. So in such legally unprovided-for or unregulated cases the judge both makes new law and applies the established law which both confers and constrains his law-making powers.  

4.4 A reconstruction of Hart

Hart’s description of legal indeterminacy in terms of the “open texture” of legal language is in many respects similar to Shapiro’s account of vagueness. Because legislation and precedent are stated in open-textured terms, further decisions must be made in hard (borderline) cases to determine the application (the extension) of those terms. Judges have discretion to decide either way how those terms of legislation or of precedent should be applied in borderline cases. The open-textured nature of language

201 COL, p. 272.
used in legislation and precedent gives judges discretion to decide either way in borderline cases. Once judges decide one way or the other on the appropriate application (extension) of the legal term, that decision goes on the record. Future judges must take into account the record, as well as the relevant practices and non-linguistic facts of the next borderline case, in determining the next borderline case.

A potential problem with reconstructing Hart’s account of legal indeterminacy in light of Shapiro’s account of vagueness is that Hart seems to attribute the source of language’s open-texture to its generality, not to its vagueness. With respect to legislation, for instance, Hart claims that “uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact”.\textsuperscript{202} Hart here seems to be limiting his description of the open-texture of language to “the use of general classifying terms”.

An argument could be made that, if Hart is proposing a view of the open texture of general terms, then a reconstruction based on Shapiro’s vagueness-based account of open texture is mistaken from the start, because generality and vagueness are distinct features of a natural language. Indeed, generality is often cited (along with ambiguity) to distinguish vagueness from other features of language.\textsuperscript{203} Generality assumes a kind of classification of individuals under a definitional umbrella. Some mathematical terms are general in this sense. For instance, the term “prime number” is general because it refers to a class of numbers that meet its definition (i.e., a positive integer that has no positive

\textsuperscript{202} CO\textit{L}, p. 128.

\textsuperscript{203} The distinction between generality and vagueness does not, of course, mean that general terms cannot be vague. “Heap”, “bald”, and “vehicle” are examples of terms that are both general and vague. The anticipated argument here is that Hart would be making a mistake if he based his account of legal indeterminacy on an analysis of general legal terms (excluding vague terms), instead of on an analysis of vague terms (including vague general terms).
integer divisor other than 1 and itself). “Prime number”, however, is not vague. Vagueness is taken (roughly) to be borderline case predication. No borderline case is generated by “prime number”. All and only the integers that meet the definition of the term will be included in the general class. This case demonstrates that a term can be general without being vague.

So, generality does not imply vagueness. On this view, then, analyzing general legal terms as vague legal terms would be wrongheaded because general terms do not—on their own—create borderline (or, in Hart’s terms, “hard” or “penumbral”) cases. So, any reconstruction (based on considerations of vagueness) of Hart’s theory (arguably based on considerations of generality) would be similarly mistaken. At least one theorist has further argued that a reconstruction of Hart’s theory solely on grounds of generality would (in his view, rightly) reduce Hart’s theory of open-texture to an epistemic theory, one which could be taken as merely describing judges’ understandable ignorance with respect to the application of general terms to specific cases.204

Limiting Hart’s account of legal indeterminacy to an account of the generality of legal terms would significantly alter Hart’s stated views on the open-texture of language and the discretion of judges, however. In particular, the reduction of Hart’s analysis of hard cases to an epistemic analysis of judicial decision-making is an unwarranted distortion of Hart’s theory. Although Hart discusses the contours of rules in terms of a “core of certainty” and a “penumbra of doubt”, there is a wealth of textual evidence (some of which has already been cited) to support the notion that he believed the apparent ignorance of judges in deciding hard cases is due to the open texture of legal language.

204 See, for example, Sorensen’s “Vagueness has no function in law”.
Hart argued, as did Waismann, that indeterminacy was due to our inability to employ language to fully determine its application to unforeseeable future cases. A better reconstruction of Hart would recognize the centrality of the irreducibly open-texture of natural languages as the cause of the indeterminacy of law and would expand Hart’s diagnosis to include “general classificatory terms” in an analysis of vague terms.

Before laying the groundwork for a reconstruction of Hart to avoid the seeming necessity of “generality” to his theory, a brief historical note might be in order. Hart probably ignored the problem of vagueness because, at the time of his writing, the problem was not fully recognized. At the time his book was originally published (1961), vagueness was an underdeveloped area of philosophical research. Intense scrutiny of the phenomenon of vagueness—including the development of the epistemic, semantic, and ontic approaches summarized above in Chapter Two—did not begin until the mid-1970s. Although Hart certainly adhered to Waismann’s definition of “open texture” as “the possibility of vagueness”, neither the contours of vagueness nor the consequences of affirming its possibility were clear. So, Hart may be excused for not explicitly expanding his notion of “open texture” to vague terms.

The key to reconstructing Hart’s theory in terms of Shapiro’s account of vagueness is the consistent focus of both writers on borderline cases. Shapiro describes vagueness in terms of borderline cases. For Shapiro, even though some terms do not generate sorites series (a necessary element of vagueness for some theorists), if the terms generate borderline cases, they are vague. Vague terms exhibit open texture. For Hart, general terms generate borderline cases. General classificatory terms generate borderline

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205 See COL, p. 128.
206 Typically marked by Fine’s 1975 article, “Vagueness, truth, and logic".
cases. So, if the borderline cases generated by Shapiro’s vague terms and by Hart’s
general classificatory terms are sufficiently similar, then Hart’s open-texture account of
legal indeterminacy may be reconstructed in terms of Shapiro’s open-texture account of
vagueness.

Hart describes the general terms used in law as generating both plain cases and
borderline cases. Plain cases are cases in which the general terms of statutory language
need no interpretation and where the recognition of instances falling under the particular
statute seems unproblematic. These are the familiar cases where there is general
agreement as to the application of the classifying terms. General terms would be useless
to us as a medium of communicating standards of conduct, Hart insists, if there were not
such unchallenged, familiar cases. At some point, however, the plain, familiar cases
generated by the legal rule run out. As Hart puts it,

the variants on the familiar also call for classification under the general
terms which at any given moment constitute part of our linguistic
resources. Here something in the nature of a crisis in communication is
precipitated: there are reasons both for and against our use of a general
term, and no firm convention or general agreement dictates its use, or, on
the other hand, its rejection by the person concerned to classify. If in such
cases doubts are to be resolved, something in the nature of a choice
between open alternatives must be made by whoever is to resolve them.

At this point (the point of “crisis in communication”) the general language in which a
rule is expressed guides only in an unclear way. Clear direction is not provided. A
decision as to how the rule is to be applied in the given circumstance must be given. If a
person is deciding whether a bicycle is a vehicle for purposes of a given statute, then the

\footnote{However, the same may not be true for communicating non-legal standards. General terms might be
useful to communicate other kinds of standards of conduct; for instance, when directing persons to follow
“cool” people in guiding persons’ aesthetic choices. However, since non-legal terms are not the focus here,
they will be overlooked.}

\footnote{COL, pp. 126-127.}
person has discretion to decide either way. The person may decide the bicycle “sufficiently” resembles “in relevant respects” the plain cases under the general rule. On the other hand, the person may decide the bicycle does not “sufficiently” resemble the plain cases. If the person rendering judgment decides that the new case is sufficiently similar to the plain cases, the person in effect chooses to add to that line of cases the new case that resembles them in legally relevant ways. Outside the domain of plain cases, the person making the evaluation has discretion to decide whether the new case should be settled one way or the other.

Remember Shapiro’s account of the open-texture of language, and in particular, his use of Raffman’s Thesis (B). Shapiro argued that, in clear cases, Thesis (B) should be given what he called the Socrates reading (termed “B-S” below). Using Hart’s vehicle example, the Socrates reading would be:

(B-S) Competent subjects would judge a car to be a vehicle because a car is a vehicle.

In clear cases, the judgment of evaluators would track, rather than constitute, the truth of (B-S). In clear cases, competent evaluators do not, with their judgments, make cars vehicles. On the Socrates reading (B-S), a judge would not be deemed competent unless she decided the case of the car as a vehicle for purposes of the statute. Thesis (B), on the Socrates reading, offers a thesis about the evaluators’ competence, not about the status of the truth-condition of the proposition in the clear case.

The Euthyphro reading, on the other hand, views the biconditional in Thesis (B) the other way round. On the Euthyphro reading, Thesis (B) is a thesis about how the judgments of competent subjects make a proposition true. Shapiro proposed the
Euthyphro reading (termed “B-E” below) for borderline cases. The Euthyphro reading can be given to Hart’s paradigm unsettled case as follows:

(B-E) A bicycle is a vehicle because competent subjects would judge it to be a vehicle.

For borderline cases, Thesis (B-E) makes the claim that a bicycle is a vehicle only if competent judges determine it to be.

For Shapiro, the two readings of Thesis (B) provide a distinction between the role of evaluators in clear cases and in borderline cases. Judges in clear cases are competent to the extent that they track the judgments of other competent evaluators. Judges in borderline cases, on the other hand, determine how terms are to be applied. For Hart, the same distinction is made. In settled, “plain” cases, “there is general agreement in judgments as to the applicability of the classifying terms”. 209 Competent subjects have made judgments about how the terms are to be applied, and future judges merely track that line of cases. In borderline cases, however, the situation is different. The evaluator, the judge, in borderline cases “must exercise his discretion and make law for the case instead of merely applying already pre-existing settled law”. 210

Like Shapiro, Hart claims that borderline cases illustrate the existence of open-textured terms. Shapiro’s open-texture thesis is that competent evaluators may faultlessly decide either way in borderline cases. Hart, in his Postscript to The Concept of Law, makes a similar claim in the context of legal systems:

in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete. 211

209 COL, p. 126.
210 Id., p. 272.
211 Id.
So for Hart, as for Shapiro, borderline cases are unsettled (or “unregulated”), and unsettled cases are open (or “incomplete”). An open case suggests that “no decision either way is dictated.” Therefore, judges in borderline cases have discretion to choose one way or the other.

The similarities between Hart and Shapiro are striking. Aside from the apparently tangential description of borderline cases in terms of “general terms”, Hart’s view might be seen as an application of Shapiro’s general account of the vagueness of language to the specific problem of the indeterminacy of law. This is the account that will now be provided.

4.5 Legal contextualism

Shapiro’s premise about the open-textured nature of language tracks Hart’s description of the open texture of law. Moreover, Shapiro’s account of the open texture of natural languages provides Hart’s theory with needed philosophical and logical structure. Shapiro’s open-texture thesis, his explanation of the proper extension of predicates in borderline cases, and his use of the Euthyphro/Socrates contrast all help to solidify Hart’s account of legal indeterminacy. A brief summary will demonstrate how Shapiro’s views can be imported into Hart’s account of legal indeterminacy. After the summary, another feature of Shapiro’s theory that bolsters, and significantly improves, Hart’s view will be provided: the mechanism (introduced by Lewis) of conversational score.

212 Hart eschews the description of borderline cases in law in terms of “generality” in favor of law’s “indeterminacy” or “incompleteness” in his 1991 Postscript to COL, pp. 272-276.
In Hart’s view, law is a communicative enterprise. It employs language as a medium for communicating general standards of conduct to citizens and officials. The language used to formulate law’s general standards is communicated through the device of legislation or through the device of precedent. However it is communicated, the language employed by law exhibits, like all natural languages, the feature of “open texture”. The open texture of the language of law permits legal indeterminacy by permitting borderline cases, cases in which the application of the standard (whether framed as a rule, a principle, or some other societal norm) is unclear.

In clear cases, a judge does not have the discretion to decide the case either way. The correct extension of the term being considered has been determined by legal practice—including prior relevant judicial decisions—and non-linguistic facts. The correct extension of the term “vehicle” in Hart’s public park statute to the clear case of the SUV has been determined by prior legal practice (e.g., cars and pick-up trucks are considered “vehicles”) and the non-linguistic facts (e.g., SUVs are saliently similar to cars and pick-up trucks in that they have four wheels, weigh over one ton, burn gasoline, and have somewhat loud motors). A judge would not be free to exercise discretion, all things being equal, to determine that an SUV was not a “vehicle” for purposes of the statute. The Socrates reading of the relevant instantiation of Thesis (B) would hold for the clear case of SUVs. Given Thesis (B), an SUV is a vehicle if and only if duly-elected (and, therefore, presumably authorized and competent) judges would judge it to be a vehicle. On the Socrates reading, the thesis would be that a judge, to be competent, must determine that an SUV is a vehicle. The judge’s decision, in clear cases, tracks the truth of the proposed thesis.
The analysis of borderline cases is markedly different. In borderline cases, a judge is permitted (by the open-texture thesis) the discretion to decide the case either way. If the court is asked to apply the legal term “vehicle” to the borderline case of a moped, then the Euthyphro reading of Thesis (B) comes into play: A moped is a vehicle because duly-elected judges would judge it to be a vehicle. In this case, the judge’s decision is a determination. The judgment determines the truth of the legal proposition “A moped is a vehicle (for purposes of the public park statute)”.

Until the judge renders a decision in a borderline case, the correct extension of the predicate has not yet been determined. Legal practice and non-linguistic facts may settle the meaning of the term “vehicle” with respect to the statute. However, the extension of “vehicle” to the borderline case of a moped is not settled until the judge makes a decision one way or the other.

The judge’s decision, once made, determines the law with respect to that, and relevantly similar, cases. However, since the judge also makes law in borderline cases, precedent also requires adjudication whenever another unanticipated (or unperceived relevantly similar) case arises in the future. In this manner, the law has the potential to become ever more determinate; its extant rules and principles may, with every decision, admit of fewer and fewer borderline cases. As a society matures and its legal system decides more cases, Hart suggests, its general standards of conduct, as announced via legislative enactment and precedent, should become (at least to a point) more determinate.

This notion of legal progress, of the systematic replacing of borderline cases with settled cases, might, at first, seem problematic. It appears that more judicial decisions on
any given legal rule would provide more determinate applications of that rule (i.e., more determinate extensions of the borderline legal terms). The more instances of putative “vehicles” that are adjudicated, for example, the more clear the applications of the statute to future putative cases of “vehicles”. On further reflection, however, Hart’s theory might seem to renounce the possibility of such progress. Hart claims that judges make law in borderline cases. So the outcome of adjudication in borderline cases is law. But judge-made law, like legislature-made law, is susceptible to the open texture of its language. Precedent, then, like legislation, admits of borderline cases. So, it seems as though the sharpening of the proposition of law (the outcome the parties to the court case were requesting) might not help in determining future cases calling for an application of that law.

Legal progress, in the sense that adjudication might render the law more determinate, can occur only if the standards for adjudication are more stringent than the standards for legislation. Hart recognizes the problem, and he addresses it in the Postscript to *The Concept of Law*:

It is important to note that the law-creating powers which I ascribe to judges to regulate cases left partially unregulated by the law are different from those of a legislature: not only are the judge’s powers subject to many constraints narrowing his choice from which a legislature may be quite free, but since the judge’s powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes. So his powers are interstitial as well as subject to many substantive constraints.\(^{213}\)

More stringent standards for adjudication will ensure that a judge’s decision will be appropriately constrained not only to the facts of the current case, but also by the relevantly similar cases that have been decided previously. By “following precedent” as

\(^{213}\) COL, p.273, emphasis in the original.
it applies to the case, the judge’s decision will be appropriately limited. The scope of the judge’s “law making” will be much narrower than the scope of the legislator’s “law making”. In other words, the scope of adjudication will be narrower than the scope of legislation. Narrowing the scope of adjudication will permit legal progress with respect to any particular rule because the judges will be seen as “sharpening” the same rule that the legislature enacted. In this manner, the same rule will become more determinate with every judicial decision that applies it.\textsuperscript{214}

This does not mean, however, that judicial precedent must always be followed and that the rule in question will always be sharpened “in the same direction” by reviewing judges. In some circumstances, judges may distinguish the facts of the current case from the facts in prior cases so that the relevant legal rule or principle may be applied to permit a different result. Depending on the nature of the case, “distinguishing the facts” can appear quite similar to “changing the rule”. A recent example might be the Atkins case. Atkins reversed the rule established only 13 years earlier in the U.S. Supreme Court Case of Penry v. Lynaugh,\textsuperscript{215} that States could execute mentally retarded criminals. Atkins reversed Penry on the ground that the facts surrounding Atkins were different than those surrounding Penry. The facts that changed in the 13-year interim between the cases were that a significant number (although not a majority) of States had changed their laws to prohibit the execution of mentally retarded criminals. Moreover, even bedrock principles of statutory construction may be ignored if the court determines that countervailing reasons exist. For example, stare decisis, the principle that guides

\textsuperscript{214} The continual sharpening of a proposition of law by court action will be the rule. The exception will be in the relatively infrequent cases where a reviewing court “unsharpens” the finding of a lower court by overturning it and remanding the case for re-sentencing. See the discussion below in Section 4.6.

\textsuperscript{215} 492 U.S. 302 (1989).
judges to follow controlling legal precedent, does not mandate that, in all cases, prior precedent must be followed. The U.S. Supreme Court has determined that, when justice requires it, a prior controlling legal principle—like “separate but equal”216—is no longer valid and should not be applied in future cases.

In order for precedent to ensure progress, consistency between and among judicial determinations must be enforced. To the extent possible, judicial determinations of legal rules and principles should constrain future judicial determinations of the same legal rules and principles. A mechanism is needed to input judges’ decisions, to track those decisions, and to enforce consistency.

Shapiro’s adaptation of Lewis’s “conversational score” provides this mechanism. The score, or record, is a sort of running database. Persons involved in conversations propose that certain judgments be placed on the record and, if the other party to the conversation accepts them, the judgments are placed on the record. So, if two persons are judging, in the “forced march” series, whether a man in the borderline area of the predicate “bald”—say man #924—is bald, then their judgment will go on the record. For the purposes of these two persons, and in the context of this particular conversation, the proposition “Man #924 is bald” is true. However, as the conversationalists continue “marching” up the series, there will come a point where they cannot agree on whether the predicate “bald” should be extended to the particular case, say man #980. They are unsure whether to continue extending the predicate “bald”—as they have throughout the series—to man #980. One explanation for this uncertainty in attributing baldness to man #980 is that the standards of precision for appropriately extending the predicate have

increased. Although these two competent subjects may have determined, with respect to man #924, that “bald” could be appropriately extended, as the two subjects delved farther into the borderline area, it seems that the standards for what counts as baldness have increased. They are looking at a man with a certain number and arrangement of hair on his head. That pattern is much the same as the hair patterns on the immediately preceding men. However, at this stage, they cannot confidently judge man #980 to be bald.

Shapiro states that there are three options. The two can just bite the bullet and say that man #980 is not-bald. This would provide a sharp cut-off for the series and would make the rest of the men (from man #980 through man #2000) not bald. This is not an appropriate outcome, however, given that the “forced march” example is provided to enforce tolerance, a widely assumed necessary element of vagueness. By stipulating to a sharp cut-off of the series, the two would be offending against tolerance. And, although this might be appropriate in real life for a variety of reasons (including practical ones, such as that the evaluators are getting tired or that they might want to go home), positing a sharp cut-off does not help one offer an account of vagueness (which was the whole reason for positing the example). A second option would be not to judge whether man #980 was bald. Tolerance would not be affected by the non-judgment of a particular case in the sorites series.²¹⁷ So exercising this option in the thought experiment would not invalidate one’s description of vagueness. However, if the option not to judge were exercised, then the two evaluators might have to go to the opposite end of the series—to man #2000—and judge the men’s head states beginning with a clear case of non-

²¹⁷ For Shapiro, a decision not to judge—as opposed to the mere non-judgment—would violate tolerance. So that option is not considered here.
baldness. At some point they would come to a man—say man #990—that put them in the same evaluative state they faced with man #980. They could not judge whether man #990 was non-bald. If they exercised the second option again, this would leave nine cases—man #981 through man #989—unjudged. And this would not meet the requirements of the “forced march” in which every case is supposed to receive a verdict. We may, however, regard the forced bivalence (each case must be either bald or non-bald) as a convenience. This leads to a third option. Once in the borderline area, the evaluators might decide that a particular man—say man #985—is non-bald. Given the nature of the series, this would offend against tolerance. However, as the series is broken with this seeming sharp cut-off, the evaluators could remove some of their prior judgments from the record. So, if they agree to call man #985 non-bald, then they would have to remove the proposition “Man #984 is bald” from the conversational record. The removal of propositions would “spread backward” for an undetermined number of cases. The conversationalists at some point would reach a case—say man #965—that would call for the verdict of “bald”. The evaluators could then affirm the truth of their former proposition “Man #965 is bald”. However, so as not to offend against tolerance, they would be forced back up the series, removing prior verdicts as they go. There is no way to determine how far the backward spread will reach in either direction. The fuzzy band of verdicts asserted and then removed from the record constitutes the borderline area for the predicate “bald”.

The description of the three options illustrates how the conversational record enforces tolerance. The record also enforces consistency. The conversationalists, to the extent that they are aware of each others’ judgments, cannot place something on the
record that their evaluative partner does not agree to. The underlying agreement, along with the ability to remove items from the record in borderline cases, enforces consistency between the evaluators throughout the course of the conversation.

A wealth of propositions will be agreed to prior to any judgment concerning the proper extension of a particular (vague) predicate. The conversational score will contain a variety of assumptions, presuppositions, relevant comparison and paradigm classes, and propositions that have been either implicitly or explicitly agreed to. So in the baldness example listed above, it is assumed that the evaluators know, among other things, which men have been assigned what numbers, that the numbers increase with the increasing number of hairs, that the arrangement and number of hairs is relevant to what counts as baldness or non-baldness, that one’s shirt color (for example) is not relevant to what counts as baldness or non-baldness, that the relevant comparison class is the 2000 men in the series, and that the relevant paradigm class for baldness includes (someone sufficiently like) Ving Rhames, and the relevant paradigm class for non-baldness includes (someone sufficiently like) Howard Stern.

Before the evaluation starts there is a conversational record that already exists between the two evaluators. That is the context within which the evaluation is to take place. The context changes with the context of the evaluation. When one passes from the area of clear cases to the area of borderline cases the conversational context changes. In the borderline area, for example, the inability to judge baldness is attributed to the change in conversational context, namely, that their pre-conceived notions about baldness, the series, etc., etc., do not determine the truth of propositions. The borderline area marks a change in conversational context within which the evaluators are free to
decide one way or the other, without undermining their competence, whether a particular man is bald. Their determination will make it true, or at least “true enough” for the purposes of that particular evaluative context, that Man #X is either bald or non-bald.

The conversational record is the record of all the conversations shared between the two speakers. It provides the context for all future conversations.\(^{218}\) The conversational record need not be limited to two conversationalists, however. Indeed, Lewis proposed his notion of conversational score to provide a context within which any utterance in a natural language could be evaluated. The conversational score, therefore, may be placed on the conversational record by every person who utters a sentence in that language. Dictionaries, encyclopedias, television documentaries, and other sources may contribute to the conversational score of a natural language like English. Of course, not every speaker of English will be charged with knowing all of the additions to and removals from the language’s conversational record. Not knowing the entire score does not make one an incompetent speaker. However, as conversations evolve, the participants continually accommodate each others’ particular use of the conversational score.\(^{219}\)

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\(^{218}\) This is a departure from Shapiro’s account of the conversational record for conversations. For Shapiro, prior conversations do not provide the context for future conversations; they are presupposed. Moreover, the conversational record, for Shapiro, is an artificial device incorporating “common knowledge”, including things extraneous to the past conversations between two speakers. These distinctions do not make much of a difference in the proposed description of the conversational record in a legal context, however, and will be ignored in what follows. Where the distinctions do make a difference, they will be highlighted below in Section 4.6.

\(^{219}\) This notion of “continual accommodation” is not an explicit part of Shapiro’s account of the conversational record. However, Lewis’s account of conversational score employs the notion of raised “standards of precision,” standards that are predicated upon the speakers’ shared “rules of accommodation”. The tendency to raise standards of precision based on a tendency to accommodate one’s fellow conversationalists is the notion adverted to here.
Assume that you and I attended college together. We’ve gone on “road trips” together and have gone to many of the same parties where alcoholic beverages were served. We both know what driving is. We both know what being intoxicated is. Moreover, we have a shared experience both of drinking and of driving. Given that background, and as part of our recent discussion on other matters, you tell me that you have been cited for driving while intoxicated. You believe that the charge is unfounded because you were arrested for sitting in your car, listening to the ball game, while drinking a six-pack of beer. I might inform you that, under the law, “operating” a vehicle consists in being in control of the car’s keys while sitting in the driver’s seat. Since you were cited with “operating a motor vehicle while intoxicated”, and since your activities in the car constitute “operating” under the relevant legal definition, I submit that the charge is well-founded.

We have thereby placed “operating” for purposes of the charge of “operating a vehicle while intoxicated” on our conversational score. From now on, whenever we talk, we will assume that, in legal terms, “operating” means “sitting in the driver’s seat of car while being in control of the keys to the ignition”. Of course, if in our next conversation, you ask me a legal question about the necessity of signing an informed consent prior to your knee replacement, we will have to remove that legal definition of “operating” from our conversational record. “Operating” in this new context will have to do with a physician’s performing surgical procedure, not driving a car.

The reason for providing this example is to demonstrate that not just borderline instances of vagueness may be analyzed with respect to the device of conversational record. The ambiguity surrounding the term “operating” in the last example was also
cleared up using that device. The conversational record and the attempts of conversationalists to continually accommodate each other by updating the score on that record are features that transcend the literature on vagueness.  

Hart’s theory might be bolstered if he described law—a method of social control based on the communication of general standards—in terms of a conversational record. On such a theory, law would be the repository of all political enactments, decisions, rules, principles, and standards. Legislation would go on the record. Precedent would go on the record. Local rules about how government officials should operate within the legal system would go on the record. The record would contain constitutional principles, such as the proscription against “cruel and unusual” punishment and the right to “due process” of law, along with all court decisions applying those principles. The record might also contain the standards of professional conduct for lawyers, judges, and statesmen. The legal conversational record would contain all the assumptions, presuppositions, and agreements (tacit or explicit) about the practice of law in a particular jurisdiction.

This does not mean that everything on the legal conversational record would be written down, however. Conversations in legislative committees, agreements in judges’ chambers, understood rules of decorum, and relevant principles of social justice and equality might also be on the record. The legal conversational record would contain all propositions of law, however “uttered”, in a particular jurisdiction.

Assume further (at least for now) that duly elected or appointed judges are the appropriate “conversationalists” with respect to the legal conversational record. Judges

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220 Chapter Six below further explores the effect ambiguity may have on the perceived phenomenon of legal indeterminacy, irrespective of the vagueness of legal language.
are assumed to be aware of the record with respect to the law pertaining to any case that comes before them. If they are not personally aware of the law, a law clerk, or the attorneys for the parties litigating the case, will inform them of the relevant law on the record at the time. The considerations with which the court is briefed, the relevant law (i.e., the legal conversational record), and how that law applies to the facts of the case, is the context of the judicial decision.

Suppose that a judge must decide whether, in the case before her—and given the legal conversational record as it exists at the time of her decision—whether a moped is a vehicle for purposes of a statute prohibiting vehicles in a public park. Other judges in the jurisdiction have determined that a car, a pick-up truck, and an SUV are vehicles for purposes of the statute and that a bicycle, a Segway, and an electronic wheelchair are not vehicles for purposes of the statute. The judge reasons that a moped is a borderline case of vehicle. In some respects a moped is like a car, a pick-up, and an SUV. It burns gas, carries a passenger, makes some noise, and might leave ruts in the grass with its tires. In other respects, however, the moped is like a bicycle, a Segway, and an electronic wheelchair. The moped makes very little (although some) noise, carries only one passenger at a time, does not weigh very much, and does not pollute much. No combination of determinations from legal practice or non-linguistic facts determines whether a moped is vehicle. The judge’s determination will make the proposition “A moped is a vehicle (for purposes of the statute)” either true or false.

221 Given the practicalities of judicial decision-making, the judge cannot rest on the determination that the moped is a borderline case of “vehicle”, however. The legal question presented is whether a moped is or is not a vehicle. The defendant’s criminal conviction rests on the judge’s decision one way or the other. The judicial decision that the moped is a “borderline-vehicle” (a decision that would trigger an analysis of the well-known problem of so-called “higher-order vagueness”) would not be permitted in an actual legal case.
Moreover, once the judge makes her determination, that verdict will go on the legal conversational record. Other judges will have to follow that precedent, unless other considerations permit a contrary conclusion. Consider a judge in the same jurisdiction who is also asked to decide whether a moped is a vehicle for purposes of the statute. The court balances the same factors as the first judge. But the court reasons that the moped is a vehicle for purposes of the statute. In this borderline case, the judge would be permitted to make this decision, as long as the first judge’s assertion to the contrary is removed from—or otherwise altered on—the conversational record. One way this could happen is if the second judge distinguishes the facts of the case. For example, the second judge could argue that, although the first judge’s decision was appropriate for Park Alpha in the southwestern corner of their jurisdiction, it was not appropriate for Park Beta, the park involved in his case, which is situated in the northeastern corner of their jurisdiction. Noise was the primary reason for prohibiting vehicles in Park Alpha, the judge reasons, because Park Alpha is surrounded by residential communities. Park Beta, on the other hand, is surrounded by wetlands, and is on the verge of being a protected area in its own right. The reason for proscribing vehicles in Park Beta, then, would be to protect the beauty of the park by ensuring that no ruts would be made on the park’s valuable grounds.

This decision would be akin to my seemingly contrasting propositions about “operating”. When a court distinguishes its own proposition of law from other courts on the same issue, a kind of legal ambiguity arises. The legal conversational record may contain both assertions because the statements of law are actually asserting different propositions. In Case 1, the judge can be interpreted as asserting that a moped is not a
vehicle for purposes of the statute if the statute is read as ensuring protection of the public park by cutting down noise and pollution. In Case 2, the judge can be interpreted as asserting that a moped is a vehicle for purposes of the statute if the statute is read as ensuring protection of the public park by reducing wear and tear on park grounds due to unnecessary rutting.

Seemingly contrary propositions of law may go on the legal conversational record without offending against consistency if the propositions are distinguished by their facts. In such cases, ambiguity is the reason for permitting both utterances on the record. The term “vehicle” is being used in different senses in Case 1 and Case 2. So both “A moped is not a vehicle (in the context of facts relevantly similar to Case 1)” and “A moped is a vehicle (in the contexts of facts relevantly similar to Case 2)” both go on the record.

Ambiguity is not the only reason for permitting seemingly contradictory propositions of law on the legal conversational record, however. Ambiguity assumes that the same word has two different senses. The question for purposes of ambiguity is whether the separate conversational contexts have been accounted for. If a word means one thing in one context and means another thing in another context, then the word is ambiguous.

Difficulties based on ambiguity are relatively easy to resolve. Vagueness issues may be more difficult to resolve. The primary question for purposes of vagueness is whether a term that has the same meaning (e.g. “bald”) may be extended in different ways in borderline cases (e.g., Man #980 in the “forced march” case). Vagueness is also a reason for placing two seemingly contradictory propositions on the conversational record.

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222 The classic example is “bank” meaning either a financial institution or the land at the side of a river.
Suppose that the same public park is being considered in two separate cases. The same type of putative “vehicle” is being considered. In these further cases, the operator of a bicycle has been charged with a violation of the statute. The factual contexts are the same. The cases cannot be distinguished as above by their facts. Ambiguity will not resolve a discrepancy if the two judges decide to render contrary verdicts. The open texture of legal language will permit the judges to decide either way in their respective borderline cases. Each of the judges, as competent “speakers” of the language of the law in their jurisdiction, will determine the truth-value of the proposition “A bicycle is a vehicle” for the purposes of the statute. Their verdicts will make the law on the legal issue of whether a bicycle may count as a vehicle. If the jurisdiction is relatively small, then the judges will probably be aware that they are rendering a decision on the same legal issue. In that case, they will try to accommodate each other and render the same decision, whatever it may be. In borderline cases, the judges will try to come to the same verdict (as did the participants in the “forced march” example).

If the judges actually render contradictory verdicts, then the cases are subject to appeal. A higher court will then be asked to settle the issue. The higher court, in “settling” the legal issue, will, in effect, remove one of the judge’s decisions from the conversational record of that jurisdiction. In this manner, the appellate court changes the conversational record to enforce consistency between and among judge. Once one of the contradictory propositions is removed, the case (of the bicycle in the public park) is settled for that jurisdiction.

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223 This is known as “certifying” an appeal to a higher court based on what appear to be contradictory propositions of law. The higher court is asked to settle the case one way or the other so that future cases applying the relevant proposition of law will be clear. What follows in the text is not meant to be an accurate description of modern legal systems, but rather is intended to provide a regulative ideal.
The removal of one of the contradictory propositions of law from the legal conversational record serves one of law’s stated goals. The legal system will not let stand a contradiction on the same legal issue in the same jurisdiction because to do so would jeopardize law’s claim to authoritatively guide the conduct of citizens and officials in relevant cases. People must know what the law requires them to do. To the extent that contradictions are permitted on the conversational record, law’s guidance function is undermined.

The notion of two judges within the same jurisdiction deciding relevantly similar cases simultaneously is obviously an artificial example. That scenario may never occur. Typically one judge renders a decision on a case that is entered onto that jurisdiction’s legal conversational record. Then another judge, armed with the first case as a precedent, decides her relevantly similar case. In borderline cases, the second judge will feel compelled to follow the prior case and decide it in the same way. Although the extension of the legal predicate might fall in the borderline area, if there is a proposition of law already on the conversational record, then the second judge’s discretion (which the open texture of legal language gives her) is significantly curtailed. The judge, in most such cases, is required, absent countervailing considerations, to follow the former judge’s opinion. So, in most cases, the conversational record will not contain contradictory propositions of law (at least in the same jurisdiction) that must be settled by appellate court intervention.

What has been referred to throughout as the “legal conversational record” could be referred to simply, and without much distortion, as “the law”. “The law” is the abstract corpus of statutory enactments, judicial decisions, administrative rules, rules of
statutory construction, and other authoritative social rules and principles of behavior. When people ask what “the law” is, they typically are not looking for a definition; they are seeking something like a description of that jurisdiction’s legal database, the currently admitted (and, possibly, the potentially removable) propositions of law. The database evolves over time. It admits and removes many borderline propositions for a variety of reasons. “The law”, the database of legal propositions, enforces consistency by governing the manner in which statements in borderline cases are admitted or removed. Lawyers are insiders who track the evolution of the legal conversational record. People hire lawyers to get a conversationalist’s perspective on the current state of the legal conversational record and how relevant portions of that record might apply in their case. Determining what the law is requires routine checks of what propositions have been added to and what propositions have been deleted from (and the reasons for adding to and deleting from) the legal conversational record.

4.6 Distinguishing legal and conversational contextualism

The conversational record, as a device to track ongoing judgments, has proven helpful in reconstructing Hart’s account of legal indeterminacy. In particular, Shapiro’s use of the conversational record has been useful in depicting how borderline cases in law may be accounted for. There are some dissimilarities, however, between Shapiro’s use and the present use of the conversational record as a theoretical device, namely, 1) the legal “record” is less accessible than the conversational “record”; 2) the legal “score” is more permanent than the conversational “score”; and 3) the “standards of precision” in law, as opposed to those in conversations, nearly always increase. These dissimilarities
will be discussed before presenting and defending a fuller version of legal contextualism (in response to some of Dworkin’s most famous and trenchant criticisms) below in Chapter Five.

Shapiro takes the device of conversational record to be “a local version of common knowledge”, the assumptions, presuppositions, and agreements made between two conversationalists. The conversationalists both know, for instance, who Ving Rhames and Howard Stern are, that Mr. Rhames is a paradigm case of baldness, and that Mr. Stern is a paradigm case of non-baldness. The conversational record not only is accessible to persons engaged in a conversation, but is the foundational understanding upon which their conversation is based.

The conversational record of law is quite different. Although there are some assumptions, presuppositions, and agreements made between and among advocates in a legal system, the actual content of the legal record may be unclear. Take the *Atkins* case as an example. The advocates in the case were arguing over a specific legal issue, namely, whether the U.S. Constitution’s Eighth Amendment proscription against “cruel and unusual” punishment rendered unconstitutional a State law permitting the execution of mentally retarded criminals. The “record” in this case contained several assumptions and presuppositions: the United States Supreme Court is the proper court to settle the issue; the United States Supreme Court (even though it is a *federal* court) has the authority to decide the issue in the case of a State statute; if found unconstitutional, the State statute would be overturned and would, then, be considered as if it had never existed; if the Virginia’s statute were found unconstitutional, other States with relevantly

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similar statutes would also be affected; and that the criminal defendant in the case—irrespective of his or her mental status—was properly convicted of the crime charged.

These items would be “common knowledge” among advocates in our legal system. However, unlike the case of the record in a conversation, the legal record does not contain, or may obscure, other information that could be relevant in determining the issue in the Atkins case. For instance, although the advocates assumed that the court would use the standard of “cruel and unusual” punishment to determine the case, the advocates did not know precisely how that standard would be employed. Until the Atkins case, conventional wisdom among legal advocates was that the United States Supreme Court used the following rough test to determine whether a particular punishment was unconstitutionally “cruel and unusual”: if a majority of the States used it, then it would not be deemed “cruel and unusual”. In this respect, the Court was seen to gauge public sentiment over the propriety of a particular kind of punishment by tallying the various States’ legislative responses to that public sentiment.225

Unfortunately, for several reasons, the legal advocates’ “conventional wisdom” did not approximate Shapiro’s “common knowledge”: 1) because State criminal codes are peculiar and arcane, determining what State law on any given topic is extremely difficult; 2) because State legislators at times (and, particularly in the criminal realm) pass laws that may not necessarily reflect the common view of their constituents, the “tallying” test may not meet the goal of determining what true public sentiment is regarding particular punishments; and, finally, 3) the United States Supreme Court, in the

225 The Court had recently opined that punishment may be considered “cruel and unusual” under the Eighth Amendment if it is inconsistent with the evolving “standards of decency” evidenced by certain objective criteria, the most important of which is “legislation enacted by the country’s legislatures.” Penry v. Lynaugh, 492 U.S. 302, 330-331 (1989).
Atkins case, changed the rough “tallying” test to permit something less than a simple majority of the States to determine whether a punishment was “cruel and unusual”.\footnote{226 See Justice Scalia’s scathing dissent in Atkins in which he asks, “How is it possible that agreement among 47% of the death penalty jurisdictions amounts to ‘consensus’? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on ‘evolving standards’ grounds.”} Because the legal record can be obscure, fractured, and ephemeral, the legal record is not nearly as accessible to legal advocates as the conversational record was to conversationalists under Shapiro’s theory.

Although the legal record is less accessible than the conversational record, the legal record is more permanent than the conversational record. Shapiro describes the conversational record as a malleable device which can by changed at will by the participants in a conversation. If one person judges man #924—a person exhibiting a borderline case of baldness—to be bald and gets his fellow evaluator to agree, then the judgment—Man #924 is bald—goes on the record. If, based on further judgments farther down the series, the two decide to remove that judgment from the record, it comes off. The persons judging borderline cases of baldness have discretion over which way to call the cases and, therefore, which statements remain on the conversational record itself.

The same cannot be said of the discretion of duly-elected judges. Judges do not have the discretion simply to place a statement on, or to remove a statement from, the legal record. Judges are bound by adjudicative rules and principles to make their decisions conform to the prior rulings of other judges who have decided relevantly similar cases in relevantly similar jurisdictions.\footnote{227 Of course, one simple way to circumnavigate principles of precedent-following is to distinguish one’s case on the facts (i.e., this is not a “relevantly similar case”) or on the law (i.e., this is not a “relevantly similar jurisdiction”).} The principle that prior court decisions must be considered as precedents for later judicial determinations is known as
stare decisis\(^{228}\). Dworkin’s “chain novel” description of legal interpretation offers a good picture of how stare decisis works in practice. As law is developing on a particular subject, the judges are freer to lay down legal rules and principles to decide cases. This is akin to the authors of the first few chapters of the chain novel. After several chapters, however, characters, plots, and themes have been established. The discretion afforded subsequent authors to decide how to write their later chapters is constrained by the decisions of former writers. In the legal realm, judges—as subsequent “authors”—have their discretion constrained by the decisions made by earlier judges.

The device of the conversational record—to the extent that it constrains judicial decisions in borderline cases once a decision has been placed on the record—also supplies a good (and complimentary) picture of how stare decisis operates. However, this is the point where the analogy with Shapiro’s theory breaks down. In Shapiro’s view, since conversationalists are always permitted discretion to place statements on, and to remove statements from, the conversational record, nothing like a principle of stare decisis operates to constrain those decisions in the future. In short, precedent does not play a role in Shapiro’s theory.

The distinction between legal and conversational records based on the role of precedent leads to a third dissimilarity between legal and conversational contextualism: legal contextualism presupposes a systemic evolution toward higher “standards of precision” in analyzing legal statements. The principle of stare decisis requires judges to use prior decisions as precedents in their own cases. So, if a judge is deciding the case of whether a motorcycle is a “vehicle” (for purposes of Hart’s famous case), then stare

\(^{228}\) The fuller statement is, in Latin, *stare decisis non quieta movere*, meaning roughly “to stand by things decided.”
decisus would require a court to determine that a mini-bike is a vehicle, if a court had already determined that a moped and a motorcycle were vehicles. Moreover, the more cases of putative vehicles that are decided in that jurisdiction, the more clear cases (and the fewer unclear cases) of “vehicle” there become. With every court decision on the issue of what constitutes a “vehicle” for purposes of the statute (including not only decisions about what vehicles are, but also what vehicles are not) the application of “vehicle” in the statute becomes clearer. Another (simpler) way of putting this is that precedent works to continually “sharpen” the borderline terms employed in legal statements.

It is not true, however, that precedent always works to “sharpen” terms in statements of law or that judges are, in every case, bound to sharpen legal terms using precedent. Judges distinguish some cases on the facts or on the law so as to avoid following precedent. In the vehicle case, this might amount to deciding that a person should not be convicted for riding her bicycle in the park because the park was not “public” or that the opinions of another jurisdiction about bicycle-operation were not binding. Since, in these cases, judges would not be using the prior court decision as precedents in their own case, the legal statement would be neither “sharpened” nor “unsharpened”. The precedent would be ignored.

In some cases, however, judges consciously overrule prior court decisions. In so-called “landmark” cases, for instance, appellate courts have reversed a trend on a particular legal issue (regarding “Jim Crow” laws in the South, for instance) to grant more freedoms or to assign more responsibilities under the law. This reversal of precedent would act as an “unsharpening” of the legal term at issue (say, “race”) in order
to foster an overriding, compelling, and (at least up to the point of the judicial decision) divergent, public policy. Examples of this form of “unsharpening” a legal term are rare, however, in a mature legal system. The decisions are known as “landmark” decisions because they mark a point in the typically slow evolution of (“sharpening”) the law when, in one felled swoop, a court abruptly changes the course of law on a particular issue.

Another rare kind of “unsharpening” of legal terms occurs when an appellate court overrules a lower court on a particular legal issue and then remands the case back for sentencing in conformity with the court’s ruling. For instance, when the U.S. Supreme Court held unconstitutional Virginia’s statute permitting the execution of mentally retarded criminals, the legal term “cruel and unusual” was “unsharpened”. After the decision in Atkins, the Supreme Court did not inform Virginia how to change its statutes to conform to the Atkins decision. Although it might seem obvious how to rectify the legal situation in Virginia after the Atkins decision—remove the offensive term from the books—things are not so simple. Even if Virginia excised the offending term “mentally retarded” from its criminal statutes on punishment, the remaining State statute on justifiable executions might not pass constitutional muster. In short, Virginia’s officials could not be sure that any proposed change to their punishment laws would not also be counted as “cruel and unusual” punishment under the Eighth Amendment, because Virginia was given no clear direction on what constitutes “mental retardation” under the newly announced “clear and unusual” punishment standard. To the extent that 1) Virginia was required to change its laws in response to the Atkins decision and 2) the Atkins decision did not inform State legislators in what way they should change those
laws, the term “cruel and unusual” punishment as it applies to mentally retarded criminal
defendants facing the death penalty was in effect (and in Shapiro’s terms) “unsharpened”.

The cases of “unsharpening” legal terms are rare. In Shapiro’s theory, on the
other hand, the “unsharpening” of borderline terms in an ongoing conversation may be
commonplace. The reason borderline terms may be subject to “unsharpening” at any
stage of a conversation is that standards of precision can decrease based on the changing
interests of the conversationalists. If the persons are discussing a desktop, for instance,
the standard of precision for applying the term “flat” to that case may need to be raised
from their prior conversation about Kansas. However, if the context of the conversation
changes, say, to a discussion about the physical requirements for getting into the Army,
the standards of precision regarding “flat”—in particular, as a description of one’s feet—
might need to be decreased. The standard of precision for “flat” as a description of feet is
lower than the standard of precision for “flat” as a description of a desktop. Because, in
Shapiro’s view, evaluators always have discretion in borderline cases to decide one way
or the other whether a statement is placed on, or removed from the record, standards of
precision for using certain terms in those statements may be increased or decreased,
depending on the context of the conversation.

The dissimilarities between legal contextualism and conversational contextualism
are few and are related to distinctions that can be made between the methods by which
conversations (on the one hand) and legal decisions (on the other) are tracked by the
device of the “conversational record”. Legal contextualism applies the device to describe
what happens as judges—as members of a formally recognized, but not always

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229 The notion of participants to a conversation “unsharpening” borderline terms is captured by Shapiro in
terms of evaluative “jumps”.

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functionally connected—“conversation of law” make decisions that affect not only the parties before them, but all future parties in relevantly similar cases. Earlier decisions act as precedents for later decisions, constraining judicial determinations and working to continually “sharpen” the open-textured terms employed in legal language. So, to better account for the role of precedent in law, legal contextualism departed slightly from Shapiro’s account of conversational contextualism. Apart from the dissimilarities between legal and conversational contextualism over the role of precedent, however, Shapiro’s usage of the “conversational record” to track and to enforce consistency among participants in a legal “conversation” has proven quite helpful.

Remember that the resulting description of legal contextualism is meant to be a reconstruction of H.L.A. Hart’s original thoughts on legal indeterminacy, and, in particular, his discussion of the “open texture” of legal language. The description of “the law” in terms of Shapiro’s “conversational record” takes the proposed reconstruction of Hart well beyond Hart’s overall theory, however. Hart proposed not a specific theory of “the law”—the abstract corpus of law guiding the conduct of persons within a particular jurisdiction—but rather a general theory of law. In other words, Hart was concerned with providing a description of the concept of law, a description that could be used to cover any circumstance, any jurisdiction in which a system of law might be claimed to exist. In this respect, Hart’s theory was general and was, in his terms, an exercise in sociology. Hart was interested in explicating the concept of law to compare and contrast the legal status of putative societies. With Hart’s general theory, one could distinguish between legal and pre-legal communities.
Unfortunately, however, Hart’s conception of law has not proved to be an adequate description of modern legal societies. There are too many distinctions to be made between “the laws” of different jurisdictions to make his general definition of “law” of much use. Removing Hart’s account of the open-texture of law from his general theory of law permits a narrow, more useful description of Hart’s account of legal indeterminacy. Moreover, grafting Shapiro’s account of “open texture”, including most of his description of the “conversational record”, onto Hart’s remarkably similar account of the “open texture” of law, provides a more resilient account of legal indeterminacy, an account that can adequately address the many objections Hart faced during the latter half of the 20th Century.
The reconstruction of Hart offered in the previous chapter has been termed “legal contextualism” because it uses Shapiro’s contextualist approach to vagueness as a framework for Hart’s approach to legal indeterminacy. Legal contextualism describes the indeterminacy of law in terms of the open texture of legal language. The open texture of some of the terms used in legal rules and principles implies that there will be borderline cases involving the application of those open-textured terms which a judge’s decision must determine. The judge in borderline cases is granted discretion to make law to the extent that she is settling a borderline case, a case involving the application of an open-textured term. The open texture of legal terms permits judges to faultlessly decide either way, for either party, in borderline cases.\(^\text{230}\)

As a reconstruction of Hart’s account of legal indeterminacy, legal contextualism solves many of the problems—real and alleged—with Hart’s proposed theory. In this chapter, the attacks waged against Hart’s account of legal indeterminacy will be presented and then addressed in terms of legal contextualism. Recounting the attacks of

\(^{230}\text{Setting aside cases of so-called “higher-order vagueness” (HOV), in which the evaluative decision might be between whether a bicycle is a “vehicle” or a “borderline-vehicle”. Although providing an accurate description of HOV has been a perennial problem in vagueness theory, it will not be taken up here as a problem for legal contextualism. Since, in the law, juridical bivalence will require judges to make calls over whether something is a vehicle or not—rather than whether something is a “vehicle” versus a “borderline-vehicle”—HOV will be discussed only tangentially in what follows.}\)
the most famous legal determinist, Ronald Dworkin, will help not only to bolster a Hartian account of legal indeterminacy, but also to refine and shape the contours of legal contextualism.

Before presenting Dworkin’s arguments against legal indeterminacy, one similarity between Dworkin’s theory and legal contextualism should be mentioned. The contextualist description of the law as a kind of “conversational record” is quite similar to Dworkin’s description of the law as a “chain letter”. Each of these devices provides a mechanism that keeps track of prior moves in a language game (writing a serial novel, having a conversation) and that requires later participants in the game (future authors, future speakers) to acknowledge the former moves as they continue the process.

The mechanism is the same. Each member of the enterprise, either serial author or conversationalist, adds statements to a kind of evolving database. Dworkin’s serial authors add a chapter to an ongoing novel. Shapiro’s conversationalists add judgments about vague expressions to an ongoing conversational record. The data entered into the ongoing database is available for future members of the practice to review when entering their own information (chapters or judgments). Much of the information may not be immediately accessible to some writer or speakers. Some future participants may not be aware of some of the information entered at earlier stages. Moreover, some of the information on the database will not be relevant at every stage of the practice. Not every entry will figure into one’s current judgments (about plot, for instance, or about baldness). The information is recorded at every stage, however, and can be used in making decisions at every stage of the process.

231 This does not mean, of course, that there are only similarities in using the device of “conversational record” in the contexts of law and conversations. The dissimilarities are outlined above in Section 4.6.
The reason for positing the mechanism is the same: to enforce consistency. Dworkin contends that later authors in the chain novel must make their chapters “fit” the novel the earlier writers have composed. A person cannot receive “A Christmas Carol” at some point midway through the chain novel process and write a chapter of recipes for preparing turkey dinner for the holiday. Although a turkey dinner might fit into the plot at some point in the novel, “A Christmas Carol” is not a cookbook. Later writers in the series must accommodate the decisions relating to theme, plot, character, and symbol already made by earlier writers. The decisions of later writers are therefore constrained by the decision of earlier writers. Every chapter written must “fit” with, must be consistent with, the earlier chapters. Shapiro also argues that the conversational record is meant to track and to enforce consistency. Each entry onto the record updates the conversational score between the speakers. Each speaker presupposes that all prior conversations, all substantive agreements, and all former assumptions, remain good for purposes of engaging in the current conversation.\(^{232}\) In that conversational context, the conversationalists understand one another. It is only when the conversational context changes, say when a new term is introduced or when a new extension of a vague term is proposed, that confusion ensues.

The manner of clearing up the confusion in new conversational contexts demonstrates another similarity between the two mechanisms: consistency is enforced via rules of accommodation. Within the current conversational context, speakers have accommodated each other’s assumptions, presuppositions, and prior substantive assertions. However, the participants in the conversation must adjust their rules of

\(^{232}\) Apart from the rare cases of “unsharpening” certain terms—also described by Shapiro as evaluative “jumps”. “Unsharpening” in the legal context is discussed above in Section 4.6.
accommodation when the conversational context changes. For instance, although “This is flat” may have been “true enough” for purposes of describing Kansas, it may not be “true enough” for purposes of describing a desktop. If one of the conversationalists attempts to extend the predicate “flat” to a new context, one in which the previously agreed to extension of flat may not apply, then the rules of accommodation must be adjusted to continue the conversation. The addition of the desktop, as a proposed case of flatness, increases the standards of precision for the use of the predicate “flat”. As the standards of precision increase, the rules of accommodation must change accordingly so that the enterprise—understanding within a conversation—may continue. Similarly, Dworkin argues that prior chapters of the chain letter increase standards of precision for later authors in the series. Although earlier participants have freer rein to inject characters and themes into the novel, later participants are stuck with those characters and themes. In order to write the same story, later writers must accommodate the decisions made by earlier writers.

With so many similarities between the “conversational record” model of language and the “chain letter” model of legal precedent, it might be surprising that the results achieved by using the two devices are markedly different. Dworkin holds that there are right answers to legal questions, even in borderline cases. Judges are viewed as authors in the “chain-novel” model. They are given the task of writing a chapter that makes the resulting novel (i.e., the law) “the best it can be”. This goal of “value” guides the

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233 In the legal context, it seems appropriate to think of the standards of precision consistently increasing so as to provide more guidance as precedent and further legislation fill in more “gaps”. However, in the conversational context, the standards of precision may also decrease, depending on the interests and goals of the conversationalists. For the difference in standards of precision as they relate to law and conversations, see the text above in Section 4.6.
enterprise, and, to the extent that the judges fail to construct an interpretation of the law that properly “ennobles” the text, judges fail to provide the “right answer” in the case.

On the other hand, legal contextualism, as a legal theory embracing Shapiro’s conversational record as a device for describing precedent, maintains that there is no right answer in borderline cases. Although judges consider and are sometimes constrained by the prior decisions of judges, the decision to enter a decision one way or the other onto the legal conversational score (i.e., the law) in borderline cases is not determined. Prior decisions may help to reduce vagueness in borderline cases, but the extensions and anti-extensions of vague terms cannot be eliminated via the judicial decision.

The reason for the dissimilarity in result between the two proposed mechanisms is that Dworkin models judicial interpretation as a kind of aesthetic reasoning. Dworkin believes that judges are in a position similar to literary critics. Literary critics approach literary works with a preconception of what literature is, why it is important, and how texts serve (or fail to serve) legitimate literary goals. Critics do not review literary works in a vacuum, attempting to parse the meaning of the themes and symbols used extracted from the culture in which it was written. Critics rather impute their own understandings of the purposes of literature onto the work and judge its value with respect to that overriding aesthetic context. Similarly, judges review precedent as a unified whole, a story that contains our nation’s most deeply rooted principles of political morality and most commonly held social convictions. The judge’s job is to interpret the next case, the next addition to that long-standing story, in the way that best justifies the law. The interpretation the judge must provide in any case is the one that provides not just the correct decision in the instant case, but also the one that best justifies the practice of law.
The right decision for a judge in any case is the one in which the best version of the justification of the legal practice is imparted to the case. The judge must choose the interpretation of the legal question presented that makes the practice best, all things considered.

Legal contextualism models judicial interpretation not as a kind of aesthetic reasoning, but rather as a kind of practical reasoning. The judge, in borderline cases, is faced with a decision akin to Buridan’s ass, the fictional beast that starved to death because it could not choose between two equally tasty-looking piles of hay. In hard cases, there may be no reason for a judge to decide in favor of one side over the other. The two sides may have equally compelling arguments. However, given our legal system (and its embedded practices), there is an overwhelming reason to come to a decision: the judge is given the duty to make a decision in favor of one party over the other in order to settle a particular legal dispute.

The duty to resolve a legal dispute does not imply that one of the parties has a predetermined right to prevail, however. While it is true that our legal system imposes upon judges the duty to make a decision which favors one party (a position described by Endicott as “juridical bivalence”), it is not true that a judge fails in that duty if she decides, in a hard case, that one party rather than the other should prevail. As with Buridan’s ass, although it is reasonable to choose one pile of hay or the other (to keep

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234 Dworkin denies that arguments in hard cases can be equally compelling. The possibility of a “tie” in judgment is, for him, insignificant. *TRS*, pp. 284-287. Dworkin maintains that one side in a hard case always has the better argument, always puts forward the view that better “fits” precedent and better “ennobles” the law. A judge would make a legal mistake, then, if she decided for the other party.

235 The situation is similar to the “forced march” version of the sorites problem. The “forced march” also forced bivalence on evaluators. They had to decide one way or the other at each stage of the series. However, this forced bivalence was posited only as a convenience, as a means of illustrating the effect of tolerance, not as means of describing what actually happens when speakers judge borderline cases.

from starving), there is no reason to choose either pile of hay *ab initio* (because they look equally tasty). Put another way, although judges have a duty to decide, they have discretion, in hard cases, to decide either way.

The differing models of judicial reasoning, one aesthetic, the other practical, lead to striking dissimilarities between Dworkinian interpretivism and legal contextualism in accounting for legal indeterminacy in borderline cases. Dworkin argues that the law is determined by the creative interpretation of judges imparting principles of political morality to seemingly indeterminate cases, no matter the disagreement among legal professionals and theorists or the vagueness of terms employed in contested legal rules. Legal contextualists, on the other hand, would argue that Dworkin has greatly overstated the power of political principles to cure, and has greatly underestimated the power of vagueness to create, legal indeterminacy.

Because Dworkin’s theory of legal interpretation relies so heavily upon an aesthetic model of judicial reasoning, it is easy to overlook the central role “principles of political morality” play in Dworkin’s theory. Judges’ creative task of interpreting the law is constrained, in Dworkin’s view, by the society’s extant principles of political morality. These political principles determine the “right answers” judges should give in deciding legal cases. So, for Dworkin, the primary issue underpinning the historical debate over the alleged indeterminacy of law is whether—in spite of assumed textual imprecision or systemic imperfections—principles of political morality determine the law judges announce.

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237 Juridical bivalence does not entail that the set of conflicting propositions of law being considered by the judge, taken as a complex expression, is bivalent. In other words, juridical bivalence does not entail propositional bivalence.
5.1 Dworkin’s argument from political principles

For Dworkin, the contested theoretical issue surrounding allegations of law’s indeterminacy is actually a debate over the abstract moral principles used to justify legal interpretations. Since, on Dworkin’s view, the principles of political morality determine right answers in hard cases, the disagreement surrounding the proper outcome in hard cases must be over the contested conceptions of political morality adopted by the advocates. The advocates on either side of a legal case dispute which conception of their community’s sense of justice, for instance, determines the correct interpretation of the case. Abstract principles of political morality (principles of justice, fairness, and equality) express a community’s values. The principles are elucidated in our interpretive view of the legal rule’s purpose, as was evidenced in the example of the bicycle in the Bois de Boulogne (discussed above in section 1.3). What we experienced in that example was a debate over the “contested concepts” embodied in different interpretations of statutory purpose. These concepts are concepts of political morality or principle. In deciding what the statute means, we provide an interpretation of the statutory purpose by adverting to a contested conception of a particular principle or principles of political morality.  

From this perspective, Dworkin diagnoses the cause of the proposed malady of legal “gaps”. The indeterminists—especially Hart and his followers—are unable to see that the law has adequate resources to determine legal cases because they have reduced what counts as law to only one possible source of law: legal rules. This reduction not

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238 *TRS*, p. 105.
only yields an impoverished notion of the law, it also creates legal indeterminacy as a by-product. The law consists of other resources, apart from rules, that can render the law determinate. There are principles of political morality—as well as canons of statutory instruction and other legal norms for reasonable decision-making—that, when employed appropriately, can determine even hard cases. So, Dworkin asserts, just because legal rules “run out” does not mean that the law runs out. The alleged “gaps” in the law have been fabricated by the indeterminists.239 In Dworkin’s view, what we experience as uncertainty in hard cases is not the indeterminacy of law—the “gaps” in statutes or the “running out” of legal rules. What we experience is potential conflict over competing conceptions of values as expressed in the legal principles we look to in order to properly interpret the law. The dispute in legal theory over so-called “legal indeterminacy” is not over language; the dispute is over political principles. Hence, for Dworkin, the appropriate battleground over what a law means is not semantics but politics.240

Dworkin’s view of “equal respect and concern” as the bedrock principle of democracy241 colors his interpretation of constitutional provisions. Dworkin is willing to have legal doctrines change in order to comport with modern conceptions of individual rights and liberties. Although the Constitution may not provide for the right to assisted

239 In alleging that there are “gaps” in the law, legal advocates are not disputing the linguistic form of the statute. The bicycle in the Bois de Boulogne case does not illustrate a disagreement about the syntax of the statute. No one is confused over whether the terms of the statute have been employed appropriately. Nor does it exhibit a disagreement about the semantics of the terms used in the statute. Everyone is familiar with the meaning of “bicycle” and of “Bois de Boulogne”. The disagreement is over what the terms of the statute mean in context, including the historical precedent, the purpose of enacting the statute, and the values expressed by the statute. Lon Fuller was the first to raise this series of objections against Hart’s nascent description of legal indeterminacy. See “Positivism and Fidelity to Law—A Reply to Professor Hart”, 71 Harvard Law Review 630 (1958).

240 Encompassing, of course, the principles of political morality espoused by that political state.

241 For the initial articulation of this principle as it relates to John Rawls’ theory of justice, see Ronald Dworkin, “The Original Position”, 40 Univ. of Chicago L. Rev. 500 (1973). For the fullest and most mature statement of this principle, see Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality (Cambridge, MA: Harvard University Press, 2000).
suicide (for instance), our current political values can be accommodated within a broad reading of the text.\textsuperscript{242} Another’s view of “social good” may color their interpretation differently. A legal theorist who places great emphasis on the separation of powers among the three branches of government\textsuperscript{243} might argue for a narrow reading of constitutional provisions. These theorists might argue that judges exceed their constitutional authority to the extent that their interpretations go beyond what the “founding fathers” might have intended.

For Dworkin, the clash of political values, not linguistic imprecision, describes what occurs in so-called “hard cases”. The dispute is over contested conceptions of political values that justify the law in question, not over the terms used in the law itself. The indeterminacy of law is therefore a mischaracterization of what occurs in modern legal systems. What others (incorrectly) intuit as the ontological problem of “gaps” in the law, Dworkin sees as (understandable) confusion over the variety of potential interpretations from which a judge is required to choose.\textsuperscript{244} Where others may perceive a semantic problem over the correct meaning of statutory terms, Dworkin sees a competition over the political values that supply the best theory of the law, including the present case. So, for Dworkin, the law is determinate because any judicial interpretation that constructs the practice of law in the appropriate way (i.e., according to his prescription for constructive interpretation given in Chapter One) makes it determinate.

\textsuperscript{242} As typically located in the 14th Amendment’s so-called “right to privacy”.
\textsuperscript{243} Robert Bork or Justice Antonin Scalia, for instance.
\textsuperscript{244} In the literature on vagueness, this overabundance of interpretive principles might be called a “glut”. On the distinction between “gaps” and “gluts” as it relates to vagueness, see D. Hyde, “From heaps and gaps to heaps of gluts”, \textit{Mind} 106 (1997): 641-660. Unfortunately for Dworkin, however, whether legal indeterminacy is caused by “gaps” or “gluts”, indeterminacy—brought about by either too few or too many interpretive choices—remains. Dworkin needs, but has not yet supplied, an argument for how the putative fact of an overabundance of principles from which to choose renders the law determinate so as to yield a unique correct outcome in every legal case.
The main problem with Dworkin’s theory against legal indeterminacy is that not all hard cases require an interpretation of the correct statutory purpose (for instance) to decide the case. In other words, in some hard cases, there are no “contested concepts” of statutory purpose which require “constructive interpretation” to determine an answer. Take the bicycle in the Bois de Boulogne case again. Dworkin’s “conflict” over interpretations is a straw man. The first interpretation Dworkin offered was that the statute’s purpose was “to protect against the corruption of fumes and noise.” This seems like a legitimate legislative goal. Dworkin’s second proposed interpretation, on the other hand, is not a legitimate legislative goal. Indeed, it seems incoherent. Dworkin’s second potential interpretation was that the statute was meant to “guard against the quiet of the park being disturbed by motion.” How could “the quiet” of a park be disturbed by “motion”? This ridiculous proposal for a statutory purpose would not be considered a “contested” conception of a political principle. There would be no contest. Indeed, any proposed interpretation that didn’t confuse the sense of hearing (“quiet”) with the sense of sight (“motion”) would be a better interpretation. A more realistic example of competing interpretations would employ a more realistic proposal for the second interpretation.245

Assume Dworkin’s first interpretation remains the same: the purpose of the statute prohibiting bicycles in the Bois de Boulogne is to protect against the corruption of fumes and noise. Now alter the second interpretation. The city’s lawyer argues that the

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245 It might be argued that I am being unfair to Dworkin here. “Quiet” may mean “tranquility”, rather than “emitting little noise”. However, Dworkin himself sets up the competing statutory interpretations to highlight “the eccentric ideas about motion” presented in the second interpretation. Something like this eccentric proposal must ground the second interpretation in order for Dworkin to summarily (and rhetorically) conclude: “can there be any doubt that the first offers a better interpretation?” See Dworkin’s “On Gaps in the Law”, p. 90.
defendant should be held culpable for breaking the law because the statutory purpose was
to protect the park’s grounds from undue rutting. On wet ground, the bicycle could
create ruts and should therefore be excluded from the park. Note that the same general
principle of political morality is afforded by each interpretation: the park grounds should
be protected against damage that would unduly interfere with the public’s enjoyment of
the park. There is no conflict of political principles in the amended case. Each
interpretation supports the same principle. The question in the amended case (one which
may truly be called a hard case) is not whether the judge, analyzing one principle, can
decide which interpretation of the statute is better all things considered and, therefore,
can determine the correct outcome. The question is rather, given that the abstract legal
principle supporting the two interpretations is the same, which outcome—for or against
the defendant—is determined.

In such cases we want to know to what extent, to what class of cases, the term
“vehicle” can be extended. Hard cases, on this view, are cases in which values are not
only commensurable, they are the same. In the Bois de Boulogne case, the same value,
protecting against undue deterioration of park grounds, supports both interpretations of
the law. And because the value underlying the propositions is the same, Dworkin’s
strategy of constructive interpretation will not help. When there is no conflict of political
values in hard cases, Dworkin’s interpretive theory cannot determine a “right answer”.

There is another class of cases in which Dworkin’s theory will not provide a
determinate answer. Abstract principles, even those providing an acceptable
“constructive interpretation,” do not decide cases that exhibit a kind of sorites series. In
law, these cases are common. Whenever a criminal is sentenced, the decision to impose a
particular sentence within a prescribed statutory range presents a continuum which principles of political morality cannot determine. The “right answer” to whether a kidnapper should be given a sentence of 52 months versus a sentence of 53 months cannot be determined with respect to abstract political principles. It is difficult to see how, all other things being equal, justice (or “equal respect and concern”, for that matter) could require a 52 month, rather than a 53 month, sentence in a criminal case. Moreover, when a person is awarded damages in a tort case, the value which appropriately compensates her for her injury presents a problematic continuum. An award of $100,000 versus an award of $100,001 cannot be determined with respect to abstract political principles.\(^{246}\)

Sorites problems in criminal and tort law are not limited to considerations of proper punishment or due compensation. Crimes are graded based in part on the culpability the defendant demonstrated in committing the offense. If a person acted recklessly, he will be subject to less punishment than a person (all other things being equal) who acts knowingly. A person who acts knowingly will be subject to less punishment (all other things being equal) than a person who acts purposely. The scale of potential punishment is graduated based in part on the perceived mental state of the criminal actor. The trier-of-fact, including the judge in some cases, is asked to review the defendant’s actions to determine what his mental state was when he committed the offense. Unfortunately, the analytical groupings of recklessly, knowingly, and purposely tend to blend into one another, making distinctions difficult. Is shooting a gun toward a

\(^{246}\) Dworkin sidesteps these problems of degree in criminal and tort cases (see, e.g., *TRS*, p. 71), but does not give an argument as to why his theory of interpretation may rightly exclude such routine examples of judicial decision-making.
school reckless or knowing with respect to the risk of harm one might cause to persons? Does the time of day or year matter (i.e., whether school was in session)? Does it make a difference if the shooter had an altercation with a teacher the day before? All of these factors must be considered in determining the mental state of a criminal defendant. None of them, unfortunately for Dworkin, affords a debate over contested political principles. The problem of determining what happened for purposes of assigning culpability is not resolvable by imputing the best conception of justice or equality. Moreover, as Hart recognized, tort cases conjure sorites series that do not appear to be resolved by determining which of two contested principles provides the “right answer”. Hart’s examples were of judges trying to determine what a “fair rate” was or whether a given course of conduct constituted “due care”.

The sorites problem is not limited to criminal and tort cases. The problem also arises in constitutional law cases. Assume that Dworkin’s preferred political principle of “equal respect and concern” supports the best interpretations of constitutional cases. Assume also that Atkins is a controlling legal precedent and that mentally retarded persons cannot be executed. The next case for adjudication might present the following question: what does it mean, for purposes of Atkins and the constitutional provisions and principles supporting it, to be mentally retarded? If the question can be answered with respect to the IQ scale, then the problem of the continuum is analogous to those of imposing sentences in criminal cases and awarding damages in tort cases. Just as there does not appear to be a “right answer” as to whether a kidnapper should receive a 52 or 53 month sentence, there appears to be no “right answer” as to whether a person with an IQ of 69 or a person with an IQ of 70 is “mentally retarded” for purposes of Atkins. And
even if there were a “right answer” to these questions, there is no reason to believe that
the better of two contested political principles could determine it. Dworkin’s preferred
principle of political morality—equal respect and concern—certainly could not help the
court in drawing a further line on the IQ scale to help define what “mentally retarded”
means. 247

The anticipated response to this particular argument might be that the issue cannot
be decided by appealing to the factor of IQ alone. Mental retardation must be determined
by a constellation of factors, only one of which is IQ. Unfortunately, though, if the
question cannot be answered only with respect to the IQ scale, but must also be
determined with respect to other psychological and sociological factors, then the problem
becomes one not of merely conflicting political principles, but also one of conflicting
psychological and sociological principles. The problem of the sorites series in such cases
becomes the problem of multiple continua: psychological, social, and legal. In such
cases, the propositions of law seem indeterminate, even if one accepts Dworkin’s theory
of interpretation.

Moreover, Dworkin’s example of the bicycle-in-the-Bois-de-Boulogne (above in
Chapter One) may be reconsidered as a case exhibiting a soritical series. The question in
the case is not which legal interpretation supports the best political theory but, rather,
given the same political theory, which interpretation determines how much deterioration
of the park grounds is too much. On this view, the statutory term “vehicle” presents a

247 One political principle—the principle of efficiency—might argue in favor of setting a “bright line” rule
stipulating that an IQ of 70 would be the cut-off for a finding of mental retardation for purposes of the
Atkins ruling. The idea on this proposal would be that society would be better off with a clear, though
arbitrary, cut-off than without one. But Dworkin, as a consistent opponent of utilitarian theories, could not
accept this principle of efficiency as a proper “principle of political morality”.
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kind of continuum with no discernible stopping point. From tractor-trailer through roller skates, there seems to be no logical stopping point, no fulcrum upon which an interpreter could decide one way or the other in favor of a particular interpretation. This is the phenomenon described by Hart—and solidified by Shapiro—as “open texture”. There are some legal questions—those asked in hard (or borderline) cases—that use open-textured terms whose extensions cannot be determinately applied. The phenomenon of open texture goes unaddressed by Dworkin in hard (or borderline) cases that seem to permit a range of potential “right answers”, rather than a “wrong” versus a “right” answer.

Because Dworkin’s theory of constructive interpretation does not apply in cases where political principles do not conflict, it does not provide an adequate description of legal determinacy. Because Dworkin’s theory of constructive interpretation ignores common cases of judicial decision-making, including imposing criminal sentences and awarding tort damages, it is not a good description of adjudication. Moreover, since Dworkin’s theory cannot provide a strategy to determine “right answers” in a wide variety of cases, including not only criminal and tort cases, but also some constitutional law cases, it is not a good prescription for judicial reasoning.

5.2 Dworkin’s argument against legal semantics

Dworkin has consistently held that there is, at least in principle, a right answer to every legal case. Although rival theorists have recently claimed that Dworkin has abandoned his views on the complete determinacy of law (by allegedly softening his
“right answer” thesis), Dworkin has repeatedly stated that he has not. Dworkin has, for better or worse, been the leading determinist in Anglo-American jurisprudence for the past four decades.

It may be helpful to leave the discussion of “right answers” at this point, however, and pick up where Dworkin began in the early 1970s. The notion of “right answers” has been viewed as carrying unwanted moral baggage. Dworkin’s insistence on right answers might appear to be an argument that there is always a morally right answer in every case. And, although this may be the case for Dworkin, the notion of “single (moral) right answers” to legal questions appears to be begging the question against Hart, who maintained that there was a necessary separation between law and morality. The moral claims can be set aside when discussing the issue of legal determinacy, however. Dworkin’s initial attack on “legal positivism” and on Hart in particular, focused not on principle-determined judicial interpretation, but rather on the truth of propositions of law. This move from political (and moral) philosophy to philosophy of language (and logic) may help to establish a more neutral ground for debate between Dworkin and Hart.

Dworkin has consistently stated his claims of determinacy in terms of true and false propositions of law: every proposition of law is either true or false. In Dworkin’s...

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248 Ronald Dworkin, “Pragmatism, Right Answers, and True Banality”, in Pragmatism in Law and Society, eds. Michael Brint and William Weaver (Boulder, CO: Westview Press, Inc., 1991), pp. 359-388. Dworkin claims (in footnote 1, p. 382) that, although some critics, “including Brian Barry and Joseph Raz, suggest that I have changed my mind about the character and importance of the one-right-answer claim...[for] better or for worse, I have not.” Dworkin does claim, however, at p. 365, that the “right answer thesis” is a very weak thesis that could be reduced to “the ordinary opinion that one side had the better argument.” How this exceedingly weak formulation of the “right answer thesis” could be used to support Dworkin’s version of legal determinacy is, unfortunately, left unanswered.

249 Note, however, that the historical debate between Hart and Dworkin over whether some moral principles (of justice or equality, for instance) are, or should be, considered legal principles is not particularly relevant here. Even granting Dworkin’s assertion that principles of political morality help to determine otherwise imprecise propositions of law, there is still plenty of indeterminacy—including the “open texture” of such moral terms as “justice” and “equality”—to go around.
view, propositions of law are never indeterminate; they are never, as he states it, “neither true nor false”. So, even in cases where the outcome does not appear to be determined by settled law, there is a proposition of law that determines the outcome of the case.

Dworkin famously applied the *Riggs* case (as outlined in Chapter One) to demonstrate how a true proposition of law—no person should be permitted to profit from his or her own wrongdoing—determined an apparently unsettled case. The *Riggs* Court had to do some digging into the relevant abstract principles of political morality to discover the proposition of law that would provide the unique correct outcome of the case. But, once discovered, the principle provided a true proposition of law that was used to settle a seemingly hard case.

Dworkin further contends that disagreements about propositions of law (including principles) are arguments about the truth of those propositions.\(^{250}\) The arguments over the truth of legal propositions demonstrate the contested concepts at issue. One lawyer might argue that the correct interpretation of law does not permit assisted suicide.\(^ {251}\) She might point to the fact that no jurisdiction has ever passed a law giving individuals this right. The law, as it currently stands, is clearly against granting the right to assisted suicide to terminally ill patients. Her rival would maintain that the correct interpretation of the law does permit assisted suicide. The rival might argue that, the absence of statutory law aside, the correct interpretation of the right of privacy in the constitution includes a right of self-determination, a right that permits a person, in the face of a terminal medical condition, to decide for herself when to die rather than to suffer for a

\(^{250}\) “Introduction”, p. 5.

prolonged period. And, if the terminally ill patient has the right to decide when to die, then her physician, as her medical advocate, has a corresponding right to assist in her suicide. The rival lawyers, on Dworkin’s account, are arguing over the truth of the proposition of law that individuals have the right to assisted suicide in dire circumstances. One is arguing that it is true; the other is arguing that it is false.

The question for Dworkin then becomes: in virtue of what can propositions of law be true? In answering this question, Dworkin distinguishes what he terms the “realist” view and the “antirealist” view. The realist view, the one that Dworkin espouses, is that truth conditions determine the meaning of propositions. For Dworkin, the truth of a proposition of law is determined via constructive interpretation. The judge, by appealing to both legal history (“fit”) and principles of political morality (“value”), adopts an answer to the issue presented in the case which makes “the object of interpretation”, the law of the community, the best it can be. The proposed theory the judge uses to decide the case both fits and ennobles the text under consideration. So, for Dworkin, the proper interpretation of law, the constructive interpretation rendered by the judge, is the “truth maker” for propositions of law.

Dworkin claims that the opposing “antirealist” view describes disagreements among lawyers in a different and misguided way. Antirealists are not arguing about the truth of propositions of law, Dworkin maintains, but rather are arguing about what gives meaning to the contested terms in those propositions of law. For antirealists, Dworkin contends, law is a semantic (and not an interpretive) concept. Dworkin claims that Hart, for instance, was arguing that the meaning of a “general” term like “vehicle” was not

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253 Id., p. 86.
specified in “hard cases” and that this permitted judges to interstitially legislate in those cases. Because there was not a social convention (as specified by the rule of recognition) to determine the meaning of such terms in borderline cases, the terms had no meaning in borderline cases. So the borderline propositions using those terms could be considered “neither true nor false”.

Dworkin claims that this conclusion of indeterminacy (i.e., borderline cases present propositions of law that are neither true nor false) is unwarranted, because the supporting argument contains a false premise. The meaning of legal terms is not determined by the consensus of legal practitioners (including legislators who enact the law and lawyers who advocate for new interpretations of the law). The meaning of legal terms is determined by the constructive interpretation of judges.

Dworkin argues that the antirealists’ theory of meaning—one in which meaning is based on agreement—has caused them to incorrectly believe that the law is indeterminate. Dworkin’s attack against the antirealist theory of meaning, the so-called “semantic sting”, was announced in his 1986 book, *Law’s Empire*. Dworkin begins by describing the antirealist position—including Hart’s view of the “open texture” of legal terms—as requiring legal indeterminacy when propositions of law are controversial. The antirealists, Dworkin contends,

think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are.\(^{254}\)

Dworkin claims that the antirealist is positing, as the sole test for the truth of propositions of law, agreement on the criteria which make those propositions true. The antirealist

\(^{254}\) *LE*, p. 45.
position is a *semantic* theory, according to Dworkin, because it discounts propositions of law as meaningless if there are no shared criteria for the conditions of their truth. So, on Dworkin’s view, the antirealist must hold that arguments over controversial propositions of law are meaningless.

But, as an empirical matter, Dworkin argues, this conclusion is wrong. In controversial cases, advocates *do* sensibly argue over whether a proposition—say, that mentally retarded criminals may be executed—is true or false. So, for Dworkin, the antirealist theory of meaning—that propositions of law are meaningless, unless there is agreement over the criteria by which they are determined true or false—is embarrassingly out of touch with common legal practice and common knowledge about modern legal systems.

The “semantic sting” argument was met with immediate and widespread criticism. The most forceful criticism was that Dworkin had mischaracterized Hart’s theory of law as requiring a semantic description of law as a “criterial” concept, one that required agreement regarding the correct criteria for that concept’s use. Dworkin has responded to these criticisms most recently in his 2006 book, *Justice in Robes*. Although Dworkin has not withdrawn the “semantic sting” argument, he has, in his latest book, expanded it in hopes of adequately responding to his critics.

Dworkin’s general argument remains the same. The antirealist theory of meaning that supports the claim of legal indeterminacy rests on the mistaken assumption that convergent linguistic practice determines the correct application of concepts. Dworkin

255 Hart himself argued that he never held such a view about the correct use of “law”. See *COL*, pp. 246-247.
256 *Justice in Robes*, p. 11.
considers two kinds of concepts for which convergent linguistic practice is said to
determine the correct application of contested terms: criterial concepts and natural kind
concepts.

People share criterial concepts when they agree on the definition of that concept.
People share the concept of bachelorhood, for instance, when they grasp the notion that a
bachelor is an unmarried male. Criterial concepts may be precise (e.g., triangle) or rough
(e.g., marriage). Disagreement over the correct application of criterial concepts, either
precise or rough, is a disagreement over whether or not the criteria for the concept’s
application hold in a particular case. Hence, a disagreement over whether a particular
man is a bachelor is not (appearances aside) a disagreement over whether an unmarried
male is a bachelor. It is rather a disagreement over whether person X is both a male and
unmarried.

Take Hart’s example of the vehicle in the public park. Dworkin argues that Hart
is attempting to provide an account of what occurs when judges are faced with applying
criterial concepts like “vehicle”. A vehicle, on this view, might be roughly described as
“a wheeled device used to transport humans.” Hart is claiming, according to Dworkin,
that the proposition of law—a bicycle is not a vehicle (for purposes of the statute)—is
neither true nor false, because linguistic practice regarding the correct use of “vehicle”
does not converge so as to determine the application of the criterial concept in the case of
bicycles. Because there is no consensus on the application of “vehicle” to the case of the
bicycle, the proposition of law that a bicycle is a vehicle is indeterminate.
If this were Hart’s claim, then Hart would be in an extremely difficult position. If legal practice establishes by convention conditions of correct use for legal terms, then lawyers in borderline cases are not arguing over the same concepts. In borderline cases, there can be no agreement among lawyers about what the contested concept means. In the vehicle example, one advocate holds a concept of “vehicle” that includes bicycles, while the other advocate holds a concept of “vehicle” that does not include bicycles. The two rival advocates, in arguing about what constitutes a vehicle, are not having a genuine disagreement, because they are not grasping the same concept. The same concept cannot contain as criteria of correct use both “is a bicycle” and “is not a bicycle”. If “vehicle” is a criterial concept, a concept that depends upon agreement among lawyers for its conditions of correct use, then in borderline cases, where there is no consensus, there can be no genuine disagreement among advocates. This description of the practice of law flies in the face of common experience. Lawyers certainly believe that they are arguing over the same concept when they are advocating for their respective interpretations of the law. So, Dworkin concludes, a theory that depends on convergent linguistic practice to determine the correct application of criterial concepts is inadequate as a description of law in modern legal systems.

The obvious (and convincing) argument against Dworkin’s attack on Hart is that Hart did not hold that legal concepts were criterial concepts. In the face of this criticism, Dworkin has enlarged the scope of the “semantic sting” argument to include another kind of shared concept: natural kind concepts. People share some concepts whose instances have a natural physical or biological structure, even when they do not

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257 And, again, there is overwhelming evidence that it was not.
258 COL, p. 244-248.
agree about the criteria they use to identify those instances.\textsuperscript{259} Biologists might classify a tiger, for instance, according to its particular form of DNA. Zoologists might classify a tiger in terms of its species, including comparison and contrast classes. Non-experts might call “tiger” those big striped cats at the zoo, without knowing the correct genetic or zoological classification to which such cats belong. All of these persons, even though they might not be aware of, or agree to, the different means of classifying tigers, share the same concept of tiger-hood. If an expert and a non-expert were trapped in a room with tigers, they could both agree as to how many tigers were in the room, and their agreement would be genuine. The agreement is based, not on the criteria for the correct use of the term “tiger”, but rather on the essential nature of the properties that constitute a tiger, the natural kind that “tiger” refers to. The agreement is based on the intrinsic nature of the objects collected under the concept “tiger,” even if the persons agreeing do not fully grasp what that intrinsic nature is.

Dworkin argues that the move from shared criteria of the conditions of correct use to shared natural kind concepts will not help the antirealist to provide an adequate account of legal practice. Those who analyze legal concepts as natural kind concepts make the same mistake as those who analyze legal concepts as criterial concepts: they assume that all concepts depend on a convergent linguistic practice. To the extent that theorists depend on agreement within the practice about how a given term is to be applied in a particular case, the resulting semantic theory will be descriptively inadequate. The dependence on a convergent linguistic practice is the antirealists’ fatal assumption. As Dworkin puts it, the antirealists’ mistake

\textsuperscript{259} Justice in Robes, p. 10.
lies in the assumption that all concepts depend on a convergent linguistic practice...a practice that marks out the concept’s extension either through shared criteria of application or by attaching the concept to a distinct natural kind. The infection of the semantic sting, I shall now say, is the assumption that all concepts of law...depend on a convergent practice in one of those two ways. The pathology of the semantic sting remains the same. Lawyers who are stung will suppose that an analysis of the concept of law must fit—and only fit—what lawyers mainly agree is law.  

Dworkin’s characterization of natural kind concepts as depending upon the assumption of convergent linguistic practices is misleading. He seems to be arguing that to the extent that we agree on the things that make a tiger a tiger (whatever those may be), the relevant linguistic practices have converged and this convergence triggers the “semantic sting”. The argument seems to be that, although the agreement over the correct use of natural kind concepts is much less pronounced or articulable than the agreement over the correct use of criterial concepts, the dependence on agreement is the fatal flaw. However, given Waismann’s account of “gold” as an open-textured term, Dworkin’s characterization of natural kind concepts alongside criterial concepts is not persuasive. Waismann described the open-textured concept of “gold” as a concept that could never be precisely defined and that would always permit the possibility of indeterminate application based on unforeseen (and unforeseeable) circumstances. The “agreement” among users of the term “gold” was restricted to achieving practical purposes under current conditions. If the purposes or the conditions of use changed, then the application of the term would change. So, for Waismann, the future application of

261 See discussion in Chapter One, at 18-21, above. Although Waismann did not write specifically about “natural kind” terms as they are currently described, he almost certainly would not have granted that such “kinds” could be determined by reality as explained by the criteria discovered via scientific investigation. Waismann’s argument was that, even for scientific terms, like "gold", the possibility of indeterminacy was always present, even given our best scientific testing.
open-textured terms did not depend on the agreement of competent language users. Indeed, the future application of open-textured terms assumed widespread disagreement about how the term would be applied to unforeseen cases.

In spite of the potential problem with classifying criterial and natural kind concepts together, Dworkin’s most recent writing has broadened his semantic sting argument to include both. His argument has been amended in another, more subtle, way as well. In 1986, the semantic sting argument was an argument against an antirealist theory of the meaning of contested concepts. Dworkin’s description of the faulty assumptions of semantic theories was that disagreement in practice caused an inability to determine the meaning of contested propositions of law. The incorrect description of legal practice reduced legal disputes to a dispute over ambiguous terms, terms that had different meanings in different contexts. Dworkin imagines a dispute between the two lawyers arguing the Riggs case:

If two lawyers are actually following different rules in using the word “law,” using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is. Earl and Gray must mean different things when they claim or deny that the law permits murderers to inherit: Earl means that his grounds for law are or are not satisfied, and Gray has in mind his own grounds, not Earl’s. So the two judges are not really disagreeing about anything when one denies and the other asserts this proposition. They are only talking past one another. Their arguments are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks. Worse still, even when lawyers appear to agree about what the law is, their agreement turns out to be fake as well, as if the two people I just imagined thought they agreed that there are many banks in North America.\(^\text{262}\)

\(^{262}\) *LE*, pp. 43-44.
Dworkin’s ambiguity-based argument against antirealists was expanded to include natural kind concepts, but was also transformed into a vagueness-based argument against anti-realists. As was discussed in Chapters Two and Three, vagueness analysis assumes that the predicate has an understood meaning, a meaning determined by conventional practice and non-linguistic features of the case. The predicate’s extension to borderline cases is not settled. Twenty years later, Dworkin surreptitiously reframes the “semantic sting” argument in terms of vagueness, rather than in terms of ambiguity. He no longer casts the “semantic sting” argument in terms of indeterminacy based on the disputed meaning of contested concepts, but rather on the disputed extension of contested concepts. The 2006 quotation above\textsuperscript{263} claims that the sting lies in the assumption that all concepts depend on a convergent linguistic “practice that marks out the concept’s extension”.

The distinction between a concept’s meaning (or intension) and its extension (or application) is widely recognized by philosophers of language. The meaning or intension of an expression consists of the things signified by the expression. The intension of a predicate expression is typically taken to be a concept. The extension of a predicate expression is typically taken to be the set of objects that fall under that concept.\textsuperscript{264} So, in the “forced march” example of the predicate “bald,” the intension (or meaning) of “bald” is the concept of bald, a concept that is determined by linguistic practice and rules of competent language use. Anyone who is a competent speaker of English knows what

\textsuperscript{263} Located in the text on p. 185.
\textsuperscript{264} Drawing a distinction between the “content” of a concept and that concept’s “application” is Jules Coleman’s preferred method of responding to Dworkin’s “semantic sting” argument. See Coleman’s \textit{The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory} (Oxford: Oxford University Press, 2001), pp. 115-119.
“bald” means based on the practices and rules of English usage. The extension of the predicate “bald”, on the other hand, is all of the objects—all of the men’s heads—that fall under that well-understood concept. Extending the predicate “bald” to borderline cases was the problem evidenced by the “forced march” example in the vagueness literature. At no time were the “judges” in the “forced march” example asked to determine the meaning of predicate “bald” in borderline cases. The meaning of the term, even in borderline cases, was taken as given.

Due to the distinction between meaning and extension, Dworkin’s two versions of the semantic sting are quite different. Unfortunately for Dworkin, neither version of the argument is fatal to an account of legal indeterminacy that rests on a description of the application of open-textured terms in borderline cases. The first sting misses the mark primarily because antirealists have never taken the position that contested words in borderline cases have different meanings. Hart, in particular, was not arguing that the meaning of “vehicle” was indeterminate in borderline cases. Hart’s “open texture” thesis was the very different claim that, at some point, legal rules will prove indeterminate because “their application is in question”.265 The second sting, based on the disagreement regarding extensions (or applications), rather than meanings, is harmless if it is directed against notions of legal indeterminacy based on contextual vagueness theories. Legal contextualism, for instance, does not depend on convergent legal practices to determine the extension of legal predicates in borderline cases. Indeed, the account assumes that nothing close to consensus will exist in borderline cases of open-textured terms. Since legal contextualism does not assume that the extension of legal

265 COL, p. 128.
concepts depends on a convergent linguistic practice, it is immune to the second sting’s allegedly fatal pathology. Dworkin’s rejection of so-called “semantic theories” of law on the strength of the “semantic sting” argument is unpersuasive against a contextualist account of indeterminacy.

5.3 Dworkin’s argument against legal vagueness

Because legal contextualism is based on Shapiro’s theory of vagueness, Dworkin might be tempted to reject it outright. In “Is There Really No Right Answer in Hard Cases?” Dworkin argued that descriptions of legal indeterminacy based on vagueness are groundless. The vagueness of legal language will not guarantee that there will be no right answer in cases requesting an interpretation of a statute employing vague language, Dworkin argued, because the practice of law has sufficient resources to compensate for the vagueness of canonical legal language. The argument from vagueness makes the following mistaken assumption, according to Dworkin:

that if a legislature enacts a statute, the effect of that statute on the law is fixed by nothing but the abstract meaning of words it has used, so that if these words are vague, it must follow that the impact of the statute on the law must be in some way indeterminate. But that assumption is plainly wrong, because a lawyer’s tests for fixing the impact of a statute on the law may include canons of statutory interpretation or construction which determine what force a vague word must be taken to have on a particular occasion, or at least make its force depend upon further questions that in principle have a right answer.

268 AMP, pp. 128-129.
In Dworkin’s view, since there are canons of statutory construction and other principles that determine the meanings of vague words in statutes, the law has no gaps that can be attributed to vagueness.

The obvious objection to Dworkin’s argument is that the gap-filling canons and principles might also employ vague language. In the Atkins case, the term “mentally retarded” is vague; it sets up a soritical series based on IQ (as well as other factors). So, the proposition of law (i.e., the holding) in Atkins—that mentally retarded criminals cannot be executed for their crimes—is vague. There is a constitutional principle that controls in this case. The execution of mentally retarded criminals is impermissible because, under the Eighth Amendment to the U.S. Constitution, it is “cruel and unusual”. Unfortunately, what counts as “cruel” and what counts as “unusual” may also be vague matters. We would then need to look to principles to help us determine what “cruel” and “unusual” meant. We might review appellate case law in the federal courts to see how courts have decided the issue of “cruel and unusual” punishment with respect to capital cases. But it is not clear that, even if we found sufficiently similar cases as a comparison class, we could ever eliminate borderline cases in the original statute. Vagueness would seem to follow us up at every level of review.

Dworkin anticipates this apparent objection to his argument against legal-indeterminacy-as-vagueness. He reframes the objection in terms of the truth conditions.

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269 Again, at this stage of his theorizing, eight years before the publication of Law’s Empire, Dworkin is focusing on the meanings of statutory terms, rather than their extensions.

270 It might be tempting to describe the vagueness that follows a proposition of law through every stage of appellate review, through every higher court, as “higher order vagueness” (HOV). Technically, this would not be correct, however. HOV is exhibited in predicates such as “borderline-bald” (as distinguished from “bald” and “non-bald”) or “borderline-vehicle” (as distinguished from “vehicle” and “non-vehicle”). Dworkin argues against HOV in the case of propositions of law in AMP; see footnotes 267 through 270, below, and the accompanying text.
of a vague statute that holds invalid any “sacrilegious” contracts. The alleged truth value of the proposition “A sacrilegious contract is invalid” is indeterminate; it is neither true nor false.\(^{271}\) Tom is a man who has recently signed a contract to work every Sunday. The ensuing court case presents the issue of whether Tom is in breach of the contract when he fails to show up for work two Sundays in a row. In one sense, it seems clear that Tom has violated the terms of his contract and should therefore be liable in damages. On the other hand, however, it seems that there might not be a right answer to the question presented in Tom’s Case because the statute that would invalidate his contract contains a vague term, “sacrilegious”. Since the vagueness of the contractual term renders its application to Tom’s case indeterminate, the proposition that Tom’s contract is sacrilegious (and therefore invalid) is neither true nor false. Dworkin offers a suggestion—akin to a canon of statutory interpretation—that might help in determining Tom’s case. Assume that in Tom’s jurisdiction there is a canon, Instruction (A), requiring courts to hold that if a proposition of law is not true, then it is false. In Tom’s case, if the proposition that sacrilegious contracts are invalid is not true, then it must be treated under the law as false.

The meta-level objection from the vagueness theorist now arises. Just as it may be indeterminate whether a particular contract is sacrilegious, it may be indeterminate whether the proposition that a particular contract is sacrilegious is true. Dworkin provides a picture of the objection, a model that divides the legal proposition regarding sacrilegious contracts into distinct analytical groups:

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\(^{271}\) “Neither true nor false” is Dworkin’s characterization of the indeterminists’ position. See Endicott, *Vagueness in Law*, especially Chapter Four, and the following discussion for the view that this formulation of indeterminacy, although until recently widespread, is incorrect.
Suppose all contracts are arranged on a spectrum from those clearly sacrilegious to those clearly not so. There will be a group at one end as to which the proposition, “This contract is sacrilegious,” will be true and another group, around the middle, as to which that proposition will be neither true nor false. But there are still others (roughly one-third the way along) as to which it is unclear whether that proposition is true or neither-true-nor-false. So instructions like (A) cannot eliminate indeterminacy, though they may reduce it.\textsuperscript{272}

To make the picture complete, Dworkin might also add (although he did not add) that, at the opposite end of the spectrum, there will be a group of contracts for which the proposition, “This contract is sacrilegious” is false, and another group (roughly one-third the way back toward the middle) for which it is unclear whether that proposition is false or neither false-nor-true.

Dworkin argues that this model does not help to sustain the indeterminist’s objection. The model illustrates three forms of sentences using vague terms that may be distinguished: 1) those that are true, 2) those that are false, and 3) those that are neither true nor false (containing the three groups of sentences “around the middle” of the model). These constitute, as Dworkin characterizes them, “three exhaustive truth values—true, false, and neither-true-nor-false”.\textsuperscript{273} Instruction (A), a principle of legislation that requires non-true propositions to be treated as false, would, in effect, combine the second and third forms of sentences. Propositions that are neither true nor false would be treated as being false. Instruction (A) removes the indeterminacy instigated by the usage of a vague term in the statute. The question of whether Tom’s sacrilegious contract is invalid would permit a single right answer. Either “Tom’s contract is sacrilegious” is true or “Tom’s contract is sacrilegious” is false. The further

\textsuperscript{272} AMP, p. 129. See Keefe’s Theories of Vagueness, pp. 31-36, for a complimentary discussion of the phenomenon of so-called “higher order vagueness”.

\textsuperscript{273} AMP, p. 130.
objection that one of these verdicts—say “‘Tom’s contract is sacrilegious’ is true”—is neither true nor false is unfounded because the original proposed indeterminate scheme, a scheme that was based on three exhaustive truth values, will not allow for that possibility:

If “x is Φ” is true, then “‘x is Φ’ is true” is true; but if “x is Φ” is false or neither true nor false, then “‘x is Φ’ is true” is false. In none of the three possible cases is “‘x is Φ’ is true” itself neither true nor false. 274

Since the initial argument assumed bivalence between “is true” and “is not true”, the meta-objection must continue that assumption. 275 The objector attempts to reintroduce vagueness at the meta-level of analysis by claiming that “is true” is vague. This is inappropriate, Dworkin contends, because if “is true” is not vague at the first level of analysis (i.e., propositions are either true or false), then “is true” is not vague at a higher level of analysis (i.e., propositions about the truth or falsity of other propositions are either true or false).

Dworkin makes three related and faulty assumptions in his argument against legal-indeterminacy-as-vagueness. The first assumption is that claims of vagueness imply a three-category analysis of propositions as being 1) true, 2) false, or 3) neither true nor false. The second assumption is that the appropriate way to characterize indeterminate truth values of borderline statements is as being “neither true nor false”. The third assumption is that borderline statements are to be framed as propositions that must be either asserted (as being true) or denied (as being false). Each of these mistaken assumptions will be taken up in turn.

274 AMP, p. 130. It is unclear why Dworkin believes that bivalence must be assumed at every (“higher”) level of analysis, once it is asserted in analyzing the initial proposition. His attempt to clarify his position is offered as an extensive footnote at AMP, p. 405, n. 3.

275 AMP, p. 405. n.3.
Dworkin’s characterization of vagueness in terms of three distinct categories of truth conditions is understandable. Describing vagueness in terms of “borderline cases” has probably caused confusion. The term “borderline” suggests the existence of a border, a line marking the divide between two contrasting groups. One might imagine as a spatial example the border running between two countries. On one side of the U.S.-Mexico border, for instance, there is the United States, and on the other side is Mexico. Although there may be no precise depiction of the borderline between the two countries (at least until a complete separation barrier is built), at some geographical distance away (possibly steps) from the borderline, the distinction between the two countries is apparent. This separates the land at the border into not two sections—the U.S. and Mexico, but three: Mexico, the United States, and a neutral zone (occupied by border patrols, perhaps) that is neither Mexico nor the United States.

But vagueness theorists do not describe borderline cases in terms of borders. The problem with vague terms is that the construction of borders between groups yields only more border-drawings. Take, for instance, a color spectrum from red to orange. On one end of the spectrum, the light is clearly red. On the other it is clearly orange. It might be tempting to say that, as one approaches the middle of the spectrum between the two extremes, there is a borderline color—red-orange—that separates the two extremes of red and orange. This would mean that, just like the example of a border between two countries, there would be three categories of color evinced by the series: red, orange, and red-orange. Of course, no such categorization of shades of color could be made. Each one of the borders drawn would admit of further borders. Between red and red-orange, there might be “borderline red-orange”. Between orange and red-orange, there might be
“borderline orange-red”. There is no way to draw boundaries in sorites examples. The borderline cases cannot be contained by even fuzzy boundaries. For this reason, many theorists on vagueness augment their accounts of vagueness to include a description of vague terms as being boundariless.276

If, in borderline cases, there are no boundaries by which to categorize the appropriate extensions of vague terms, then statements employing vague terms cannot be divided into a fixed number of truth functional categories based on boundaries. The borderline “area” containing vague statements is also vague. It cannot be adequately captured by a model assuming that, for instance, midway along a continuum from true to false lies a category of propositions that are neither-true-nor-false. Dworkin’s initial assumption that vagueness theorists must base their arguments for indeterminacy on a three-category distinction among propositions is therefore unwarranted. His analysis of vagueness should be revised to acknowledge current (and more comprehensive) accounts of the phenomenon.

Dworkin should also consider revising his second assumption—that borderline statements are best characterized as being “neither true nor false”. Dworkin’s reason for describing borderline statements in this way presupposes a particular view in the philosophy of language known as compositionality. Unfortunately for Dworkin, however, compositionality may not hold for a description of vague statements.

Compositionality is the view that the meaning of a complex expression is fully determined by its structure (including its logical operators) and the meaning of its

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constituents. Take the complex expression “Φ v Ψ”. Assume that Φ is true and that Ψ is false. The “or” operator, v, requires that if one of the constituents is true, then the complex expression is true. So, because one of the constituents, Φ, is true, the complex expression “Φ v Ψ” is true. Here compositionality holds.

Dworkin’s presupposition of compositionality drives his argument against the vague objector above. Assign “‘Tom’s contract is invalid is true’” to Φ and “‘Tom’s contract is invalid’ is false” to Ψ. The objector wants to say, according to Dworkin, that the complex expression “Φ v Ψ” is neither true nor false. Unfortunately, Dworkin argues, that option is not open to her. Because the “or” operator, v, is compositional and because the meanings of both the constituents, Φ and Ψ, are determined (Φ is true, and Ψ is false, including all “neither true nor false” propositions as directed by Instruction (A), is false), the complex expression “Φ v Ψ” is fully determined. For Dworkin, the expression is determinately true.277

Some logical operators may not be compositional, however. Take the conclusion of Dworkin’s argument above that the complex expression “Φ v Ψ” is “determinately true”. Contextual vagueness theorists contend that such a statement is not correct when one or both of the constituent propositions are borderline statements. For these theorists, “determinately” is a distinct logical operator that may be used when analyzing vague expressions and that should be treated differently than “true” for purposes of analyzing vague expressions. The idea is akin to Lewis’s suggestion that, in some circumstances, a proposition may be “true enough” for purposes of a conversation at a particular stage, but

277 Other theorists might attack Dworkin’s assumption of bivalence. Of course, this would be an appropriate mode of attack. However, because many vagueness theorists also assert bivalence, the ground for rejecting Dworkin’s account on that basis alone may not be as firm.
not “true enough” at a later stage. As a conversation evolves, the standards of precision may increase, so that, for instance, “Kansas is flat” is true (enough) in a conversation comparing the topography of the United States, but is not true (enough) in a conversation using pancakes or desktops as a comparison class.

Following McGee and McLaughlin (1994), Shapiro defines “determinately true” as follows:

In general when “a sentence is [determinately] true, our thoughts and practice in using the language have established truth conditions for the sentence”, at least in the actual world, and the presumably “non-linguistic facts have determined that these conditions are met”. 278

So, in the case of the “forced march” series of 2000 men, it is determinately true that Ving Rhames is bald, and it is determinately true that Howard Stern is not bald. Our paradigm cases are determinately true or determinately false because our thoughts and practice in language use have established the truth conditions for propositions about baldness and the head-states of these two gentlemen have determined that those conditions are met.

Questions arise in those cases in the “middle” of the continuum between man #1 and man #2000. The question regarding, say, man #924, is whether he is bald. However, the case of man #924 is (we will say) a borderline case. In the borderline area, it is unclear whether man #924 is either bald or not bald. The case of man #924 is unsettled. The question, as stated by contextual vagueness theorists, is whether it is determinately true or determinately false that man #924 is bald. Indeed, some contextualist theorists, including Shapiro, define borderline cases as those cases in which expressions are neither determinately true nor determinately false. Shapiro (citing McGee and McLaughlin)

278 Shapiro, *Vagueness in Context*, p. 6.
defines borderline cases in terms of the determinately operator as follows: an object \(a\) is a \textit{borderline case} of a predicate \(F\) if \(a\) is not determinately an \(F\), nor is \(a\) determinately a non-\(F\).\(^{279}\)

This description of borderline cases is quite different from the one offered by Dworkin because it is not based on a presupposition of compositionality. The “determinately” operator, in particular, need not be compositional. Indeed, if Shapiro’s definition of borderline case is correct, the determinately operator will not be compositional. If a borderline case is described as being “unsettled”, as being neither determinately \(F\) nor determinately \textit{non-}\(F\), then the determinately operator is not compositional, at least in borderline cases. Shapiro describes the situation as follows:

It may be that a sentence of the form \(\Phi \vee \Psi\) is determinately true even if it is not the case that \(\Phi\) is determinately true, nor is it the case that \(\Psi\) is determinately true. More notably, it may be that a sentence \(\Phi\) fails to be determinately true without \(\neg\Phi\) being determinately true. This, I believe is the source of vagueness.\(^{280}\)

Somewhere in the “forced march” series (presumably somewhere in the middle), there will be (at least) one borderline case \(a\) of a vague predicate \(P\). The borderline case can be designated \(Pa_j\), a case lying between the two extremes of the sorites series, \(Pa_1\) and \(Pa_{2000}\). \(Pa_1\), the case of Ving Rhames, is a clear case of baldness. It is determinately true that Ving Rhames is bald. \(Pa_{2000}\), the case of Howard Stern, is a clear case of non-baldness. It is determinately true that Howard Stern is not bald. \(Pa_j\) is a borderline case, not a clear case, of baldness. \(Pa_j\) is neither determinately true nor determinately false. Although our established practices of language use have established truth conditions for \(Pa_j\), the non-linguistic facts have not determined that those conditions have been met:

\(^{279}\) Shapiro, \textit{Vagueness in Context}, p. 7.
\(^{280}\) \textit{Id.}
As far as the language has evolved to date, Pa₁ is still open. The sentence is “unsettled”. Recall that the negation operator need not commute with the determinately operator. A sentence can fail to be determinate without its negation being determinate.²⁸¹

Dworkin’s presupposition of compositionality compelled him to assert bivalence in all cases, even borderline cases. Dworkin consistently maintained that a sentence, even a borderline sentence, cannot fail to be true if its negation is false. This contention forced Dworkin to analyze hard (borderline) cases in the same way he analyzed easy (clear) cases. Dworkin realized, however, that Hart’s account of indeterminacy might prevail if Hart could demonstrate that compositionality did not hold in hard cases—how, in other words, in hard cases being “not true” did not entail being “false”. Dworkin admitted that Hart’s “claim would be sound, as I just conceded, in an enterprise having truth conditions which permitted the assertion or denial of a proposition only in an easy case. Then, in a hard case, a proposition of law could neither be asserted nor denied as false. Its falsity would not follow from the failure of truth”.²⁸²

Shapiro’s account of borderline cases provides the counter “enterprise” Dworkin was suggesting in the late-1970s. In borderline cases, propositions of law are neither determinately true nor determinately false. Because “the negation operator need not commute with the determinately operator”, a borderline statement’s falsity would not follow from its failure of truth. Shapiro’s proposal supports the Hartian claim that, in borderline cases, there is no determinate correct answer to the legal question asked by demonstrating that there are no determinate truth conditions for legal propositions in borderline cases. Moreover, the proposal illustrates how legal propositions in easy cases

²⁸¹ Shapiro, Vagueness in Context, p. 9.
²⁸² TRS, p. 289.
may be analyzed differently than legal propositions in borderline cases. Clear (settled, 
easy) cases have determinate right answers; but borderline (unsettled, hard) cases do not.

Dworkin’s claim that borderline statements were best characterized in terms of 
assertions that those statements were “neither true nor false” resulted from his mistaken 
reliance on the principle of compositionality. Borderline statements are not to be asserted 
as being neither true nor false. Borderline cases are, rather, neither determinately true nor 
determinately false. And, since the determinately operator need not be compositional, 
Dworkin’s presupposition—at least with respect to borderline cases—is unwarranted. 
For that reason, borderline statements should be characterized as being “neither 
determinately true nor determinately false”, rather than being “neither true nor false”. 283

Propositions of law, like all propositions, are to be asserted when they are true and 
denied when they are false. Dworkin contended that, in both clear and borderline cases, 
lawyers were asserting propositions of law. Even if those propositions of law contained 
vague terms (i.e., in borderline cases), the lawyers were asserting those propositions as 
true in hopes that the judge would find in favor of their side. Indeed, it would be difficult 
to describe legal advocacy in any other way, Dworkin claimed, than as lawyers asserting 
the truth of a particular legal proposition. 284

Take the Atkins case again. One side is asserting the truth of the proposition of 
law that executing mentally retarded criminals for capital offenses is proper, Tk. The 
other side is asserting that the claim is not true, ~Tk. Dworkin sees this forced bivalence

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283 This description of the indeterminate truth value is akin to Endicott’s assertion, pace Lyons, that it is 
“unclear whether” propositions in hard cases are true or false. See Endicott, Vagueness in Law, pp. 58-59.
284 See, for example, TRS, p. 290: “Controversial propositions of law either assert or deny the existence of 
a legal right or some other legal relation. The controversy is precisely over whether that assertion or denial 
is correct.”
as something more than a systemic convenience. In Dworkin’s view one of these interpretations provides a better justification for the State’s coercive legal authority than the other; therefore, there is a right answer to the question. One of these propositions, $T_k$ or $\sim T_k$, is true. The assertion that the complex assertion that it is “neither true nor false” that $T_k$ or $\sim T_k$, is the assertion legal theorists, like Hart (says Dworkin), make to inappropriately distinguish borderline cases from clear cases.

Hart’s position is tenable, however, because borderline statements are not like other propositions. Typically, true propositions are to be asserted and false propositions are to be denied. In clear cases, this may be so. One can assert that Howard Stern is not bald and that Ving Rhames is bald. However, in borderline cases, statements are neither determinately true nor determinately false. It is unclear whether statements in borderline (“unsettled”) cases are true or false. So asserting or denying propositions about those cases would be unwarranted.

Fortunately, one need not assert borderline statements; one need only articulate them. In a highly influential article, Jamie Tappenden argued that, especially when dealing with vague predicates, there is a distinction to be made between asserting a statement and articulating a statement. Asserting a statement would imply that the utterer believed the statement to be true. The purpose of asserting something is to convince the hearer of its truth. For instance, if in the “forced march” series judging baldness, one evaluator convinces the other that a particular man is bald, then the convincing utterance is an assertion. The first evaluator is trying to convince the second that a particular man is bald. Articulating a statement, on the other hand, would imply merely that the utterer

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believed the statement was not false. Say that the two evaluators had already agreed that man #924 was bald, but that they then could not agree whether man #925 was bald. If one evaluator convinces the other that man #925 is not bald, then they have a problem. The principle of tolerance requires them to judge man #924 as not-bald. But they have just judged man #924 as being bald. The claim, at this stage of the conversation, that man #924 is not-bald is an assertion. On the other hand, the evaluator who articulates that man #924 is not-bald is claiming only that the proposition “Man #924 is not-bald” is not false. The evaluator is not asserting that “Man #924 is not-bald” is true. Indeed, he could not make such a claim in the face of his prior assertion that man #924 is bald. In borderline cases, then, utterers of vague expressions should be taken not as asserting propositions, but rather as articulating them. The evaluators are not asserting the truth of the borderline statements they consider. They are articulating the cases in order to correct mistakes or to remove certain cases from the conversational record.

The distinction between assertion and articulation seems particularly apt in a legal context. Legal advocates in hard (borderline) cases are not asserting as true the propositions of law they bring before the court. Legal advocates are articulating the propositions of law, claiming only that their preferred legal proposition is not false, in order to correct the “gaps” apparent in legislation or precedent. Take one of Dworkin’s most recent examples: Sorenson’s case.

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286 The evaluator’s utterance that man #924 is not-bald is an assertion because his purpose for making the claim is to get his colleague to retract the prior judgment about man #924.
287 Shapiro offers a similar picture but couches articulation in terms of not judging borderline cases to avoid contradiction.
288 *Justice in Robes*, pp. 7-9 and 143-145.
Mrs. Sorenson took a drug, inventum, for rheumatoid arthritis, but the drug seriously injured her heart. Mrs. Sorenson took many forms of inventum, including generic forms, several of which were made by different manufacturers. There was no way Ms. Sorenson could determine which manufacturers had made the form of inventum that had caused her heart so much damage, much less the percentage each one of those manufacturers—if indeed there were more than one—contributed to her injuries. The law in her jurisdiction did not permit recovery from any manufacturer unless Ms. Sorenson could prove that the particular company injured her. Since this task would be impossible, the drug companies argued that Ms. Sorenson should be allowed no recovery at all. Ms. Sorenson’s attorneys argued that, since each one of the companies distributed an inherently dangerous drug, they should each be held liable for Ms. Sorenson’s damages according to their share of the inventum market in that jurisdiction.

Mrs. Sorenson’s lawyers prevailed, and “market share” liability became a viable method for recovery in tort. Notice, however, that Mrs. Sorenson’s lawyers could not have been asserting the truth of the proposition that Mrs. Sorenson should be compensated according to market share liability principles. The principles did not exist prior to the court decision. On the other hand, the lawyers could be seen as articulating the proposition that Mrs. Sorenson should be compensated according to the injuring companies’ share of the market for distributing a dangerous drug. Mrs. Sorenson’s lawyers were arguing that it was at least not false that Mrs. Sorenson was entitled to such recovery. Their argument was made to convince the court that justice would not be

289 Although Dworkin invented the Sorenson case, the “market share” doctrine of tort liability has been recognized. See, for example, Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 162 Cal. Rptr. 132 (Cal. 1980), cert. denied 449 U.S. 912 (1980), passim.
served if Mrs. Sorenson were not permitted to recover in that fashion. So, to correct a mistake, to fill a legal “gap” in a hard case, the lawyers articulated a proposition of law which the court accepted.290

Since, in hard (borderline) cases, lawyers can be seen as articulating, rather than asserting, propositions of law, Dworkin’s insistence on the truth or falsity of such propositions in those cases is misguided. Articulations of legal propositions are not assertions of their truth. Moreover, no contradiction is implied by the assertion of propositions in clear cases and the articulation of similar propositions in borderline cases. No contradiction results from asserting, for instance, that Ving Rhames is bald and that Howard Stern is not bald, and articulating that Kelsey Grammar is neither determinately bald nor determinately non-bald. The distinction between assertion and articulation provides yet another means of discriminating between easy (clear) cases and hard (borderline) cases. Since this is the strategy Dworkin conceded that a rival theory must take in order to adequately ground what he called an “antirealist theory of meaning”, and since legal contextualism provides it, legal contextualism should be considered as a viable alternative to the account of legal determinacy advocated by Dworkin.

290 The articulation of a proposition of law (that may be later accepted by the court and, then, placed on the “record” of the law) provides a further analogy to Shapiro’s contextualist description of vagueness in conversation when an evaluator proposes that a statement be placed on the record.
CHAPTER 6
THE LINGERING PROBLEM OF CONTEXTUAL AMBIGUITY

The hallmark of contextualist accounts of vagueness is the characterization of truth as truth-in-a-context.\textsuperscript{291} Raffman held that truth was truth-in-a-psychological-context. Raffman argued that truth could be assigned to propositions employing vague terms as long as the assignment was made with respect to a given psychological state. A shift in psychological context permitted a shift in one’s evaluation of whether a vague predicate could be extended to the new context, the new borderline case. The subject’s psychological change in observing a color spectrum would permit a change in judgment from, say, red to not-red. Shapiro argued for a social, not a psychological, shift in context. For Shapiro, a shift in the conversational context between two competent speakers of a natural language permitted a shift in one’s evaluation of whether extending a vague predicate in a borderline case was appropriate. If two conversationalists judged man #924 (in a soritical series of 2000 men) to be bald, then, given that conversational score (and the principle of tolerance), they were required to either judge man #925 as being bald or not to judge man #925 at all. Shapiro’s notion of truth was truth-in-a-conversational-context, truth given a conversational score.

\textsuperscript{291} As contrasted with, for instance, the supervaluationist notion of truth as truth-in-all-(legitimate)-contexts or the epistemicist notion of truth as knowable-truth.
Legal contextualism applies Shapiro’s account of vagueness, and its corresponding account of truth, to legal language. A proposition of law is true in a certain context. The context is the legal conversational score—the database of the law in a particular jurisdiction. The decisions of judges in the jurisdiction add to the conversational score and increase the standards of precision for using the legal terms determined by those cases. If a judge decides, for instance, that a bicycle is a vehicle for purposes of the “public park” statute, then, for purposes of future legal conversations (including future cases applying the same statute), a bicycle is a vehicle that cannot be ridden in the public park. The rules for accommodating other speakers of legal language in that jurisdiction change with the changed standards of precision for using “vehicle”. Competent users of the legal language will use “vehicle”, at least in the context of this particular statute, as including bicycles, as well as all the other vehicles that have been included by precedent.

The lingering problem for contextualists is that it is unclear which speakers of a language are to be included in the “relevant community of competent speakers”. As Shapiro argued, in borderline cases, this group of speakers determines the extension of vague predicates. Vague predicates in borderline cases are judgment-dependent, dependent on the judgments of competent users to determine how (i.e., to which cases) they are to be applied. If the community of competent language users determines the extension of vague predicates (and not, for instance, the meanings of these predicates, as suggested by semantic theorists), then specifying who belongs in the community of competent language users seems to be a crucial part of a contextualist theory.
Unfortunately, there may be no non-circular way of determining who belongs in the class of “competent speakers”. Remember Raffman’s Thesis (B): an item lies in a given category if and only if the relevant competent subjects would judge it to lie in that category. In Raffman’s view, Thesis (B) is true in borderline cases because competent judges in those cases determine their category memberships. This leaves open the question as to which is the chicken and which is the egg, according to Shapiro. Is a speaker competent because she judges a particular man to be bald, or is a particular man bald because the speaker who attributed baldness to him was a competent judge?

Shapiro suggests a way out of this theoretical roundabout:

We have to specify, or postulate, a group $S$ of speakers, who we assume to be the competent ones, and all judgements are relative to this group $S$. The idea is that, strictly speaking, it does not make sense to say that a speaker is competent…but only that she has this status relative to $S$…A different choice of the background class of speakers would result in different extensions for “competent”, but that is to be expected.

Speakers of a given language are to be deemed competent relative to an assumed class of competent speakers. In the case of the predicate “bald”, the relevant competent speakers would, for the most part, be ordinary speakers of English. We understand the paradigm cases of baldness (Ving Rhames) and non-baldness (Howard Stern) and can make distinctions between men’s head-states based on the number and arrangement of hair in relation to those paradigm cases, at least until we get to borderline cases. In the borderline area, then, we, as competent speakers, can determine what counts as baldness. As competent speakers, we are permitted to decide the borderline cases either way.

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292 Raffman, “Vagueness without Paradox, p. 70.
293 Shapiro, *Vagueness in Context*, p. 145.
Problems may arise, however, when distinct classes of (assumed) competent speakers are asked to determine the extensions of vague predicates by employing the same conversational record. Take the case of baldness again. Assume $S$ is the class of ordinary speakers of English, the class we just assumed appropriate to determine the extension of “bald” in borderline cases. Assume also that there are two other classes, potentially subsets of Class $S$: Class $S'$ is the class of all English-speaking Rogaine (and other hair-growth product) marketers, and Class $S''$ is the class of all English-speaking shampoo advertisers.

In this version of a sorites series, a Rogaine marketer and a shampoo advertiser are asked to determine which of #2000 men are bald. Given the relativity of the competency classes involved, we might predict that there will be a wider range of borderline cases than in an interest-neutral conversational context (i.e., in Class $S$). The Rogaine distributor may be more likely than others—based on his desire to sell more hair-growth product—to call men in the borderline cases bald. The shampoo advertiser, on the other hand, may be more likely than others—based on his desire to sell more shampoo—to call men in the borderline cases non-bald. The Rogaine distributor’s competence is determined by the class of competent hair-growth salesman; his tendency to call more men “bald” would be deemed competent relative to Class $S'$. Similarly, the shampoo advertiser’s tendency to see more men as non-bald would be adjudged competent relative to Class $S''$, the class of shampoo advertisers. If competent judgment is tied to a class of speakers deemed competent and the class is determined in some other
way than “all speakers of the language”, then such cases are sure to arise. What counts as the proper use of the vague term, “bald”, in the English language will be quite different depending on the class of competent subjects one deems relevant.

The problem illustrated here is that different communities of competent speakers may determine the correct use of vague words in the same natural language in different ways. Baldness-for-a-Rogaine-salesman and baldness-for-a-shampoo-marketer may be very different concepts requiring very different extensions. This does not mean that contextualist accounts of vagueness are compromised given the bare existence of different communities of competent users. The moral is that the contextualist about vagueness may need to take into account the relevant “competency contexts” as well as the appropriate “conversational context”.

The notion of different “competency contexts,” however, suggests a charge of ambiguity. It seems that different communities of speakers might mean different things by their use of “bald”, for instance. Although this phenomenon may rightly be called ambiguity, it is not the ambiguity related to the assignment of a term in relation to an external class. The claim is not that bald-for-a-man and bald-for-a-tire employ two different senses of the word “bald”. That type of ambiguity is easy to avoid. Once the external comparison classes are revealed, the ambiguity is resolved. Once we know that we are speaking of tires instead of men, for instance, the ambiguity about what “bald” means is readily resolved.

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294 The latter assignment would be problematic because it would make competence equivalent to infallibility.

295 Otherwise known as “lexical ambiguity”.

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The ambiguity involved in the above case—the case of the Rogaine and shampoo salesmen—is with reference to the same comparison class. Each community of competent users is employing the term “bald” to determine cases of human males. The ambiguity involved in this case exists because judges with different perspectives, different interests, and different reasons for attributing baldness are being asked to evaluate whether certain men are bald or not. The ambiguity is caused not by differing comparison classes but, rather by differing personal perspectives.

The ambiguity caused by differing personal perspectives may contribute to the persistence—and increase the difficulty of settling—borderline cases. In short, this kind of ambiguity may be another source, along with vagueness, of linguistic (as well as legal) indeterminacy. The proposed effect on language of the ambiguity caused by differing perspectives is not original. Indeed, Friedrich Waismann, the originator of the open-texture premise of language, described the phenomenon as the “systematic ambiguity” of language. Waismann’s description of systematic ambiguity—as set forth below in section 6.1—helps to clarify contextualist claims by providing a distinct, but related, source of linguistic indeterminacy. In section 6.2, Waismann’s theory will be shown to support legal contextualism as a model upon which to distinguish different aspects of law in terms of the different legal communities that engage the legal system. The resulting account of law may also help to establish a research program—set forth below in section 6.3—for better defining the distinct contexts of legal communities so as to better determine the truth or falsity of legal propositions in borderline cases.

296 Because Shapiro was concerned only with the contours of contextual vagueness, and not with the implications of (what might be called) contextual ambiguity, he does not consider this form of ambiguity—or of Waismann’s treatment of it—in his book.
6.1 Language strata

In his article “Language Strata”, Waismann reveals what he takes to be a common problem in early 20th century philosophy: theorists attempted to solve philosophical problems by reducing sets of troublesome statements to sets of assumed unproblematic statements in an allegedly more basic language. Waismann provides three examples. Logical atomism unsuccessfully attempted to reduce all sentences in a language to a set of “atomic propositions” from which all statements in the language could be derived. Phenomenalism unsuccessfully attempted to reduce material object statements into sense-data statements. Behaviorism unsuccessfully attempted to reduce psychological statements to a long set of counterfactual sentences about how the person being analyzed would behave under certain circumstances. These three famous philosophical schools—atomism, phenomenalism, and behaviorism—were unsuccessful, according to Waismann, because each committed the same methodological error: each tried to translate a problematic domain of statements into a single basic language.

Waismann argues that the reductionist program is fatally flawed because it fails to account for the distinct language domains in which different kinds of statements are made. Statements about material objects, for instance, are not the same kinds of statements as statements about sense-data. “That is a cat” is a different kind of statement

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298 Waismann cites the “early” Wittgenstein as an example of the “atomic” view. See, for example, Ludwig Wittgenstein, Tractatus Logico-Philosophicus (New York: Routledge, 2001), originally published in 1921.
from “That is ‘a bundle of sense-data tied together and with the edges trimmed off’”.\textsuperscript{301}

A statement about a cat is a statement about a thing, namely, a cat. As a thing, a cat resists being reduced to other (allegedly more basic) levels of discourse. A statement about bundles of sense-data is not a statement about a cat (about a thing); it is a statement about sense-data. So, for Waismann, object statements and sense-data statements belong in two distinct language domains. He calls these distinct domains “language strata”:

All this talk about material objects and sense-data is a talk about two language strata, about their relation, about the logic of this relationship. The problem arises along the plane where the two strata make contact, so to speak. The difficulty is to understand in precisely which way a material object statement is related to a sense-datum statement; that is, what sort of relations hold between members of different strata; and that is a problem of logic.\textsuperscript{302}

Specifying the relations between language strata is a problem for logic because each language stratum has its own logic. If each stratum employed the same logic, then there would be no problem posed by the relations between and among the language strata. Indeed, the common mistake made by atomism, phenomenalism, and behaviorism was in assuming that the same logic could be applied in distinct language strata. The theorists assumed that they could draw the same sorts of inferences from statements in the “reducible” language as from statements in the “reduced to” language. Waismann describes the situation in terms of behaviorism:

The whole thing rests on a naivete—that there is one basic language (suitable for describing the behaviour of rats) into which everything must be translated. The motto ‘Only rats, no men!’ overlooks the fact that psychological statements belong to a stratum of their own, with a logic different from that of the language in which you say how a person looks, how he smiles, in short what he has in common with a rat.\textsuperscript{303}

\textsuperscript{301} “Language Strata”, p. 245.
\textsuperscript{302} \textit{Id.}
\textsuperscript{303} “Language Strata”, p. 246.
The question remains, however, why behaviorists would so resolutely contend that they could use the same terms and the same logic in describing human behavior as they could use in describing rat behavior. Waismann claims that the behaviorists failed to account for the distinct language strata—of statements about human behavior and statements about rat behavior—because of an ambiguity in the term “behavior”. In one sense, “behavior” means a series of movements caused by some physiological stimuli. Human behavior and rat behavior can be described in the same terms if “behavior” is taken in this “behavior-as-movement” sense. The smell of food will cause both a hungry rat and a hungry person to follow it to its source. In this first sense, behavior is taken to be determined by causes. However, “behavior” can also be taken to be determined by motives or reasons. In this second sense, “behavior” is seen as an action, a willed movement determined, at least in part, by the actor’s reasons for moving. In this second sense, then, human behavior cannot be described in terms of rat behavior, in terms of a series of movements caused by physiological stimuli. To the extent that humans are motivated to act by reasons, statements about human behavior exist in a different language stratum than statements about rat behavior. To the extent that behaviorists inappropriately conflated the two senses of “behavior” (describing behavior-as-action solely in terms of behavior-as-movement), the behaviorist program was undermined.

Waismann calls the ambiguity evidenced when a term—like “behavior”—is used (oftentimes unknowingly) in distinct language strata “systematic ambiguity”. Systematic ambiguity is a kind of ambiguity, because the same term has a different meaning depending on which language stratum it is being used in. So, for example, the meaning of “behavior” as determined by causes is not the same as the meaning of “behavior” as
determined by *reasons*. This type of ambiguity is systematic because the ambiguity is only realized within practices that employ distinct language strata simultaneously. The program of behaviorism inappropriately employed the distinct language strata of action-statements and movement-statements and, thereby, encouraged the systematic ambiguity of behavior-as-action and behavior-as-movement.

Systematic ambiguity is not restricted to philosophical theories like behaviorism, phenomenalism, and atomism. Consider another field of inquiry: music. “Melody” is a term commonly used in music. But “melody” exhibits systematic ambiguity. “Melody” can mean a sequence of tones, a sequence of air vibrations. “Melody” can also mean a succession of transcribed musical notes. Finally, “melody” can mean a kind of message formally communicated from the composer to instrumentalists. Depending on the language stratum in which one converses (within the field or practice of music) “melody” takes on a different meaning:

we may say that each stratum has a logic of its own and that this logic determines the meaning of certain basic terms. In some respects this is obvious. Whether a melody is a sequence of air-vibrations, or a succession of musical notes, or a message of the composer, depends entirely on the way you describe it.\(^{304}\)

Because the meaning of a systematically ambiguous term is determined by the way “you” describe it, Waismann’s account of language strata is grounded in the language speaker’s personal perspective. The systematic ambiguity of “melody”, for instance, is easy to dispel if you know who is providing the musical description and what purpose the description serves. A listener might typically describe a melody as a sequence of tones (air vibrations). An instrumentalist might typically describe a melody

\(^{304}\) *Id.*, p. 247.
as a succession of musical notes. A composer might typically describe a melody as a message communicated to transcribers and instrumentalists. The three different perspectives provided by the listener, the instrumentalist, and the composer suggest three distinct language strata for each of their uses of “melody”. The distinct logic of each stratum determines the meaning of “melody” for each of these persons’ (quite different) descriptions.

General theories, then, should begin not with the subject matter to be described (e.g., “material object statements” or “sense-data statements) but, rather, with the perspectives—including the interests and goals—of the persons who are offering descriptions of the subject matter. Differing perspectives imply different ways of describing something. Moreover, for Waismann, differing ways of describing something suggest different domains of discourse that contain those differing descriptions. The theorist is cautioned not to make what amounts to a “category mistake” by describing something the same way in two distinct domains of discourse. To guard against this theoretical tendency, Waismann proposes distinct language strata within which different kinds of descriptions may be made. Each of the language strata has its own logic—its own rules of inference, its own conditions for truth—by which meanings of propositions within that strata are determined. The harmful effects of systematic ambiguity are only realized to the extent that theorists fail to recognize a strata shift in the discussion over a given term. The meaning of a term changes when the domain of discourse—the language stratum—changes because each stratum has its own logic.

Waismann’s account of systematic ambiguity coheres with the contextualist account of vagueness offered by Shapiro. Shapiro argues (using Waismann’s premise of
language’s open texture) that “true” means “true in a conversational context”. If the conversational context changes, then the standards of precision and the rules of accommodation for extending the predicate “true” also change. As Lewis put it, what counts as “true enough” in some contexts does not count as “true enough” in other contexts. Waismann’s account of systematic ambiguity makes a similar claim. If the domain of discourse—the language stratum—changes to another language stratum, then the logic changes. The meaning of a particular term in one stratum may not be the same as the meaning of the same term in another stratum. For Waismann, then, a change in context (strata) provides a change in meaning (for the term being described). Both Shapiro and Waismann propose a change in logical standards based on a change in “conversational” context. The difference between the two accounts is one of focus. Shapiro’s open-texture account of vagueness describes the effect of a shift in conversation on appropriately extending a borderline predicate. Waismann’s account of systematic ambiguity describes the effect of a shift in language strata on appropriately determining the meaning of a term based on the varying perspectives of the persons who use it.

6.2 Legal strata

Chapters One through Five focused on a description of legal indeterminacy as a kind of vagueness, in particular as a kind of contextual vagueness. This section makes the further claim that the failure among legal theorists to recognize and deal with the systematic ambiguity of certain legal terms—including “law”—has created much of the dispute between theoretical rivals. In short, legal theorists who have attempted to provide
a general theory of law have reduced what they mean by “law” to a preferred legal perspective. The hope is that, by delimiting the different legal strata and the distinct perspectives of the different communities who engage the legal system, the systematic ambiguity will be revealed and may then be properly addressed.  

Before describing what systematic ambiguity in the law is, it might be helpful to explain what it is not. First, systematic ambiguity in the practice of law is not the ambiguity that might exist because different meanings have been assigned to particular terms by legislatures and courts in different jurisdictions. For instance, it might be that a bicycle is permitted in a public park in Columbus, Ohio, but is not permitted in a public park in Cincinnati, Ohio. The two different jurisdictions may have determined that the same ordinance—no vehicles are permitted in a public park—encompasses different types of vehicles. Or, put another way, the two jurisdictions may have separately decided that “vehicle” means something different in their jurisdiction than it means in other jurisdictions. Although this difference in meaning might be considered a form of ambiguity, it is an easy form of ambiguity to dispense with. It is akin to the ambiguity permitted by varying external comparison classes. The ambiguity of “bald” is not troublesome if baldness is being considered with respect to different comparison classes, such as bald-for-a-tire and bald-for-a-man. Similarly, the ambiguity of “vehicle” in the above case can be dealt with by acknowledging that two different kinds of vehicles are being discussed: vehicles-in-Cincinnati and vehicles-in-Columbus. Ambiguity based on jurisdictional distinctions of the meanings of statutory terms is not systematic ambiguity.

305 A similar approach was taken to delimit the distinctive roles to be taken by law professors engaged in legal scholarship in Christopher D. Stone, “From a Language Perspective”, 90 Yale Law Journal 1149 (1981).
A newly proposed method of accounting for the difference in legal theorizing—a method that exploits the differences between doctrinal decisions in developing a general theory of law—also should not be considered as an example of the systematic ambiguity of “law”. Ronald Dworkin, in his Introduction to *Justice in Robes* (2006), accounts for the difference between his theory of law and others in terms of how each of the theorists (himself included) construct legal theories. Dworkin argues that the difference between his account of law and his rivals’ accounts of law is primarily one of preference. The differences are based on the formal choices one makes in constructing one’s theory of law. Dworkin provides an artificial framework by which the choices both he and his rivals have made in constructing their respective theories can be elucidated. The framework employs four stages of legal theorizing: 1) the semantic stage, 2) the jurisprudential stage, 3) the doctrinal stage, and 4) the adjudicative stage.

In the semantic stage, the legal theorist decides what kind of concept law is. One can decide, according to Dworkin that law is a criterial concept, a natural kind concept, or an interpretive concept. If law is a criterial concept, then the theorist must specify what kinds of criteria specify the truth functions for propositions of law and what kinds of rules or practices determine the criteria of correct use. If law is a natural kind concept, then the theorist must provide an account of the structure law exhibits so as to render a “natural kind” analysis appropriate. If law is an interpretive concept, then the theorist must provide an account of legal practice that demonstrates the interpretive attitude required of citizens and officials in determining the truth or falsity of propositions of law.

At the second, jurisprudential, stage, the theorist provides a description of the practice of law that best justifies her choice in the initial, semantic, stage. Since Dworkin
thinks law is an interpretive concept, he provides an account of law in which judges are given the authority to determine the truth of propositions of law (i.e., to determine the meanings of contested terms) by adverting to the principles of political morality that best justify not only the “correct” outcome in the case, but also the practice of law as a whole. Since Hart (at least on Dworkin’s theory), presumed that law was a criterial concept, Hart provided an account of law that justified the social agreements of persons to be guided by rules of obligation to the extent that a particular systemic pedigree for the enactment of those rules was followed.

In the next stage—the doctrinal stage—the theorist provides an account of the conditions under which propositions of law are to be determined true. Again, since Dworkin believes law is an interpretive concept, he provides an account of the truth conditions of law that relies on a judge’s interpretation of contested principles underlying disputed cases. Hart’s account of the truth conditions of propositions of law must rely on an inadequate (according to Dworkin, but adequately addressed by applying Shapiro’s account of contextual vagueness above in chapters 4 and 5) antirealist theory of meaning which permits some propositions of law to be considered “neither true nor false”.

In the adjudicative stage, the theorist is charged with answering the question of how political officials should enforce the law. For Dworkin, judges are the officials appointed to enforce the law, including the principles of political morality behind the law. Judges should enforce the law by providing the interpretation of legal provisions that best “fits” and “ennobles” the text before them. Since Hart’s theory relies on a criterial concept of law (argues Dworkin), a concept that does not permit moral principles to count as legal criteria, Hart must say that a judge should enforce the law by applying it to
the case at hand with no (or at least very little) consideration of the principles of political morality. Judges, on Hart’s view, would be overstepping the bounds of discretion if they engaged in the political and moral considerations that, for instance, legislators are permitted to do.

For Dworkin, then, the doctrinal distinctions witnessed between legal theorists (or, at least, between himself and Hart) surface at the outset, in the first stage of legal theorizing. The initial choice of concept-type impacts all further theorizing. This, for Dworkin, is the explanation for why there are rival theories of law: the contested conceptions of law and of modern legal systems are based on the theorists’ preferred way of describing the concept of law.

At first blush, this description of theoretical rivalry seems to exemplify Waismann’s description of systematic ambiguity. A theorist takes a particular perspective of the concept of law, and all further theorizing about law is based on that perspective. For Hart, law is a criterial concept. For Dworkin, law is an interpretive concept. The two theorists seem to have set up two distinct language strata in which the term “law” has two different meanings. The two different strata have two different logics; neither will permit inferences regarding “law” in the other. So it is not surprising that Hart and Dworkin had such a long-running debate over the so-called “concept of law”. The two have been talking past each other, employing different descriptions of the concept of law in their theories and in their arguments with one another.

On closer examination, however, the debate Dworkin describes does not exhibit systematic ambiguity over “law” but, rather, is another example of ambiguity based on the failure to fix the external comparison class. Just as bald-for-a-tire is not the same
kind of baldness as bald-for-a-head, law-as-an-interpretive-concept is not the same kind of law as law-as-a-criterial concept. The two theorists are, on Dworkin’s view, debating the best way to describe (and the best theory to explain) the concept of law.

The systematic ambiguity of “law”, on the other hand, might be illustrated by considering a particular case from a variety of perspectives. The different perspectives would suggest distinct language strata within which the meaning assigned to “law” by the different persons could be determined. This would be similar to Waismann’s case regarding the term “melody”. The systematic ambiguity of “melody” was demonstrated by approaching its description from the viewpoints of listeners, instrumentalists, and composers. The viewpoints of those engaging the legal system—not just theorists who construct general accounts of the practice, but also the persons who make, use, enforce, apply, and adjudicate the law—must be considered if the distinct strata of law are to be revealed.

The United States Supreme Court recently accepted for review two cases (Parents Involved in Community Schools v. Seattle School District and Meredith v. Jefferson County Board of Education) that might require a re-examination of the Court’s current “affirmative action” doctrine. The two cases involve groups of white children who were not accepted into a neighborhood school in a public school system that used race as a factor for admission.

In one case, a Seattle parents group brought an action against its city school district, claiming that it was unfair for the district to use race as an admission criterion. A Washington State appellate court upheld the admission policy because race was only used

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306 U.S. Supreme Court Docket No. 05-908.
307 U.S. Supreme Court Docket No. 05-915.
as one of several “tiebreaker” criteria to admit students into particular schools. Race was only considered in case students’ admissions “scores” were tied. Then not only race, but also other factors, including whether a sibling also attended the school or whether a student’s residence was situated closer to the school building, were considered. The appellate court upheld the school policy on the further ground that, as recently as 1993, the United States Supreme Court had, in *Grutter v. Bollinger*,\(^{308}\) upheld the admissions policies of the University of Michigan permitting the use of race as a factor in admitting someone to a school if race were used as a weighting factor, and not as a criterion for admission, and if the school’s compelling interest to achieve racial diversity were met by using race as a factor.

The Kentucky case involves a 1974 federal court order to end segregation in public schools. After the federal decree ended in 2001, the Jefferson County school district instituted an admissions policy that included guidelines based on race. The intent of the school district was to continue the policy of desegregation the federal decree had initiated. A mother, Crystal Meredith, claimed her son was denied entrance to a local school under the Jefferson county policy because he was white. A federal appellate court later determined that the school district’s admissions policy was constitutional because it did not require that a racial quota be met and that other factors beside race were considered in admitting students to neighborhood schools.

The recently accepted cases challenge the Court’s prior line of rulings (from *Bakke*\(^{309}\) to *Grutter*) with a straightforward articulation of a proposition of law: public school admission policies that employ race as a factor (even if the factor is used as a

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“non-explicit” or “weighting” factor) undermine the Court’s reason for establishing the “affirmative action” doctrine. If race is a factor that may be used to admit a minority child but that may not be used to admit a non-minority child, then race is being used (or at least could be used) as a factor to deny access to a public school education to non-minority children. Denying a child the right to a public school education due to her race is an unconstitutional deprivation of due process and is the precise reason the Court instituted the “affirmative action” policy. For this reason, the parents of non-minority children are asking the Court to remove race as a criterion (either as an explicit or a “weighting” factor) upon which admission to a public school can be based.

Many interests are represented by these two cases. The Washington and Kentucky legislators and school boards are interested in meeting their continuing obligation to provide a fair and efficient public school education for all students living in their jurisdictions. In promoting racial diversity through tailored admissions criteria, the legislators are seeking to give equal access to public schools within current legal constraints (including “affirmative action” policies). Based on the upcoming United States Supreme Court ruling, the legislators may have to change their school admission policies.

Parents of school children have very different interests. Parents like Ms. Meredith want to give their children the best public school education possible. Although parental interest in quality education is constrained by current legal standards in their jurisdiction, parents do not typically take a broad view of educational standards. Parents do not view the law like legislators do. Unless the parents form a citizens’ action group (like the one
that was formed in Seattle) or take some other concerted legal action, parental interest
over access to public school education typically ends with their own child’s admission.

School administrators are charged with enforcing state school law and city school
ordinances. Administrators therefore have a vested interest in enforcing the laws the
legislators enact. Administrators must also try to meet the expectations of the parents and
school children in their districts. Because the administrators must meet the dual goal of
enforcing legal requirements while maintaining some level of quality educational
programming, the administrators have an overwhelming interest in a well-run and orderly
public school system.

Local courts are charged with providing consistency in the enactment and
enforcement of laws governing public school education. The trial courts have an interest
in the consistent application of school law throughout their jurisdictions. The interest for
local courts is broader than that of local administrators. Local courts make rulings in
hopes of making all school systems in their jurisdiction function efficiently, subject to
current legal constraints.

Appellate courts, including the United States Supreme Court, must decide
whether current legal constraints are sufficient to forward the over-riding political
objectives served by the legal provisions in question. In the two cases just accepted by
the Supreme Court, the political goal to be served is racial diversity in public schools
under an “affirmative action” policy. The Court must decide whether non-quota
admission criteria continue to serve as legitimate means toward achieving the compelling
purpose of diversity, whether other means should be chosen, or whether racial diversity
should continue to be recognized as a compelling governmental purpose. Whereas
legislators, parents, school administrators, and local courts are constrained by current legal rules and standards, the appellate courts must, at times, determine what the appropriate contours of those constraints are and, in landmark cases,\(^{310}\) determine whether those constraints should be rejected or replaced.

Each of these groups of interested parties—legislators, parents, school administrators, trial courts, and appellate courts—constitutes a distinct community of speakers of a common language: the law. According to legal contextualism (as adopting the mechanism put forward by Lewis and Shapiro), the law is the ongoing conversational record—the database—of codified statutes, relevant precedents, and related principles regarding public school admissions. The law provides the “current legal constraints” alluded to above. With each State or school board enactment, a proposition of law is added to the ongoing record. The record may be changed when a parent successfully appeals a school board ruling regarding the school’s failure to admit her child on considerations of race. The record is changed when school administrators enforce (or fail to enforce) the law as it applies to children in their own schools. The record is officially amended when trial courts render decisions that change certain schools’ admissions criteria. Finally, the record is changed when appellate courts invalidate school policies that are not consistent with stated public goals. Each of these communities uses (the record of) the law as a basis for stating its own position. And each statement has the potential of altering (the record of) the law.

The claims of each community are of a very different character, however. Because each community has its own unique set of interests to be served by engaging the

\(^{310}\) Or what Dworkin calls “pivotal” cases. See *LE*, pp. 41-45.
legal system and by attempting to amend (the record of) the law, each community develops standards of precision and rules of accommodation necessary to communicate competently. Although the members of each community appeal to the same legal conversational record in making arguments to serve their own respective interests, competence in “language use” is determined differently for the different communities. A person need not be a competent legislator, for instance, in order to argue that her child should be granted admission to a local school. In other words, the standards for competently making the law are not the standards for competently using the law to argue for a child’s admission to a neighborhood school. One must be very careful not to assume that the “relevant competent community” of legal “speakers” is homogenous. As Shapiro stated, “the question of who are ‘we’ looms large”.

Waismann’s notion of language strata becomes particularly relevant here. Waismann argued that, because different groups of people have different perspectives from which to view a particular thing, each group will have a different, and completely acceptable, way of describing that thing. A composer views a melody as a communication and, therefore, describes it as a message. An instrumentalist views a melody as a succession of notes and describes it in those terms. A physicist might describe a melody in terms of air vibrations and sound waves. For Waismann, the manner in which our manifold description of some thing assumes distinct language strata can be stated quite generally. Things (like melodies) present several distinct aspects. The different aspects of things permit different perspectives from which we may view them. Persons viewing a particular thing from their own unique perspectives may

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describe the same thing in different ways. In other words, the different descriptions that can be made suggest different language strata within which those descriptions are made.

In law, the different strata are evidenced by the different communities of persons who engage the law to serve their respective interests. There are distinct legal strata, different domains of legal discourse, in which members of the different communities, arguing from their unique perspectives, articulate propositions of law. The lesson to be learned from Waismann is that these propositions of law must be analyzed within the distinct legal strata in which they are offered.

Legislators make the law. As the group of persons elected to enact law, legislators are obligated to debate the policies and procedures surrounding the putative law so that its implementation is efficient and its goals are met. Legislators are required to follow a set of rigid guidelines in enacting our laws and are held accountable for introducing laws based on improper considerations of personal, financial, political, or other gain. Legislators are also constrained by constitutional principles, especially those laid down by the 1st Amendment. Legislators are not permitted to enact laws that abridge freedoms of speech, press, association, or religious practice. The law is the result of following this official procedure of “enactment”, a general communication formally debated and announced in order to guide the conduct of citizens and officials.

Citizens use the law in deciding what course of action to take under certain circumstances. Once a law is properly enacted, the law purports to guide the conduct of citizens. The guidance may come in the form of a carrot-and-stick; for instance, the tax credit of $2000 for buying a hybrid fuel automobile in 2005. The guidance may come in the form of a stick only; for instance, the proscription against crimes that typically
includes a term of incarceration for violations. These legal incentives and disincentives work to guide the practical reasoning of citizens in determining what to do in particular situations. The authoritative mark placed on legal pronouncements gives them additional weight in their deliberations. For instance, a state government employee may feel that, after eight years of service, she deserves to own reams of paper, boxes of computer discs, and other workplace supplies. However, she knows that a conviction for theft as a governmental employee not only is a felony (irrespective of the value stolen), but also excludes her for life from any future government employment. This knowledge may keep her from loading up her briefcase with those items. The legal pronouncement, and its threat of punishment, deters her, even if the likelihood of her getting caught is slight. For the citizen, then, the law is used primarily as a guide, or an authoritative input, to practical reason.

Officials, including police officers and administrative agencies and personnel (like school administrators) enforce the law. For officials, the law is a means to an end of social order. It is difficult to think of a “law enforcement officer” as anything other than a person who has the authority to control the conduct of individual citizens so as to maintain order. A traffic cop is authorized to pull over drivers at random sobriety checkpoints—without any suspicion at all that any of the drivers is, in fact, driving drunk—in order to ensure that drivers in that area are generally protected against actual drunk drivers. The executive branch of the federal government is currently authorized to track the non-criminal conduct of individual citizens (including what library books one checks out and what telephone calls one makes) in order to promote international security interests against terrorists.
Law enforcement officers are constrained in achieving the purpose of social control, however, by several targeted constitutional prohibitions in criminal cases. Police officers are obligated not to unreasonably search a suspect’s house (under the 4th Amendment) and not to coerce a confession from a suspect (under the 5th Amendment). Prosecutors, as law enforcement officers, also have special duties with respect to criminal suspects. Prosecutors must bring a case to trial within a designated period in order to uphold the defendant’s right to a “speedy trial” (under the 6th Amendment). Moreover, while incarcerated awaiting trial, jailers must provide their inmates with basic health care and sustenance. These constitutional provisions speak only to law enforcement officers in their dealings with criminal suspects. Whereas legislators were constrained by the 1st Amendment to the Constitution in enacting the law, law enforcement officers are constrained in their conduct toward citizens by the 4th, 5th, and 6th Amendments to the Constitution.

Juries and trial courts apply the law to the facts of a particular case. From this perspective, the law is a template upon which to order history and to categorize responsibility. Jurors and trial courts are given the responsibility of deciding, based on presented evidence, what happened in a given case. Did the defendant run the red light, thereby causing the accident? Did the police officer use excessive force in firing his gun to stop the fleeing suspect? Jurors and trial courts are known as “triers of fact” because their responsibility in the legal system is limited to deciding what the facts are. Juries, in particular, are not permitted to discuss what the pertinent law is or should be. They must take the law as it is given to them and decide whether a defendant’s actions constitute illegal conduct. The jury’s decision of what facts are relevant in deciding whether a
defendant is legally responsible is constrained, however, by the evidence that is presented
at trial by opposing counsel in an adversary system. For this reason, the Constitution
(under the 6th Amendment) provides rules and principles for establishing the right to
counsel and the right to have a jury decide one’s criminal guilt or civil liability.

Since the law employs open-textured language that must be specified on a case-
by-case basis in a manner that best serves the articulated political purposes of the society,
appellate courts determine the law. Appellate court judges do not decide the facts; that is
left to juries and judges in lower courts. Appellate court judges determine whether the
law was appropriately applied in the case by the lower court. By determining whether the
law was appropriately applied in the lower courts, the appellate courts may also be
determining the truth conditions of certain propositions of law (e.g., whether a
proscription against “vehicles” includes a proscription against bicycles).

In determining whether the law was correctly applied, appellate court judges are
providing two social services simultaneously. The courts are rendering a decision about
the law so as 1) to resolve the dispute between the parties and 2) to resolve similar
disputes in future cases. For example, when Roe v. Wade312 announced that the right to
privacy inherent in the Constitution’s 14th Amendment protected Roe’s right to terminate
her pregnancy during the first trimester without government intrusion, the decision
decided the case both for Ms. Roe and all future pregnant women. Decisions in future
cases might restrict the wide sweep of the Roe decision by, for instance, glossing the
“trimester analysis” as a medical (and not a legal) description for “viability” of the

312 410 U.S. 113 (1973).
fetus,\textsuperscript{313} by withholding the right to abort from those seeking government funding to do so,\textsuperscript{314} or by predicking the right on a 24-hour waiting period in which information regarding other alternatives can be given.\textsuperscript{315} Judges are guided in making these decisions by legal rules about following precedent, about the proper role of the judiciary in a three-branched system of government, and about the proper means of establishing legislative intent and of statutory construction. Admittedly, other factors, such as societal unrest, personal ambition, and political expediency might enter into appellate decisions. But the institutional reason for having legal rules in this adjudicative stage of law is to guide the actions of appellate court judges and to steer them away from acting on other (societal, personal, or political) reasons. In short, the appellate court’s determination of legal issues is constrained not only by statutory language and precedent, but also by well-recognized institutional rules of proper judicial decision-making.

Law can be described in terms of the related, but different, activities of 1) making law, 2) using law, 3) enforcing law, 4) applying law, and 5) determining law. Each of these activities is engaged in by different communities within a modern legal system—legislators, citizens, law enforcement officers, triers-of-fact, and appellate courts, respectively. These different communities view the law from appreciably different perspectives. The different communities engage the law in order to better meet their own distinct and widely varied purposes and interests. On the legal contextualist view, then, the law would have at least these five distinct strata. Because the law exhibits at least five distinct strata, there are at least five different meanings ascribable to the term “law”.

\textsuperscript{314} Harris v. McRae, 448 U.S. 297 (1980).
Legislators, those who have been given the authority to enact laws for the good of the governed, might describe the law as Aquinas did: “Law is nothing other than a certain ordinance of reason for the common good, promulgated by him who has care of the community”. Legislators have the duty of caring for their community by promulgating reasoned ordinances for the common good.

Citizens, however, might not describe law in those terms and would almost certainly not consider the “the common good” as a primary focus of a legal system. Citizens employ law to solve everyday problems, such as how to get one’s child admitted to a neighborhood school or how to get out of a bad lease with a difficult landlord. Citizens might regard law as Hart did, as a collection of duty-imposing, power-conferring rules designed to guide the conduct of citizens in their everyday affairs and of officials in their dealings with citizens.

A greater purpose for the law, beyond the effective guidance of conduct within a society, is probably beyond the ken of the citizen’s perspective. In particular, the goal of social order may be outside the typical interests of individual citizens. Law enforcers, on the other hand, might view the law as Austin did, as a general authoritative command by a political sovereign backed by the threat of a sanction if it is disobeyed. Since police officers and administrative officials are charged with instituting the political processes

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316 *Summa Theologica*, Question 90, Articles 1-4.
317 Oliver Wendell Holmes, Jr., in “The Path of the Law”, 10 *Harvard Law Review* 457 (1897), argued that the practice of law should be perceived practically, as if through the eyes of the “bad man”, a person who wishes only to escape, or at least to ameliorate, liability for something he’s done.
318 *COL*, p. 240.
(detention, arrest, and prosecution) that result in sanctions for law violations, law enforcement officers might wish to support such a “command theory” view of the law.

Juries and trial judges cannot view law as an order backed by threats, in the Austinian tradition, however. As triers-of-fact, juries, for instance, are guided only by the law with respect to deciding what happened in a particular legal case so as to decide what level of liability (including criminal culpability) is appropriate. The law governing juries is not backed with a sanction. The law for triers-of-fact might be better described as a convention of “coordination”, obligating the members of the jury to perform their legal functions in a reasonable and efficient manner.\(^ {320} \)

The view of law taken by appellate court judges is unique. Although appellate court judges are constrained by rules of proper judicial decision-making and the canons of statutory construction, precedent, and other legal standards, the appellate court judges are, to a limited extent, permitted to overturn precedent and change the law. Landmark decisions that ended school desegregation, decriminalized abortion, and halted the execution of mentally retarded criminals are examples of cases in which the United States Supreme Court reversed their own decisions in order to better promote broader principles of justice and fairness. On this view of appellate judging, then, the law might best be described by Dworkin’s notion of “constructive interpretation”.

Each community, then, might describe the law from its perspective in entirely different terms. Following Waismann’s counsel, we should not be tempted to reduce all the ascribed meanings for “law” offered by these distinct legal communities into one

\(^ {320} \) See, for example, John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), especially pp. 276-281, for a description of law as a system of rules designed to resolve a community’s “co-ordination problems”.
preferred description of law. We must avoid any attempt to describe the several distinct legal strata in terms of one preferred stratum. Waismann warned against this unwarranted reductionist policy by proffering examples in the philosophy of language. The problem with phenomenalism, for instance, was that it improperly reduced all material object statements to an allegedly basic language of sense-data statements. Phenomenalists failed to realize that material object statements and sense-data statements were statements being made in distinct language strata each having its own logic. Similarly, legal theorists who fail to realize that not all propositions of law can be reduced to the statements of a preferred legal stratum will provide legal theories that are as distorted as the linguistic theories offered by phenomenalism. Describing the law in the same terms for all, or even some, of these different legal communities would be a theoretical mistake.

The famous Hart-Dworkin debate is thus best viewed as a clash of improperly reductionist theories. Hart and Dworkin were not, contrary to Dworkin’s assertion, arguing over contested conceptions of law. Hart and Dworkin were arguing that the appropriate purposes to be served by a modern legal system are the ones contained in their preferred legal strata.

Hart maintained that the overriding purpose to be served by law was to guide the conduct of citizens and officials. His theory therefore focused on the rules communicated by the legislature and by precedent to guide persons within the jurisdiction. Legislators and judges (as interstitial legislators) enacted laws to guide conduct. The citizens and officials to whom those rules of authoritative guidance were given were obligated to follow the rules. Because Hart’s theory focused primarily on the legal strata of making
law and *using* law, his theory described the role of appellate judges as either interstitial legislators who make the law or as official who use the law to guide their own (official) conduct. Hart could not account for the creative realm of appellate judging, a realm in which judges may be given discretion to avoid the application of clearly codified law in order to foster a principle of political morality.\(^{321}\)

In response to Hart’s failure to completely capture the role of appellate judges in constructing new interpretations of law, Dworkin characterized the role of the appellate court as essentially creative. The legal enterprise is interpretive, requiring appellate courts to create the best interpretation of the law consistent with current legal constraints, but with the purpose of ennobling the law as it applies to the particular case and as a justification of the society’s coercive authority. Dworkin therefore makes Hart’s reductionist mistake with respect to the different stratum of *determining* the law (i.e., the stratum “occupied” by appellate courts). Dworkin’s general theory of law distorts what law is for legislators and citizens. His somewhat nebulous direction for officials to “take an interpretive attitude” toward law or for citizens to recognize the “protestant attitude” they should take in “imagining” their society’s political principles\(^{322}\) are beside the point. Law is not an interpretive enterprise for legislators and citizens. No interpretation of law is required for legislators to enact a legal provision.\(^{323}\) As long as the proper form for enacting a provision is followed, the result is the law.\(^{324}\) Moreover, for most citizens in most circumstances, an interpretation of the law is not required in deciding what course

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\(^{321}\) See Dworkin’s usage of the *Riggs* case, as outlined above in Chapter One.

\(^{322}\) *LE*, p. 413.

\(^{323}\) This may be what drives Dworkin to counter-intuitively distinguish between “legislative rights” and “legal rights”. For Dworkin, courts are the only bodies sanctioned to provide legal rights.

\(^{324}\) This is the driving force behind Hart’s reliance on the “rule of recognition” as the sole test for the validity of a law. If the proper pedigree is followed, the result is valid law.
of conduct to take. The bulk of life—going to work, driving to the store, paying a billproceeds without the need for legal interpretation. Although there are employment laws, traffic laws, and contract laws governing these respective activities, there is little reason in most circumstances for citizens to have to interpret those laws. The paradigm cases of law for citizens engaged in everyday behavior are not the “pivotal” decisions that Dworkin prefers to use as paradigm cases of law. So, even if Dworkin is correct, and law is an interpretive concept for appellate court judges, it would not (without further argument) be correctly considered an interpretive concept for legislators and citizens.

A general theory of law should incorporate all of the identifiable legal strata if it is to provide a complete and undistorted description of modern legal societies. Such a theory of law would provide an account of the distinct legal strata as sub-practices of law: making law, using law, enforcing law, applying law, and determining law. The general theory would also have to provide an account of the relationships between and among the sub-practices of law as meeting all of the articulated purposes of a modern legal system by adding and removing propositions on the society’s legal “conversational” record.

6.3 A research program for legal contextualism

Waismann contended that language exhibited distinct strata, each of which had its own logic that determines the meaning of certain basic terms. Based on his premise of language strata, Waismann argued for a new research program in the philosophy of language. Instead of referring to what he has called “strata” in terms of the different kinds of statements used—“material object statements”, “descriptions of vague
impressions”, “statements of laws of nature”—Waismann suggested defining these statement types in terms of the idiosyncratic characteristics of each language stratum:

What I now suggest we do—and this is a programme for the future—is to reverse the whole situation by saying: “The formal motifs which we have been considering all combine to impress a certain stamp on a stratum; they give us the means to characterize each stratum “from within” that is with no reference to the subject”. If we carefully study the texture of the concepts which occur in a given stratum, the logic of its propositions, the meaning of truth, the web of verification, the senses in which a description may be complete or incomplete—if we consider all that, we may thereby characterize the subject-matter.325

To further explicate his research program, Waismann offers an analogy with geometry. For 2000 years, the definitions of “point”, “line”, and “plane” were problematic. Mathematicians thought that they had to first define the meanings of these primitive symbols before seeing that the “axioms” of geometry (e.g., “Three points determine a plane”) were somehow self-evident. Modern mathematics defines these basic terms—and the relations holding between basic terms—as those terms and relations that satisfy the axioms of geometry. The axioms determine the meaning of the primitive symbols. Philosophers of language should follow mathematicians, Waismann argues, by specifying the logic of (or, roughly, the axioms contained in) each stratum so that the meaning of each stratum’s basic terms can be determined.

A research program for legal contextualism might be developed along these lines. Assuming that there are five distinct legal strata,326 there will be five ways of determining what “law” means in each of the strata. We can designate those different descriptions of law by virtue of their respective strata. For instance, the law for purposes of the first

325 “Language Strata”, p. 246.
326 There may be more strata involved with communities who talk about the law, including “practicing the law” for lawyers, “teaching the law” for instructors, and “describing the law” for theorists.
strata—making the law—could be designated by law\textsubscript{m}. Law for purposes of the second-strata, using the law—could be designated by law\textsubscript{u}. The complete assignment of “law” designations to the different legal strata would look like something like this:

<table>
<thead>
<tr>
<th>Stratum</th>
<th>Practice</th>
<th>Community</th>
<th>Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>Making the law</td>
<td>Legislators</td>
<td>law\textsubscript{m}</td>
</tr>
<tr>
<td>Second</td>
<td>Using the law</td>
<td>Citizens</td>
<td>law\textsubscript{u}</td>
</tr>
<tr>
<td>Third</td>
<td>Enforcing the law</td>
<td>Officials</td>
<td>law\textsubscript{e}</td>
</tr>
<tr>
<td>Fourth</td>
<td>Applying the law</td>
<td>Triers-of-fact</td>
<td>law\textsubscript{a}</td>
</tr>
<tr>
<td>Fifth</td>
<td>Determining the law</td>
<td>Appellate judges</td>
<td>law\textsubscript{d}</td>
</tr>
</tbody>
</table>

In order to reduce the systematic ambiguity of the word “law”, the question of what the law is on such-and-such would have to be asked in each legal stratum, subject to the purposes acknowledged by each of the practices and the interests of each of the communities. A correct statement of the law would have to be provided within the context in which the question was being asked. Take, for instance, the “law” governing statements made by criminal suspects to police officers. The famous United States Supreme Court case of *Miranda v. Arizona*\textsuperscript{327} stands for the legal proposition that suspects who are 1) in custody and undergoing 2) interrogation by 3) police officers must be read their *Miranda* rights and be provided counsel if requested. Each of these three elements must be present before the suspect’s 5\textsuperscript{th} Amendment right against self-incrimination under *Miranda* is triggered. The question in such cases might be what “the law” says “in custody” means. For if a person is not “in custody” for purposes of *Miranda*, then the officer need not read the suspect her rights.

Think of the different ways of determining the meaning of “law” in each legal stratum. Law\textsubscript{m} would say almost nothing about the meaning of “in custody” for purposes of the Fifth Amendment because the bright-line *Miranda* rule is a creation of the judicial

\textsuperscript{327} 384 U.S. 436 (1966).
branch, not the legislative branch. A legislator might enact a statute (law_m) if she thought
that persons’ rights were being systematically abused under the court-created law. Apart
from that, however, law_m would remain silent about “custody” under Miranda. Law_u (for
citizens) might be that one should always invoke one’s Miranda rights on every contact
with the police. This is the only way of assuring that one’s rights against self-
incrimination are protected. Law_c (for police officers) might be that an officer should
always keep conversations with suspects light and breezy, keep office doors open, never
wear a firearm, offer soft drinks, etc., so that “custody” will be exceedingly difficult to
prove. Trial courts are oftentimes asked to suppress evidence from trial when “custody”
is a close call. Law_a in such cases is whatever the court decides it is based on the facts
presented and constrained by any authoritative legal rules and standards of judicial
decision-making. Law_d would be the law on Miranda as it may be molded by future
appellate court decisions. Law_d on Miranda might change if a higher court determines
that Miranda is being circumvented by widespread police tactics to gain confessions from
unwitting suspects.

Each stratum acknowledges by reference the law (generally described) as the
conversational record, the legal system’s “score”, on “custody” for purposes of Miranda.
However, given the different interests of each community in each legal stratum, the
meaning of “law” as it relates to the issue of “custody” may be quite different. For the
legislator, the law is described as current case law, a judicial determination that will not
be addressed until there is an overwhelming social reason to do so. For the citizen, the
law on custody is described as an important bit of information to know in case one has to
deal with police officers investigating a crime. For the police officers, the law on custody
is best described as an impediment to social control, a source of rights that should remain hidden from those they are investigating. For the trial court, the law on custody is an element of a legal rule that must be applied to decide what happened during an investigation to determine whether the police violated an alleged criminal’s constitutional rights. For the appellate court, custody is a legal proposition containing an open-textured principle requiring an interpretation consistent with precedent and political value.

In order to determine the meaning of “law” as used in each stratum, the legal contextualist must be prepared to offer an account of the logic of each stratum. Although this project is well beyond the scope of this work, one could outline how it might be accomplished. The theorist would begin with the purposes to be fostered and the interests to be represented in each of the legal strata by each of the legal communities. This would provide the appropriate context within which to analyze the normativity of the reasoning of members in each community. Distinctions could then be drawn in considering what makes a legislator, for instance, a competent user of the law, as opposed to what makes a citizen (for instance) a competent user of the law. The intuition is that the “rules of competent use” for each of these communities would be very different given their members’ distinct reasons for engaging the legal system. Legislative logic might include inferences from justifiable political theories, like utilitarianism or Kantianism. On this view, lawsm should be enacted to the extent that they further the preferred political theory. Citizenry logic, on the other hand, might include inferences based on considerations of practical reason in which lawu could be used as an independent
motivation for acting one way rather than another. The purposes and interests of each stratum would need to be explicated to demonstrate how (i.e., based on what system of inferential reasoning) each community could utilize the same language—the law (in the conversational score sense)—to effect the diverse purposes and assert the varied interests.

The final step in contextualist legal theory would be to demonstrate how each of these accounts of reasoning related to the others so as to accurately describe a complete (even if not unified) legal system. The idea would be to interconnect the varied purposes and interests involved in a legal system to show how law—the social institution—works to effect the purposes of the law—the legal conversational database—as exemplified in the different legal communities. Although this task seems daunting, it should not be impossible. Indeed, the structure of this system can be sketched by using some recognized “theories of law” not as general descriptions of law, but rather as accounts of the distinct legal strata.

For instance, as has been stated above, Dworkin’s account of constructive interpretation might be acceptable as an account of law_d under the proposed legal contextualist general theory. Exclusive legal positivism describes law as legal rules that are enacted according to a prescribed procedure so as to brand them with an authoritative marking and that are designed to guide the conduct of officials and citizens. This might be an appropriate description of law_m. And, given just these two accounts, there is nothing inconsistent with collecting them into the same general system of law. The fact that law_m is placed on the record of the law so that it can guide conduct is not inconsistent

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328 Such a theory of law would probably employ an underlying “externalist” view about motivation by reasons. See, for example, Derek Parfit, “Reasons and Motivation”, Supplementary volume - Aristotelian Society 71 (1997): 99-130.
with the fact that \text{law}_d \text{ might later alter \text{law}_m} because it no longer serves recognized political purposes. The theoretical problem, as suggested by Waismann, is in trying to describe \text{law}_m \text{ and \text{law}_d} \text{ in the same way.}

By specifying the distinct legal strata and by specifying each stratum’s unique purposes and interests, the legal contextualist might make more definite the contexts in which legal arguments are made. In each context, within each legal stratum, the rules of accommodation and the standards of precision will be made more definite so that the members of each community can “speak” legal terms according to shared standards of correct use within each of those communities. If the contexts of legal discourse are made more definite, then the arguments made within those contexts will be easier to analyze. The distinct legal strata will have their own logic, their own rules of inference upon which arguments can be judged. The propositions of law based on those rules of inference will be more readily discernible as true or false (or as neither determinately true nor determinately false). In this manner, then, legal indeterminacy, apart from the overriding considerations of the open-textured nature of language, may be reduced: first by making legal contexts, legal strata, more definite; second by restricting legal arguments to the parochial logic of those distinct strata; and third by determining the meanings of terms used in propositions of law based on the logic of those distinct strata.
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