Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine

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Introduction

The Supreme Court's "void-for-vagueness" (or simply "vagueness") doctrine, rooted in the substantive due process guarantee of the Fifth and Fourteenth Amendments,[1] is occasionally used to strike down statutes that "fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and "encourage arbitrary and erratic arrests and convictions."[2]

The void-for-vagueness doctrine is a confusing conceptual thicket. In the First Amendment context, it is often applied in tandem with its close cousin, overbreadth doctrine,[3] to strike down

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1. The Due Process Clause states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3. Substantive due process refers to the "due process limitation on conduct-regulating policy." Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1050 n.8 (1968). Its counterpart, procedural due process, protects values such as the opportunity to be heard in a forum in which one's substantive rights are to be adjudicated, and notice that such adjudication is scheduled to occur.

2. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1979) (citations and internal quotation marks omitted).

3. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (stating that an overbroad statute's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). Both vagueness and overbreadth are ultimately components of substantive due process. Though the courts often speak of overbreadth as a First Amendment doctrine, and do not generally apply overbreadth analysis outside the First Amendment context, the values protected by the overbreadth doctrine—substantive limitations on what conduct the government can constitutionally prohibit, coupled with a concern that unclear boundaries between lawful and unlawful conduct risk "chilling" constitutionally protected conduct—are not unique to the free

laws that prohibit too much speech and thus threaten to chill constitutionally protected conduct.[4] In such cases, it is unclear what independent work the void-for-vagueness doctrine is doing. Like overbreadth, the vagueness doctrine functions sometimes as a substantive limit on what conduct government can constitutionally prohibit and at other times as a third-party standing rule that allows litigants to challenge a statute as "facially" unconstitutional,[5] thereby inviting the court to consider how the statute might be applied to the hypothetical conduct of other parties not before the court.[6]

To further complicate matters, the Court has often said that criminal statutes will receive more stringent scrutiny under the vagueness doctrine, but the vagueness problem may be mitigated if the statute has a *scienter* (criminal intent) requirement. Similarly, vagueness raises different concerns depending on whether the challenged statute is a *conduct rule* (regulating persons' conduct directly) or *decision rule* (authorizing officials to execute the law, and giving them more or less discretion in doing so),[7] though of course that distinction itself is not always straightforward.[8]

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expression context. In any event, the rights listed in the Bill of Rights, including the First Amendment, are best understood as manifestations of substantive due process. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992) ("The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights.").

4. *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611, 611, 614 (1971) (holding that an ordinance "making it a criminal offense for 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by'" is "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct").

5. A "facial" vagueness challenge to the constitutionality of a statute (as opposed to a challenge to the statute "as applied" to the challenger's own conduct) asserts that the statute cannot constitutionally be applied to any conduct. In a facial challenge, it is irrelevant that the statute's terms, even if vague, clearly encompass the challenger's own conduct. Facial challenges thus assert the rights of third parties as well as those of the challenger.

6. *See generally* Henry P. Monahagn, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

7. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627 (defining "decision rules" as "laws addressed to officials," and "conduct rules" as "laws addressed to the general public"). For an application of this distinction to vagueness doctrine, see generally Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491 (1994).

8. A decision rule that creates scope for official activity implies a conduct rule: a person whose conduct falls within the permissible area of regulation (as defined by the decision rule) thereby makes herself subject to sanctions or, at least, official attention such

Finally, application of the vagueness doctrine outside the First Amendment context has been restricted to a limited set of fact situations, most notably "status" and "vagrancy" crimes. Vagueness challenges are routinely rejected in the area of economic regulations, even where such regulations carry criminal penalties.[9] This parallels the Court's post-New Deal refusal to strike down economic regulations on other substantive due process grounds—though this difference in the liberty interest affected by a statute has no obvious relation to "vagueness" itself.

Scholars have criticized the void-for-vagueness doctrine as a fig leaf for judges' extraconstitutional substantive commitments.[10] Indeed, one theorist has suggested that the incoherence of the doctrine is an *asset* because it permits judges to bring in such values: "[T]he value of vagueness doctrine lies essentially in the value of judicial and constitutional indirection."[11]

In Part I, I briefly explain the void-for-vagueness doctrine. In Part II, I explore the concept of vagueness as understood by linguists and philosophers working outside the legal community.

In Part III, I discuss the void-for-vagueness doctrine's roots in substantive due process. I argue that the doctrine contains no unique element that separates it from other substantive due process

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as the "order to disperse" permitted by the loitering ordinance struck down in City of Chi. v. Morales, 527 U.S. 41, 47 n.2 (1999). *But see* Dan-Cohen, *supra* note 7, at 627–30 (describing and criticizing the view that decision rules imply conduct rules).

9. *See, e.g.*, *Papachristou*, 405 U.S. at 162 ("In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed.").

10. *See, e.g.*, Note, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U. PA. L. REV. 67, 75 (1960) ("[I]n the great majority of instances the concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures."). *See also* Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1363 n.9 (2010) (collecting sources).

11. Post, *supra* note 7, at 507. Post explains:

> Vagueness doctrine serves as a vehicle for the implicit judicial resolution of independent questions of substantive constitutional law. We can, on the one hand, view this as a weakness of vagueness doctrine, because the doctrine suppresses a full and frank judicial evaluation of these substantive constitutional issues. . . . But, on the other hand, we might also reflect that courts are often neither equipped nor prepared to offer comprehensive and candid constitutional analyses of social relationships, and that in such circumstances vagueness doctrine offers a useful means of exercising discriminating, indirect, and yet effective judicial control.

principles; thus scholars that have characterized the doctrine as a veil for substantive commitments are basically correct. These commitments, however, are not mere extralegal judicial preferences. Rather, they are consistent with traditional substantive due process principles. The results in celebrated void-for-vagueness decisions could have been reached through a straightforward application of due process principles, without employing the void-for-vagueness doctrine.

Finally, I conclude that a major contributing factor to the conceptual incoherence of the void-for-vagueness doctrine is that the doctrine has—despite its name—nothing whatsoever to do with vagueness. Vagueness (and indeterminacy generally) is pervasive in law and hardly confined to the handful of statutes that the Supreme Court has struck down on void-for-vagueness grounds. Instead, I propose that the Court's commitment to the "fundamental rights" framework of substantive due process[12]—which narrowed the domain of substantive due process protection so as to virtually eliminate judicial review of "economic" statutes—has led it to couch some results that do not fit this framework in terms of the vagueness doctrine, so as to avoid reopening the possibility of broader, more robust judicial review of *all* statutes, regardless of their subject-matter, on substantive due process grounds.

I. The Void-for-Vagueness Doctrine

A. *Papachristou v. City of Jacksonville*[13]

In April 1969, four friends—two black men and two white women in their early 20s—were driving in a car along a thoroughfare in Jacksonville, Florida.[14] They had just eaten at a restaurant owned by one of the women's uncles and were on their way to a nightclub. All four were employed, none had a meaningful criminal record, and one had just been released from a veterans' hospital for wounds suffered in the Vietnam War. They never made it to the nightclub: instead, they were arrested, charged with "vagrancy—prowling by

12. For an explanation of the "fundamental rights" framework, *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 791–919 (3d ed. 2006).

13. *Papachristou*, 405 U.S. 156.

14. *See* Brief for Petitioners at 5–7, *Papachristou*, 405 U.S. 156 (No. 70-5030). The parties stipulated to the facts as set forth in the Brief for Petitioners. *See id.* at 5.

auto"[15] under a city ordinance, convicted, and sentenced to ten days in jail. Their convictions were upheld by the Florida appellate courts.

The arresting officers claimed to have stopped the car and made the arrests because the four "had been seen stopped near a used car lot which had been broken into several times" and not because the car was occupied by two black men and two white women in the year 1969.[16] But the police admitted that they had neither looked very hard for, nor found any evidence of illegal activity. Further, on the night of the arrest, an anonymous person in the Jacksonville police department called one of the women's parents to inform them that their daughter "had been out with a Negro."[17]

The crime these four people had supposedly committed was vagrancy under a Jacksonville ordinance that provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.[18]

The Supreme Court reversed the convictions and struck down the ordinance as unconstitutional. Writing for the Court, Justice Douglas found that the ordinance was "void for vagueness" in that it

15. The phrase "prowling by auto" was included on the police report, but appeared nowhere in the ordinance. *See Papachristou*, 405 U.S. at 168 n.11.

16. Brief for Petitioners at 6–7, Papachristou v. City of Jacksonville, 405 U.S. 156 (No. 70-5030).

17. *Id.* at 7.

18. *Id.* at 11.

"fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and "encourage[d] arbitrary and erratic arrests and convictions."[19]

In this holding, the concept of vagueness acts as a label for two legal principles that are basic to substantive due process, legality, and the rule of law: (i) fair warning (also known as "fair notice") and (ii) non-arbitrariness. The principle of legality, reflected in the maxim *nulla poena sine lege* (no penalty without a law), provides that the criminal law must be stated in advance, rather than crafted ad hoc to capture a particular person's conduct.

A corollary of the principle of legality is the idea that only proper institutional actors—namely, legislatures—may define the content of the criminal law.[20] As the Court has put it, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications."[21] Citizens should not have to run the risk of violating laws that are effectively created on the spot by the enforcement decisions of police officers or the courts.

The notice and excessive discretion concerns cited by the *Papachristou* Court are not unique to vagrancy statutes, even if such statutes invite particularly galling violations of legality principles. But *Papachristou* foreshadowed what would become a defining limitation in the Court's void-for-vagueness jurisprudence: namely, that vagrancy laws, and other laws seemingly designed to cast a large net permitting law enforcement officers to target "undesirables"—that is, socially stigmatized persons—would be scrutinized much more closely than other statutes for purposes of the vagueness doctrine. But the Justices' singling out of vagrancy laws seems to reflect a substantive distaste for such laws: neither linguistic vagueness nor the rule of law concerns articulated by the *Papachristou* court are unique to vagrancy statutes.

19. *Id.* at 162 (citations and internal quotation marks omitted).

20. *See, e.g.*, United States v. Reese, 92 U.S. 214, 216 (1875) ("If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such.").

21. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (citation and quotation marks omitted).

B. Vagueness Doctrine After *Papachristou*[22]

If a litigant seeks to show that a statute is unconstitutionally vague on its face, and the statute does not affect First Amendment interests, the challenger must show that the statute is "impermissibly vague in all of its applications."[23] This test is sometimes phrased as a requirement that "the challenger [] establish that no set of circumstances exists under which the [statute] would be valid,"[24] or as a requirement that statutes be sufficiently clear that " "persons of common intelligence must necessarily guess at [their] meaning and differ as to [their] application."[25] And in *City of Chicago v. Morales*,[26] a plurality of the Court stated that the loitering ordinance at issue was "vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard of conduct is specified at all*."[27]

These standards are extremely difficult for a person challenging a law on vagueness grounds to meet. The Supreme Court has struck down criminal laws as unconstitutionally vague on their face only four times outside of the First Amendment context since the New Deal.[28] Three of these cases involved vagrancy or loitering statutes; the other involved an abortion statute.

The normal rules of statutory interpretation continue to apply in a vagueness challenge. Thus, context may supply the minimal

22. To clarify the unique role of vagueness doctrine, I ignore cases in which the challenged statute is said to affect First Amendment interests or trigger the related, but distinct, doctrine of "overbreadth." *See supra* notes 3–6 and accompanying text.

23. *Hoffman Estates*, 455 U.S. at 489.

24. United States v. Salerno, 481 U.S. 739, 745 (1987).

25. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

26. 527 U.S. 41 (1999).

27. *Id.* at 60 (quoting *Coates*, 402 U.S. at 614) (emphasis added) (quotation marks omitted).

28. In addition to *Papachristou*, 405 U.S. 156, *see Morales*, 527 U.S. 41 (plurality opinion) (striking down an ordinance prohibiting "criminal street gang members" from "loitering" with one another or with other persons in any public place); Kolender v. Lawson, 461 U.S. 352, 353 (1982) (striking down a criminal ordinance requiring "persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer"); Colautti v. Franklin, 439 U.S. 379, 381 n.1 (1979) (striking down an abortion statute requiring that an abortion provider "(1) make a determination based on his experience, judgment, or professional competence that the fetus is not viable, and (2) upon determining that the fetus is viable or . . . may not be viable[,] to exercise that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted").

definiteness required by the vagueness doctrine. For example, in *Grayned v. City of Rockford*,[29] the Court noted that the noise ordinance at issue was "written specifically for the school context, where the prohibited disturbances are easily measured by the normal activities of the school."[30] This "particular context" gave "fair notice to those to whom [the statute was] directed."[31]

The Court often professes to apply vagueness doctrine more stringently to criminal statutes rather than statutes with civil sanctions, because in the latter case "the consequences of imprecision are qualitatively less severe."[32] Additionally, the Court has said that a *scienter* (criminal intent) requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice that one's conduct is proscribed.[33] This makes sense because a criminal statute that includes a criminal intent (or *mens rea*) requirement is less likely to encompass morally innocent conduct, and so more likely to accord with people's intuitions about what conduct is illegal.

The void-for-vagueness doctrine is closely related to the doctrines preventing judicial creation of crimes[34] and the rule of lenity, a "canon of strict construction of criminal statutes" that "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[35] All of these

29. Grayned v. City of Rockford, 408 U.S. 104 (1972).

30. *Id.* at 112.

31. *Id.* Similarly, in United States v. Lee, 183 F.3d 1029, 1032 (9th Cir. 1999), a challenge to a statute aimed at exporters of military items, the Ninth Circuit wrote that because the "regulation at issue is directed to a relatively small group of sophisticated international businessmen," that limited context made the regulation "sufficiently communicate[] its meaning." *Lee*, 183 F.3d at 1032. And the Second Circuit has held that whether a regulation satisfies due process may depend in part upon whether a "reasonably prudent person, *familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve*, has fair warning of what the regulations require." Rothenberg v. Daus, 481 F. App'x 667, 671 (2d Cir. 2012) (emphasis added).

32. *Hoffman Estates*, 455 U.S. at 498–99.

33. *Id.* at 498–99. *See also Kolender*, 461 U.S. at 357.

34. *See, e.g.*, *Reese*, 92 U.S. at 218–22 ("If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such."); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3 (2013) (noting that "in some early cases," the Supreme Court invoked "the separation of powers doctrine . . . to support the proposition that Congress, by the enactment of an ambiguous statute, could not pass the law-making job on to the judiciary").

35. United States v. Lanier, 520 U.S. 259, 266 (1997) (citations omitted); *see also* United States v. Hockings, 129 F.3d 1069, 1072 (9th Cir. 1997) (stating, in the context of vagueness, that "the rule of lenity must be applied to restrict criminal statutes to conduct clearly covered by those statutes"); Ralf Poscher, *Ambiguity and Vagueness in Legal*

doctrines share the common aim of ensuring that people subject to the criminal law have adequate notice of what conduct is prohibited. Such doctrines help ensure that the criminal law does not operate as a trap for the unwary.

Though the Court applies stricter vagueness review in the criminal law context, it does not apply equally careful scrutiny to all criminal statutes. Instead, as elsewhere in constitutional law since the New Deal, legislatures and agencies are given virtually free rein to regulate activity, so long as that activity is deemed "economic" in nature.[36] Hence, legislatures may freely create new crimes, so long as the activity criminalized does not involve the exercise of a "fundamental right."

As the Court has explained, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."[37] Thus, "economic regulation is subject to a less stringent vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action."[38]

The term "economic regulation" is itself vague in the linguistic sense; however, there are borderline cases of what activity may be classified as "economic," and of what laws can be characterized as "regulatory." For example, the Seventh Circuit held that an "absolute ban" on the sale of drug-related "instruments" could not be characterized as an economic regulation, even though the regulation in question was aimed at "head shops" (businesses that sell marijuana paraphernalia) and not at drug dealers.[39]

Interpretation, 14 n.42 (2011), *available at* http://ssrn.com/abstract=1651465 (noting the connection between linguistic vagueness, legality, and the rule of lenity).

36. For background on the New Deal revolution in Constitutional law and the ideological developments that triggered it, see generally RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006) and RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2005).

37. *Hoffman Estates*, 455 U.S. at 498.

38. *Id.* (citations omitted); *see also Lee*, 183 F.3d at 1032.

39. Record Head Corp. v. Sachen, 682 F.2d 672, 678 (7th Cir. 1982).

II. Vagueness, Properly Understood: Linguistic and Philosophical Accounts

A. Vagueness

The Supreme Court's use of the term "vagueness" does not exist in a vacuum: vagueness is a familiar problem, or set of problems, in the disciplines of linguistics and philosophy. To evaluate the coherence and appropriate scope of the void-for-vagueness doctrine, it may be helpful to briefly consider the understanding of vagueness in these other disciplines.

In linguistics and philosophy, a term or expression is considered "vague" if it allows "borderline cases."[40] Examples of vague expressions include size-denoting terms such as "small" and "large";[41] color terms such as "grey";[42] terms denoting objects that have properties, such as "mountain" and "wind";[43] terms of language and culture such as "Serbo-Croatian";[44] thresholds defined by convention in a particular discourse community, such as "obesity"[45] and "statistical significance";[46] definitions of classification, such as the names of species;[47] most statements involving numbers or measurements, such as "a yard";[48] hedging expressions such as "probably" and "apparently";[49] and many others. In short, "vagueness is everywhere."[50]

One theorist has argued that the Supreme Court has used the term "vagueness" as a catchall for all forms of statutory

40. *See generally* KEES VAN DEEMTER, NOT EXACTLY: IN PRAISE OF VAGUENESS 9 (2010); ROY SORENSEN, *Vagueness*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2012), *available at* http://plato.stanford.edu/archives/win2013/entries/vagueness/.

41. *Id.* at 8–9.

42. *Id.*

43. *Id.* at 68.

44. *Id.* at 30, 68.

45. *Id.* at 52.

46. *Id.* at 89.

47. *Id.* at 29.

48. *Id.* at 80.

49. *Id.* at 120–22, 125.

50. *Id.* at 9.

indeterminacy.[51] But vagueness is distinguishable from ambiguity and generality, which are other forms of indeterminacy.

Ambiguity can be either semantic or syntactic; that is, it can arise from either word meaning or sentence structure. Semantically ambiguous terms come in two varieties: *homonymy* and *polysemy*.[52] In homonymous terms, there is no obvious connection between the different senses of the word: for example, the word "bank" can refer to either a riverbank or a commercial bank.[53] Polysemous terms, by contrast, may refer to several referents that share some common element: for example, the word "bank" could refer to a commercial bank, or to a building in which a bank operates; likewise, the word "child" could refer either to "offspring" or "immature offspring."[54] Semantically ambiguous expressions have multiple meanings, but context usually makes clear which of these meanings is meant.[55]

Syntactical ambiguity (or *amphiboly*) is more common in legal interpretation.[56] For example, statutory interpretation questions routinely arise in situations where it is unclear as a matter of syntax whether a modifier modifies one or more clauses in a statute.[57]

Generality, in turn, refers to the "graded feature of generic terms, as opposed, for example, to names, to apply to sets of objects or situations."[58] Such generic terms trade off informativeness in favor of inclusiveness to varying degrees.[59] For example, "living being" is more general than "tree," which in turn is more general than "oak."[60]

The concept of vagueness—itself vague, as borderline cases have borderline cases, a phenomenon called "higher-order vagueness"[61]—is multifaceted. Borderline cases can be classified as *absolute* or

51. *See* Poscher, *supra* note 35, at 2 ("In a colloquial sense, both vagueness and ambiguity are employed generically to indicate indeterminacy. This is the sense in which vagueness is understood in the 'void for vagueness' doctrine.").

52. *See id.* at 4–5.

53. *See id.*

54. *See id.*

55. *See id.* at 2–3.

56. *See id.* at 3.

57. *See, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646 (2009) (holding that, in a statutory provision reading "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," the adjective "knowingly" modified "a means of identification of another person").

58. Poscher, *supra* note 35, at 5.

59. *See id.* at 5–6.

60. *See id.* at 5.

61. SORENSEN, *supra* note 40.

relative; absolute borderline cases are those in which "no possible method of inquiry could settle" the question[62] (for example, whether a boy is obese, or when a fertilized egg becomes a person).[63] Another way of putting this is that our inability to classify absolute borderline cases is "not due to ignorance of the facts or other surmountable cognitive limitations."[64] Concepts such as obesity, shortness, and personhood are inherently indefinite, such that it is "intrinsically uncertain" whether certain borderline cases can be said to fall within the concept.[65] By contrast, in relative borderline cases, "the unknowability of a borderline statement is only relative to a given means of settling the issue."[66]

Vagueness issues can be further classified according to whether they pertain to individuation or classification.[67] Vagueness of individuation relates to the precise delimitation of an object; vagueness of classification, which is widespread in law, relates to the fact that the continuous phenomena challenge the discrete terms of our language.[68] Classificatory vagueness comes in two forms: quantitative ("vagueness of degree") and qualitative (or "combinatory"). Quantitative classificatory vagueness relates to line-drawing problems, such as deciding whether a particular color is "grey" or "black."[69] Qualitative classificatory vagueness arises from the fact that it is often indeterminate which conditions are necessary or sufficient for a particular borderline case to be classified as a case of the vague label.[70] H. L. A. Hart's famous "No vehicles in the park" hypothetical is an example of combinatory vagueness: what properties must an object have to be classified as a "vehicle"?[71]

The problem of vagueness arises because reality is continuous, while language—and, behind language, human cognition—must break apart this continuity to function. To think through a problem requires an exercise of attention, and to pay attention is to exclude

62. *Id.*

63. *See id.*

64. Poscher, *supra* note 35, at 6 (quotation marks omitted).

65. *Id.* (quoting CHARLES SANDERS PEIRCE, in, DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 748 (J. M. Baldwin ed., MacMillan 1902)).

66. SORENSEN, *supra* note 40.

67. Poscher, *supra* note 35, at 7.

68. *Id.* at 7–8.

69. *Id.* at 8.

70. *Id.* at 9.

71. *Id.*

what is irrelevant—to sort the world into discontinuous objects and concepts.[72] Likewise, to communicate is to narrow: the term *mother*, for example, communicates a concept that, at the very least, excludes males and children; the concept *tree* certainly excludes a stone. Richard Dawkins has referred to this phenomenon as the "tyranny of the discontinuous mind."[73]

Even the reverse act of generalizing from specific phenomena to abstract concepts can be seen as a narrowing, even though the abstract concept is a set with more elements than the discrete phenomena from which the concept was generalized. This process of abstraction is often accomplished by the use of variables, which are artificial objects of thought that stand in for a larger (and often infinite) set of phenomena. The equation for a line, $y = mx + b$, represents the compression of an infinite variety of possible lines into a simple equation consisting of a relation between three variables. To try to work with the phenomena of lines without such an equation is virtually inconceivable because the human mind can only maintain four or five visual objects in short-term memory at once,[74] and any visualization of the concept of infinity that we might attempt is doomed to inadequacy, because one additional object ($n + 1$) can always be added to our conception.

Therefore, the delimitation of reality into discontinuous concepts, words, and variables is an essential component of reason

72. *See* WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 402–04 (Holt 1890), *available at* http://psychclassics.asu.edu/James/Principles/prin11.htm.

> Millions of items of the outward order are present to my senses which never properly enter into my experience. Why? Because they have no *interest* for me. *My experience is what I agree to attend to*. Only those items which I *notice* shape my mind—without selective interest, experience is an utter chaos. Interest alone gives accent and emphasis, light and shade, background and foreground—intelligible perspective, in a word. It varies in every creature, but without it the consciousness of every creature would be a gray chaotic indiscriminateness, impossible for us even to conceive . . . . Every one knows what attention is. It is the taking possession by the mind, in clear and vivid form, of one out of what seem several simultaneously possible objects or trains of thought. Focalization, concentration, of consciousness are of its essence. It implies withdrawal from some things in order to deal effectively with others, and is a condition which has a real opposite in the confused, dazed, scatterbrained state which in French is called *distraction*, and *Zerstreutheit* in German.

73. VAN DEEMTER, *supra* note 40, at 5.

74. G. A. Alvarez & P. Cavanaugh, *The Capacity of Visual Short-Term Memory Is Set Both by Visual Information Load and by Number of Objects*, 15 PSYCH. SCI. 106, 106 (2004).

and communication. Nevertheless, we cannot lose sight of the fact that something of the texture of reality is lost in the reduction of reality into discontinuous units of thought and speech.

The problem of vagueness exemplifies this loss of texture. When we state a proposition that classifies a borderline case as falling within a vague concept, we are implicitly imposing "precisifications"—arbitrary dividing-lines—on our use of the vague concept.[75] We are imposing some degree of "crispness" on the vague concept.[76] But this does not eliminate the underlying vagueness of the concept or the possible nature of the classified object as a borderline case of that concept.

Though we must make do with vague concepts if we are to reason and communicate, there can be serious consequences of forgetting that we are artificially simplifying reality by classifying objects according to vague concepts. These consequences of human beings' "taste for false clarity"[77] can include the possibility of political manipulation through the misuse of framing and statistics,[78] the proliferation of meaningless claims through media such as advertisements,[79] and empirical or scientific mistakes that can cumulate over time.[80] For example, the results of an empirical psychology study may be cited again and again until it is taken as gospel, while the vagueness inherent in the tested concepts—for example, the cluster of (vague) properties determined by the authors of the DSM-IV[81] to constitute a (vague) diagnosis—is forgotten.[82]

75. *See* Poscher, *supra* note 35, at 17–18.

76. *See* VAN DEEMTER, *supra* note 40, at 9 (coining the term "crisp" to denote expressions that are not vague).

77. *Id.* at 6.

78. *Id.* at 7–8.

79. *Id.*

80. *Id.* at 34–36 ("[C]rucially, even the most sophisticated definitions have some residual imprecision, and it is unclear how this imprecision can ever be got rid of completely"); *id.* at 46 ("[I]f you do not know what it is that you're trying to measure then your test is ultimately built on sand."); *id.* at 52 ("In cases such as the measurement of intelligence, where [] objective anchors are largely absent . . . measurement is at risk of arbitrariness.").

81. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (4th ed. 2000).

82. *See, e.g.*, Sandra Hamilton, Myron Rothbart, and Robyn M. Dawes, *Sex Bias, Diagnosis, and DSM-III*, 15 SEX ROLES 269, 269 (1986) (finding that "vague diagnostic descriptions promoted sex stereotyping and sex bias in diagnosis"); Leonard Sax, *Now You Too Can Be Diagnosed with Schizophrenia!*, PSYCHOLOGY TODAY (June 30, 2013), *available at http*://www.psychologytoday.com/blog/sax-sex/201306/now-you-too-can-be-diagnosed-schizophrenia ("As a practitioner, the main problem I saw with DSM-IV was

B. Linguistic Vagueness and the Void-for-Vagueness Doctrine

The basic problem with applying insights from the linguistic understanding of vagueness to law is that just as vagueness is pervasive in ordinary communication,[83] so vagueness is pervasive in the law.[84] But while we must often make do with vagueness and imprecision in our everyday lives, the law must often select a definite, final result from an artificially constrained set of possible legal outcomes. For example, a person is either guilty or not guilty, liable or not liable, reasonable or unreasonable; the defendant intended or did not intend to cause a particular result; the person was capable or not capable of entering into the contract; and so on. Leo Katz has called this the "either-or" phenomenon of law and characterized many of these classificatory exercises as involving Sorites paradoxes[85] (e.g., on what day does a fetus become a person? How many grains of sand make a heap?),[86] which are characteristic of vagueness problems.

The philosophical and linguistic implications of vagueness pose a considerable threat to the idea of the rule of law, the characterization of law as determinate and "autonomous," and the idea that hard cases in law have "right answers" which judges can discover through sufficient reasoning and inquiry.[87] If a jury must decide whether a criminal defendant is *either* guilty *or* not guilty, and the judge might imprison the defendant as a consequence of that verdict, it seems unseemly to point out that the statutory definition of the crime under which he is to be sentenced is pervaded with vagueness—especially if the case is close. Instead, legal vagueness is disguised under conclusory labels. For example, the issue of guilt has been settled "beyond a reasonable doubt," a verdict was supported by "clear and convincing evidence," and so on. Radical challenges to legal determinacy are left to the academy; the job of courts and juries is to decide—to engage in artificial precisification and to classify

that the criteria were too vague. The vagueness of the criteria gave rise to enormous variability in diagnosis across different regions of the United States.").

83. *See* VAN DEEMTER, *supra* note 40, at 9–10.

84. *See* Nash v. United States, 229 U.S. 373, 377 (1913) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . he may incur the penalty of death."); *see also* Poscher, *supra* note 35, at 14.

85. *See* LEO KATZ, WHY THE LAW IS SO PERVERSE 139–81 (2011).

86. *See* VAN DEEMTER, *supra* note 40, at 11–13; SORENSEN, *supra* note 40.

87. *See* Poscher, *supra* note 35, at 19.

borderline cases on one or the other side of the liability or guilt threshold.

However, one lesson that a brief detour into the linguistics and philosophy of vagueness can teach lawyers is that the Supreme Court's void-for-vagueness doctrine has nothing to do with vagueness. The rule of law values of fair notice and non-arbitrariness that the doctrine aims to promote are problems posed by legal indeterminacy in general, not vagueness in particular. And while linguistic vagueness is indeed a threat to legal determinacy and the rule of law, the characteristic of vagueness is hardly confined to the handful of statutes that the Court has struck down under the void-for-vagueness doctrine.

Further, the Court has explicitly said that the defining characteristic of linguistic vagueness—the existence of borderline cases—does *not* suffice to invalidate a statute under the void-for-vagueness doctrine. "[D]ifficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not necessarily render a statute unconstitutional for indefiniteness."[88] After all, "[r]ules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary."[89] And "the mere fact that close cases can be envisioned" does not "render[] a statute vague," as "[c]lose cases can be imagined under virtually any statute."[90] Thus, "[i]mpossible standards of specificity are not required,"[91] and it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[92]

In sum, the vagueness doctrine has nothing to do with vagueness properly understood, and the due process principles applied in vagueness cases are not designed to eliminate vagueness (or indeterminacy) itself. Nor are they capable of doing so. The doctrine is "not designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take

88. Jordan v. De George, 341 U.S. 223, 231 (1951) (citing United States v. Wurzbach, 380 U.S. 396, 399 (1930)).

89. Miller v. Strahl, 239 U.S. 426, 434 (1915).

90. United States v. Williams, 553 U.S. 285, 305–06 (2008).

91. *Jordan*, 324 U.S. at 231 (citing United States v. Petrillo, 332 U.S. 1, 67 (1947)).

92. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."[93]

III. Vagueness Doctrine and Substantive Due Process

The void-for-vagueness doctrine supposedly protects constitutional values associated with "ordinary notions of fair play and the settled rules of law."[94] As the Court noted in *Papachristou*, "[l]iving under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids."[95] This principle has deep roots in the Anglo-American legal tradition: "[a]t common law, it was the practice of courts to refuse to enforce legislative acts deemed too uncertain to be applied."[96]

Lon Fuller's principles of legality provide a convenient starting point for understanding the concept of legality and the meaning of the rule of law. According to Fuller, laws should ideally be generally applicable, publicly promulgated, non-retroactive, understandable, non-contradictory, possible to comply with, stable across time, and actually administered or enforced as written.[97] Vagueness as a linguistic phenomenon implicates a number of these principles by virtue of its nature as a challenge to the existence of—even the *possibility* of—legal determinacy.[98] Expressions of the void-for-vagueness doctrine tend to equate vagueness with inadequate notice and excessive discretion, both of which implicate several of Fuller's principles.

The vagueness doctrine is a subset of substantive due process,[99] which in turn is the primary constitutional vehicle for the principle of legality.[100] But it only makes sense to conceptualize the doctrine as a

93. *Lanier*, 520 U.S. at 271 (citation and quotation marks omitted).

94. *Connally*, 269 U.S. at 391.

95. *Papachristou*, 405 U.S. at 162 (citation omitted).

96. LAFAVE, *supra* note 34.

97. *See* LON L. FULLER, THE MORALITY OF LAW 33–38 (Yale Univ. Press 1964); SCOTT J. SHAPIRO, LEGALITY 392–98 (2011).

98. *See* Poscher, *supra* note 35, at 15, 19, 21, 22–23, 28–38 (discussing the implications of different linguistic and philosophical understandings of vagueness for the idea of legal determinacy and the rule of law).

99. *See, e.g.*, *Papachristou*, 405 U.S. at 165 (referring to the constitutional problems with the challenged vagrancy ordinance as "due process implications").

100. *See, e.g.*, Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 238 (1976) (stating that "guarantees of procedure and legality" are "expressed as 'due process' and 'law of the land'"). The phrase "by the law of the land," *per legem terrae*, appears in

subset of substantive due process if the doctrine includes some elements or principles absent in the larger set of substantive due process cases.

However, on closer inspection, all of the rule of law principles said to be vindicated by vagueness cases such as *Papachristou* are already included in the concept of substantive due process. There is no additional constitutional value vindicated by the vagueness doctrine, but absent in substantive due process doctrine. Even the briefest survey of cases in which the Court struck down statutes on substantive due process grounds without mentioning vagueness shows that these statutes were often also indeterminate and "vague" in a linguistic sense, and that in striking down the laws, the Court often described itself as vindicating legality principles.[101] Thus, the vagueness doctrine seems to be applied not when a statute is especially indeterminate, nor where it raises the linguistic vagueness problem of "borderline cases," but rather when the statute affects no recognized "fundamental right," but a court wishes to strike it down anyway.

Litigants who challenge a regulation on vagueness grounds face stiff hurdles and rarely succeed, in part because they carry the burden of persuasion on the issue of vagueness and must litigate on the

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the Magna Carta and was the historical precursor of the Due Process Clause. *See* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 5–11 (2003).

101. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975) ("The Due Process Clause [] forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied.") (citation and quotation marks omitted); Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (holding that the Equal Protection Clause was violated when a homeowner was "intentionally treated differently from others similarly situated" and there was "no rational basis for the difference in treatment"); *id.* ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.") (citations omitted). While *Olech* is an equal protection case, equal protection itself is rooted in the traditional value of nonarbitrariness. The concept of nonarbitrariness—that is, concern about the arbitrary exercise of power—plays a significant role in void-for-vagueness cases like *Papachristou* which vindicate the idea that "[t]he Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Morales*, 527 U.S. at 60 (quoting *Reese*, 92 U.S. at 221). At some point, excessive official discretion amounts to an authorization to make, rather than simply enforce, the law: legislatures may not entrust such authority to the "moment-to-moment judgment of the policeman on his beat." Smith v. Goguen, 415 U.S. 566, 575 (1974). A central concern about excessive official discretion is that the discretion may be exercised in arbitrary or discriminatory ways. *See Kolender*, 461 U.S. at 359–61.

terrain of highly unfavorable standards of review. The judicial hostility to vagueness challenges is rooted in principles of judicial restraint and respect for legislative enactments: "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language."[102]

But these challenges are virtually identical to those facing litigants seeking to strike down a statute on substantive due process grounds, provided that the statute does not affect a "fundamental right." The standard of review applied in such cases is the highly deferential "rational basis" test, according to which "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[103] If the Court can identify "plausible reasons for Congress's action," its "inquiry is at an end."[104] Under rational basis deference, statutes bear "a strong presumption of validity," and challengers have the burden to "negative every conceivable basis which might support" the statute.[105] "Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature."[106] Thus, if a statute is deemed to infringe

102. Parker v. Levy, 417 U.S. 733, 757 (1974). *See also, e.g.*, *Broadrick*, 413 U.S. at 610–11 (stating that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008) (citing the "fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," and the risk of "short circuit[ing] the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution") (quotation marks and citations omitted).

103. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993).

104. *Id.* (citations and quotation marks omitted).

105. *Id.* at 314 (citations omitted). Note that *Beach Commc'ns* is an equal protection case rather than a due process case, so this language applies to a classification in the statute, but the same analysis applies in due process challenges that trigger rational basis deference. In any case, equal protection is best understood as a component of substantive due process—an outer limit on permissible government action—albeit one with an explicit textual predicate in the Constitution. *See supra* note 101.

106. *Beach Commc'ns*, 508 U.S. at 313.

only non-"fundamental" liberties, as the vast majority of statutes do, it is virtually impervious to constitutional challenge.

Conclusion

One reason for the conceptual messiness of vagueness doctrine is that the term "vagueness" as understood in constitutional law has little to do with "vagueness" as a linguistic and philosophical concept. This supports the contention that the void-for-vagueness doctrine operates as a veil for other substantive commitments. Specifically, vagueness doctrine acts as a filter through which the Court has applied traditional substantive due process limits on government activity to statutes affecting liberty interests that are otherwise unprotected under the Court's post-New Deal substantive due process framework. This framework, which elevates certain judicially favored "fundamental rights" for special protection, generally leaves legislatures free to legislate and criminalize at will in areas not affecting these "fundamental rights."

This conclusion—that the void-for-vagueness doctrine has operated as a mechanism for judges to strike down statutes that violate substantive due process principles but that do not affect "fundamental rights"—is supported by the findings of Risa Goluboff, who delved into the Supreme Court archives to study the notes and draft opinions produced by the judges in *Papachristou*.[107] Goluboff found that earlier drafts of Justice Douglas's opinion in *Papachristou*, as well as memos exchanged between the Justices who eventually joined that opinion, showed that Justice Douglas initially planned to strike down the Jacksonville ordinance on substantive due process grounds. His preferred method of doing so was to recognize that substantive due process protection extended to a fundamental right "to walk, stroll, or loaf."[108]

In Goluboff's view, the behind-the-scenes history of the *Papachristou* case illustrates that the judges were still working out the contours of the fundamental rights framework, considered identifying a new fundamental right in *Papachristou*, but refrained from doing so in order to avoid further broadening the content of "fundamental rights" in the wake of the *Griswold v. Connecticut*[109] expansion of those rights.

107. *See generally* Goluboff, *supra* note 10.

108. *Id.* at 1381.

109. 381 U.S. 479, 484–85 (1965).

My conclusion is slightly different. I argue that the legality principles vindicated in *Papachristou* and other "vagueness" cases are simply applications of long-recognized rule-of-law principles protected by substantive due process. However, the Justices' commitment to the fundamental rights framework—which narrowed the domain of substantive due process protection so as to virtually eliminate judicial review of "economic" statutes—led them to couch their results in terms of the vagueness doctrine, so as to avoid reopening the possibility of broader, more robust judicial review of *all* statutes, regardless of their subject-matter, on substantive due process grounds.

Even if vagueness decisions such as those striking down vagrancy statutes seem to accord with our intuitions or "considered judgments"[110]—that is, seem to reflect an important aspect of the ordered liberty protected by the Constitution—this does not mean that the void-for-vagueness doctrine is the only way to reach such results. If the doctrine is conceptually indefensible and wholly disconnected from the meaning of "vagueness" as understood in linguistics and philosophy, as I have argued, then constitutional theorists should jettison the "vagueness" label and acknowledge that these statutes were unconstitutional because they infringed upon the liberty protected by substantive due process in constitutionally unacceptable ways. If the Court's post-New Deal discussions of substantive due process cannot make room for such results, this could mean that the Court's conception of substantive due process has become too narrow, failing to provide secure constitutional support for aspects of liberty that seem intrinsic to our constitutional order.

In sum, rather than expand the ultimately incoherent vagueness doctrine to encompass additional statutes, the Court could vindicate the values underlying its vagueness cases by recognizing that these values have deep roots in substantive due process and therefore need not rest upon a misguided notion of "vagueness." There is no value recognized by vagueness doctrine that is separate from traditional substantive due process concerns about arbitrariness, lack of notice, unlimited police power, uncompensated takings, private abuse of public power, and excessive discretion. Indeed, focusing on vagueness as a separate category of constitutional analysis distracts courts from identifying and addressing the values that highly

110. *See* JOHN RAWLS, A THEORY OF JUSTICE 46–51 (Harvard Univ. Press rev. ed. 2009) (discussing the role of "considered judgments" in moral reasoning).

indeterminate statutes, like the ordinance struck down in *Papachristou*, may violate.

In sum, vagueness doctrine has been used to protect important rule-of-law values in cases like *Papachristou*, but the doctrine itself paradoxically subverts the rule of law by concealing the substantive commitments underlying decisions in which it is applied. If the prevailing understanding of substantive due process is too narrow to encompass these substantive commitments, and these commitments accord with our considered judgments about the constitutional order, then the appropriate response is to revise and broaden our understanding of substantive due process. This would require rejecting definitions of "liberty" that limit constitutional protection to certain privileged subject-areas (such as expression, the right to marry, etc.), while declaring open season for legislatures to regulatethe broad swaths of human activity that do not fall within these judicially favored categories.