

Vagueness and Legal Language

Vagueness is an inescapable attribute of language. Professor Christie's interesting and informative analysis discusses how vagueness is often an aid to precise communication and how a functioning legal system depends on the existence of vagueness in language. Professor Christie then discusses the limitations imposed on the use of language as a means of communication by the presence of this very same vagueness and suggests that these limitations rather than being cause for despair should spur the utilization in the law of other communication devices. He concludes that vagueness is not a deterrent but, rather, an indispensable element in the regulation of human conduct through legal rules.

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How often has the complaint been heard that words, the tools of the lawyer, are vague and imprecise. This Article will examine the underlying basis of this complaint, and it will be urged that it is precisely this vagueness in language which often permits the law to perform so many of its social functions. It is not being urged that vagueness is itself an end or always a boon to the lawyer's work, but it is submitted that such an examination is an essential prolegomenon for any further study of the effect of language upon the judicial process.

In the first few pages of this Article attention will be directed to the more obvious ways in which the vagueness of language affects the law. Succeeding portions will focus on the less conspicuous relationships of vagueness to the law. Finally, a discussion of the limitations imposed on certain areas of the law by vagueness and imprecision in language will emphasize the need for other techniques whose use, when noticed, is often decried but which should, instead, be welcomed as an important addition to the legal tool chest. If this last point can be established, the implications that it has for the judicial process as a whole will be well worth considering, although the pursuit of this more ambitious undertaking is beyond the scope of the present Article.

At the outset the customary distinctions between vagueness

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and ambiguity must be kept in mind. Vagueness is normally used in the philosophy of language in connection with general terms with an open textured meaning. When such words are used in discourse, the intended scope of the term is often unclear. Terms referring to colors are simple examples of vague terms. Ambiguity on the other hand is normally used to refer to a situation where a general term may be at once *clearly* true of certain objects and at the same time *clearly* false of the same objects. A classic example given by Professor Quine is the term "light" as applied to the term "feathers," since "light feathers" may be in fact dark in color although light in weight.¹ To give another example, Professor H. L. A. Hart refers to a case where a testator leaves his "vessels" to a legatee. Did the testator mean to refer to his crockery or to his yachts or to both?² With these distinctions in mind, it should be noted that this Article will be primarily concerned with the problem of vagueness.

I.

In this first section, dealing with the more generally recognized interrelationships between law and the vagueness of language, particular attention will be directed to two legal techniques dependent for their effect precisely upon the vagueness in language. These techniques are by no means confined to the legal sphere; their use is much more widespread and no philosophy of language can afford to ignore their existence. The first technique is the purposive *search* for vagueness, for reasons sometimes bad and sometimes good. The second technique is the purposive *use* of vagueness as a means of permitting at least some amount of necessary control over the authority that one power group is forced to delegate to a subordinate power group.

A. THE PURPOSIVE SEARCH FOR VAGUENESS

No one doubts that it is the function of courts to interpret statutes in the light of the purposes which the legislature had in mind in enacting the statutes. This is no more than a specific application of the principle, self-evident to all students of language, that a speaker's remarks must be interpreted in the context in which the remarks are made. But sometimes those who are called upon to interpret someone's remarks disapprove of the

1. QUINE, WORD AND OBJECT 129 (1960).

2. Hart, *Dias and Hughes on Jurisprudence*, 4 J. Soc'y Pub. Teachers of Law 143, 144 (1958); cf. Williams, *Language and the Law—II*, 61 L.Q. REV. 179-81, 189-92 (1945). The latter article is one of five very interesting and lucid articles by Dr. Williams entitled "Language and the Law" which appeared in volumes 61 and 62 of the *Law Quarterly Review*.

purpose which the speaker seemingly had in mind. The situation becomes acute when the interpreter is required to act upon the speaker's remarks. In such circumstances it is only natural for the addressee of the remarks to search for vagueness so as to be able to say, "well he really couldn't have meant this, so he must have meant this."³ The listener thus discards a contextually more likely interpretation for a less plausible one which better accords with his standards of good and bad.

Normative language is constantly undergoing such stresses in the ordinary experience of almost everyone. How many housewives have had to tell their maids that "dust the house" meant just that and not merely "dust the porcelain"? In the law, the enterprise of purposely pretending not to hear is, of course, institutionalized. One may wonder what Anthony Comstock's reaction would have been if someone had told him that the statutes unqualifiedly prohibiting the importation of contraceptive devices into the United States,⁴ which he was so instrumental in getting enacted,⁵ were going to be construed so as only to prohibit the importation of such devices for "immoral purposes." Mr. Comstock would have been no doubt gratified to know that the importation of contraceptives by physicians is not for "immoral purposes."⁶

It is ancient history that the exploitation of the vagueness in language reaches maximum utilization when the groups in con-

3. Cf. the following AP dispatch which appeared in the Minneapolis Sunday Tribune:

A Windsor man who posted a sign on his barn saying "Please do not ask permission to hunt," returned from work in nearby Binghamton to find several hunters in his woods.

When he inquired whether they had read his prominently displayed sign, one replied, "We did read it. We thought you just didn't want to be bothered."

Minneapolis Sunday Tribune, March 8, 1964, § H, p. 3, col. 1.

4. 46 Stat. 688 (1930), as amended, 19 U.S.C. § 1305(a) (1958). A companion criminal statute also makes it a crime to transmit contraceptives through the mails. 18 U.S.C. § 1462 (1958). The first such prohibitions, in substantially the same absolute form, were contained in the Act of March 3, 1873. 17 Stat. 598.

5. Mr. Comstock was influential in securing the passage of the legislation of 1873, including the provisions prohibiting the transmission of contraceptives. See BENNETT, ANTHONY COMSTOCK 1014-17, 1067-73 (1878); BROWN & LEACH, ANTHONY COMSTOCK 131-44 (1927).

6. *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) (construing 46 Stat. 688 (1930) (now 19 U.S.C. § 1305(a) (1958))). The court relied upon a suggestion in an earlier case involving the criminal statute. *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) (the intent to make an absolute prohibition cannot be "lightly . . . ascribed to Congress").

trol of the legislatures and those in control of the courts are antagonistic to each other.⁷ At such times maxims such as "statutes in derogation of the common law must be strictly construed" are applied with a vengeance to make legislative change of the law difficult.⁸ Perhaps a desire that human liberty should not be lightly taken away has led to the maxim that "penal statutes should be strictly construed," and yet the application of this maxim has certainly led to what some might call fairly gross perversions of language.⁹ In the extreme case where a prohibition against "every" is interpreted so as to prohibit only "some," it may be felt that the distortion of language is so glaring that there is no danger of the creation of new vagueness. Still, how does a legislature make sure that "every" is taken to mean "every"? At all events, enough has been said to indicate that, owing to the conflicting human inclinations of not wanting to disobey lawful directives and yet at the same time of not wanting to implement directives considered unjust or unreasonable, lan-

7. There are other ways, of course, in which the courts may deal with legislation of which they disapprove. Such legislation, for example, may be declared void on account of vagueness. But not all extremely vague legislation is declared void and the conclusion is inescapable that the void-for-vagueness technique is often a way of deciding a case without articulating basic differences in policy between courts and legislatures. For a good discussion of this question, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

8. For an interesting and concise account of English and Canadian experience with the social legislation of the 1930's, see Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1, 20-27 (1938). See generally Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). In the famous case of *Johnson v. Southern Pac. Co.*, 117 Fed. 462 (8th Cir. 1902) a statute requiring that "any car used in moving interstate traffic" be equipped with automatic couplers was held not to apply to locomotives. The decision was reversed. *Johnson v. Southern Pac. Co.*, 196 U.S. 1 (1904).

9. For illustrations, see Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935); Comment, *Criminal Law and Procedure-Statutory Construction*, 32 MICH. L. REV. 976 (1934). Among the most shocking examples is *Lyons & Co. v. Keating*, [1931] 2 K.B. 535, an English case, where a statute prohibiting the use of any substance "purporting to be cream" was held not to cover the use of emulsified fat in items purporting not to be cream but only to contain cream. See also *McBoyle v. United States*, 283 U.S. 25 (1931): An airplane was held not within the scope of an act making it illegal to transport a stolen motor vehicle in interstate commerce, where motor vehicle was defined as an "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." In *State v. Goldenberg*, 30 Del. 458, 108 Atl. 197 (1919), a pawnbroker who charged 3% interest per month and 3% of the amount of the loan as storage fee for the property pawned was held not to violate a statute restricting interest on loans to 3% per month.

guage will often be the scapegoat. Where there appears to be no vagueness, vagueness and even ambiguity¹⁰ will be created; the slightest trace of vagueness will be exploited. Once vagueness has been found, one is free to choose the interpretation of which one approves. There are, then, powerful forces at work impelling men to search for vagueness in language and even intentionally to create new vagueness with which a philosophy of language must always reckon.

Yet no one would argue that such a technique — despite its dependence on the exploitation or even the intentional creation of vagueness — is a completely unjustified one. To deplore the inevitable use of such a technique would be to ignore the fact that legislatures and prior judges do make mistakes, do fail to consider all the implications of their acts, do improvidently try to accomplish too much and that some means must exist whereby those called upon to administer existing norms to new cases can avoid the disastrous results to which such improvidence would otherwise lead. This is not to say that subsequent administrators should, or even in the nature of things must, have unbridled discretion to avoid the implications of prior rules of law through the purposive search for vagueness. For present purposes, it is enough to note not only the inevitability but the necessity of such a technique. The ascertainment of how best to keep this technique within reasonable bounds is beyond the scope of this Article, although much of the succeeding portions of this Article will be very relevant to such an inquiry.

B. THE PURPOSIVE USE OF VAGUENESS

Vagueness has some uses in law which permit men, through the use of language, to achieve more sophisticated methods of social control, for example, the use of vague language in legal directives to postpone ultimate decision. Such postponement may be desired for a variety of reasons that are often interconnected. It may be felt, for instance, that what is needed is individualized application of a legal directive. Thus, in ordering integration of the public schools, the Supreme Court said that integration must proceed "with all deliberate speed."¹¹ The initial decision as to what is "all deliberate speed" in any particular situation is left for the lower federal courts after an examination of the circumstances of each case. On the other hand, vague language may

10. A man who tried to vote for a dead man was held not to have impersonated one entitled to vote since dead men can't vote. *Whiteley v. Chappell*, [1868] 4 Q.B. 147; cf. text accompanying notes 1 & 2 *supra*.

11. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

also be used because a law giver may have a general idea of what he wants to accomplish but may be uncertain as to what specific conduct to prohibit. He decides on some vague general standard which can evolve through a series of individual applications, a general standard which can even change in content as the nature of society changes. Perhaps the most famous of such general standards are the "due process" provisions in the fifth and fourteenth amendments to the Constitution.¹² Another is the constitutional grant of power to the federal government "to regulate Commerce . . . among the several states";¹³ it was once argued, unsuccessfully, that Congress could not regulate interstate telegraph companies because at the time the Constitution was adopted the telegraph had not yet been invented.¹⁴ Finally, on a more mundane level, one might cite section five of the Federal Trade Commission Act of 1914, which empowers the FTC to prevent "unfair methods of competition."¹⁵

The importance of the flexibility that vagueness gives to all normative methods of social control can scarcely be overestimated and is recognized by all. It allows man to exercise general control over his social development without committing himself in advance to any specific concrete course of action. Without such flexibility, man would have to choose between no regulation and the impossible task of minute specification of what is and what is not to be permitted. Moreover, as already shown above, if man tries to regulate too much in advance, he will be faced with the need to pervert his own language through the constant creation of vagueness in order to save himself from his own improvidence.¹⁶

II.

The two aspects of vagueness in language to be discussed in this section, although very germane to the law, have received

12. It is obvious that "due process of law" and "the equal protection of the laws" evolve in meaning with the development of man. *Compare* *Plessy v. Ferguson*, 163 U.S. 537 (1896), *with* *Brown v. Board of Educ.*, 347 U.S. 483 (1954). At one time, of course, minimum wage regulation was unconstitutional. *Compare* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *with* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

13. U.S. CONST. art. I, § 8.

14. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1 (1877).

15. 38 Stat. 717 (1914), 15 U.S.C. § 45(b) (1958).

16. There is an additional aspect of vagueness that is related to those which have been discussed in the text. That is to say, there is another use of vagueness that would have to be considered in any attempt to establish how a legislature may assert its control over what is done by courts. It has been noted that courts may search for and even create vagueness in order to avoid legislative directives. It has also been noted that a legislature may use vagueness

attention primarily from philosophers of language and not from lawyers. These two aspects of vagueness serve as positive boons to language, particularly to legal language. The first is the need for vagueness necessitated by what Professor Quine calls "the linearity of discourse."¹⁷ The second aspect also helps in coping with deficiencies inherent in language; it is a means of attaining a precision in discourse which would otherwise be either unattainable or attainable only at a price which we might hesitate to pay. This use of the vagueness in language may best be introduced by an example from I. A. Richards. Professor Richards points out that a painter working with oils may, with a limited palette, attain more precise representations by thinning and combining his few initial colors than can a man constructing a mosaic who starts out with a greater variety of colored tiles but who, precisely because he cannot thin and combine his tiles, is more limited than the painter in the results he can obtain.¹⁸ The general idea is, of course, that through the skillful combination of vague terms a draftsman can often achieve better results than he can by stringing together — or, if one prefers, fitting together — precise technical terms.

A. VAGUENESS AND THE LINEARITY OF DISCOURSE

Reference here, of course, is being made to the fact that we can only utter or write down words one at a time. To paraphrase Quine,¹⁹ we often find that an understanding of some matter *A* is necessary preparation for an understanding of some matter *B* which we are trying to explain. Yet, we sometimes find that *A* itself cannot be explained in adequate detail or even correctly, in

ness precisely in order to give a large measure of freedom to the courts. Sometimes, however, a court which is impatient with legislative lethargy in initiating legal reforms may seize upon intentionally vague language in a statute to bring about so-called "necessary" reforms on its own initiative. In such situations it might be said that the legislature meant to be vague but not quite as vague as the court has made out. That technique of government which employs the purposive use of vagueness might then be said to have been abused. The court has exceeded the freedom which the legislature meant it to have. But the present Article is concerned with vagueness and legal language. As already noted, therefore, the ambitious undertaking of how to deal with the problems of legislative control over judicial action that are suggested in a discussion of vagueness and legal language is beyond the scope of this Article. It might be noted in passing, however, that these problems are often political in nature.

17. QUINE, *op. cit. supra* note 1, at 127.

18. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 69-73 (1936); cf. OGDEN & RICHARDS, *THE MEANING OF MEANING* 205-07 (8th ed. 1946). See also RICHARDS, *op. cit. supra* at 61-63.

19. QUINE, *op. cit. supra* note 1, at 127.

any sense of that word, without an awareness of certain exceptions and distinctions that depend on a prior understanding of *B*. This, of course, is always the problem of one constructing a dictionary and is very often the problem confronting one who is drafting a statute. Moreover, in both endeavors variations of the basic problem are often met: *A* is defined in terms of *B*; to understand *B* one must know not only perhaps something about *A*, but also something about *C* and *D*; and for some reason or other it is not felt expedient to define *C* and *D* until a much later stage in the drafting process. In all these situations vagueness comes to the rescue of the draftsmen. One first states or uses *A* vaguely, proceeds to *B*, *C*, and *D*, and eventually narrows down the meaning of *A* without ever having to call upon the reader "to learn and unlearn any outright falsehood"²⁰ in the preliminary statement of *A*. One need not turn to a dictionary for examples or even dwell for long on the fact that dictionaries are sometimes forced to be almost completely circular in definition, as when, for example, "poetry" is defined, *inter alia*, as "the art or work of poets" and a "poet" is defined as "a composer of poetry."²¹ The law abounds with examples of the use and abuse of this technique and a few examples should suffice to make the point sufficiently clear.

In section 1 of the *Restatement of Contracts* a contract is defined as a promise or set of promises for the "breach" of which the law gives a remedy.²² The draftsmen were forced to begin somewhere and accordingly they began with a definition of "contract." And yet to define "contract" they had to use the concept of breach or breach of contract, a concept which they had not yet defined. The draftsmen presupposed that the term "breach" as applied to contracts had already some vague meaning for the reader, at least enough of a meaning to let them proceed on their scheme for the construction of their restatement of the law. Indeed, it is not until section 312, by which time the notion of contract has been much refined, that they proceed to define "breach of contract."²³ There, under the topic heading "Nature of a Breach," section 312 defines "a breach of contract" as the non-performance of any "contractual" duty of immediate performance. Then, in the next 13 sections they proceed to particularize more fully what they mean by "a breach of contract."

Now, it is not being urged that the draftsmen of the *Restate-*

20. *Ibid.*

21. WEBSTER'S NEW COLLEGIATE DICTIONARY 651 (1951 ed.).

22. RESTATEMENT, CONTRACTS § 1 (1932).

23. *Id.* § 312.

ment are engaging in circular reasoning. There would seem to be nothing improper in what they are doing. They were faced with the problem of defining what a contract is when the notion of a contract depends on some understanding of what it means to breach a contract; and yet to fully understand what is meant by a breach of contract one must know what is a contract and what is a contractual duty. Here the fact that their readers already have a vague concept of "breach" comes to the draftsmen's rescue and allows them to proceed step by step. Otherwise their task would be almost hopeless.

A second—less clear cut and thus more typical—example to illustrate the point is a problem dealt with by the draftsmen of the Civil Aeronautics Act of 1938, the pertinent provisions of which have been incorporated into the Federal Aviation Act of 1958. In section 1(2) of the 1938 act, an "air carrier" was defined as any citizen of the United States who engages in "air transportation."²⁴ It was assumed that the term "air transportation" already had perhaps at least some vague meaning for the reader. Then, in section 1(10), "air transportation" was defined as "interstate, overseas, or foreign air transportation."²⁵ It was here assumed that the words "interstate," "overseas," and "foreign" already had some vague meaning for the reader which further helped him in understanding the term "air transportation," for this term without any further intermediate definition was then used in a succeeding definition. Not until section 1(21) was everything brought together, when the meaning of "interstate," "overseas," and "foreign," as applied to "air transportation," was explained.²⁶ In that section "interstate air transportation," "overseas air transportation," and "foreign air transportation" were respectively defined to mean the "carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between" certain points, the "interstate," "overseas," or "foreign" character of the air transportation depending on the points between which the carriage is performed.²⁷ By this stage it is clear why an "air carrier" is one who engages in "air transportation" and why "air transportation" is something done by an "air carrier." It is also now clear why a knowledge of what is "interstate, overseas, or foreign air transportation" was considered a prerequisite for knowing what "air transportation" is and why a crude definition

24. 52 Stat. 977 (1938) (now 49 U.S.C. § 1301(3) (1958)).

25. 52 Stat. 978 (1938) (now 49 U.S.C. § 1301(10) (1958)).

26. 52 Stat. 979 (1938) (now 49 U.S.C. § 1301(21) (1958)).

27. *Ibid.*

of "air transportation" as "interstate, overseas, or foreign air transportation" is a helpful intermediate definition before attempting to define these latter terms, upon whose definition a complete understanding of "air transportation" depends.

If words carried no meaning to the reader apart from the meaning conveyed by the actual definitions contained in the act, any definition would of course have been impossible since no act can define every word used therein. Even more important for present purposes, reading an act would be like reading random and arbitrary collections of symbols which would have no meaning at all until every word in the act had already been read. Only a computer could have a good enough memory to be able to read a document in this way.

The examples given should suffice to clear up the point now being illustrated. The big danger to be noted in the use of this definitional technique — the presupposition of some vague understanding of terms to be later more adequately defined partly in terms of what has by then already been defined — is that one may come close to finding himself engaged in the circular reasoning which has infected some of the attempts to define "poet" and "poetry."²⁸ This would have been the case in the example taken from the *Restatement of Contracts* if the draftsmen, rather than postponing, as they did, further definition until the concept of "a contract" had been adequately refined, had attempted to present the definition of "a breach of contract" immediately after the definition of "a contract." But draftsmen are neither always this careful nor, perhaps, do they always care. At any rate, as the following provisions of the recent New York Civil Practice Law and Rules would seem to suggest, the never, never land of circular definition may not really always be so very far away.

Section 105. Definitions

(i) Judgment. The word "judgment" means a final or interlocutory judgment.

(j) Judgment creditor. A "judgment creditor" is a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it.

(k) Judgment debtor. A "judgment debtor" is a person, other than a defendant not summoned in the action, against whom a money judgment is entered

(n) Money judgment. A "money judgment" is a judgment, or any part thereof, for a sum of money or directing the payment of a sum of money.²⁹

28. See text accompanying note 20 *supra*.

29. N.Y. CIV. PRAC. L. & R. § 105 (1962).

The situation is only saved from complete ludicrousness by the fact that in section 5011, after the word judgment has already been used hundreds of times in the act, a judgment is, finally, defined again as "the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final."³⁰ The words "interlocutory" and "final," however, are never defined, and why, if these terms are not thought sufficiently important to define, it is helpful to know that a money judgment is, *inter alia*, a judgment for a sum of money, is not readily apparent. Were it not for the fact that the draftsmen can safely assume that most lawyers already quite thoroughly know the meaning of the words being defined, it would appear that the definitional techniques used would have been of little help in furthering an understanding of the act.

B. VAGUENESS AS AN AID TO PRECISION

If men had sufficient technical terms of very precise meaning to cover every complex idea that they wished to express, vagueness would perhaps not be so necessary as a means for achieving precision in discourse. There is no such sufficient fund of precise technical terms available, however, nor is it likely that there shall ever be such a complete pool of technical words. Moreover, whether the availability of a hypothetically fairly complete set of precise technical terms would be an advantage is at the very least open to question. The expansion of the vocabulary would have to be of enormous dimensions to accommodate the vast number of new terms required, and it is evident that human life being what it is there would always be some areas where precise technical terms were not yet available. Who could hope to master such an immense language? Who would dare to teach it? As a practical matter, then, although precise terms do have their uses, there will be much need of other devices to achieve workable precision in language.

One such device employs the use of vagueness. Reasonable precision may be achieved through the use of several general terms to narrow down the intended meaning to the area of overlap of the terms used, somewhat as precision in spatial reference may be achieved through the overlapping of circles and the focusing of attention on the area which the several intersecting circles have in common.³¹ A novelist makes use of this device, for example, to describe a sunset; a lawyer uses the same device to define a vague general word which he proposes to use in a statute

30. N.Y. CIV. PRAC. L. & R. § 5011 (1962). See generally 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.01 (1963).

31. Cf. RICHARDS, *op. cit. supra* note 18, at 69-73.

or a contract. Examples from legal sources must surely immediately occur to the most casual reader. It will thus only be necessary to give a few simple examples of how the superimposition of several vague general terms can be used by lawyers to arrive at a workable precision.

The following definitions obtained from various random sources are fairly adequate examples:

(1) From the *Restatement of Torts*:

An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.³²

(2) From the Regulations of the Food and Drug Administration:

The term "coal-tar color" means articles which (1) are composed of or contain any substance derived from coal tar, or any substance so related in its chemical structure to a constituent of coal tar as to be capable of derivation from such constituent; and (2) when added or applied to a food, drug, cosmetic, or the human body or any part thereof, are capable (alone or through reaction with other substance) of imparting color thereto.³³

(3) From the Criminal Code of the United States:

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.³⁴

Although the words in terms of which the expressions "ultrahazardous activity," "coal-tar color," and "labor organization" are defined are not much more precise than the expressions being defined, these definitions are very helpful in focusing attention on what the respective draftsmen hoped to cover by the use of the terms in question and in determining what was not intended to be included in the meaning of these terms in the context in which they are being used.

In the examples, vague terms were given a more readily apprehendable content through the superimposition of vagueness. As has been already noted, this use of vagueness permits us to fulfill our needs for adequate means of communication without encumbering our language with a vocabulary so enormous as to

32. RESTATEMENT, TORTS § 520 (1938).

33. 21 C.F.R. § 9.1(a) (1963).

34. 18 U.S.C. § 610 (1958).

preclude practical utilization of language. Vagueness here has been used to fill in the outline of terms of broad but imprecise meaning. The definitions give content to the general offhand reaction to these terms.

Sometimes vagueness helps us to cut down the size of the vocabulary necessary for adequate communication in a somewhat different way. We may, for example, for want of any other available word, wish to use a vague word in one of what might in some situations be called its secondary meanings and to exclude entirely the other and more usual meanings associated with this word. We may then say that "for purposes of this statute *X* shall mean" or "*shall be defined as*" Thus, we may cope with a new situation by using a known word in one of its less usual senses, without at the same time disputing that the word in most other contexts has a somewhat different meaning. Through the "defined as" device, an *ad hoc* solution has been reached without outraging anyone's sense of linguistic propriety. The lawyer has thereby avoided having to invent a new word and he has, as far as he could, avoided taking sides as to the "proper" or "primary" or "most helpful" use of a word.³⁵ He has left these jobs for the professional linguists; vagueness has given the lawyer the means of proceeding in the absence of such special guidance and possibly even despite such special guidance.³⁶

Perhaps as clear an illustration of this technique as one could wish is the definition of "political activity" contained in the Registration Act of 1940:

For the purposes of this section: "Political activity" means any activity the purpose or aim of which, or one of the purposes or aims of which, is the control by force or overthrow of the Government of the United States or a political subdivision thereof, or any State or political subdivision thereof³⁷

35. One might note in passing that some inquiries concerning meaning, such as those seeking the "true" or "real" meaning of the expressions under consideration, seem fruitless. See Hart, *supra* note 2, at 144; cf. QUINE, *op. cit. supra* note 1, at 26-38, 160.

36. My attention was drawn to this aspect of legal language by the late Professor Austin's discussion of "adjuster-words." AUSTIN, *SENSE AND SENSIBILITY* 73-77 (reconstructed by G. Warnock 1962). Professor Austin, a philosopher, not a lawyer, discusses the use of expressions "like a pig" to enable us, without inventing new words, to talk of animals similar to pigs in some ways but dissimilar in other ways. It seems to me the "defined as" technique in the law serves the same purpose of allowing us to proceed without having to tamper with, or even to get involved in deciding on, the primary meaning of the word being used. See *id.* at 75.

37. 54 Stat. 1201, 18 U.S.C. § 2386 (1958).

That this is not a usual definition of "political activity" is too clear for further comment. Yet one would be loath to say that "political activity" does not include the activities upon which this act has focused attention.

III.

In the preceding sections of this Article, attention has been drawn to the fact that vagueness can serve some very useful functions in communication. There are nevertheless some serious limitations on use of language as a means of ordering human relations that are imposed by the inescapable element of vagueness. The succeeding portions of this Article will discuss some of the problems created by the presence of these limitations.

A. THE APPLICATION OF VAGUELY WORDED STANDARDS — DISTINCTIONS NOT CAPABLE OF ARTICULATION

That language is too imprecise to perform certain desirable tasks is evident; the important question is what conclusions one should draw from this defect in language. A number of courts, it is submitted, have drawn the wrong conclusion. These courts have been confronted with situations in which they could not articulate the distinctions they wished to draw between the various factual situations involved. From this inability they concluded that the difference to which they wished to call attention did not exist. Yet, differences do exist in the real world, differences of which thoughtful — and even sometimes unthoughtful — people can be aware, and often no satisfactory articulation of the differences can be made.³⁸ Surely one would be foolhardy to deny that a brandy taster can tell the differences among several samples of cognac with which he has been presented, even though the taster might not be able to explain what the differences are. Indeed, we all do somewhat the same thing in testing colors, for example. Most of us can distinguish between, say, turquoise and aquamarine, even though an adequate verbal description of the variance would be difficult. We should find the task of differentiation and explanation easier, of course, if we could have both the aquamarine and the turquoise samples before our eyes at the same time so that we could answer questions by just pointing at the samples. A similar approach is justified, and is indeed often used, in the law. Cases are often decided on the basis of a comparison with other real and imaginary cases, even though a completely adequate test for imposing the reasoning of one group of

38. Cf. AUSTIN, *Other Minds*, in *PHILOSOPHICAL PAPERS* 44, 52-53 (1961). Austin asserts that we know many things that we cannot describe in words.

cases, rather than that of another group, on a particular fact situation would be difficult to formulate.

Some courts have ignored these "facts." For example, the attempts to distinguish among slight negligence, negligence, gross negligence, and recklessness (often equated with wanton negligence) are familiar. Many of the attempts were prompted by the provisions of automobile guest statutes that exempted the owner and/or driver from liability for negligence but imposed liability for either gross negligence or recklessness. The manner in which these statutes were framed indicated that the legislature felt that not only were gross negligence and recklessness distinguishable but that gross negligence could be distinguished from negligence.³⁹ Judge Magruder's description of Chief Justice Rugg's method of distinguishing among negligence, gross negligence and recklessness is instructive: It was simply the difference "among a fool, a damned fool, and a God-damned fool."⁴⁰ Although one would intuitively argue that these distinctions make much sense, the attempt to apply the distinctions in practice proved perplexing. Eventually many courts threw up their hands and declared that there were no degrees of negligence, that there was no practicable difference among slight negligence, negligence, and gross negligence. The only workable distinction was between negligence and recklessness.⁴¹ The distinction between the two was said to lie in the fact that negligence was to be determined solely by objective standards, whereas recklessness required a type of

39. See *Williamson v. McKenna*, 223 Ore. 366, 390, 354 P.2d 56, 67 (1960). Compare *Finkler v. Zimmer*, 258 Mich. 336, 241 N.W. 851 (1932), with *id.* at 342, 241 N.W. at 853 (concurring opinion).

40. Harvard Law Record, April 16, 1959, p. 7, quoted in PROSSER & SMITH, CASES ON TORTS 213 (3d ed. 1962).

41. A good example is *Williamson v. McKenna*, 223 Ore. 366, 354 P.2d 56 (1960). The statute in question spoke in terms of "gross negligence or . . . reckless disregard of the rights of others." The court held that gross negligence was to be construed as identical with "reckless disregard of the rights of others," because the courts were unable to "separate" the two expressions. *Id.* at 390-92, 354 P.2d at 67-68:

It has been argued that our statute clearly expresses the legislative intent to classify gross negligence as a type of conduct separate and less culpable than reckless conduct. It is not impossible that the legislative draftsman labored under the misconception (not uncommon in 1929 when our guest statute was enacted) that negligence could be divided into degrees. If we should assume that the legislature intended to describe a degree of fault which the courts are unable to separate from reckless conduct, then the statute would have to be declared void for vagueness. The other choice is to reconcile the two expressions in the statute.

Similar cases in other states are cited in the opinion. Some of these cases are

mens rea.⁴² It was this *mens rea* which was said to distinguish recklessness from negligence and not any necessary differences in the objective manifestations of the behavior being examined. Yet, in proving recklessness, it was recognized that it was not necessary to show that the defendant intended to do the harm which he caused or even that he actually appreciated the great risk to which he was subjecting others. It was enough if he *should have* appreciated the high degree of risk involved.⁴³ The result, therefore, was not exactly the abolition of degrees of negligence. The hypothetical reasonable man entered the picture again, not, of course, to determine what the reasonable man would have done under the circumstances but rather to determine what the reasonable man's state of mind would have been had he done the things which the defendant was accused of doing. Degrees of negligence were reintroduced under the guise of something akin to implied malice, *i.e.* implied recklessness. The primary result, then, was merely that one possible further distinction was discarded without perhaps adequate examination of the utility of retaining this distinction.

It is the thesis of this Article that differences which are hard to articulate can still be utilized in the law. To remain with the example now being discussed, it is submitted that slight negligence, negligence, gross negligence, and recklessness may be distinguished among themselves and that perhaps even other further distinctions of a similar nature might be made. It is further contended that not only can these distinctions be made, but that courts (or courts and juries) can make these distinctions. It is, however, not being argued that appellate courts can tell the lower courts specifically how to make these distinctions or that juries can be

among the cases cited in notes 42 and 43 *infra*. For a discussion of the very unsatisfactory treatment courts have accorded to the language in automobile guest statutes, see HARPER & JAMES, *THE LAW OF TORTS* 950-54 (1956).

In a very recent case, *Clayton v. Bartoszewski*, 198 A.2d 692 (Del. 1964), the Delaware Court, in applying a Virginia statute, noted that Virginia did distinguish between gross negligence and recklessness and concluded that Virginia took the pragmatic approach of defining gross negligence as conduct on the part of the driver of a motor vehicle such as will allow a nonpaying guest to recover in the absence of a showing of contributory negligence. A claim based on recklessness could not be so defeated. To the present writer, this is a refreshing point of view.

42. See, *e.g.*, *Brown v. Roach*, 67 So. 2d 201, 203 (Fla. 1953); *Findlay v. Davis*, 263 Mich. 179, 248 N.W. 588 (1933); *Williamson v. McKenna*, 223 Ore. 366, 389-90, 354 P.2d 56, 67 (1960).

43. See, *e.g.*, *Olszewski v. Dibrizio*, 281 Mich. 423, 424, 275 N.W. 194, 195 (1937); *Williamson v. McKenna*, 223 Ore. 366, 390-400, 354 P.2d 56, 67-71 (1960). The *Restatement of Torts* defines "reckless disregard of safety" as an

specifically told how to make these distinctions. If it is necessary for appellate courts, in reviewing lower court decisions, not only to supervise generally the lower courts' results but also to tell the lower courts exactly how to proceed, then the task of distinguishing in great detail is indeed hopeless. Moreover, many distinctions, even some which the courts presently make, should then be abandoned.

It is the position of this Article that appellate courts need not always tell lower courts and juries exactly how to proceed. Adequate supervision and meaningful appellate review can often be secured without any such ambitious goal. Indeed, as previously noted, there are areas where it is specifically recognized that juries and lower courts can handle distinctions despite the fact that an appellate court would be hard put to articulate adequately any type of test usable by anyone who was not already aware of the distinction in question. The appellate courts, for instance, have repeatedly rejected the argument that distinctions between the amount of proof required in civil and criminal cases should be dropped as well as the argument that there cannot be more than one degree of proof required in civil cases.⁴⁴ The law is much too flexible for that. The courts have asserted that juries can indeed distinguish between proof which satisfies the "preponderance" test from that which also satisfies the "clear and convincing" test and that both these tests can in turn be distinguished from the "beyond a reasonable doubt" test.⁴⁵ It has been asserted that these distinctions can be applied although any attempt to describe the differences in even remotely logically foolproof terms is doomed to utter failure. In fact it is generally agreed by many courts and by most commentators that these terms, of whose meaning jurors already have some notion, are best left undefined because almost all attempted definitions create more problems than they solve.⁴⁶ The most practical method of applying these terms and of making the distinctions implicit in them is by the putting of cases. The better jurors probably decide whether the proof in the case before them satisfies the "beyond a reasonable doubt" test or the "clear and convincing" test by asking them-

intentional act or omission done by one "knowing or *having reason to know*" that his conduct involves both an unreasonable risk of harm to another and a high degree of probability that substantial harm will result. RESTATEMENT, TORTS § 500 (1934). (Emphasis added.)

44. See, e.g., *Kempf v. Himsel*, 121 Ind. App. 488, 516, 98 N.E.2d 200, 212 (1951); *Botta v. Brunner*, 26 N.J. 82, 91, 138 A.2d 713, 717 (1958).

45. *Ibid.*

46. See MCCORMICK, EVIDENCE 682-83 (1954); 9 WIGMORE, EVIDENCE 319-27 (3d ed. 1940).

selves what, in the type of situation presented to them, would unquestionably be an instance of proof "beyond a reasonable doubt" or of "clear and convincing" evidence on a disputed point and by then comparing the proof before them with the paradigm cases.

It is not the thesis of this Article, however, that the current standards of proof are the most aptly phrased or that juries adequately handle those standards.⁴⁷ There is no need to take sides here on these issues. Part of whatever problem is felt to exist no doubt is partly owing to the fact that juries, unlike a judge acting as the trier of fact, must decide in isolation how to apply the pertinent standard of proof to the case before them without the benefit of the experience of other juries in similar situations.⁴⁸ Be that as it may, the important point here is that in certain current situations, distinctions are recognized in the law even though the distinctions cannot, in any very helpful sense, be adequately articulated. The specific illustrative situations to which reference has been made in the text of this Article are, moreover, not the only ones.⁴⁹ The second point being suggested here is that the rational way to deal with such areas of the law is by the putting of cases, real and imaginary, with which the instant case can be

47. In Comment, *Evidence: The Validity of Multiple Standards of Proof*, 1959 WIS. L. REV. 525, an attempt is made on the basis of a controlled experiment to show that the standards are neither aptly phrased nor adequately handled by juries. But, from the way the standards of proof used in the experiment were formulated and the limited scope of the experiment, I fail to see that the arguments were substantiated. Preponderant proof, for example, was proof which made the fact in question "more likely than not," while clear and convincing proof imposed a burden greater than one which required "that the facts are more probably true than false." *Id.* at 528-29. Moreover, the fact that one person might believe that something was highly probable while on the same evidence another might believe that the fact was not even more probable is not only not surprising but should have been taken into account. Juries sit in groups of 12 for this reason, because on an individual basis degrees of probability are very largely subjective. For the interesting suggestion that the emphasis should be on degrees of belief of the jurors rather than the weight of the evidence, see McBaine, *Burdens of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).

48. It might be of some relevance to note in this connection that Judge Palmore of the Court of Appeals of Kentucky has criticized the practice in that state of allowing juries to fix sentences in criminal cases, *inter alia*, on the ground that a jury faced with such a task must act without knowing what other juries have done in similar cases. PALMORE, SENTENCING OF CRIMINALS IN KENTUCKY (Kentucky Review of Government No. 6, 1963).

49. As will be made explicitly clear later on, in the text following note 61 *infra*, the problem of how to distinguish among different standards of proof or different degrees of negligence is nothing but a limiting case of the more

compared.⁵⁰ To illustrate what is meant by such a case-by-case approach in areas where precise definition is impossible, an attempt will be made to indicate how various degrees of negligence could be distinguished in, say, automobile cases as required by a hypothetical statute that imposes a graduated scale of recovery for various shades of asocial conduct, depending on the degree of culpability involved. The degrees of culpability in ascending order will be called slight negligence, negligence, gross negligence, and recklessness.

Assume that the first case presented to a trial court involves an automobile driven at 60 miles per hour through a built-up area where the speed limit is 30 miles per hour. Let us assume — although it is not essential to do so — that, since by hypothesis this is the very first case of this type, the jury finds the facts in a special verdict and the court decides whether, on the facts as found, the defendant is liable. Let us assume further that the judge rules against the defendant on the grounds that he has been negligent, that he has not behaved as a reasonable man would have in like circumstances. It is apparent, of course, that the only thing that is important here is that a decision be made. What decision is made is for present purposes relatively unimportant. Assume now a second case in which a person driving through a similar built-up area at 35 miles per hour is found to have been guilty of slight negligence. Then, assume a third case where one driving through such an area at 75 miles per hour is found to have been guilty of gross negligence. Finally, assume a case where a man is found to have acted recklessly by driving through a built-up area with a

common general problem of how to apply any general standard which does not supply a precise test for deciding what is within and what is without the standard. Leaving aside the obvious reference to the question as to what a reasonable man would have done, which is asked in negligence cases, one may refer to judicial willingness to decide what, in Chief Justice White's phrase, is an "unreasonable" restraint of trade, *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1912), or to English concern as to what is "natural justice" in exercising review of administrative orders, see note 50 *infra*.

50.

In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it had been interpreted in the courts is much more definite than that.

Ridge v. Baldwin, [1963] 2 All E.R. 66, 71 (H.L.) (Lord Reid).

30-mile speed limit at 90 miles per hour. There will be other cases too, cases where the defendant motorist has been drinking and/or trying to caress his girl friend. Here again the most important thing is that decisions be made. Exactly what decision is made in a particular case is not, for present purposes, very important. Now, when a new case is presented to the courts, the question is how like the past cases is the instant case. Is a case where the defendant was driving 55 miles per hour through a built-up area more like the case of slight negligence where the defendant was doing 35 miles per hour or is it more like the case of negligence where the defendant was doing 60 miles per hour? It will be noted that an attempt is not being made to classify the 55 miles per hour case with the 60 miles per hour case and then to explain why both are examples of negligence rather than of slight negligence or of gross negligence or of recklessness. If this is the task of the court faced with the 55 miles per hour case, then all the old problems reappear and the task may well be hopeless.⁵¹ The problem is, given that 60 miles per hour is negligence and that 35 miles per hour is slight negligence, what should 55 miles per hour be classed as? It is evident that one would be foolish and just plain wrong to say that reason has no place in such a scheme. As noted, of course, these are not instances of situations where reason comes in to prescribe a grand test to justify and explain all the cases. Rather, given certain cases decided in a certain way, we ask, can the instant case be meaningfully distinguished in a rational way from any of the decided cases? If not, if the instant case is like an earlier case except for the fact that the plaintiff has red hair, then the instant case must be decided as the prior one was. In the example given earlier, if the two precedents in point are 35 miles per hour is slight negligence and 60 miles per hour is negligence, then a case involving a car driven at 55 miles per hour, it must be conceded, should result in a finding of negligence. In summing up, to appropriate, if I may, the more eloquent prose used by Roy Stone in another and more general context, given that the former is negligence then the question is: "how like a spark from a traveling steam engine which ignites a

51. I am assuming, of course, that once it has been decided either legislatively or even judicially to use multiple standards the courts are not about to allow the constant relitigation of the wisdom of such use. I am also assuming that something like a system of *stare decisis* prevails, so that precedents can serve as paradigm cases because precedents, particularly the leading precedents which furnish the key paradigm cases, are not lightly overruled. These assumptions, of course, are the assumptions underlying our present legal system.

nearby hay-rick are the decomposed remains of a snail in a ginger beer bottle which causes harm to the plaintiff — is a cricket ball hit out of the ground injuring a woman on the highway. . . ."⁵²

It may be objected that this technique is not suitable for use by juries but rather is practicable only in a country like England where most civil suits are tried to a judge without a jury.⁵³ This would not necessarily seem to be so. First, the jury already has a rough idea of what terms like slight negligence, gross negligence, and recklessness mean. Second, if a higher degree of consistency is desired, the judge could charge the jury in general terms so as to make sure that all the jurors have a rough idea of the relevant distinctions and then give the jury a few examples of what, in somewhat related circumstances, have been held to be recklessness, gross negligence, negligence, etc.⁵⁴ Admittedly, although in the federal courts and in many state courts judges are permitted both to sum up the evidence for the jury and to comment upon the evidence, they do not in fact generally do so.⁵⁵ Such reticence is presumably based on the fear that an inadvertent word might lead to a reversal on the ground that the court was invading the province of the jury and indicating how the case should be decided. Thus, even though they might, American trial courts usually do not use examples to clarify the words used in their charges. Still, in many American jurisdictions judges can and sometimes perhaps do illustrate their instructions to the jury by posing illustrative cases.⁵⁶ Moreover, with respect to degrees of negligence, something like this on a less ambitious scale is already being done in comparative negligence jurisdictions like Nebraska and Wis-

52. Stone, *Symposium and Suit*, Northwest Review, Vol. 5, No. 4, p. 10, at 13 (1962).

53. Although the point really needs no citation, reference may be made to the leading work on the subject, JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 63-65 (2d ed. 1953).

54. Cf. Lord Atkin's suggestions for explaining to a jury the difference between the crime of dangerous driving and the crime of manslaughter through the operation of a motor vehicle. *Andrews v. Director of Pub. Prosecutions*, [1937] A.C. 576, 584-85.

55. See Wright, *Instructions to the Jury: Summary Without Comment*, 5 WASH. U.L.Q. 177-79, 212 (1954); Wright, *Adequacy of Instructions to the Jury: I*, 53 MICH. L. REV. 505, 507 (1955). For a survey of the current status of the power of judges to comment on the evidence in instructing the jury, see ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS § 00.01 (Sept. 1959 draft). See also Wright, *The Invasion of Jury: Temperature of the War*, 27 TEMP. L.Q. 137 (1953).

56. For the power of the federal courts, see *Quercia v. United States*, 289 U.S. 466 (1933). For the situation with respect to the states, see Wright, *Adequacy of Instructions to the Jury: I*, 53 MICH. L. REV. 505, 507 n.10 (1955).

consin. In Nebraska plaintiff may recover only if his negligence is "slight" in relation to defendant's, and the jury, with what guidance it can get from the judge, must, in the light of their own experience and of their powers of reason and of imagination, compare the defendant's negligence with that of the plaintiff.⁵⁷ In Wisconsin plaintiff may recover only if his negligence "is not as great" as that of the defendant.⁵⁸

It might also be noted that most of the so-called reform movements have favored greater judicial participation in the trial of jury cases.⁵⁹ Finally, many difficult types of civil cases such as antitrust cases, both civil and criminal, are being increasingly tried by the court without a jury, precisely, it would seem, because a judge can and, of course, does look at the other cases in point.⁶⁰ Thus it is not totally unrealistic to suppose that with the help of illustrative examples a judge or a judge and a jury can handle many distinctions which could profitably be utilized and with which they could not otherwise deal. Even without the pos-

A recently decided case, *United States v. Merz*, 84 Sup. Ct. 639 (1964), deserves mention in regard to what could be done in this area. The case concerned judicial use of commissions to determine the issue of "just compensation" in eminent domain proceedings. The Court, through Mr. Justice Douglas, noted that the commissioners, "we assume, will normally be laymen, inexperienced in the law". *Id.* at 643. The Court declared:

The judge who uses commissioners, however, establishes a tribunal that may become free-wheeling, taking the law from itself, unless subject to close supervision. The first responsibility of the District Court, apart from the selection of responsible commissioners, is careful instruction of them on the law. That was done in one of the present cases. But the instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like.

Ibid.

57. NEB. REV. STAT. § 25-1151 (1956). See also S.D. CODE § 47.0304-1 (Supp. 1960).

58. WIS. STAT. § 331.045 (1961).

59. See A.B.A. REP., SECTION OF JUDICIAL ADMINISTRATION (1938); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 221-62 (1949). The Report of the Section of Judicial Administration was adopted by the ABA at its convention in July 1938 except for the recommendation for universal adoption of the Federal Rules of Civil Procedure. *Id.* at 221-22, 505 n.*.

60. Reference to table C 4 of the appendixes of each of the *Annual Reports of the Director of the Administrative Office of the United States Courts* for the period 1957-62 (1961 excepted) indicates that of cases between private individuals and involving federal questions more than twice as many are tried to the court without a jury than with a jury. Almost all contract actions in which the United States is plaintiff are tried without a jury. The 1961 Report is unusable because for some inexplicable reason table C 4 therein is

ing of illustrative examples by the trial courts, the law can and does rely on standards which cannot be adequately explained in words. As already noted, jurors generally have a fairly good idea of the meaning of terms like slight negligence and gross negligence or reasonable doubt and preponderance of the evidence,⁶¹ and they already have in mind some paradigm cases illustrating the use of these terms. Nor, as will be shown shortly, even in cases of this type is it impossible to achieve an adequate degree of consistency among jury verdicts. Without the use of illustrative examples, however, the number of such vague standards which juries can adequately handle is, of course, limited. In the growing area of civil cases tried without a jury, as previously noted, these limitations, of course, do not exist.⁶²

It will be appreciated that the problem which has just been discussed is really but a special case of a more general legal phenomenon. The chief problem considered thus far has been how to differentiate in application among standards incapable of precise definition. It has been a difficult problem because the standards involved have applied to the same general type of factual situation and it has been found impossible adequately to express in words the differences upon which choice of the applicable standard depends. The more general problem, to which some allusion has already been made, is how to apply any standard expressed in vague general terms. Here the problem is not, if you will, a choice between competing standards but between the application or nonapplication of one particular standard. The obvious point is, however, that the problems merge. In the more general case no one could seriously argue that, short of abandonment, there is any alternative to a case-by-case particularization of what a vague general standard means. Nor, unless one is willing to urge the abolition of the jury, can one maintain that, even with proper judicial guidance, juries are incapable of participating in such a case-by-case development. That juries usually have some vague

compiled differently from those of other years. In the 1962 *Report*, table D 4 shows that, for the fiscal year ending June 30, 1962, of 19 defendants in criminal antitrust suits who were actually tried, 15 were tried to a judge without a jury. Cf. Sarpy, *Civil Juries, Their Decline and Eventual Fall*, 11 LOYOLA L. REV. 243, 249-52 (1963). Most studies of the jury system in civil cases focus, of course, on personal injury litigation. See JOINER, *CIVIL JUSTICE AND THE JURY* (1962); LEVIN & WOOLLEY, *DISPATCH AND DELAY* (1961). Reference has already been made to Judge Palmore's dissatisfaction with the Kentucky system of permitting juries to sentence offenders because the juries are ignorant of what other juries have done in similar cases. Note 48 *supra*.

61. See notes 46, 56 & 58 *supra*.

62. See note 60 *supra*.

idea of what most general legal standards encompass is of considerable help. If judges could and would aid them further with the use of paradigm cases, the job could be accomplished more satisfactorily. The handling of multiple standards is admittedly more difficult, and that is why I have concentrated on it in this Article. Although it is more difficult, I do not believe it cannot be done and I hope I have shown how it can be done and is being done.

B. JUDICIAL—PARTICULARLY APPELLATE COURT—SUPERVISION

A present day illustration of the problem of appellate court supervision may be found in the Supreme Court's policy of granting certiorari in FELA and Jones Act cases.⁶³ Conceding that the criticism of this policy may be justified, once the Court has decided to hear cases of this type for review of essentially factual issues, it has no alternative but to accept a great many similar cases so as to provide, through these decisions, a basis for analogical reasoning from case to case by the lower courts.⁶⁴ When the phrase "no alternative" was used in the preceding sentence it was assumed, of course, that, in addition to deciding the case before it, the Supreme Court desired to provide guidance to the lower federal courts, even if only eventually to cut down the number of petitions for certiorari. It was further assumed that the Court is not about to furnish the necessary guidance by promulgating the rule that "plaintiff always wins."⁶⁵ Given, then, the Supreme Court's desire to provide guidance in this area and given

63. See Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96-98 (1959); Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441 (1956); Comment, 6 VILL. L. REV. 549 (1961). See also *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 25 (1959) (Harlan, J., dissenting); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 524 (1957) (Frankfurter, J., dissenting). Mr. Justice Harlan continued to make the same point in *Basham v. Pennsylvania R.R.*, 372 U.S. 699, 701 (1963) (dissenting opinion) and *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 122-23 (1963) (dissenting opinion).

64. Hart, *supra* note 63, at 96-98 argues that the Court is taking too many of these cases. See also Note, 69 HARV. L. REV. 1441 (1956); Comment, 43 CORNELL L.Q. 451 (1958). *Basham v. Pennsylvania R.R.*, 372 U.S. 699, 701 (1963), is the vehicle for Mr. Justice Harlan's latest emphasis on this point.

65. In *Shenker v. Baltimore & O.R.R.*, 374 U.S. 1, 14-15 (1963) Mr. Justice Goldberg, in a dissent in which he was joined by Mr. Justice Harlan and Mr. Justice Stewart, intimates that the Court may in fact be making a workmen's compensation statute out of the FELA. In *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 27-28 (1959) (dissenting opinion) and *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 334-35 (1960) (dissenting opinion) Mr. Justice Harlan indicated that he feared that in this area the Court had abandoned all attempts to control juries and that the Court was in effect appearing to promulgate a rule

that the "plaintiff always wins" rule is unacceptable, it is no criticism of the Court to argue that it is not furnishing sufficient general guidance in the form of clear and readily applicable general rules as to how to decide future controversies.⁶⁶ In the nature of things, such general rules clearly articulating all relevant considerations are impossible. General rules are, of course, helpful even here; but the only way an appellate court can assert close control in this area is, in addition to formulating some general rules, to proceed case by case to the establishment of what, on certain facts, is negligence, is enough to get plaintiff to the jury. With these examples before them, lower courts can then devote themselves to seeing how the cases before them differ from those "given" cases, the paradigm cases decided by the Supreme Court. Only, of course, as the number of authoritatively determined paradigm cases becomes sufficiently large will the guidance thus furnished be more than fairly rough. Yet, the only way to establish any adequate guidance in this area is by such a case-by-case method.

If a further reference to a use of this method may be permitted, one might refer to the myriads of cases on "doing business" as a test of venue and jurisdiction. General guidelines are provided by the Supreme Court,⁶⁷ but if one wants really to know what it is to "do business," or how the "doing business" test differs from the "transacting business" test, he would be well advised to examine the voluminous decisions turning on narrow factual distinctions being issued every day by the federal and state courts.⁶⁸ He then may try to distinguish his case from or analogize his case to the decided cases in his jurisdiction. If the Supreme Court wishes to do more than give general guidance, then, as in the FELA and Jones Act areas, it will have to handle a much larger load of cases turning on factual differences not always of the greatest magnitude.

The conclusion, then, is that courts can, do, and must handle differences which cannot be articulated in precise general rules by appellate courts. But to say this is not to say that results are

that whatever a jury says goes. See also *Basham v. Pennsylvania R.R.*, 372 U.S. 699, 701 (1963) (Harlan, J., dissenting).

66. See *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 28 (1959) (Harlan, J., dissenting); *Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 229 (1959) (Frankfurter, J., dissenting).

67. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

68. For some idea of the immense number of cases in this area and of the need for close factual analysis, see Note, *Doing Business as a Test of Venue and Jurisdiction Over Foreign Corporations in the Federal Courts*, 56 COLUM. L. REV. 394 (1956).

unpredictable or not subject to adequate appellate supervision. Adequate appellate supervision may be achieved by broad and perhaps fairly vague general formulas giving a general guidance and by a selective acceptance for decision of cases involving clear cut paradigm factual situations, while the trial courts — and intermediate appellate courts, perhaps through per curiam disposition without opinion — develop the large number of precedents necessary to make the system work. If a looser degree of control and less consistency among results is acceptable, the cases could be left almost exclusively to the discretion of juries with the courts confining their interference solely to those few cases, to return to the original example, where no “reasonable jury” could have found the conduct in question to be slight negligence, or gross negligence, or negligence. A lesser number of paradigm cases would be necessary here than in the situation where the courts take a more active role in the trying of the cases.⁶⁹

At any rate, although the job cannot be done overnight, as high a degree of predictability can be achieved in areas where precise general rules are unavailable as in those areas where relatively precise general rules differentiating various classes of facts are possible. All that is necessary is that the area chosen for case-by-case development be one where a large number of cases will arise which require judicial resolution. As has already been suggested, the job can even be accomplished by a relatively aloof appellate tribunal, such as the Supreme Court, if it is willing to pay the price of accepting a large number of cases. The important point which must be stressed, however, is that appellate courts must resist the temptation to conclude that, because no precise general rules of differentiation are possible, the differences either do not exist or are such as to be unusable in a mature legal system. Such a conclusion would rob the law of much of its richness and impair its ability satisfactorily to order human relations. To so conclude would also lead to an unwelcome increment in the already heavy concentration on the appellate courts as the centers of the legal universe that dominates so much of law teaching. Vagueness does incapacitate language from performing certain tasks by certain methods but there are other means available for accomplishing many of these tasks. The putting of cases, decision from examples, is one such means.

69. One might add that even the most precise general rule possible is no insurance of consistency of application because of the necessity of finding that the facts are such as to call into play the legal rule. The more precise the rule the easier it is sometimes for the unscrupulous to avoid it. See FRANK, *COURTS ON TRIAL* 52-53 (1949).

CONCLUSION

Vagueness is an inescapable aspect of our language. It has been submitted in this Article that vagueness is not always a hindrance to precise and effective communication. Indeed an attempt has been made to show that vagueness is sometimes an indispensable tool for the achievement of accuracy and precision in language, particularly in legal language. Vagueness in legal language has also given our law a much needed flexibility. At the same time there are some jobs which our linguistic tools, partly even because of vagueness, cannot completely perform without the aid of other communication devices. The error to be avoided here, it has been submitted, is that of assuming that because general rules cannot do it alone the job cannot be done, or is not worth doing. That would be an error of the first magnitude.

