A Puzzle About Vagueness, Knowability, and Judicial Discretion

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On one occasion or another, Joseph Raz has – along with several other legal positivists – endorsed the following, and seemingly consistent, two theses: That in cases in which it is indeterminate whether the relevant legal language applies to the relevant set of facts, officials have discretion to decide either way; and that there are no unknowable reasons.

In this paper, I point out what I take to be a deep but unacknowledged tension between these two claims. The tension requires some careful teasing out, but the basic idea is that given certain further theses/assumptions concerning law, language, and normativity, to which legal positivists generally subscribe, the two claims turn out to be inconsistent. In addition to examining the sources of the tension in some detail, I also address several possible objections to my argument and discuss which of the many theses the Razian positivist should give up. The aim, however, is not to survey all the options; rather, the point is, first, to make clear why legal positivists need to say much more about the way vagueness affects the reasons for action that (the enactment of) legal norms give rise to and, second, to identify some promising ways to relieve the tension between the two theses.

1. The tension between KNOWABILITY and DISCRETION

In *From Normativity to Responsibility*, Raz proposes an account of what it takes for something to be a reason for action. For a fact to constitute a reason, he says, it is not enough that it counts in favor of some action, it also has to be true that the agent for which it is a reason (if

it is a reason) can respond to that fact using her rational powers (i.e. the faculty of Reason). Or else it would not be able to play a role in explaining the agent's action. This is Raz's *explanatory/normative nexus* (henceforth, 'Raz's Nexus').[1]

Among other things, Raz's Nexus implies two substantial constraints on what it takes for something to be a reason – knowability and availability. If a fact is unknowable to the relevant agent, she could not – even given her best efforts – respond to it using her rational powers. As a result, that fact does not constitute a reason for her, even if it counts in favor of some action that is available to her. Same goes if the relevant action is not available to the agent – in that case, she cannot rationally respond to the fact in question either, even if it is a knowable one. Consequently, it does not constitute a reason for the agent to perform that action.

In this paper, we will be concerned only with the knowability condition:

KNOWABILITY: If *p* is a reason for A to ϕ, then *p* is knowable to A.[2]

My aim is to show that – via this existence condition on reasons – there is (at least *prima facie*) a deep tension between Raz's Nexus and the standard positivist commitment to judicial discretion:

DISCRETION: In cases in which it is indeterminate whether the relevant legal language applies to the relevant set of facts, officials have discretion to decide either way.[3]

[1] See Raz (2011), 87.

[2] See Raz (2011), 87, 110 and 122.

[3] See e.g. Raz (1979/2002), 96 and 113–4.

I will try to make as explicit as possible how this tension arises; there are many theses involved – some more controversial than others – but each offers a point of pressure, a possible way out. Hopefully, at the end of the paper, we will have some idea which of all the many moving parts are the most movable. I should note, though, that since DISCRETION is such a core commitment of any positivist account of law, I will not seriously consider rejecting it here. I do not mean to entirely rule out that the tension I identify might ultimately provides some reason against DISCRETION, but I think that once we consider some of the available moves, the reason (if any) would be a rather weak one.

Now let us see how the tension between DISCRETION and KNOWABILITY arises – step by step. DISCRETION typically rests on a number of claims, one of which concerns the nature of vague language:

VAGUE LANGUAGE: If an object (broadly construed) is a borderline case of a predicate (relative to a context of utterance), then it is indeterminate whether the predicate applies to that object (in that context).

Coupled with the thesis that the legal content of a legal provision either is or directly corresponds to its communicative content (depending on how the notion of legal content is characterized), VAGUE LANGUAGE produces another thesis embraced by most positivist:[4]

[4] For ease of exposition, I adopt an unrestricted version of the thesis relating legal content and communicative; however, the argument will go through on a weaker version, to which I think that every legal positivist is committed – as long as it is true for a significant set of cases that the legal content of a legal provision is or directly corresponds to its communicative content, we have a robust puzzle.

VAGUE LAW: If an object (broadly construed) is a borderline case of a predicate occurring in a legal provision, then it is indeterminate whether the provision applies to that object.[5]

On the assumption that the legal reasons that a legal norm gives rise to either are or directly correspond to its legal content (again, depending on how the notion of legal content is characterized), this entails the following:

VAGUE LEGAL REASONS: If it is indeterminate whether a legal norm applies to an object (broadly construed), then it is indeterminate whether it gives the relevant subject(s) a legal reason for action, vis-à-vis that object.[6]

This – I take it – is just a limited application of a more general principle concerning vagueness and normativity.

The view under consideration, then, entails that if a subject acts in a way that is borderline legal (relative to some provision), it is indeterminate whether she fails to respond to a legal reason (provided by that provision), because it is indeterminate whether such a reason is present. On the assumption that a subject violates a legal norm only if she fails to respond to a legal reason provided by that norm, this further entails that it is indeterminate whether she violates the relevant legal norm. If such a case goes to court, the relevant officials (jury or judges) therefore have – assuming no other legal norms apply to the case (such as a rule of lenity) – no more legal reason to decide against the defendant than to

[5] See Raz (1979/2002), 72.

[6] See Raz (1979/2002), 74.

decide in her favor. As a result, they have discretion to decide the case either way, on the basis of extra-legal considerations. Or so this line of reasoning goes.

VAGUE LANGUAGE, however, has other implications, which ultimately get the view under consideration into trouble, insofar as it is supposed to include KNOWABILITY. The root of the problem is that, according to standard theories of linguistic vagueness, borderline propositions are unknowable:

IGNORANCE OF LANGUAGE: If it is indeterminate whether a predicate applies to an object (relative to a context of utterance), then it is unknowable whether the predicate applies to that object (in that context).[7]

This thesis immediately produces a parallel with VAGUE LAW:

IGNORANCE OF LAW: If an object (broadly construed) is a borderline case of a predicate occurring in a legal provision, then it is unknowable whether the provision applies to that object,

which, in turn, entails a parallel with VAGUE LEGAL REASONS:

IGNORANCE OF LEGAL REASONS: If it is indeterminate whether a legal norm applies to an object (broadly construed), then it is unknowable whether it gives the relevant subject(s) a legal reason for action, vis-à-vis that object.[8]

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[7] See e.g. Williamson (1994), 185 ff., and Soames (2009), 370. All standard accounts of vagueness accept KNOWABILITY, but it varies whether it is independently motivated or taken to be a consequence of the particular account.

[8] See Raz (1979/2002), 74.

As before, we can take this to be a limited application of a more general principle.

It is here, however, that the parallel reasoning breaks down and the trouble starts. Given KNOWABILITY, IGNORANCE OF LEGAL REASONS entails that in cases of vagueness it is *not* indeterminate whether the relevant legal provision gives subjects a legal reason for action: *It determinately does not.* According to KNOWABILITY, if it is impossible to know whether p is a reason for A to ϕ, then p is simply not a reason for A to ϕ. This produces an immediate conflict with VAGUE LEGAL REASONS. VAGUE LEGAL REASONS, IGNORANCE OF LEGAL REASONS, and KNOWABILITY are thus inconsistent.[9]

Moreover, KNOWABILITY entails that if a subject acts in a way is borderline legal (relative to some provision), then she determinately does not fail to respond to a legal reason (provided by that provision). She therefore determinately does not violate the relevant legal norm, assuming (as before) that a subject violates a legal norm only if she fails to respond to a legal reason provided by that norm. Insofar as the matter depends on the subject having violated the norm in question, the relevant officials thus have more legal reason to decide in her favor than to decide against her, assuming that – as a matter of legal fact – cases in which the defendant determinately did not violate the legal norm in question ought to be decided in her favor. KNOWABILITY thus also conflicts with DISCRETION.[10]

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[9] We might also frame the matter the following way: If A's ϕ-ing is p-dependent and it is indeterminate whether p, then it is indeterminate whether the p-relevant facts constitute a reason for A to ϕ; but if so, then it is unknowable whether these facts constitute a reason for A to ϕ, in which case they – via KNOWABILITY – determinately do not constitute such a reason.

[10] We could perhaps also summarize the conflict in the following way: In cases of vagueness in the law, DISCRETION assumes that there is equal reason to treat the subject as having (had) a reason to do as the relevant provision prescribes and as not having (had) such a reason. KNOWABILITY, however, entails that in such cases we have more/most/sole reason to treat as not having (had) such a reason. Hence, the inconsistency charge.

All this has been rather abstract, so to make things more concrete, let me borrow and extend an example from Raz.[11] Council tax regulations give people whose properties count as dwellings a legal reason to make payment to the council. We can say that in virtue of the relevant regulations, the fact that some property, P, is a dwelling is a legal reason for the owner, A, to make payment to the council. But let's then say that some property, P*, owned by B, is a borderline case of the predicate 'dwelling'. This entails that it is indeterminate whether the predicate applies, which, in turn, entails that it is indeterminate whether council tax regulations apply to P*. As a result, it is indeterminate whether council tax regulations give B a legal reason to make payment to the council. Consequently, if B decides not to pay, it is indeterminate whether she violates the relevant legal norm. If B's case goes to court, the relevant officials therefore have discretion to decide the matter either way, assuming no other legal norms apply to the case.

However, if it is indeterminate whether council tax regulations give B a legal reason to make payment to the council, then it is unknowable whether they do so. Given KNOWABILITY, this entails that these regulations determinately do not give B such a reason. Here, then, is the first inconsistency. Further, however, KNOWABILITY also entails that if B decides not to pay, then it is *not* indeterminate whether she violates the relevant legal norm: she determinately does not. Thus, assuming no other legal norms apply to the case, it ought – as a matter of legal fact – to be decided in her favor, which conflicts with the conclusion about discretion in the previous paragraph. The conclusion from all this is that the view under consideration is inconsistent.

[11] See Raz (1979/2002), 72–73.

I hope it has been made clear both how the tension between KNOWABILITY and DISCRETION arises and how many theses are involved. With so many moving parts, it is not feasible to examine each of them here. Instead, I will address, first, a few worries, and then turn to considering some suggestions for which theses to reject in order to relieve the tension. I will argue that the best bet – at least for the Razian positivist – is to revise both IGNORANCE OF LANGUAGE and KNOWABILITY. As we will see, this generates pretty deep commitments in philosophy of language and metaethics. If what I say is correct, it is clear that legal positivists – such as myself – need to say much more about the way in which vagueness affects the reasons for action that (the enactment of) legal norms give rise to.

2. Relieving the tension – possible ways out

Let me begin by clarifying KNOWABILITY and IGNORANCE OF LANGUAGE a bit, to fend off certain misunderstandings. First, it helps to get clear about the modality involved in KNOWABILITY. On Raz's account, KNOWABILITY is a rather strong condition: for something to count as a reason, someone at the time would have found out about it had they put in their best efforts.[12] Most naturally, perhaps, this is read to apply to the agent herself, for which the relevant consideration is or is not a reason – namely that had *she* put in her best effort, she would have come to know the relevant fact.

Now, even if we go along with the idea that there are epistemic constraints on what it takes for something to count as a reason we might worry that Raz's constraint is too strong.[13] For the purposes of our discussion here, however, the strength of the constraint doesn't really matter, since my argument – if it goes through – will go through on a very

[12] See Raz (2011), 110, fn. 6.

[13] See e.g. Chang (2013), 10–11.

weak reading of KNOWABILITY. The tension with which I'm concerned arises even if something counts as a reason (for a particular agent) only if it can in principle be known by someone with normal human epistemic capacities.

This naturalistically specified level of constraint ensures that the tension arises even if we adopt an orthodox epistemicist account of vagueness (on which an omniscient being, for example, would know all the true borderline propositions). If we instead adopt a semantic or ontological account (or certain unorthodox epistemicist accounts), then we can do with an even weaker constraint, since – on such accounts – borderline propositions cannot even be known by cognizers with "perfect" epistemic capacities. The bottom line is that as long as there is *any* epistemic constraint on what it takes to be a reason, this will cause serious misalignment in the positivist commitments relevant to judicial discretion.

Second, it is important to note in relation to IGNORANCE OF LANGUAGE that when we are considering whether a proposition is knowable (relative to a cognizer), we hold fixed everything that is relevant to the truth-value of *r* in the world of evaluation. As Wright (2003) points out, the modality involved in knowability claims – at least as they feature in the debate about the nature of vagueness – is "constrained by the distribution of truth values in the actual world."[14] This allows us to fend off the immediate worry that some borderline propositions are in fact knowable, in which case my argument would be either unsound or restricted to some yet-to-be-specified subset of borderline cases.

Consider, for example, Joe, who is (actually) borderline tall. Now, he might have of course have been determinately tall, in which case the proposition *that John is bald* is – in some sense – knowable, despite being indeterminate in the actual world. This might be due to John's being taller in some possible world, or it might be due to a different standard of

[14] Wright (2003), 101.

evaluation for 'is tall'. It is far beyond the scope of this paper to discuss further ways in which borderline propositions might be knowable in this unconstrained sense. This much is clear, however: it is important to keep the constrained modality in mind throughout the paper, or else my argument will by unduly taken to fail for (at a minimum) any contingent singular borderline proposition, i.e. for any case in which a contingent property are predicated of a particular object (such as when 'dwelling' is predicated of P*).

Having set these worries aside, it is time to consider several possible ways out, by rejecting one or more of the theses involved. Some of the suggestions will aim to preserve as much as possible of Raz's general framework, while others will propose that we give up some of its core tenets – although none of them will consider rejecting DISCRETION, as I have indicated. I will argue that three of these suggestions provide a reasonable response, and that the one that provides the easiest way out for Raz is not necessarily the best one. Although we might relieve the tension by arguing that Raz's Nexus generates a knowledge-constraint only in determinate cases or by adopting a non-standard account of vagueness, on which borderline propositions are borderline knowable, I think we may learn more about the normativity of law by examining whether, or at least in what way, the knowability condition applies to legal reasons. Ultimately, though, the best bet might be to combine the latter two strategies and reject both KNOWABILITY and IGNORANCE OF LANGUAGE, at least in their current form.

2.1 "No reasons either way"?

It might be suggested – contra Raz – that cases of vagueness in the law should be analyzed not as cases in which it is indeterminate whether the law provides a reason to do as directed, but as cases in which the law fails to provide reason either way. If that is correct, then the

fact that KNOWABILITY entails the absence of reasons is not inconsistent with DISCRETION. We just have to be careful to keep in mind that this absence "goes both ways," as it were.

It may seem reasonable, for example, to say that in borderline cases, the law both fails to provide officials with reasons to treat the relevant subject as having had reason to act as prescribed by the relevant provision and fails to provide them with reasons to the contrary. It may also seem reasonable to say that – due to the borderline status of P* – council tax regulations both fail to give B a reason to pay and fail to give her reason not to pay.[15] Perhaps an "absence of reason either way" analysis dissolves the problem, by allowing us to block the move from VAGUE LAW to VAGUE LEGAL REASONS?

Despite the *prima facie* plausibility of this analysis, the strategy fails. Judicial discretion in borderline cases is supposed to rest on the fact that it is indeterminate whether the subject violated the legal norm in question and so the reasons that we ought – in the first instance – to pay attention to are the legal reasons that the relevant provision provides the relevant subject. Once we do so, however, we see that the suggested analysis severely overgenerates discretion, as "absence of reason either way" applies to any situation about which the law is truly silent.

Council tax regulations, for example, neither give me reason to eat healthy nor to not eat healthy. And they neither give me reason to wash my car nor to not wash my car. But to say that officials have any form of discretion with respect to these circumstances would be rather bizarre. The general point here is that, for any law, there are all sorts of cases in which it fails to give us reasons either way, and this failure has nothing to do with vagueness, as such. It seems to me that cases of vagueness in the law have to be analyzed in terms of it

[15] Because there is neither reason for her to treat P* as a dwelling nor reason to treat P* as a non-dwelling.

being indeterminate whether the relevant subject has a reason to act as the relevant provision prescribes.[16]

2.2 Retroactivity to the rescue?

Most legal systems allow law to be applied retroactively in certain cases, either by legislation or by judicial decision-making. In the US, for example, retroactive tax legislation is not unheard of. And in the UK, it seems fair to say that judges have significant leeway to introduce changes into the law, based on extra-legal considerations. When a common law rule produces an unjust outcome, for example, the court may decide that certain features of the relevant case allow it to be distinguished from other cases to which the rule applies; in this way, conduct that was determinately legal at the time is sometimes made illegal retroactively. This complicates the picture I have presented, since every actual legal system allows for at least some exceptions to the rule that cases in which the defendant determinately did not violate the legal norm in question ought to be decided in her favor. This will not change the fact that VAGUE LEGAL REASONS, IGNORANCE OF LEGAL REASONS, and KNOWABILITY are inconsistent, but it certainly makes it less clear that the same goes for KNOWABILITY and DISCRETION. Perhaps the issue I am pointing out is less consequential than I make it out to be?

The answer, I think, is no. Although the resolution of borderline cases does involve retroactivity, there is – at least intuitively – a clear difference between a case in which a person is convicted of an offense that was determinately not part of the law at the time of action and a case in which a person is convicted for doing something that is borderline illegal. All else equal, the former seems worse than the latter, which is – I submit – explained

[16] Thanks to Andrei Marmor for pressing me to address this point.

in part by a difference in the reasons involved. In the former case, the defendant did not fail to respond to a reason provided by the norm on the basis of which she is being convicted, while in the latter it is indeterminate whether the defendant failed to do so. Thus, intuitively, DISCRETION employs a weak notion of retroactivity/discretion, rather than a strong one.

However, it is worth pointing out that there are also problems downstream from a strong analysis of DISCRETION. Actual legal systems, for example, neither confer unlimited lawmaking power to judges nor contain norms that specifically permit strongly retroactive judicial decisions in borderline cases.[17] It might of course be suggested that, in each actual legal system, borderline cases somehow form a subset of the set of cases in which such decisions are permitted; perhaps, some more general – but still limited – norm guarantees strong judicial discretion in borderline cases. It is difficult to see, however, how this holds true of any actual legal system, let alone of all. Consider, for example, the US legal system. Under what general norm permitting judges to apply law retroactively could borderline cases – as a unified class – conceivably fall?

2.3 Expanding the domain of legal reasons (conservatively)?

It might be suggested that the way I have construed the domain of legal reasons is too limited. Just as we can sometimes convert credences into probability judgments, we can also sometimes convert borderline cases into knowable propositions: if P* is a borderline case of the predicate 'dwelling', then presumably it is true and knowable that this is so. Perhaps this

[17] One fundamental reason why no actual legal system contains a specific norm of this sort is that it is actually part of the problem, as I have described it, that officials do not generally conceive of judicial decisions in borderline cases as blatantly/determinately retroactive, because they do not generally realize that this is the normative effect that KNOWABILITY has.

fact is appropriately regarded as a legal reason, and one that B disregards in some significant sense if she does not pay council tax?

Some authors put (something like) this idea in terms of subjects being "put on notice" – that if they do not do as directed in borderline circumstances, then they may be subject to official action, such as prosecution and punishment.[18] Usually, albeit not universally, this provides subjects with a reason to err on the side of caution in such circumstances, a reason that seems grounded in the law in a way that is not totally dissimilar to the case of "normal" legal reasons – especially if they conform better to the reasons that apply to them by so erring. Maybe the solution is to say that disregarding a "notice-based" reason in a borderline case is tantamount to it being indeterminate whether one responds to a legal reason provided by the relevant legal norm, in which case it is indeterminate whether one violates it?

I am not prepared to rule this option out entirely, but I think we have good reason to think that it doesn't work. I do think that – at least in some cases – the fact that it is indeterminate that p is a legal reason for A to ϕ is a reason for A to ϕ. I want to resist, however, the idea that it is a *legal* reason to do so.

Now, for practical reasoning in general, I think it is true that the fact *that p is indeterminate* is one of the things that can "kick in" in circumstances in which the case for a course of action depends on p. Say, for example, that there is a drizzle outside, such that it is indeterminate that it is raining. If it were clearly raining, that fact would be a reason for me to bring an umbrella, should I venture outside. But since it is indeterminate whether it is raining, I cannot – assuming a standard account of vagueness – know that it is raining (or, for that matter, know that it is not raining). Hence, if we assume KNOWABILITY, *that it is*

[18] See e.g. Soames (2011) and Waldron (2011).

raining is not a reason for me to bring an umbrella. Typically, however, this is of limited practical significance. The reason is that other considerations tend to "kick in" and determine what we ought to do. The same facts about the world that make it the case that it is indeterminate that it is raining can presumably constitute a reason for me to bring an umbrella, for example because they make it sufficiently probable that it will rain. The general thought here is that, in determining what to do, we can usually replace things that we don't or can't know with things that we do know – and this includes cases of vagueness.

I say 'typically' because there do seem to be cases of practical reasoning in which it is much less clear that any other considerations kick in in this way. Consider, for example, the difference between the father who promises to take his family to the park on Sunday if it isn't raining and the man who randomly promises to give a stranger 10 bucks if the next man he sees is bald. In the former case, if on Sunday it is indeterminate that it is raining, presumably the father ought still to take his family to the park. Granted, *that it is not raining* may not be a reason for him to do so, but other reasons kick in, making the overall balance of reasons count in favor of taking them to the park (although it could go either way, depending on the circumstances). In the random promise case, if the next man that the promisor sees is borderline bald, then *that the man is bald* is not a reason for him to give a stranger 10 bucks (assuming KNOWABILITY). In this case, however, it is far from clear that any other reasons kick in. For one, no stranger reasonably expects to get 10 bucks.

Suppose, however, that there were in fact a reason for the promisor to err on the side of caution and give the stranger the money, perhaps due to threat of violence, or something of that sort. In this case, it seems to me that even if we counted the fact that it is indeterminate that the man is bald as being among the promisor's reasons, it would be very odd to call it a *promissory* reason. We may have all sorts of reasons "downstream" from

having made a promise, but only some of them are properly labeled promissory. The same, I think, applies to the case of legal reasons. People may have reasons to err on the side of caution when it comes to borderline cases of illegal conduct, or even reasons to run the risk, but I hesitate to call these *legal* reasons. For one, to keep the comparison to promissory reasons, it would seem bizarre to say that if the promisor did not give the stranger the money, she would be breaking her promise. And it doesn't seem any more palatable to say that it is indeterminate that she would be breaking it. Similarly, it seems very strange to say that if a subject fails to respond to a notice-based reason associated with the enactment of a legal norm, it is thereby indeterminate that she violates that norm.

2.4 Whose reasons?

Another suggestion might be to apply something like the previous response to officials, rather than subjects. Perhaps we can "disconnect" DISCRETION from the reasons that apply to subjects and focus instead on the reasons that apply to officials in borderline cases, one of which is *that it is indeterminate that A ϕ-ed* (where ϕ is the relevant norm-act)? Perhaps I have been focusing on the wrong set of agents?[19]

Although I think it is not so counterintuitive to take propositions about indeterminacy (as opposed to indeterminate propositions) to be among the legal reasons that officials have in borderline cases, it is quite problematic to disconnect DISCRETION in this way. Most fundamentally, it would require giving up the most straightforward and robust basis for the notion of judicial discretion in borderline cases, i.e. that it comes about as a consequence of it being indeterminate that a norm has been violated. And it would have to be explained how – instead – judicial discretion is a direct function of the relevant norm and

[19] Thanks to Kenneth Ehrenberg for this suggestion.

the facts of the case. I see no good way to do this. Of course, one might stipulate that to violate a norm just is to do something to which it is indeterminate that the relevant predicate applies (rather than having failed to respond to a legal reason provided by the relevant norm), but this would require entirely rejecting a normative analysis of legal rules – so this strategy would also block the moves from VAGUE LAW to VAGUE LEGAL REASONS and from IGNORANCE OF LAW to IGNORANCE OF LEGAL REASONS, anyway. I don't want to claim that this is not a possible way out, but it is one that is definitely not available to the Razian positivist.

Further, this line of response partly collapses into – and inherits the problems of – the "strong retroactivity/discretion" suggestion, discussed in section 2.2, since judicial discretion is here taken to be consistent with the subject determinately not having violated the norm in question.

2.5 Does the argument equivocate?

So far, I have – in line with most standard theories of vagueness – been taking it for granted that the unknowability involved in IGNORANCE OF LANGUAGE and KNOWABILITY is of the same kind. But what if the former employs a specific vagueness-related notion of ignorance while the latter employs an ordinary factual notion? In that case, the argument equivocates and the problematic inference doesn't go through.

The idea behind this strategy is that we can distinguish between two notions of unknowability – one factual and one vagueness-related – and that these have different implications vis-à-vis the epistemic constraint on what it takes to be a reason. On this suggestion, the factual unknowability of *p* entails that *p* is determinately not a reason, but the

same does not go for vagueness-related unknowability; instead, in case *p* is a borderline proposition, the respective ignorance entails indeterminacy regarding *p*'s being a reason.[20]

This is a promising strategy, I think, but it comes with very deep commitments in philosophy of language and metaethics. The main issue is that it would require a theory of vagueness on which vagueness-related ignorance is analytically distinct from ordinary, factual ignorance, or else we can simply reproduce the problem. Of course, all standard theories of vagueness – even Williamson (1994) – take indeterminacy to be a special source of ignorance, but it is far less clear that there is supposed to be any difference in the actual ignorance produced. In both cases, the agent does not know that *p*. And the different modalities involved in the respective unknowability claims won't afford a distinction either, since being in principle unable to come to know that *p* entails being unable to come to know that *p* given one's best efforts. This, of course, is one of the reasons there is a puzzle here in the first place. It seems clear, then, that in order to make something like this suggestion work, we will have to appeal to something beyond mere ignorance/unknowability properly distinguish the factual cases and the vagueness-related cases.

I think we can make some headway here by reminding ourselves that KNOWABILITY is a cognitive constraint generated by Raz's Nexus, as a result of what it takes to respond to something using one's rational powers. Perhaps, when *p* is indeterminate, the Nexus has different implications for what is cognitively required in order for an agent to rationally respond to *p*? This is not an entirely unexplored question, but – as Williams (2014) notes – there is very little consensus about what the cognitive role of indeterminacy is, beyond mere ignorance – i.e. about what attitude(s) one ought to take to *p*, when (one knows that) *p* is indeterminate. Still, I think the bare-bones idea provides enough grounds to distinguish

[20] Thanks to Stefan Sciaraffa for valuable discussion about this strategy.

between the following two principles (using 'X' as a placeholder for the cognitive role of indeterminacy, or set/cluster thereof), which is all we need to make the strategy under consideration palatable:

> If *p* is determinate, then A is able to respond to *p* using her rational powers only if A can – given her best efforts – come to know that *p*
>
> If *p* is indeterminate, then A is able to respond to *p* using her rational powers only if A can – given her best efforts – come to X that *p*

Restricting KNOWABILITY this way, the fact that indeterminacy entails unknowability no longer generates an inconsistency.

Ultimately, then, the strategy here is not to claim that the argument equivocates, but – rather – that it mistakenly applies KNOWABILITY to cases of vagueness, when in fact it only applies in determinate cases. This is a promising strategy, I think, but it is by no means an easy way out – in order for it to work a lot more needs to be said about the cognitive role of indeterminacy.

2.6 Rejecting IGNORANCE OF LANGUAGE

One of the assumptions of the previous suggestions – and of much of the debate about vagueness, both in philosophy and in law – is that there are in fact clear borderline cases. Over the past two decades or so, however, this assumption has been met with increasing resistance and many authors now favor views that seem to better respect the actual difficulty of forming reliable judgments about borderline cases.[21] I go along with this assumption for

[21] See e.g. Raffman (2014), 67.

the sake of argument (Raz certainly holds this view), but it is worth pointing out what happens once we give it up.

Not everyone will agree, and – as we will see below – some authors prefer to provide independent grounds for this, but rejecting the assumption that there are any clear borderline cases might motivate us to revise IGNORANCE OF LANGUAGE: Perhaps, if, for the relevant range of cases, it is never clear whether it is indeterminate that a predicate applies to an object (relative to a context of utterance), then it is indeterminate that it is unknowable whether the predicate applies to that object (in that context)?

Other grounds for revising IGNORANCE OF LANGUAGE have also been proposed, although these accounts remain non-standard. For example, Barnett (2011) joins Dorr (2003) in arguing that it might be *indeterminate* that a fully informed person knows *that p*, in case *p* is indeterminate. There are some differences to their arguments, but basically they agree that it might be the case that if it is indeterminate that *p* and some suitably specified cognizer knows all the relevant facts, then it is indeterminate that she knows *that p*, and that she knows *that not-p*. There will simply be no fact of the matter regarding which epistemic state she is in, given full knowledge of the relevant facts.

To be sure, any suggestion to revise IGNORANCE OF LANGUAGE will be highly controversial, and the thesis is still representative of any standard account of vagueness, but if the revised version of it turns out to capture the correct understanding of the relationship between vagueness and (un)knowability, then the tension between KNOWABILITY and DISCRETION is indeed relieved. Consequently, this option would allow the Razian positivist to retain all of her commitments in philosophy of law and metaethics, but her new commitments in philosophy of language will run pretty deep.

Still, it is probably the "simplest" strategy on offer. And – fittingly – such accounts would, I think, entail that it is indeterminate whether borderline propositions can guide action. That is, if it is indeterminate that *p*, then it is – on these views – indeterminate that *p* is knowable to the agent; consequently, it is indeterminate whether she would be able to respond to *p* using her rational powers.

2.7 Rejecting, or at least modifying, KNOWABILITY *for legal reasons?*

There is a another way to relieve the tension between KNOWABILITY and DISCRETION that also preserves all the major commitments of the Razian positivist but doesn't require radical revision of our theories of vagueness: to accept KNOWABILITY for "real" reasons but reject it for "pure" legal reasons. Although restricting KNOWABILITY and revising IGNORANCE OF LANGUAGE are in some sense easier options – at least, or especially, if the work is delegated to philosophers of language – I think we may learn more about the normativity of law by examining whether, or at least in what way, KNOWABILITY applies to legal reasons.

As Shapiro (2006) has usefully pointed out – drawing heavily on Raz's influential notion of a *detached legal statement* – we can distinguish between (at least) two senses of 'legal reason'.[22] On one reading, 'legal' functions as an adjective – on the other, as a qualifier. On the adjectival reading, a legal reason to ϕ is a real reason to ϕ, the existence of which depends on the operations of legal institutions (suitably understood). A real reason here is just a fact or consideration that in fact counts in favor of some action. On the qualified reading, one has a legal reason to ϕ – roughly – just in case, from the perspective of the law, one has a real reason to ϕ (at least partly in virtue of the law having directed one to ϕ). Given the

[22] See Raz (1975/1990), 171–177, and (1979/2002), 153–157. Raz himself drew heavily on Kelsen (1960/1967).

distinction between these two understandings of legal reasons, it makes sense to ask whether KNOWABILITY applies equally to both. I think a very good case can be made that it applies – if it applies – to the former, but not the latter.

Now, on the adjectival reading, legal reasons are real reasons that people have in virtue of the operations of legal institutions. Accordingly, if KNOWABILITY applies to real reasons, then it applies to legal reasons (in this sense). On the qualified reading, however, legal reasons *purport* to be real reasons, and so the way in which KNOWABILITY applies – if it applies – is less clear. It seems reasonable to say, though, that if legal reasons in a robust enough sense purport or aim to be real reasons, then they will be subject in some relevant way to the conditions that apply to real reasons. I boldly suggest that, insofar as legal reasons purport to be real reasons, the epistemic constraint on what it takes to *be* a real reason is a *standard of evaluation* for legal reasons (rather than an existence condition). If that is true, then unknowable legal reasons are still legal reasons, just defective ones. Same goes for other existence conditions for real reasons, such as the availability constraint.

On this understanding of KNOWABILITY, there is no conflict with DISCRETION, and the tension is relieved. Nevertheless, there is an uneasy asymmetry here. If what I have said is correct, we can evaluate vague legislation against the standard of knowability that applies to real reasons. The extent to which individual cases will measure up against this standard will vary depending on what it would take to come to know them given one's best efforts. If we assume a standard account of vagueness and that KNOWABILITY applies to real reasons, then the failure will be total in borderline cases. This seems to predict that we should have a rather negative view of judicial discretion, more negative than seems to be actually the case. Why would it make sense for officials to have discretion to decide either way in borderline

cases, if such cases constitute a determinate failure, vis-à-vis what the law purports to do (i.e. to provide real reasons)?

The answer is far from clear to me. To be sure, there is an inclination within most legal systems to treat borderline cases "cautiously" – to decide in favor of the defendant, or at least not to be neutral about the fact that it is indeterminate that she violated the law in question. The common law rule of lenity in criminal law is a prime example. And, sometimes, this is justified in terms of a failure to guide action (adequate notice, due process, etc.). However, as commentators point out, the rule of lenity is less common in criminal law than one might expect, and when it is present, it is often not applied as often as one would think. In addition, it is extremely rare to find similar rules outside criminal law. This suggests a significantly less negative attitude regarding judicial discretion than seems predicted by retaining KNOWABILITY for real reasons (and thus as a standard of evaluation for legal reasons) and a standard account of vagueness (on which borderline propositions are unknowable).

This is by no means a clear problem, and it may well be that there are many possible explanations of this apparent asymmetry that concern none of the theses that we have been examining here. There tend to be so many considerations at work in deciding legal cases that it is difficult to make firm judgments about how different considerations are weighted against each other, whether in particular cases or – especially – across entire legal systems. It is worth considering, however, whether the asymmetry goes away if we combine the suggestion here with the suggestion from the previous sub-section. Perhaps the legal positivist should both revise KNOWABILITY and adopt an account of vagueness on which it is indeterminate that borderline propositions are knowable? At the very least, what this does

– at least ideally – is to align our evaluative attitude toward judicial discretion with the way in which the law succeeds in its aspirations to provide subjects with real reasons for action.

Here is how the story would go on such an account. Say that it is indeterminate whether some object o (broadly construed) is a borderline case of a predicate P occurring in a legal provision L and that, consequently, it is indeterminate that, from the point of view of the law, *Po* is a real reason for A to ϕ. In case A doesn't ϕ, this entails that it is indeterminate that A violates L. If A's case goes to court, then the relevant officials have – assuming no other legal norms apply to the case (such as a rule of lenity) – no more legal reason to decide against A than to decide in her favor. As a result, they have discretion to decide the case either way, on the basis of extra-legal considerations.

Furthermore, it will – on this account – be indeterminate how such cases measure up to the knowability standard (against which we can partly, but crucially, evaluate legislative directives). This marks a difference, for example, in how we should weigh the law's action-guiding failure in such cases, which is then weighed against other considerations in determining the outcome of the case. I submit that, holding everything else fixed, if we adopt a standard account of vagueness, we ought to give considerably more weight to action-guiding considerations in such deliberations than if we adopt a non-standard account (i.e. one on which indeterminacy entails indeterminate knowability), due to their different implications for the (im)possibility of knowledge. The latter, I think, is more in line with our intuitions about proper practical reasoning – as concerns action-guidance, there is, intuitively, something worse about retroactive and secret law than vague law. This suggests to me that although either strategy – i.e. revising IGNORANCE OF LANGUAGE or rejecting KNOWABILITY for legal reasons – will make the puzzle go away, combining the two might be the best option on offer, at least for the legal positivist.

3. Conclusion

I hope to have made it clear how the (at least *prima facie*) tension between KNOWABILITY and DISCRETION arises and that this should motivate legal positivists to say much more about the way vagueness affects the reasons for action that (the enactment of) legal norms give rise to. I also hope to have indicated which of the possible ways out I take to be most fruitful. I haven't been able to consider all the options, of course, but have tried to make palatable three strategies: first, to argue that the argument mistakenly applies KNOWABILITY to cases of vagueness, when in fact it only applies to determinate cases; second, to modify IGNORANCE OF LANGUAGE in such a way that indeterminacy entails indeterminate knowability/unknowability, rather than determinate unknowability; and, third, to reject KNOWABILITY for legal reasons but accept it for real reasons. In the end, as we saw, the best bet – at least for the Razian positivist – might be to combine the latter two strategies. This preserves all the major commitments of Raz's general framework, I think, but also generates very deep commitments in philosophy of language and metaethics.[23]

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[23] [Acknowledgments]

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