An Ineffable Shade of Blue: The Allure of Indeterminacy

by David J. Perlman

Perhaps the best way to understand the law, or to see anything clearly for that matter, is to stand outside of it, at least momentarily. A contemporary of Aristotle, Eubulides of Miletus, developed a set of puzzles that happen to throw an illuminating light on the law. One puzzle, known as "The Bald Man," supposes that a man begins losing his hair one hair at a time. It poses the question, with the loss of which hair does he become bald? The first? Second? Third? Three hundredth? If you accept the entirely reasonable notion that the loss of a single hair is not enough to make him bald, you will ultimately have trouble admitting the obvious: that a man losing his very last hairs is indeed bald. In the end, the man is surely bald, but when did he become so? Another Eubulides puzzle embodies the reverse of The Bald Man–the incremental addition of the characteristic feature: how many successive grains of sand must you add to a single grain before the accumulation becomes a heap? Do you reach a heap after three grains or thirty thousand? The so-called "Heap" ultimately lent these puzzles their name, "sorites," after "soros," for "heap." 1

Simple sounding perhaps, sorites raise unanswerable questions. What are the limits of human perception, knowledge, reason and language? How does language function? We manage daily existence without asking, much less answering, such questions. But they lie at the bottom of every communication and have special consequences for the law. The law uses language, often its own unique language, to classify conduct and apply its classifications to particular instances recurring in the world. Thus, if there are limits to our ability to perceive, understand or describe phenomena, including our own conduct, then such limits must affect the law and ultimately qualify justice.

Because the law must distinguish between gradations of conduct, it is plagued by the sorite. One can imagine a continuum with negligence at one end and recklessness at the other. One moves from negligence to recklessness by incremental additions of an awareness, or the opportunity to become aware, of a risk of injury. If a hazard stares you in the face, if you know that people have been previously injured and still ignore the hazard, you are reckless. If the hazard is more obscure or uncertain, if it lies closer to the periphery of consciousness, you are negligent. Indeed, the continuum runs from cautious, non-negligent conduct all the way to intentional conduct, and although each legal concept along the way may by itself appear distinct, we cannot identify or articulate precisely where or how caution becomes negligence, negligence, recklessness and recklessness, intent. The borders are fuzzy.

Suppose a sliver of banana peel lies on the floor of the local market. It is only a millimeter square, so even if the grocer could see it, a customer would be unlikely to slip on it. But as you add millimeter after millimeter, it gets both more apparent and more hazardous. At what point, with the addition of which millimeter, does the grocer who

ignores the sliver become negligent?

Homicide lies on a similar continuum from manslaughter to first-degree murder. Where does premeditation begin? Where does it slip into something less–a killing merely in the heat of passion? It may seem that legal analysis side-stepped a sorite by diminishing the possible significance of the amount of time required for premeditation; we are not compelled to parse minutes or hours to discover the instant of first-degree murder. But because legal decision-making involves classifying a phenomenon–human conduct–that functions for the most part independently of our classifications, the sorite still lurks in the background. The particulars of reality are complex, multi-faceted, infinitely varied and diversely motivated, while legal classifications exist, as they must, on a plane of generality. Although the murderer is not likely to conform his or her conduct to fit neatly into a predetermined legal classification, the legal decision maker is still obliged to make the fit. The legal terms–premeditation, murder, manslaughter–despite the gloss of meticulous definitions, are only a slight aid in delimiting the murky region surrounding our agreed paradigms.

In his autobiography, the renowned naturalist, archeologist and essayist Loren Eiseley offered an interesting description of near homicide. Eiseley happened to spend his late teenage years, the depression era, riding the rails, an aimless hobo–an unlikely beginning for a career of lasting intellectual stature. He had caught a late night mail train somewhere in the vicinity of Nevada but failed to secure the best perch. Near dawn, a brakeman spotted him and began to beat him. The train raced along at 60 miles an hour. They fought between the cars. Soon enough, Eiseley realized that the man wanted to kill him. "A thin hot wire like that in an incandescent lamp began to flicker in my brain," he wrote. 2

The "hot wire" becomes a metaphor for Eiseley’s corresponding murderous impulse. He was nineteen and strong. "All it would take was a slight shift of footing and the use of my right hand now clinging to the uprights. He would be gone, as he wanted me to go, under the wheels.” But Eiseley had a capacity, whether moral, intellectual or both, to control that thin hot wire. A bookish youth, he had read the train schedule and recalled that the train would soon arrive at a stop. He realized that the man was tiring and that he was stronger and that he could hang on. He also realized that if he sent the brakeman over, he would be discovered, eventually drawn to a source of water in that dry, sparsely populated region. So he hung on, and as the train slowed, the brakeman gave up and disappeared.

If the brakeman had ended up beneath the wheels, what sort of homicide would it have been? Is it only the man who has the head to remember train schedules and anticipate consequences–the man with sufficient mind to cool the thin hot wire but who recoils from doing so–who can formulate intent? The less cerebral, more impulsive man who cannot even recognize the thin hot wire–a Billy Budd–what of him? Would his impulsive act fall short of premeditated murder? Would self-defense justify the killing since deadly force was unnecessary and since, in any case, the struggle was merely a

battle of fists? Perhaps the legal classification would depend on the use of that right hand clinging to the uprights: would it have pushed the brakeman over or simply have supported Eiseley while he dodged a lunging attacker?

Twentieth century philosophers, influenced by Wittgenstein, have considered the identification of color to be a linguistic problem with sorite-like implications. Imagine an immensely long row of panels. The panel on the far left is blue and on the right it is white, and each panel changes incrementally from blue to a slightly lighter shade as one moves from left to right. Shutters cover the panels so that they can be selectively displayed. An observer looking at a panel toward the left would consider it blue. If he was shown the panel just to its right, he would barely notice a difference and so would say that it, too, was blue. If shown the second of the two panels and the one just to its right, he would notice so little change that he would have to say that it was also blue. And so panel after panel would be blue, the change being ever so slight, that it would be difficult, if not impossible, to say where white began. Moreover, to the extent an observer claimed to have found a decisive boundary between blue and white, it would probably be different from another observer's.

Perhaps the problem of the sorite is epistemic–that is, it reflects the limits of human knowledge. There is indeed a cut-off point in the real world where blue becomes white, a non-heap becomes a heap, first-degree murder becomes manslaughter and negligence becomes recklessness, but we just do not know, or are incapable of knowing, where it is. Under this view, it is not the assumption that a thing must lie either inside or outside the category–blue or bald or heap–that is mistaken. Or, to use an appropriate term from the field of logic, it is not bivalence–the principle that a proposition (i.e. "the pile is a heap") must be either true or false–that is flawed. Rather, it is a weakness in our ability to discriminate, whether between blue and white, hairiness and baldness or heaps and non-heaps, that causes the problem. Possibly our ability to perceive, discriminate, understand or know is inherently limited such that we will never be able to determine where blue becomes white or a non-heap becomes a heap. Nevertheless, this epistemic explanation still holds out the prospect that, by intellectual effort and increased rigor, we could at least refine our discriminatory faculties and come closer to saying where colors change or where baldness and a heap are attained. To some extent, the legal system has internalized this attitude. Our legal culture promotes the belief that every legal problem does indeed have a correct answer awaiting discovery; if only we could apply a sophisticated enough understanding of the law, we could find that answer.

The stoic philosophers accepted the principle of bivalence and found themselves wrestling desperately with the sorite. To avoid making a false statement when faced with sorite uncertainty, the stoic Chrysippus proposed silence. If you are sure that an accumulation of sand grains is not yet a heap and if asked whether it is, you answer "no." If you are sure that the accumulation is a heap, you say "yes." For cases in between, you say nothing. Indeed, one should fall silent before reaching uncertainty,

while still remaining certain that the growing sand pile is not yet a heap, for only then can one avoid a false assertion. Chrysippus recognized that one cannot be certain of the breadth of uncertainty–that is, where uncertainty begins after the no-heap category ends. That border, too, is fuzzy, because if you could see it, you could just as easily spot where a non-heap became a heap. Thus, by premature silence, one avoids asserting "This is not yet a heap" when, in fact, it is. This strategy values the avoidance of false statements over the affirmation of all possible true statements; for in order to avoid making a potentially false statement–"This is not a heap"–it entails a deliberate refusal to make a true one.

The law incorporates the Chrysippus strategy through the mechanism of the burden of proof. By placing the burden on a party asserting a claim, the law expresses a preference for avoiding false affirmations over affirming all true claims at the risk of being overinclusive and thereby affirming some false claims. In the face of uncertainty, a choice one way or another seems inevitable.

Closely related to viewing the problem as epistemic is viewing it as a problem of vagueness. The emphasis shifts–instead of the fault lying in our capacity for knowledge, it lies merely in our selection of terms. To a large extent, our legal culture also operates under the vagueness presumption. It encourages the belief that, if we could come up with new terms or symbols or identify characteristics, we could overcome the imprecision that presents itself when existing linguistic tools confront hard cases. We can invent or apply words that correspond to our discriminations–navy blue, royal blue, sky blue, pale blue. Just as there are blues with different qualities, a heap has certain qualities other than being just a quantity of sand. A billion grains of sand lying side by side do not make a heap; a heap is a pile. Two grains of sand stacked on top of each other do not seem to be a pile. Four grains arranged as a pyramid might be a pile, at least from a microscopic view, but they are still not a heap.

The law adopts similar strategies of definition and redefinition. Every single-word legal standard–"negligence," "recklessness," "premeditation"–has its conventional definition. Creating definitions is not too different from describing constituent parts, as in the heap example. Thus, the law resorts to "elements" or "tests" that must be proven or satisfied before a phenomenon falls within a given classification. Also related is the common strategy of placing some contextual parameter on the inquiry: a heap for what purpose? For a child playing with a toy bulldozer? For a man with a spade or with a real bulldozer?

Although these approaches yield a type of progress in beating back the border region, they never defeat it. As much analysis as one applies to a sorite, the conundrum remains–how does one identify or articulate where or how a non-heap becomes a heap or one color fades into another? Where, after all, does negligence begin? Never will we capture that ineffable shade of blue. Possibly the sorite’s intractability does not arise merely from our limited capacity to know or from a correctable imprecision in the

existing terms. Indeterminacy may lie at a deeper, semantic level.

Every word employed as a gloss on the manifestly inadequate term is itself subject to its own gray area of indefiniteness. The law, like many an endeavor, has invented its own specialized language, in part to achieve greater precision; but legal terms, once in use and under semantic pressure, find themselves defined and re-defined, often in non-specialized, more vernacular language. The legal term "fiduciary duty," for instance, has a rather amorphous content standing alone. We know that a fiduciary duty arises in relationships of dependency and that it entails a duty of loyalty. But in precisely what relationships does it exist and what is a "duty of loyalty"–an oddly colloquial substitute for the technical term? The answers to such questions are apparent only from the use of the phrase "fiduciary duty" in caselaw. Indeed, the jurisprudence on fiduciary duty can be viewed as an effort to define what the phrase really means and how to use it properly.

It is widely accepted among semantic theorists that words derive their meaning from use. They do not stand in a static relationship to meaning–as if a word's meaning were immutable and distinct, separable from a word, trailing discretely behind it. Jonathan Swift touched upon such a mechanical, unchanging equivalence between a word and its meaning with his description of the Academy of Lagado in Gulliver's Travels, where certain learned gentlemen have eliminated words altogether and carry packs of things on their backs and display things instead of uttering a word.3 But words, even nouns like "heap," are not substitutes for things and vice versa. Rather, meaning is dynamic, based on fluid interactions within an ever-changing, shared linguistic system. We do not know what "fiduciary duty" means before we use it, even if common sense suggests that we cannot use it until we know what it means. Within this fluid system, words always carry the potential for new applications and altered meanings. We can discern an indigenous haze–an alluring mist–rising from the edges of linguistic symbols.

Ironically, this mist, this seeming imprecision, may be a necessary consequence of language, tied inextricably to the way words convey meaning. Without the capacity for words to acquire new and different senses, to manage ever-changing applications, language would become tired, wooden and inexpressive, identical in all times and places–that clumsy, old, academic pack of things. But language is always recreating itself, as if from scratch. Its continual re-invention requires and fosters semantic elasticity. The resiliency of words to bear unanticipated meanings permits nuance and metaphor–and allows us to apply "fiduciary duty" to the new, unanticipated case. Another way of conceiving the problem is this: no such thing as "blue" or "heap" or "negligence" or "first degree murder" really exists; these are merely intellectual constructs, useful signs, metaphors themselves, that facilitate communication but do not maintain a necessary and absolute congruence with the phenomena that constitute reality. Sometimes these metaphors work, but they also reach a point of failure.

The sorite itself stands as a metaphor for the central challenge of law–the consistent application of a limited set of terms to a protean reality. Robert Frost's famous

observations on metaphor apply both to the sorite as a metaphor for law and to the metaphors–that is, the language–of legal discourse: "All metaphor breaks down somewhere. That is the beauty of it. It is touch and go with metaphor, and until you have lived with it long enough you don't know when it is going. You don't know how much you can get out of it and when it will cease to yield. It is a very living thing. It is as life itself." 4 Metaphor is everywhere. For in the end, we can comprehend or communicate one thing only in terms of another.

FOOTNOTES

1. For an understanding of sorites and their place in philosophy, the author is indebted to R.M. Sainsbury and Timothy Williamson, "Sorites," in A Companion to the Philosophy of Language, ed. by Bob Hale and Crispin Wright (Oxford: Blackwell, 1997), 458-484. 2. Loren Eiseley, All the Strange Hours: The Excavation of a Life (New York: Charles Scribner's & Sons, 1975), 9-10. 3. Jonathan Swift, "Gulliver's Travels," in Gulliver's Travels & Other Writings by Jonathan Swift, ed. by Ricardo Quintana (New York: Random House, Modern Library Edition, 1958), 148-149. 4. Robert Frost, "Education by Poetry," in Selected Prose of Robert Frost, ed. by Hyde Cox and Edward Connery Lathem (New York: Holt, Rinehart and Winston, 1966), 41.