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Vagueness and the Guidance of Action Jeremy Waldron

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"The desideratum of clarity," said Lon Fuller, "represents one of the most essential ingredients of legality." And Joseph Raz gives us the reason: "An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it." Raz lists clarity as one of the key principles of the rule of law and he associates it (as he associates all such principles) with what he calls "the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behavior of its subjects."

Like Fuller, Raz thinks that this commitment to *guiding action* and the requirement of clarity that is founded upon it are not just technical or formalistic, ideas. They are ways of respecting human dignity. Law approaches governance in a way that takes seriously the capacities associated with ordinary human agency. As H.L.A. Hart acknowledged, legal norms "consist[] primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further direction." Fuller's position is that embarking on this "enterprise of subjecting human conduct to rules involves ... a commitment to the view that man is ... a responsible agent, capable of understanding and following rules." And Raz agrees:

A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are

¹ LON FULLER, THE MORALITY OF LAW (1964), p. 68.

² Joseph Raz, *The Rule of Law and its Virtue*, in his collection THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 at 214 (1979).

³ Ibid., p. 214.

⁴ H.L.A. HART, THE CONCEPT OF LAW (Second edition, P. Bulloch and J. Raz eds., 1994), 206-7. See also ibid., 38 (specifically on action-guidance by the criminal law.)

⁵ FULLER, op. cit., p. 162.

rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations.⁶

The question for this paper is whether the presence in the law of provisions which may be described as vague, unclear or imprecise is necessarily at odds with this commitment.

2.

An old case from Ohio, *State v. Schaeffer*, gives us a couple of examples from traffic law to work with.⁷ In 1917, the Ohio General code contained the following provision:

§12604: Whoever operates a motor cycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality, or more than fifteen miles an hour in other portions thereof, or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars.

But it preceded that with a provision of quite a different character:

§12603: Whoever operates a motor vehicle or motorcycle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person, shall be fined not more than twenty-five dollars.⁸

The difference is stark: §12604 worked with precise numerical speed limits: 8 mph in some areas, 15 mph in other areas; and 20 mph on the open road. The limits strike us as absurdly low, but this was 1917 and at least a driver knew what was expected of him. However, §12603 approached the matter in an entirely different way. It did not use numerical speed limits; instead it spoke of "a speed greater than is reasonable or proper." Compared to §12604, §12603 is imprecise, and because of that it seems likely, in Raz's words, "to mislead or confuse at least some of those who desire to be guided by it."

⁶ Raz op. cit., p. 222.

⁷ State v. Schaeffer 96 Ohio St. 215; 117 N.E. 220 (1917). Page numbers in the text are to the pagination of of the Ohio State.

⁸ For the two provisions, see ibid., 218.

True, §12604 is not a paragon of precision. The phrase "in the business and closely built-up portions of a municipality" is not a precise specification of a zone of application for the 8 mph limit. Business districts have vague edges and the term "built-up" has its own vagueness. §12603 avoids those forms of vagueness by applying universally to any public road or highway, but it more than makes up for that in the vagueness of the speed limit it lays down.

A driver—a Mr. E.E. Schaeffer—ran over and fatally injured a three year old boy known as Buley Csaki who was playing in the street in a built-up area with a large number of other children. The state said he was driving at 25 to 30 mph; Schaeffer denied this, saying he was going no faster than 8 mph. (pp. 217-8). Perhaps to avoid the factual issue, the state proceeded against him with a manslaughter charge based on an alleged violation of §12603.

Schaeffer was convicted and on appeal he complained "that section 12603 ... is unconstitutional and void, for the reason that it is too indefinite and uncertain in its terms." His claim was that

the words 'reasonable' and 'proper' are so general, comprehensive, and variable that it would be impossible for the defendant to know, or for the jury to fairly determine what was a violation of the statute; that juries in one case would hold a speed to be reasonable, while the same speed under the same circumstances might be held by another jury in the same county, at the same term, to be unreasonable. In short, it is urged that the statute should definitely fix what is a reasonable speed and a proper operation of a car. (pp. 228-9)

Constitutional doctrine provided then, as it provides now, that statutes can be struck down as void for vagueness, either because they fail to comply with the Sixth Amendment requirement that the accused "be informed of the nature and cause of the accusation" or because their vagueness represents a failure of due process.

But the Supreme Court of Ohio unanimously rejected this complaint, and Mr. Schaeffer's conviction was upheld. I believe it was rightly upheld. More important, I think the Ohio Court's reasoning in vindication of §12603 helps us see the complicated ways in which a vague or imprecise provision can still succeed in guiding the actions of those subject to it. What the court said was this:

The Legislature ... in this instance, saw fit to fix no definite rate of speed for the car. ... Some statutes have undertaken to fix a rate of speed which would be prima facie dangerous, but a rate of speed dangerous in one situation would be quite safe in another situation, and if the rate of speed were definitely fixed, naturally it would have to be the minimum speed at which cars might be safely driven, because that speed would have to be a safeguard against every possible situation which would be perilous even at a speed of six or eight miles an hour. There is no place in all the public [roads] where a situation is not constantly changing from comparatively no traffic to a most congested traffic; from no foot travelers to a throng of them; from open and clear intersections, private drives, and street crossings, to those that are crowded; from free and unobstructed streets to streets filled with crowds of foot travelers and others getting off and on street cars and other vehicles. In order to meet these varying situations, and impose upon the automobilist [sic] the duty of anticipating them and guarding against the dangers that arise out of them, this statute was evidently passed in the interests of the public safety in a public highway. (pp. 230 and 234-5)

The Court went on to say that it is precisely the statute's "adaptability to meet every dangerous situation" that commends it as a valid enactment.

Absolute or mathematical certainty is not required in the framing of a statute. Reasonable certainty of the nature and cause of the offense is all that is required. Some offenses admit of much greater precision and definiteness than others; but it is quite obvious that in the case at bar the statute must be sufficiently elastic and adaptable to meet all the dangerous situations presented, in order to adequately safeguard the traveling public, whether foot passenger, horse, or motor vehicle. Section 12603 is as definite and certain on the subject-matter and the numerous situations arising thereunder as the nature of the case and the safety of the public will reasonably admit. (p. 236)

The Court was not convinced by the complaint that different juries might apply §12603 in different ways: this, it said, "is inevitable under any system of jurisprudence on any set of facts involved in a criminal transaction." In all sorts of areas of the law, courts use what

is called "the rule of reason"—from *reasonable doubt* in the ordinary charge to a jury in criminal cases, to *reasonable grounds for believing that one is in danger* in a case of self-defense. And the Ohio court added this about the provision in question:

The careful, conservative driver need have no fear of it. The reckless, wanton speed maniac needs to be kept in fear of [§12603]. The life of the humblest citizen must be placed above the gratification of the motor maniac, who would turn the public highways into a race course. (p. 234)

This last point is well worth emphasizing, indicating as it does that there are different attitudes one can have, towards the sort of guidance offered by law. I shall take it up at the end of this chapter in section 9.

In the sections that follow, I want to consider these issues in a more abstract way; I want to explore the complexity of the idea of a legal provision's guiding the action of those subject to it. Like Raz—indeed like almost everyone writing in jurisprudence today—I accept that *guiding action* (or *guiding conduct* or *guiding behavior*) is the mode of governance distinctive to law. But I believe we need to approach the question of unclarity, vagueness and imprecision in law with a more sophisticated notion of guidance than the one we often use. Having one's action guided by a norm is not just a matter of finding out about the norm and conforming one's behavior to its specifications. It can involve a more complex engagement of practical reason and practical deliberation than that. So that is what I shall explore in the pages that follow.

3.

Let us begin with a simple question about the ordinary case. What is it for action to be guided by a rule? On the most straightforward model—a model corresponding roughly to the last part of Ohio's §12604—the action of a person P is guided by a legal provision L₁, when the following conditions are met.

⁹ In this chapter, I shall not pursue the distinctions that are sometimes needed as between different kinds of indeterminacy, such as ambiguity, vagueness, and contestability. I set these out in Waldron, *Vagueness in Law and Language—Some Philosophical Perspectives*, 82 CALIFORNIA LAW REVIEW (1994), 509.

Model (i)

- (1) L_1 contains a requirement that some type of behavior B_1 is to be performed (in some type of circumstance C_1);
- (2) P is capable of understanding and remembering L_1 ;
- (3) At any given time, P is capable of noticing whether he is in a circumstance of type C_1 ;
- (4) When P notices that he is in circumstance C_1 , he is capable of monitoring his behavior to see whether he is performing B_1 or not;
- (5) If he finds that he is not, he is capable of modifying his behavior so that he is performing B_1 in circumstance C_1 .

In the case of Ohio's $\S12604$, circumstance C_1 might be "driving outside of a municipality," and behavior B_1 might be "driving no faster than 20 mph." P's action can be guided by this ordinance in a way that is perfectly familiar to every driver. We keep an eye out for where we are (in the country or in the city, for example); we pay attention to traffic signs; we glance at our speedometer; and we slow down or speed up accordingly. By its presence, by our understanding of its provisions, and through the connection between that understanding and our own practical agency, the traffic law guides our actions.

Notice that this model of action-guiding is quite different from any idea of P's simply responding to, as though *galvanized* by, a command to do B₁. Model (i) highlights distinctive features of human agency: the ability to internalize a norm, ¹⁰ to monitor and control one's behavior on the basis of that norm, and the ability to notice the features of one's environment and circumstances and relate those to the other abilities just mentioned in the service of compliance with the internalized norm. Possession of these capacities is an important aspect of human dignity: Fuller and Raz both emphasized

¹⁰ I mean "internalize in the straightforward sense given by condition (2); I don't mean that the person necessarily comes to endorse the norm in question.

this and I have tried to give it prominence in my own recent writings about the connection between dignity and the rule of law. Though model (i) uses the term "behavior" to characterize what is required of P, it is not a "behaviorist" model; it takes seriously the mental and epistemic aspects of full-blooded human agency. And it does seem to presuppose a clarity requirement. The kind of self-monitoring and self-control indicated in conditions (3), (5), and (6) assumes that P has a clear sense of the circumstances that L₁ makes salient and the form of behavior that L₁ seeks to elicit in those circumstances. P is supposed to be able to match his perception to the clear indication from L₁ that it matters whether he is in circumstance C₁ and he is supposed to be able to match the monitoring and control of his behavior to the clear indication from L₁ that it matters whether he is performing B₁ in that circumstance or not. With the best will in the world, he may be in difficulty so far as the relation between the law and his agency is concerned, if the specification of the relevant circumstance or the specification of the required behavior is indeterminate.

4.

Though the simple model I have just given indicates ways in which the imposition of straightforward legal requirements respects human agency, the capacities that model (i) presupposes are not the only practical capacities that individuals have. Consider a more complicated model, corresponding to Ohio's §12603:

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¹¹ See also Jeremy Waldron *Dignity, Rank, and Rights, in* 29 THE TANNER LECTURES ON HUMAN VALUES (Suzan Young ed., forthcoming, June 2010), *available at* http://ssrn.com/abstract=1461220 ¹² Cf. HART, op. cit., p. 40 on "the 'puzzled man' ... who is willing to do what is required if only he can be told what it is" and JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) at 316-17, on the idea of "the law-abiding citizen."

Model (ii)

- (1) L_2 contains a requirement to the effect that there should be some appropriate modification of one's behavior whenever circumstance C_2 occurs;
- (2) P is capable of understanding and remembering L₂;
- (3) At any given time, P is capable of noticing whether circumstance C_2 has occurred;
- (4) When P notices that circumstance C_2 is occurring or has occurred, he is capable of considering what behavior is now appropriate;
- (5) Pursuant to that judgment, P is capable of monitoring his action to determine whether he is behaving in what he judges to be an appropriate way in circumstance C_2 .
- (6) If he judges that he is not behaving in an appropriate way in circumstance C_2 , P is capable of modifying his behavior so that it does become appropriate for circumstance C_2 .

In our example, C_2 may be any of the factors alluded to in §12603 such as the narrowness of the roadway, the amount of traffic, or the presence of other factors (such as small children playing on the road) which may make one's ordinary driving—one's usual speed, for example—a potential danger to life or property. And the legal provision requires us to drive at a speed no greater than is "reasonable or proper" for those circumstances.

What is distinct about this model is the failure to *specify* the action that is to be performed when P is in the new circumstance C₂. It is up to P to figure out what action is appropriate. For example, traffic laws often require drivers to lower their speed, below the posted speed limit, when bad weather (a blizzard or a severe rainstorm) strikes the freeway or when they become aware that an accident has taken place ahead of them. The legislature may not specify a lower speed limit for these circumstances, because what is an appropriate speed may vary so much depending what else is going on (how much traffic there is, for example, or how bad the accident is) that it makes more sense for drivers to be left to figure this out for themselves. This doesn't mean that the law

endorses whatever the driver decides to do; P may still be cited for driving at an unreasonable speed in the circumstances, because a police officer judges that P's calculation at step (4) is culpably mistaken; and he may be convicted if a judge accepts that view. But just because he can be second-guessed by a police officer doesn't mean that one might as well specify a speed limit for C_2 ; all it means is that the particularized calculation required at step (4) is capable of being assessed by law.

Like the Ohio Supreme Court, I believe that L_2 guides action in model (ii). True, it doesn't do so by precisely specifying an action to be performed, but it offers an input into P's agency nevertheless, directing his practical reason to a problem to which the law draws his attention, and requiring him to come up with and implement a solution.

We sometimes say that what distinguishes model (ii) from model (i) is that in (ii) the legal provision is presented in the form of a standard rather than a rule. And when we distinguish rules from standards, we sometimes say that the difference is that a standard is a norm that requires some evaluative judgment of the person who applies it, whereas a rule is a norm presented as the end-product of evaluative judgments already made by the law-maker. A posted speed limit of 55mph represents a value-judgment already made by the legislature that that speed is appropriate for driving in the designated area. A legal requirement to drive at a "reasonable" speed, by contrast, looks for a value-judgment to be made downstream from the legislature; it indicates that the legislature has not decided to make all the requisite value-judgments itself, but has left some to be made by the lawapplier. That characterization of the difference between rules and standards is helpful here, but only if we remember that the first law-applier is not the police-officer who pulls the driver over and issues a citation or the judge in traffic court who decides whether or not to enter a conviction. The first law-applier is P, the driver himself. 13 Aware of the norm, he takes it on-board—internalizes it—and makes for himself the evaluative judgment that the norm requires him to make and monitors and modifies his behavior accordingly. He may do so well or badly; and if he does it badly, he may be liable to citation, conviction, and penalty; and this too he is aware of. All of this adds up to the distinctive way in which P's action is guided by L_2 in model (ii).

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¹³ For the idea of self-application, see HART AND. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge and Frickey eds., 1994) at 120.

Notice that the mode of action-guidance in model (ii) is also compatible with the commitment to dignity that I mentioned in section 1 and at the end of section 3, and to forms of governance that respect human dignity and take seriously the agency of those to whim legal norms are addressed. The dignity of a human agent does not just consist in his estimable capacities for normative comprehension, self-monitoring and the moderating of his own behavior; it also consists more broadly in his capacity for practical deliberation in both structured and unstructured ways. An open-ended standard of the kind we are considering invokes that capacity and relies on it. It credits the subject with the sophisticated ability to adapt his agency to his own practical thinking, and it indicates the kind of circumstance in which that ability is required of him.

By the way, I am not saying that what L_2 instructs P to do is "pull over and ponder" (so to speak) as though it were dictating the actual implementation of the P's engagement of his powers of practical reasoning. The authorities do not care what sort of thinking process P actually goes through or how long it takes him; what they want him to do is drive at a reasonable and proper speed. They expect that he will respond to this instruction using his powers of practical reasoning oriented to the circumstances in which he is in. But practical reason can be exercised in all sorts of ways, some of them quick and implicit, some of them sustained and reflective. The law is indifferent about that. (In everything that follows, I am using "practical reason" in a way that reflects the force of this point.)

5.

A pedant might say that my analysis of model (ii) unhelpfully elides the distinction between judgment (of what action is appropriate) and the guidance of action on the basis of that judgment. Inasmuch as the law requires the former, it is not *action* that it is guiding. The pedant may bolster this position by developing the following contrast with model (i). Model (i) assumes that the legislature has reached a value-judgment about the desirability or moral necessity of B₁ (e.g., driving at a certain speed) in circumstance C₁. That was something the legislators had to do—at what we might call the evaluation stage of the law-making process—before they could finally draft, enact, and promulgate L₁. Maybe this was something they argued about, did research about, felt unsure about, and

so on. But they did not begin the process of guiding the action of those subject to their authority until they had completed all that thinking and debating at the evaluative stage. Well similarly, the pedant might say, in model (ii), a legislature that leaves it up to P (and those reviewing P's behavior) to formulate the appropriate speed for circumstance C_2 is not guiding P's action; by leaving the evaluative stage to P, it is casting him in the legislative role, leaving it up to him to guide his own action only after he has determined for himself in his capacity as a delegated law-maker a speed limit for the circumstances. So in model (ii), the pedant will say, step 4 is not an instance of action-guidance.

I think the pedant's point is misconceived. Model (ii) as we have presented it does involve some determinate guidance offered to P by the law-maker. True, it is not a case of the law-maker saying, "Do precisely this." But the law-maker identifies a pair of circumstance, indicates that some adjustment of behavior is appropriate when one of these circumstances is overtaken by the other, attempts to focus P's practical reason on what that change of behavior should be, and indicates by whatever penal provision are attached to L₂ that P should take this whole business seriously. That is guidance. The law in model (ii) guides P's practical reasoning through certain channels. It evinces some faith in that reasoning, inasmuch as it empowers P's practical reasoning rather than seeking to dominate or supersede it. But what it indicates will *not* be tolerated, is a failure on P's part to orient his practical reasoning to the circumstances specified by the law-maker.

We can quibble about words and debate whether this is a case of guiding action rather than guiding the use of practical reason. For myself, I see little daylight between the two ideas. But if our pedant wants to insist on the contrast, then we should respond by revisiting the initial premise of our account, namely, that law's function is to guide action. There is, after all, nothing canonical about the phrase "guiding action." If a sharp contrast between (a) "guiding action" and (b) "engaging practical reason" is causing difficulty here, then we should reconsider the proposition that "guiding action" is how law characteristically proceeds. We may want to say that that was intended in a broad inclusive sense—a sense that might include (a) and (b)—not in a narrow sense that focused on (a) to the exclusion of (b).

Our pedant might have put his point in terms of Joseph Raz's theory of authority. ¹⁴ He might say that, according to Raz, law claims authority and law can only claim authority if particular legal directives represent somebody's view of how somebody else should behave. This is because a claim to authority over P is always a claim that P would be better off following the guidance of the person claiming authority than trying to figure things out for himself. So—on this interpretation of Raz's approach—nothing which does not represent such a view can have authority attributed to it. And nothing can plausibly count as an exercise of authority if its net effect is to leave P in the position of having to figure out the issue for himself. Model (i) seems to satisfy this set of requirements, but—the Razian pedant will say—model (ii) does not. In model (ii), P has to do all the figuring out for himself and the view to which he subjects himself—the view expressed in L₂—is simply that it is incumbent on him to do this.

I actually believe that Raz's position is (or can be made) more accommodating than this. Though Raz does in some places use the language of the law's representing the judgment of someone else on what exactly P ought to do, in other places he phrases his position more abstractly. One thing he says is that a law "must represent the judgment of the alleged authority on the reasons which apply to its subjects." Now a person may have certain reasons for action; and a person may also have certain reasons for thinking (I mean reasons for practical thinking). We sometimes say of a person who we think made a hasty decision: "He ought to have taken more time to think this decision through." Having a reason to deliberate carefully means having a reason to pay particular attention to the reasons that one has for acting. One can be guided on the former set of reasons (reasons to deliberate) as well as on the latter (reasons to behave in a certain way). An advisor may say to us, "I don't know what you should do about the decision you face, but I am certain that you should take more time over it than you are proposing to take." If we accept that advice, we are in some sense accepting authority: we are submitting ourselves to the judgment of the advisor on reasons that apply to us—the set of reasons for and

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¹⁴ See JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), Chs. 2-3.

¹⁵ Joseph Raz, *Authority, Law, and Morality* in his collection ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (Revised edition, 1994), 210 at 219.

against taking a given amount of time to deliberate on an issue. It would be quite wrong to say that this cannot count as an exercise of authority simply because the advisor doesn't give us his bottom-line view on what we ought, finally, to do.

If this is correct, then Raz's conception of authority does not support the pedant's complaint. In model (ii), L_2 does represent the legislature's view of reasons that apply to P, but it is the legislator's view about reasons that apply to P's deliberating. The legislator has taken a view about when P's deliberating on the possibility of a change in his behavior is appropriate or requisite. The legislator says, "Such deliberating is appropriate or requisite when circumstance C_2 occurs."

So a law like the one presented in model (ii) is an action-guiding norm, once one recognizes the complexity and multi-layered aspect of action-guidance. It mobilizes some or many of the resources of practical reason or practical intelligence possessed by the norm subject—a mobilization that might not take place if the law-maker had not promulgated L₂. And it does so in a way that channels and directs the use of practical reason, without specifying what its outcome is to be. This is an important guidance function, and if it is our view that law aims to guide action, we should not disqualify norms like this from counting as law, simply because they do not fully specify the action that is to be performed.

In characterizing Raz's position, some people attribute to him the view that law, if it is to be authoritative, must be such that those subject to it can figure out what it requires without recourse to moral judgment on their own part. This formulation needs to be treated very carefully. It is true that P cannot figure out what behavior to engage in pursuant to L₂ without making a moral judgment. But what L₂ in effect says to him is something like, "Now is the time for you to engage your practical reason to figure out what difference circumstance C₂ should make to your behavior." In our driving example, §12603 said to Mr. Schaeffer that the dangers an automobile evidently posed to children playing in the street indicated the need for practical deliberation about his speed (either quick and implicit deliberation in the case of a skilled and responsive driver or more sustained reflection in the case of a driver not habituated to deliberation of this kind).

¹⁶ See e.g. Ronald Dworkin, *Thirty Years On*, 115 HARVARD LR, 1655 (2002), at 1671-5.

And *that* instruction—"*Now* is the time to deliberate"—can be identified without moral deliberation. True, the instruction is to deliberate, and once we have identified it we can't follow it without engaging in moral reasoning; but the moral reasoning is not essential to figuring out that that is what the driver is being instructed to do.

7.

Someone might object that the guidance element in model (ii) is minimal. Almost any vague provision will direct the norm-subject's attention to his own behavior in some way: even "Do the right thing" can be construed as an instruction to "Watch what you are doing," so that it elicits some slight change of orientation in the practical reason of the person to whom it is addressed. But—goes the objection—this is not the same as saying that the provision succeeds in guiding action. A law must let a person know what is expected of him; it is not enough to simply alert P to the fact that something is expected of him.

Certainly it is possible to guide action to a greater or lesser extent. The behavior that is elicited by a given directive can be specified in more or less detail: so §12404 tells drivers to lower their speed from 20 mph to 15mph when they enter a municipal area, but it does not tell them what gears to use as they lower their speed, or how sharply they should brake in order to bring this about. Is this an objection to §12404? Must every legal provision be as precise and specified as it is possible to be?¹⁷ No; legislatures differ in what they are trying to achieve so far as the fine texture of action-guidance is concerned, and usually by their terms, they can indicate that too to the citizen. So in the case of the Ohio speed limit, it is evidently no part of the legislative intention to guide the choice of transmission mode (when to down-shift etc.) by which the slowing to the lower speed is achieved. Within reason, a lowering of speed to 15 mph by whatever means is acceptable. The provision makes it clear that it is the velocity rather than the mode of achieving the velocity that it is concerned with. Something similar is true of §12603. A commonsense approach to the language of the provision indicates that the legislature has

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¹⁷ Cf. the discussion of detail and abstractness IN F.A. HAYEK, THE CONSTITUTION OF LIBERTY 150-3 (1960). Hayek believes that specifying action in fine detail is typical of the rule of custom, whereas abstract, coarse-grained guidance is typical of the rule of law.

deliberately chosen a strategy of flexibility and it has communicated *that choice* to the citizen as part of the impact it expects to have upon his agency. As the Ohio court observed, "it is quite obvious that in the case at bar the statute must be sufficiently elastic and adaptable to meet all the dangerous situations presented, in order to adequately safeguard the traveling public" (p. 215). The statute presents itself to the citizen in that spirit.

Again, the objection we are considering (and answering) here can be restated in Razian terms. Raz poses this rhetorical question: "If it is the purpose of the law to make a difference to our life, does it not follow that its realization of its purpose depends on its ability to exclude morality?" He thinks the answer is "Yes," and this seems to imply that there is something problematic about a statute which does little more than reiterate what morality requires anyway.

So consider §12603. Drivers are already subject to the requirements of morality; and, even before law intervenes, morality requires those who operate motor vehicles not to drive them at a speed greater than is reasonable or proper in the circumstances. Even in our broader sense of action-guidance, morality requires drivers to consider how reasonable their driving is in various circumstances. All this is something that a conscientious driver should be able to figure out without the aid of §12603. So what does §12603 *add* in the way of practical guidance? What difference does it make? With §12604, we know what the law adds: a determinate speed limit that moral reasoning by itself would not necessarily yield. But all that §12603 does is to repeat the demands of morality.

I don't see this as a problem. All sorts of laws repeat the demands of morality: a law prohibiting murder does that. Laws reiterating the demands of morality serve an important function. They give public expression to important values and requirements. They help in moral education. They authorize sanctions for moral violations. And above all they guide the behavior of those who might not otherwise attend to moral requirements. Sure, moral requirements are incumbent on everyone; everyone ought to be guided by them without further ado. But some are not guided by morality because

¹⁸ Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1 (2004), 8-9.

they are badly brought up or indifferent to moral considerations, susceptible to weakness of will or forgetfulness or the poor quality of their moral reasoning. So a law like §12603, which merely reiterates the demands of responsible driving, has an important ancillary role to play. It helps morality actually make the practical difference that morality is supposed to make; and it forces people to focus on the moral demands incumbent upon them.

8.

Model (ii) concerned the legal use of all-purpose evaluative predicates—like "reasonable" or "proper" or "appropriate." I have argued that such norms (such standards) are action-guiding, though what they guide in the first instance is the element of practical deliberation involved in the exercise of agency. I think the same can be said about standards that use thick moral terms like "inattentive" and "aggressive." They too guide practical reasoning, but they provide additional structure and channeling for the practical deliberation that they elicit. Suppose the Ohio General Code had complemented the provisions we have already studied with the following (imaginary) provision:

Section 12605: Whoever operates a motor vehicle or motorcycle in an aggressive or inattentive manner on the public roads or highways shall be fined not more than twenty-five dollars.

A term like "inattentive" or "aggressive" singles out a particular kind of evaluation that it invites us to make, relative to our conduct or (if one is a police officer) relative to the conduct of someone else. By a *kind* of evaluation, I mean an evaluation that pays attention to a sub-set of all the features of a situation that might be thought relevant from the broadest evaluative point of view. A given episode of driving might be evaluated in all sorts of ways—ranging from its speed to its necessity (as in the wartime slogan "Is your journey necessary?), but "inattentive" focuses evaluative attention on just some of those features, viz. the driver's awareness and alertness to the surrounding circumstances, including the road, the conditions, and actions of the other road-users, as well to the information that his own automobile presents in terms of speed instruments, noise, etc. The prohibition on inattentive driving starts us off down some paths of evaluation and not others. A police officer given the task of pulling over inattentive

drivers will be zeroing on some particular aspects of driving such as where the driver's gaze is directed, or at behavior (like swerving etc.) likely to result from undue distraction. And equally the driver himself, confronted with §12605, will remind himself of the importance of attentiveness and include this among the dimensions on which he plans and monitors his behavior. True—the standard does not tell him precisely what to do—where to look when, how often to glance at his dashboard or to the right and to the left at what is happening in other lanes. But it instructs him to begin thinking about what actions are required *under this heading*.

The same is true of the prohibition on aggressive driving. Before he became aware of this rule, it may not have occurred to the individual driver that he should develop modes of evaluation of his own conduct along this dimension of aggressiveness. He might have been thinking "The more aggression the better," provided he takes sufficient care; nobody wants undue timidity on the road. Or he may not have given the matter any thought at all, just routinely driving too close to cars that he wants to overtake or using his horn when someone is in his way. But now the law indicates to him that aggression is a bad thing and that he had better engage his practical reasoning to figure out what a prohibition on this aspect of driving behavior might reasonably be thought to involve in the various circumstances in which he finds himself. The law assumes that he is capable of this—i.e. capable of initiating and engaging in the forms of practical reason that flow from an awareness (perhaps an awareness for the first time) that there is a problem with aggressive driving. It assumes he is capable of reflection on this matter and capable too of mapping the results of such reflection on to the monitoring and modification of his own driving habits. So, this too is *law guiding action*, only the guidance now demands an even more complicated and constrained structuring of practical deliberation.

9.

Hart and Sacks, in their great work *The Legal Process*, refer to a category of norms which they call "inchoate rules." An inchoate rule is a norm that has the appearance of something that seeks to manage and control all aspects of it application, but for some reason fails to do so, leaving it in effect for the courts to settle the precise nature of the

directive that is given. They say, "[a]n inchoate rule is, in effect, a partial postponement of the authoritative determination of public policy as to the matters left uncertain." On the account that they give, an inchoate rule does not become a complete rule until the courts have contributed significantly to our understanding of it by "reasoned elaboration." Hart and Sacks explain this process in a section of their book entitled "The Process of Reasoned Elaboration of Purportedly Determinate Directions."²⁰

Are norms like §12603 and §12605 inchoate rules? I do not think so. They are not purportedly determinate; they are, to use another phrase from Hart and Sacks, "avowedly indeterminate." As I said in sections 5-6 and as the Ohio court noted, the legislature made clear its intention to communicate a flexible standard in §12603; and I am stipulating that the same sort of intention is evident from our imaginary §12605. The legislature does not want these norms pinned down to a precise and exact meaning that will govern all future cases; that would detract from the very elasticity that it is aiming at and it would detract from the sort of active consideration by citizen that it is seeking authoritatively to elicit.

I fear that it is harder for jurists to see this in a case like §12605 than it is in the case of §12603. If someone asks about the meaning of "reasonable" or "appropriate," all we can do is indicate that these are flexible all-purpose predicates of evaluation that invite us to consider a number of possible factors in an open-ended way. But for somewhat more specific terms like "aggressive" and "inattentive," it is tempting to think that the law-makers must have had something more specific in mind and it is tempting to try to identify what that is, and call that the legislative meaning of the term. This has been the history of "originalist" approaches to the use of thick evaluative terms like "cruel" in the American constitution (in the 8th Amendment). Instead of reading a prohibition on "cruel punishment" as an invitation to engage in structured practical deliberation along the subset of dimensions of evaluation that "cruel" indicates, the temptation is to treat the word as a cipher for the particular practices that the framers of the constitutional provision must have had it in mind to condemn. Or, in the case of some modern human

¹⁹ HART AND SACKS, op. cit.., at 139.

²⁰ Ibid., 145-50. ²¹ Ibid., 150.

rights provisions, like the prohibition on inhuman and degrading punishment in Article 3 of the European Convention on Human Rights, the temptation is to substitute an array of particular decision by an authoritative court—shackling is degrading, corporal punishment is inhuman, etc.—for the structured deliberation that is invited by the ordinary language meaning of these terms.²² Both these approaches treat the norm in question as an inchoate rule, and one way or another their strategy is to flee as soon as possible from the indeterminacy occasioned by an acknowledgement that these are evaluative terms inviting evaluative judgment. By contrast, the approach that I have taken looks for what Ronald Dworkin has called a "moral reading" of these provisions, which involves judges trying to figure out in their own voice as a matter of moral judgment what punishments are cruel (or inhuman or degrading) and what punishments are not.²³

Maybe there are good political reasons for treating provisions like the Eighth Amendment as inchoate rules. Constitutional originalism, for example, is sometimes motivated by a distrust of judges' exercising the sort of independent moral evaluation that would follow from their taking the moral reading seriously. The worry is that judges will indulge their own subjective policy preferences if they are asked to say in their own voice whether (e.g.) capital punishment is cruel. Maybe that fear of judicial independence or judicial subjectivity justifies the originalism approach. But what does not justify it is the proposition that the Eighth Amendment, on the moral reading, fails to give the judges any guidance. It *does* give them guidance; only what it guides is their decision as to whether to engage in moral deliberation on this matter in the way that the meaning of the term "cruel" invites.

10.

I have tried to answer the objection that standards like §12603 and our imaginary §12605 fail to guide action and that this is why their imprecision is objectionable. An alternative objection is that such imprecise standards provide altogether too much in the way of

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²³ Cf. Ronald Dworkin, Freedom's Law (1996),

²² See also Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves*, available on SSRN at http://ssrn.com/abstract=1278604 and in TORTURE, TERROR AND TRADE-OFFS (Chapter 9).

action-guidance, because they chill and deter not only the behavior to which they are eventually applied, but also a lot of behavior in the vicinity as people strive to avoid the risk of being caught out by these indeterminate provisions. A numerical speed limit deters only the behavior that exceeds 8 mph or 15 mph or whatever the limit is. But a requirement to drive at a reasonable speed or a requirement to not drive aggressively may deter much behavior that might not eventually be found by a court to be unreasonable or aggressive simply because the agent plays it safe to avoid the risk of prosecution. This objection is very common, and it may be justified in the case of an inchoate rule—where the legislature has managed to indicate that behavior up to some specified limit is permissible but has failed to provide a determinate indication of what that limit is. However, it is not usually justified in the case of standards like the ones we are considering.

Think back to what the Ohio Supreme Court said about §12603 in *State v. Schaeffer*:

The careful, conservative driver need have no fear of [the provision]. The reckless, wanton speed maniac needs to be kept in fear of it. The life of the humblest citizen must be placed above the gratification of the motor maniac, who would turn the public highways into a race course. (p. 234)

The Court's position seems to be that "chilling" the behavior of "[t]he reckless, wanton speed maniac" may be a good thing; it may be a good thing if the formerly inattentive driver becomes hyper-vigilant or if the formerly aggressive driver is led by §12605 to become extremely, perhaps even unnecessarily polite.

The underlying point here is that guiding action need not be conceived as an exact enterprise. Chilling action is also a way of guiding action. It brings a person's action under legal control within a broad and vaguely defined range rather than by reference to a specific act-type (such as driving at an exactly specified speed). The instruction to "Slow down," for example, guides action and it does so even though the recipient of the instruction knows pragmatically that dropping his speed by 1 mph does not satisfy the requirement and knows too that dropping his speed *to* 1 mph may be taking things too far. Somewhere in between these extremes, there is an area of behavior that the instruction guides him towards. But it is a vague area and, from the law's point of view,

it probably doesn't matter if the desire to avoid sanctions biases things towards the lower end of the scale. Much the same, I believe, may be said of §12603.

If there is a serious objection to chilling action in this sort of way, it is probably better phrased in terms of a background concern for liberty rather than a background concern about guiding action as such. In First Amendment doctrine, we sometimes worry that restrictions on speech in a particular area will "chill" speech in the surrounding area, and we think that this is a problem because we have a strong general commitment to freedom of speech in all but the areas where we can say with confidence that a specific restriction is needed.²⁴ The U.S. Supreme Court has sometimes said that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."²⁵ But it is not clear that any such assumption is warranted in the driving case. Do we really want to say that because the freedom to drive fast (or as one pleases) needs breathing space to survive, government may regulate in the area only with narrow specificity? I don't think so. Often the use of model (ii) is justified in areas where we think there is no strong background right to liberty, no freedom that requires an unchilled breathing space. It is justified in areas where a person's actions already warrant the watchfulness of the law and where eliciting the person's own watchfulness is by no means objectionable. Driving, at least in 1917, was just such a case.

Beyond that, the other objection that a legislature needs to confront is an apprehension of unfairness in the disparity that may sometimes occur between the citizen's idea of what is reasonable and the authorities' view of what is reasonable when the citizen's action is reviewed by the police or by the courts. We are not now concerned with the reckless, wanton speed maniac who says, "I am shocked—shocked!—to find out that I was expected to slow down so much in a built-up area with children playing in the street." What about the responsible driver who is just unsure about whether his good-faith estimate of reasonable speed is going to coincide with that of the police? I am thinking here about the person who worries whether his own good faith calculations will be

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²⁴ See, e.g., *Citizens United v. Federal Election Commission* 130 S.Ct. 876 (2010) at 892: "Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime."

²⁵ National Ass'n for Advancement of Colored People v. Button 371 U.S. 415 1963 at 433.

regarded by others as idiosyncratic or the person who worries that he may be confronted with a judge or a magistrate who has an idiosyncratic view of the matter that differs from his own. Once again this is not a concern about action-guidance, but it may be a real concern nonetheless.

I do not believe that this concern is answered, in the way philosophers are often tempted to answer it, by appealing to a notion of objectivity—that is, by saying that so long as there is an objective right answer to the question of what is a reasonable speed to drive at in a given set of circumstances, no one can complain about unfairness when his own subjective calculation is corrected by a court. There can be an objective right answer and still people can come up with widely disparate estimates, and so the question does have to be confronted:²⁶ is it fair to subject P's estimate to review on the basis of someone else's estimate, in circumstances where the two of them might widely diverge?

To avoid this concern, one might want to confine the use of model (ii) to areas of conduct where we have reason to believe there is not going to be such a wide divergence. Driving, it seems to me, is such an area. In State v Schaeffer, although there was a factual disagreement about how fast the defendant was driving, there seemed to be little disagreement about how fast it was appropriate to drive when numbers of children were playing on the street. Responsible drivers and responsible law-enforcement officials were likely in 1917 to converge around a fairly low number. In areas where there is likely to be greater divergence—whether because of different cultures in regard to the activity in question or because of different patterns of perception of what is and what is not a circumstance that promises danger—something more along the lines of model (i) may be appropriate. Possibly this might lead us to reconsider our imaginary §12605 or at least the part that relates to aggressive driving. Cultures of driving may have developed so disparately that we can no longer rely on a sort of background consensus to obviate the unfairness of subjecting one persons' view of what is and is not aggressive to another person's view on that matter. It is possible that an otherwise good driver might say, not disingenuously, "I am shocked to find that driving up close behind a vehicle that is travelling below the usual speed in the fast lane and flashing my lights to indicate that I

²⁶ See Waldron, *The Irrelevance of Moral Objectivity*, in NATURAL LAW THEORY (Robert George ed., 1992), 158-87, reprinted in JEREMY WALDRON, LAW AND DISAGREEMENT 164-87 (1999).

want to overtake is treated as aggressive driving." It may be better to do what most states now do,²⁷ which is to authoritatively define aggressive driving in terms of certain specific practices. This represents in effect a shift from model (ii) to model (i).

On the other hand, cultures of aggressive driving don't come out of nowhere. They grow and develop as people begin to take less and less responsibility for the considerateness of their driving patterns. We imagined an honest driver being surprised to learn that his attitude towards overtaking was regarded by the police or the courts as aggressive. But it might be more realistic to imagine such a driver being slightly defiant about his driving and resistant to the processes of practical reasoning that the law aimed to elicit: "I don't need anyone to teach me how to drive. Those slow-pokes in the fast lane need to learn to pull over and let those of us by who know how to drive at speed." The early stage of emergence of this sort of attitude represents in effect *an assault on what might be an existing consensus about reasonable and safe driving* and an attempt to replace it with a different, more Darwinian, approach. The attitudes (and the driving) of such a person may or may not be admirable; but we may have less sympathy with his complaint about unfairness when he finds his actions authoritatively reviewed on the basis of standards more prudent than those he is trying to inculcate.

11.

Believe it or not, my main concern is not about traffic rules. I have come to these issues through a different and darker route: the problem of legal provisions that prohibit torture.²⁸ The United States anti-torture statute (18 USC §2340A) makes it an offense punishable by up to 20 years imprisonment (or death if death results) to commit, conspire or attempt to commit torture.²⁹ Now, "torture" is a vivid term, and for most of us it summons up grisly and distressing images of practices that fall indisputably within its sphere of reference. But its boundaries do seem to be contestable. Is sleep deprivation

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²⁷ Florida's definition is typical. Aggressive driving means "at least two of the following: speeding, unsafe or improper lane change, following too closely, failure to yield right of way, improper passing, failure to obey traffic control devices." See http://www.ghsa.org/html/stateinfo/laws/aggressivedriving_laws.html

 $^{^{28}}$ See Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUMBIA LR1681 (2005) and Torture, Terror and Trade-offs: Philosophy for the White House (2010). 29 18 USC §2340A.

torture? What about forcing people to stand in a stressed position for many hours? Is water-boarding a form of torture? All these questions have been debated. The anti-torture statute actually provides a definition

"torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering ... upon another person within his custody or physical control.³⁰

Unfortunately this definition does not remove the indeterminacy; it just helps to identify its source. Torture is vague in large part because the phrase "severe physical ... pain or suffering" is vague. Severity of pain or suffering is a continuum, but the use of the word "torture" in seems to presuppose that we can say, of a given episode of pain and suffering, that it either is severe or it is not. In this respect, §2340A is rather like our imagined §12605, prohibiting aggressive driving. It invokes a standard conveyed by a thick term of evaluation, and it engages our practical reasoning in this regard, on the optimistic assumption (which may or may not be justified) that—when prodded by the law—we know and agree about how to apply it.

I believe that the following points drawn (by analogy) from what has been said about our paradigms of traffic law in Ohio can help us think through the difficulties that might arise with regard to the anti-torture statute.

First, the indeterminacy of §2340A, such as it is, does not prevent it from being action-guiding or from making a practical difference to the agency and behavior of those who are subject to it. Inasmuch as it imposes a non-negotiable prohibition and threatens heavy penalties, it constitutes a warning to the community of people likely to be engaged in coercive interrogation that they should give the most careful thought to their choice of interrogation techniques. They are put on notice that the very thing that might attract them to a technique—its painfulness and people's inability to resist it—are themselves the locus of the gravest legislative concern. So, for example, even though the law as written does not settle in a determinate way whether water-boarding is torture, it does tend to guide their agency away from such techniques.

³⁰18 USC 2340 (1).

Secondly, the fact that a relatively indeterminate prohibition might "chill" interrogative activity is hardly a cause for concern. For suppose it is the definition of "severe pain or suffering" that is giving pause to our imagined interrogator. He is in the business, let's say, of deliberately inflicting considerable pain on detainees already and he just wants to know where exactly the severity line is, so that he can push up against it, but not be seen to cross it. The electrodes are already plugged in and the dial turned up to 4 or 5; he wants to know how much higher he can go. I think we are unlikely to say of this case what we observed the Supreme Court saying about speech—that because the practice of deliberately inflicting pain in interrogation needs breathing space to survive, government may regulate in the area only with narrow specificity. Instead, we might see the interrogation context as being a prime case for legislative watchfulness and we may have no difficulty with the idea that the watchfulness that the law in turn elicits from interrogators may lead to an excess of caution.

Sure, opinions may differ on this. Some will say that we need to avoid chilling interrogative activity, because we need the results of interrogation in our pursuit of the war against terrorism. (An analogy would be the opinion that we need fast efficient driving and so it is important not to chill that with vague safety-oriented ordinances like §12603 and §12605.) But now at least we have located the nub of the dispute. It is not a general concern about vague statutes; it is a concern about the relative seriousness with which we should take the background liberty on which the statute impinges.

Thirdly, we might conceivably identify a problem about fairness, in which an interrogator professes surprise about the way in which his estimation of which practices count as torture (or which episodes of pain count as severe) are second-guessed by a warcrimes tribunal. Whether we like it or not, it is possible that under conditions of modern pluralism, different cultures have emerged which in fact treat these phenomena in quite different ways, so that someone is not just weeping crocodile tears when they say: "I am shocked—shocked!—to learn that I am to be punished for setting dogs on prisoners or depriving them of sleep for a month." That may be so. Alternatively, it is possible that there has been an attempt in recent years deliberately to *create* such a disparity of evaluations, to muddy the waters of human rights law and international humanitarian law so that it appears that the consensus on which §2340 and §2340A were predicated has

dissolved. On this account, statements of the "shocked—shocked!" variety would be part of a campaign, deliberately calibrated to foster this dissensus. If that is the case, I think we should be much less impressed by these complaints of unfairness relative to the ordinary operation of a provision like this. We should probably be less impressed by them anyway, inasmuch as the likelihood of actual prosecutions under §2340A is in fact vanishingly small, and the main effect of the attempt to pin down a precise meaning for "torture" or "severe" is in fact to furnish the administration with a determinate envelope to push.

12.

Complaints about vagueness and imprecision are not just abstract concerns in legal philosophy. They do afford us an opportunity to think more complicated thoughts in our philosophical conceptions of what it is for a legal provision to guide action, and I have tried to set out in this chapter what some of those complications might be. But we need to remember that it is vague *law* we are talking about, not just vague propositions. That we are talking about vague law means, at the end of the day, we are talking about the auspices under which punishments will be meted out and sanctions imposed; and that should alert us to the seriousness of the matter. But we should understand, too, what is at stake in the legislative or regulative enterprise. That is also a deadly serious matter protecting people from torturers or, in our traffic case, from "[t]he reckless, wanton speed maniac." In these and similar areas, it is good to focus on the need for legislative flexibility, or what Aristotle once called the "lesbian" rule: "For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian molding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts."³¹ The adaptability of law, secured precisely by what others would call its indeterminacy, is not incompatible with law continuing to guide the actions of its subjects. It is a valuable legislative resource and a respectful one too, for it works in tandem with the most sophisticated understanding of people's powers of practical reason.

³¹ ARISTOTLE, THE NICHOMACHEAN ETHICS (David Ross trans., 1980), p. 133 (Book V, Chapter 10).