ARBITRARINESS: WHY THE MOST IMPORTANT IDEA IN ADMINISTRATIVE LAW CAN'T BE DEFINED, AND WHAT THIS MEANS FOR THE LAW IN GENERAL

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I. INTRODUCTION

The crucial idea of "arbitrariness" runs throughout the law. Processes of decision making and the outcomes of those processes can both be considered arbitrary. Usually, but not always, the law thinks of arbitrariness as undesirable.[1] What arbitrariness means, however, is surprisingly elusive. My main thesis, put negatively, is that it is futile to seek any standard definition of arbitrariness. No such standard definition is possible. This will prove true not only of "arbitrary" and its synonyms in the law generally, but even within particular narrower subject matter areas, such as administrative law.[2] Put positively, my main thesis is that legal

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1. A number of judges have referred to the exercise of peremptory jury challenges as an inherently arbitrary and capricious right, where arbitrariness is seen as at least neutral in its legal effects. *See, e.g.*, Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *353); Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *353); Davis v. Minnesota, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115, 1117–18 (1994) (Thomas, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting)); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 162 (1994) (Scalia, J., dissenting) (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting) (quoting *Lewis*, 146 U.S. at 376); Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)). The idea of arbitrariness in the peremptory challenge area, where no reasons generally need be given for the challenge, is similar to how the idea of arbitrariness is used, more negatively, elsewhere in the law. We are not, at least, taking a river bank and a savings bank to refer to the same idea of "bank." *See* RONALD DWORKIN, LAW'S EMPIRE 44 (1986).

2. *See infra* Section III.

arbitrariness is, or at least should be, strongly and variously contextual,[3] in ways I shall explain herein.[4]

Briefly, I will argue that understanding arbitrariness in the law requires an understanding of the conflict between "invariantist" and "contextualist" approaches to the idea of the arbitrary.[5] Contextualism, as I shall define it below, offers the best available understanding of how the idea of arbitrariness actually functions in the law. As we better understand the forms of contextualism, we then understand better the context-dependent multiple meanings of arbitrary. In turn, better understanding the idea of arbitrariness helps us better understand the murkiness and contestedness of the law in general.

II. UNDERSTANDING CONTEXTUALISM

To give ourselves something to work with, let us begin with what seems the most relevant definition of the arbitrary in general, provided by the *Oxford English Dictionary* ("OED"). The OED defines "arbitrary" as "[d]erived from mere opinion or preference; not based on the nature of things; *hence*, capricious, uncertain, varying."[6]

This definition seems to focus on the arbitrariness of an outcome or of a substantive decision, rather than on the decision-making process itself. But this need not trouble us. More worrisome here is the reference to the arbitrary as "uncertain" or "varying."[7] No doubt, arbitrariness often takes the form of capriciousness, with uncertainty or variability then resulting. Dining, say, at a particular Italian restaurant on whose directory listing one's jabbed finger happened to land exemplifies this sort of arbitrariness. Arbitrariness in this instance is seemingly linked with

3. *See infra* Section II.

4. *See infra* Sections II–IV.

5. *See infra* Section II.

6. THE OXFORD ENGLISH DICTIONARY 602 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). The OED also offers "[u]nrestrained in the exercise of will; of uncontrolled power or authority, absolute; *hence*, despotic, tyrannical." *Id.* This alternative seems a bit strong for some administrative decisions that are held arbitrary on grounds merely of perceived insufficiencies in explanatory logic. *See infra* Section III. The most relevant OED definition of "capricious," on the other hand, is as follows: "Full of, subject to, or characterized by caprice; guided by whim or fancy rather than by judgement or settled purpose; whimsical, humoursome." THE OXFORD ENGLISH DICTIONARY, *supra*, at 869.

7. *Id.* at 602.

uncertainty, variability, and unpredictability. But this is hardly the only major form of arbitrariness.

In fact, some important forms of legal arbitrariness can be characterized in nearly opposite terms. In the extreme case, consider an agency administrator who is, wherever relevant, driven by some fixed political principle, or by what critics would refer to as a rigid overriding political ideology. In the relevant range of cases, that administrator's decisions would tend to be arbitrary—far less clearly so "capricious"—even though they are driven by a uniformly settled bias or purpose, and are hardly random, unpredictable, uncertain, or varying.[8] Politics may certainly play a role in generating arbitrary, but quite predictable, agency outcomes.[9]

So it seems fair to say thus far that at a minimum, arbitrariness may be a bit harder to define than one might have imagined. One should carefully distinguish an arbitrary decision-making process from a particular decision-making process that is arbitrarily unfair or biased. Arbitrariness itself may not be unfair or biased, and arbitrariness may not be the problem with unfair or biased decision making. Consider the well-known gender equal protection case of *Reed v. Reed*.[10] In *Reed*, the state arbitrarily and uniformly preferred men over women of the same statutory class as intestate estate administrators.[11] The problem in *Reed*, however, was in systematically treating women unequally with men;[12] an arbitrary selection scheme actually might systematically tend to treat men and women equally. Given a male and female candidate desiring to serve as administrator, a random toss of an unbiased coin could be arbitrary, yet unfair and not violative of anyone's equal protection rights.[13]

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8. *See supra* text accompanying note 6.

9. For a judicial finding of agency arbitrariness arguably linked to the very predictability, rather than any randomness or mere fancy, of partisan politics, see both the opinion for the Court and Justice Rehnquist's opinion dissenting in part in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Insurance*, 463 U.S. 29 (1983).

10. 404 U.S. 71 (1971).

11. *Id.* at 75. ("Section 15-314 [of Idaho's probate code] is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15-312. In such situations, § 15-314 provides that a different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.").

12. *Id.* at 76–77.

13. *But cf. id.* at 76. ("A classification [for equal protection purposes] must be reasona-

But these sorts of problems with defining the idea of arbitrariness in a standard dictionary sense can be managed. And no unavoidable vagueness of the idea of arbitrariness, by itself, makes arbitrariness undefinable in a dictionary sense. Generally, vagueness of an idea creates uncertainties of application in close or marginal cases, but this need not make the vague idea undefinable. We can fairly assume that ideas like "bald" and "flat" are vague[14] but still definable in a dictionary sense.

What does create serious difficulty for a useful dictionary definition of a term such as arbitrariness is an especially high degree of contextuality of the term. It is said that, generally, "contextual themes are gaining increasing recognition these days."[15] Of course, we have always seen the importance of context in some general sense. We insist, for example, that our words "not be taken out of context," whether we are ordinary citizens or judicial opinion writers.[16] "Contextualism," as we will be using the term, will have a more distinctive meaning.

To begin to clarify the idea of contextualism, we can think again of the idea of flatness, which we have already assumed is a vague term.[17] Precisely where any given surface becomes or stops being flat will be unclear, hence the vagueness of the meaning of flat. But beyond this, more importantly, the meaning of "flat" will also depend upon context and relevant purposes and interests. Context, and the underlying purposes and interests at stake in that context, will affect the actual standards for calling something flat.[18]

Consider, for example, the flatness of an airport runway or a country road, in contrast with the flatness of a glass table, or a writing surface. Standards for flatness are, in a sense, inconsis-

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ble, *not arbitrary*, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added)).

14. *See* MARK TIMMONS, MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM 112 (1999) (citing David Lewis, *Scorekeeping in a Language Game*, 8 J. PHIL. LOGIC 339 (1979), *reprinted in* 1 PHILOSOPHICAL PAPERS, at 244–45 (1983)).

15. *Id.* at 114.

16. *See, e.g.*, Wisehart v. Davis, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.) ("Judges expect their pronunciamentos to be read in context . . . .").

17. *See supra* note 14 and accompanying text.

18. *See* TIMMONS, *supra* note 14, at 112 (citing Lewis, *supra* note 14, at 245–46).

tent.[19] We might call a particular runway or a particular country road flat, and we might describe some particular glass table top or a particular writing surface as not flat. And we might say all this even if in some literal sense the latter objects were flatter than the former—perhaps the table and the writing surface have only mere scratches, few in number, whereas the former have the bumpiness caused by half-inch surface irregularities, or changes in elevation of even several feet.[20]

We could thus imagine a standard ant having a tougher time crossing a foot of runway or road than a foot of the table top or the writing surface, yet we would continue to call the former flat and the latter not flat. This would again be because differences in context involve differences, and even contradictions, in standards and meanings. And this is fundamentally because different purposes and interests are at stake, themselves largely creating the crucial differences in context. On a runway or country road, an "abrupt" rise or fall in surface height of less than half of an inch is, for most practical purposes, insignificant.[21] Such a surface is thus flat.[22] But on a table top or writing surface, an abrupt rise or fall of only an eighth of an inch or less may make the surface unsuitable and thus not flat for a typical gracious display or for writing.[23] The contexts and their underlying purposes and interests differ in ways calling for different standards and meanings of flatness.

The activities of taking off and landing an airplane, driving a car, displaying an aesthetically pleasing furniture surface, and writing smoothly and uninterruptedly involve different purposes and interests, thus evoking different standards and largely constituting different contexts.[24] Realistically, "flat" involves different standards or criteria for invocation in these different contexts. The meaning of "flat" varies to one degree or another with the

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19. *See* PETER UNGER, IGNORANCE: A CASE FOR SKEPTICISM 58–59 (1975) (stating that the term "flat" is absolute and thus "where we say that one surface is flatter than the other, we may paraphrase things like this: The first surface is either *flat, though the second is not* or else it is *closer to being* flat than the second."); *see also* Lewis, *supra* note 14, at 245 (reasoning that a desk is flatter than pavement under a raised standard of precision).

20. *See* Unger, *supra* note 19, at 66.

21. *See* Lewis, *supra* note 14, at 245.

22. *Id.*

23. *Id.*

24. *See id.*

changes of context.[25] There is in this sense no single meaning, definition, or property of flatness.[26] This overall logic amounts to what we call contextualism in action.

I shall examine below how the idea of the arbitrary fits into this contextualist pattern in a more complex, multidimensional way.[27] In the meantime, though, we should establish that flatness is hardly the only, or the most important, example for which meaning varies, even inconsistently, with changing contexts. Consider this further example, involving the idea of knowing:

> Suppose . . . that having seen my children a minute ago, I assert "I know my children are in the garden." My neighbour Harold then says, "Good, because an escaped prisoner is seeking hostages nearby." I may then appropriately claim, "On second thoughts, [sic] I do not know, I should check carefully." Standards for knowledge appear to have shifted. . . .[28]

The argument being made by this paragraph is that the parent has indeed changed his or her mind, but has in some sense not necessarily contradicted herself. We need not accept or reject this example. My point is merely to illustrate the general logic of the argument. The idea here is that the insertion of a serious and immediate possible threat to the children has dramatically changed and raised the stakes. As a result, the relevant context has now changed. Before, with a background assumption of no unusual danger to the children, it would be standard, proper, and responsible for a parent to say that she "knew" the children were in the garden if they had been seen there a minute before. But the addition of the new serious hostage-taking threat to the children changes the context, and thereby the very standards for knowing. Based on this theory, the parent could know in the one context, but not know in the other, and in some sense not be con-

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25. *See id.* at 245–46.

26. *Cf.* John Greco, *What's Wrong with Contextualism?*, 58 PHIL. Q. 416, 426 (2008), *available at* http://www3.interscience.wiley.com/journal/120084229/issue ("[I]f the word "knowledge' picks out different properties in different contexts, then there is no property of knowledge proper. Rather, there is only knowledge language, which picks out any number of properties in different contexts.").

27. *See infra* Section III.

28. Bruce W. Brower, ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig. Ed., 1998) (entry for "Contextualism, Epistemological"), *available at* http://www.rep.routledge.com/article/PO58?authstatuscode=202. Such cases are often discussed in terms of a claimed contextualism of knowledge, or epistemic contextualism. Our concern is more with the contextualism of meaning, or semantic contextualism.

tradicting herself, because of the justifiable changes in standards for knowing based on the dramatic changes in interests at stake.[29]

Nothing really depends upon this particular example, but we might add to its plausibility by noticing that we generally set different standards for knowing in different contexts. We might say, for example, that a child knows how water boils based merely on the child's brief, simple quiz or game show answer. We might also say, however, that a quantum chemistry graduate student—surprisingly or disappointingly—does not know how water boils, based on his exam answer, even though the graduate student knows all that the child knows, and, indeed, well beyond what the child knows.[30]

Importantly, as it turns out, our words vary in the degree to which their meaning varies with changes in context. We can imagine a simple continuum. At one end of the continuum are terms whose meaning does not vary much with changes in context. Or more precisely, it is hard to relevantly change the context in which such terms appear. Such terms we could classify as strongly invariantist.[31] Terms such as "less than one meter in length" or "below freezing" might fall toward the invariantist end of this simple continuum. These phrases' meanings might well change from context to context, but typically less so, than the term flat.[32] Flatness would fall more toward the contextualist end of the continuum, with invariantism and strong contextualism thus working as opposites.[33]

Arbitrariness and its close synonyms, I will argue, fall in complex ways toward the contextualist extreme. The meaning of arbi-

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29. Nor would we say of this example that two completely different senses of "know" are involved, as in the case of a river bank and a savings bank. *See supra* note 1.

30. *See* Peter Ludlow, *Contextualism and the New Linguistic Turn in Epistemology*, *in* CONTEXTUALISM IN PHILOSOPHY: KNOWLEDGE, MEANING, AND TRUTH 11, 11 (Gerhard Preyer & Georg Peter eds., 2005) (suggesting that high standards for "knowing" are set in both philosophy classes and in "a court of law"). I note briefly that the discussion of changes in word meaning below will not depend on the separate matter of what are called "indexicals," including words such as "I" and "you," whose concrete, substantive meaning may obviously also vary depending upon speaker and context. *See* John Perry, Indexicals, Apr. 23, 2000, http://www–csli.stanford.edu/~jperry/PHILPAPERS/demon-enc.pdf.

31. For discussion of epistemological invariantism, see Brower, *supra* note 28; Preyer & Peter, *Introduction* to CONTEXTUALISM IN PHILOSOPHY: KNOWLEDGE, MEANING, AND TRUTH, *supra* note 30, at 2; Jessica Brown, *Subject-Sensitive Invariantism and the Knowledge Norm for Practical Reasoning*, 42 NOÛS 167, 167 (2008).

32. *See supra* notes 17–26 and accompanying text.

33. *See* sources cited *supra* note 28.

trary will change significantly as context and the underlying, perhaps conflicting, purposes, interests, and stakes vary. The significance, degree, and frequency of the changes of meaning of arbitrary lead to the conclusion that it is more misleading than helpful to imagine that arbitrary has a standard, convenient, legal definition,[34] even in particular legal contexts, such as judicial review of administrative actions.[35]

Before I address the idea of arbitrariness in some important contexts, I should clarify a bit further how, in general, one context differs from another. Contextualism[36] holds that our language is interest-dependent.[37] More broadly, we can say that "context itself is to be understood in terms of such things as . . . interests, purposes, expectations, and so forth."[38] The essential presence of sometimes conflicting interests and purposes suggests, naturally, that something is at stake in any context, and that the importance of the stakes may vary with context,[39] with some contexts presenting "low-stakes situations" and others "high-stakes situations."[40]

Without pressing the legal issues just yet, we can easily see that the interests and purposes involved in cases of alleged arbitrariness can vary in their gravity. The denial of a vacationer's recreational fishing license and the imposition of the death penalty might, in particular cases, both be arbitrary, but we can see that the gravity or seriousness of the interests at stake in the two cases can vary substantially.[41] We shall see below how such considerations can lead to the elevation of the standards for what counts as arbitrary, or, on the other hand, how they can lead to

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34. *See infra* Sections III–IV.

35. *See infra* Section III.

36. Again, our primary focus is not on the contextualist nature of, say, knowing something, or on something's being morally right or wrong, but on the contextualism of meaning, on what is called semantic contextualism.

37. *See* Greco, *supra* note 26, at 417.

38. Patrick Rysiew, *Epistemic Contextualism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Sept. 7, 2007, http://plato.stanford.edu/entries/contextualism-epistemology/ (focusing on attributor epistemic contextualism).

39. *See* Brown, *supra* note 31, at 167–68.

40. Greco, *supra* note 26, at 418.

41. For reference to the idea of greater or lesser relevant variability among contexts, see Ernest Sosa, *Contextualism, Epistemic, Recent Work on*, ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig ed., 1998), *available at* http://www.rep.routledge.com/article/PO61?ssid=1079207542kn=1#.

the relaxation of such standards, and thereby alter the meaning of arbitrary.[42]

One necessary complication is that in any decision-making context, more than one common interest or purpose will likely be in play. A given actor may hold more than one interest. Different persons may hold different and perhaps conflicting interests, of different intensity, at different times. Thus, even the judge may have some interests distinct from the litigating parties (including the government) during the trial, and another set of interests during sentencing.[43] We could easily add to the judge's various possible interests if there is an appeal of the decision.

More generally, legal contexts can be identified and described by reference to the purposes and interests deemed to be at stake by any interested person. Whether all parties have fully understood their own interests, or those of other parties, is a possible complication. As a further complication, some persons may have interests that actually refer mainly to the interests of other persons. Thus, in addition to the litigants themselves, other persons similarly situated, the broader public, legislative oversight committees, the government,[44] agency decision-making officials or agency branches,[45] trial and appellate courts and private counsel, journalists, scholars, and sundry critics may also have overlapping and conflicting interests at stake.[46]

This is not to suggest that all such purposes and interests are equally important and should equally affect the meaning of arbitrary or any other legal term. But the potential for conflicts over the meaning of important legal terms on this basis is not hard to understand. In the extreme case, the conflicting purposes and in-

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42. *See infra* Section III.

43. Greco, *supra* note 26, at 436.

44. For the classic reference to multiple and in a sense conflicting possible government interests in an administrative case, see *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)) (articulating a procedural due process balancing test).

45. See, for example, the various potentially conflicting interests internal to the administrative agency itself in the immigration case of *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41–48 (1950), *superseded by statute*, Supplemental Appropriation Act of 1951, Pub. L. No. 81–843, ch. 1052, § 3, 64 Stat. 1044, 1048, *as recognized in Ardestani v. INS*, 502 U.S. 129, 133–34 (1991).

46. For more general reference to the problem of "whose interests matter?," see, for example, Brian Weatherson, *Questioning Contextualism*, *in* ASPECTS OF KNOWING: EPISTEMOLOGICAL ESSAYS 133 (Stephen Hetherington ed., 2006).

terests of prosecutors, death penalty defendants, and other actors almost guarantee continuing conflict over the proper meaning of "arbitrary" in the context of the death penalty and its adjudication.[47] In general, we should expect death penalty defendants to argue for a more "rigorized," higher-standard understanding of arbitrary, in various respects, and prosecutors for the contrary.[48]

There is certainly much more to say about contextualism in general.[49] But it is more important for our purposes to now apply

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47. In contrast, in a case with few conflicting purposes and interests, we should expect less conflict over the meaning of "arbitrary."

48. By contrast, the idea of procedural due process, or literally the process that is "due" is arguably by its own dictionary definition already inherently contextualized and sensitive to interests. Due process itself may mean the process that is due, fitting or appropriate in the particular context, or under the particular circumstances. "Due" here functions like a placeholder. We see this played out in the explicit interest-focused contextualism of the *Eldridge* three-part balancing test. *Eldridge*, 424 U.S. at 334–35 (citing *Goldberg*, 397 U.S. at 263–71).

For the sake of a clear contrast, consider the idea of being "below freezing." No doubt even the idea of "below freezing" has some contextual element, but far less prominently. The idea of "below freezing" will usually be clearly established in advance—as we often falsely imagine "arbitrary" to be—and then applied to various sets of circumstances. The meat storage locker, the outdoor temperature in Frostbite Falls, interstellar space, and the carton of ice cream may all count as "below freezing," uniformly applied across the cases.

"Below freezing" will thus have a largely pre-contextual meaning in this sense. Due process, has, by contrast, a meaning that inherently refers to interests in their contexts. And the idea of the "arbitrary" makes no such explicit contextual reference, but is variously defined, in accordance with the more or less conflicting particular interests, in varying contexts.

49. Contextualism is generally thought of as either a mild form of, or as a constructive response to, relativism or skepticism. *See, e.g.*, Preyer & Peter, *supra* note 31, at 3 ("[C]ontextualism is a mild form of relativism about the truth of sentences"); Mark Richard, *Contextualism and Relativism*, 119 PHIL. STUD. 215, 215 (2004) ("[C]ontextualism about knowledge, being a sort of relativism, seems to have trouble accounting for epistemic disagreement."); *see also, e.g.*, Greco, *supra* note 26. *But cf.* Berit Brogaard, *Moral Contextualism and Moral Relativism*, 58 PHIL. Q. 385, 385 (2008) (suggesting moral contextualism need not involve genuine relativism); Michael Williams, *Why (Wittgensteinian) Contextualism Is Not Relativism*, 4 EPISTEME 93, 93 (2007) ("I deny that this contextualist view amounts to epistemic relativism. On the contrary, contextualism is the cure for all skeptical temptations, relativism included."). Epistemic contextualism is thus sometimes thought of in contrast not only to seeking some secure foundational truth, to a somehow mutually supportive coherentist network of beliefs, and as well to skepticism, since standards for knowing are thought to vary, with greater and lesser rigor or demandingness, according to context. Skepticism, for example, loses its bite if the proper standards for knowing something, in some specified context are easily met.

For a discussion of additional critiques of some forms of contextualism, see, for example, Berit Brogaard, *In Defence of a Perspectival Semantics for 'Know'*, 86 AUSTRALASIAN J. PHIL. 439, 440–42 (2008) (discussing the appeal of invariantism), and Albert W. Musschenga, *Empirical Ethics, Context-Sensitivity, and Contextualism*, 30 J. MED. & PHIL. 467, 484 (2005) ("A common objection against theories such as epistemic contextualism is that they do not provide room for criticising the internal moralities of practices."). Such criticisms, whether otherwise sound or not, are of limited relevance for our purposes.

the basic semantic contextualist framework to the idea of arbitrariness, not only within the crucial administrative law context,[50] but also within the death penalty context,[51] for the sake of contrast.

III. ADMINISTRATIVE ARBITRARINESS FROM CONTEXT TO CONTEXT

For legal contexts generally, a decision is often thought of as arbitrary when it is "founded on prejudice or preference rather than on reason or fact."[52] One problem for such a definition is that arbitrary decisions can also be based on genuinely unrecognized logical or evidentiary gaps, murky reasoning, or flawed methodology.[53] These can be inconspicuous mistakes, hardly resulting from prejudice or willful preference. Another problem is that narrowly politically-driven outcomes may reflect not only prejudice or preference, but also a substantial component of "reason or fact,"[54] despite their arbitrariness. Similarly, if we legally define the related term "capricious" in terms of "unpredictable or impulsive behavior,"[55] we may lose track of the possibility of arbitrariness as a rigid, systematic, ideological bias, which may be both predictable and far from capricious or impulsive.[56]

As with arbitrariness in more general contexts,[57] the legal dictionaries get us off to a questionable start in thinking about arbitrariness in the law.[58] In the crucial context of the Federal Administrative Procedure Act ("APA"), the idea of arbitrariness is not defined, but is given a certain coloration by closely associated language.[59] Thus, courts reviewing many forms of agency rulemaking and adjudication are called upon to consider whether the

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50. *See infra* Section III.

51. *See infra* Section IV.

52. BLACK'S LAW DICTIONARY 119 (9th ed. 2009).

53. *See, e.g.*, Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1024–25 (D.C. Cir. 1978) (discussing the rule-making process of the especially technical Clean Water Act).

54. BLACK'S LAW DICTIONARY 119 (9th ed. 2009).

55. *Id.* at 239.

56. See, for example, the veiled debate over the National Labor Relations Board ("NLRB") political bias, in *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359, 363–66 (1998).

57. *See supra* notes 6–8 and accompanying text.

58. *See supra* notes 52–56 and accompanying text.

59. *See* 5 U.S.C. § 706(2)(A) (2006).

agency acted in a way that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[60]

Arbitrariness in this APA sense and in other legal senses may be either substantive[61] or procedural.[62] As for what legal arbitrariness itself means, we might initially assume that some light will be shed by the adjacent statutory terms. The interpretive canon of *noscitur a sociis* suggests that the meaning of arbitrary might be clarified by the textual company it keeps.[63] But in the case of arbitrary in the APA, the typical neighboring terms may actually be in some respects too close in meaning to arbitrary to shed much additional light.

Consider, for example, possible relationships between arbitrary and capricious decision making on the one hand, and unreasonableness in decision making on the other. In at least some APA contexts, it has been argued, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence."[64] Similarly, courts have doubted whether there is much consistent, practical difference between the arbitrary and capricious standard on the one hand, and a "clearly erroneous" or "clear error of judgment" standard on the other.[65]

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60. *Id.*; *see also* Alaska Dep't Envtl. of Conservation v. EPA, 540 U.S. 461, 496–97 (2004); United States v. Bean, 537 U.S. 71, 77 (2002).

61. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199 (2003) ("[T]he "substantive result' of a referendum may be invalid if it is "arbitrary and capricious' . . . .") (quoting Eastlake v. Forest City Enters., 426 U.S. 668, 676 (1976))).

62. *See, e.g.*, Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions,* 48 RUTGERS L. REV. 313, 318–89 (1996) ("[T]he 'arbitrary or capricious' test regulates an agency's *decisionmaking process* by ensuring that the agency reaches its conclusions through a rational decisionmaking mechanism." (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42–43 (1983)).

63. *See, e.g.*, United States v. Williams, 553 U.S. ___, 128 S. Ct. 1830, 1839 (2008) ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated." (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961); 2A N. Singer & Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.16 (7th ed. 2007)).

64. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377 n.23 (1989) (citing Manasota-88, Inc. v. Thomas, 799 F.2d 687, 692 n.8 (11th Cir. 1986) ("As a practical matter . . . the differences between the "reasonableness' and "arbitrary and capricious' standards of review are often difficult to discern.")).

65. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 35 n.74 (D.C. Cir. 1976) (en banc) (noting some courts "use the 'clear error of judgment' phrase as a shorthand summary of 'arbitrary and capricious' review," while others apparently equate "arbitrary and capricious" and "clearly erroneous") (citations omitted).

Even more curiously, there is actually uncertainty over whether there is any consistent and practical difference between the arbitrary and capricious standard and the "substantial evidence in the record as a whole" standard. One might imagine that since the substantial evidence standard presupposes an exclusive written record for review, it could be more rigorous in some respects than arbitrary and capricious review.[66] But there is actually much uncertainty over whether these two standards differ significantly in practice.[67]

We thus discover that within administrative law, arbitrary and capricious often seems practically indistinguishable from various other related standards of review, even while the sentiment remains that the standards are or should be somehow distinguishable.[68] What explanation can be offered for this frequent sense of these standards' vague practical equivalence, with occasional doubts and exceptions?

From my basic thesis, this sense of a frequent but occasionally evaporating practical equivalence between arbitrariness and alternative standards of review is not surprising. In my view, there is simply no reasonably fixed definitional meaning for arbitrary and its closest cognates. The meaning of arbitrary is actually a variety of meanings, dependent upon variations in contexts, which reflect differences in purposes and interests, and the gravity thereof—the stakes—according to the various actors directly or indirectly involved.[69] Where the stakes are thought to be high, arbitrariness review may be correspondingly demanding, as rigorous in that context as some more formally demanding standard. But it will also be possible to compare arbitrariness review in a low stakes context with more rigorous review under some other standard. And since no meaning for arbitrary and its closest syn-

66. *See id.* at 37 n.79.

67. *Id.* ("[S]ome have noted that in reviewing the evidence relied upon in agency proceedings, the two standards often seem to merge." (citing Assoc'd Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor 487, F.3d 342, 349–50 (2d Cir. 1973) (Friendly, J.))); Thomas J. Miles and Cass. R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) ("In practice . . . review under the substantial evidence standard is essentially the same as review under the arbitrary and capricious standard, though it is sometimes thought that review for substantial evidence is somewhat more searching."); *see also* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 160–63 (John F. Duffy & Michael Herz eds., 2005) [hereinafter GUIDE TO JUDICIAL AND POLITICAL REVIEW].

68. *See supra* 63–66 and accompanying text.

69. *See supra* Section II.

onyms can be pinned down, there will always be a sense that "arbitrariness" can be the practical equivalent of other standards, but it cannot be so regarded in an exceptionless way.

The mistaken quest for a decisive answer in this respect is based on the false belief that in the typical administrative context, and perhaps elsewhere, arbitrary has some recognizable, if vague, standard definitional meaning. This is incorrect, but we can see how many are thus misled not only by legal[70] and other dictionaries,[71] but also by widely recognized case law. Often, the case law can be interpreted to lend an apparently invariantist cast to the idea of arbitrariness.[72]

To make matters worse, to the extent that standards such as "clearly erroneous," "unreasonable," and "unsupported by substantial evidence" are indistinguishable in practice from an arbitrariness standard, the indefinite meaning of arbitrariness may well, to some degree, be manifested in the jurisprudence of these standards as well. The meanings of "arbitrariness," as well as of "clearly erroneous," "unreasonable," and "unsupported by substantial evidence," might well all turn out to be highly contextualized. The unavoidable murkiness of "arbitrariness" would thus simply expand.

In contrast, though, the widely cited *State Farm* case seems to offer some apparently flat, simple principles that might seem to support an invariantist approach to the meaning of arbitrary in typical administrative cases.[73] The Court prefaced its discussion in *State Farm* with the qualifying language of what is "[n]ormally" the case.[74] But with that general, non-contextual caveat, the Court then listed circumstances of which each seem sufficient to establish arbitrariness.[75] None of the circumstances or principles seem bound to any substantive legal context. Thus, the Court declared:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to

70. *See supra* notes 53–61 and accompanying text.

71. *See supra* notes 8–12 and accompanying text.

72. *See supra* notes 27–29 and accompanying text.

73. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

74. *Id.* at 43.

75. *Id.*

> consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[76]

Each of these circumstances reads literally as normally sufficient for a finding of arbitrariness. There does not appear to be any sense of how the meaning of these enumerated circumstances might depend upon substantive context. There is no suggestion, for example, that "implausible" is context-dependent. Certainly there is no assumption that this listing, even in conjunction with additional language from *State Farm*,[77] is exhaustive of the ways in which an agency decision can be arbitrary.[78] But each of these listed considerations would generally seem to suffice for arbitrariness.

An agency's violation of a weaker, less stringent version of these considerations could also be found arbitrary.[79] Perhaps an agency has considered an important aspect of the problem, but has inadequately done so.[80] That agency decision might also be held arbitrary. My point is not that the Court's discussion of arbitrariness in *State Farm* is incomplete. Instead, my point is that in offering supposedly sufficient criteria for administrative arbitrariness that are largely independent of substantive context, the Court has attempted the impossible. Within and beyond typical administrative contexts, arbitrariness cannot be usefully defined without crucial reference to context, and ultimately to the purposes and interests of one or more concerned actors.[81] Arbitrariness will thus be shown to be far removed from fitting any invariantist or dictionary-type model.

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76. *Id.*

77. *See id.* at 42–44.

78. *See infra* notes 82–92 and accompanying text.

79. *See, e.g.*, Scenic Hudson Pres. Conference v. Fed. Pwr. Comm'n, 354 F.2d 608, 619 (2d Cir. 1965) (less than ten pages of agency discussion of a gas turbine alternative rejected by the agency).

80. *See, e.g.*, *id.*

81. Thus, where the contexts are more alike, we would expect less variation in the meanings of arbitrariness. The greater the dissimilarities among contexts, the more clearly inadequate any single dictionary-type judicial definition of arbitrariness will be.

State Farm,[82] however, is hardly the only major case that adopts an invariantist, context-insensitive[83] approach to arbitrariness. Elsewhere there are what appear to be sensible, perhaps nearly exceptionless, principles that might supposedly suffice for a finding of arbitrariness, again apparently regardless of context. Ultimately, though, common-sense, dictionary-style invariantism conceals the deeper reality that the very meanings of arbitrariness will depend crucially upon variations in substantive context.

As a further example of attempted invariantism, the Court, citing *State Farm*, recently linked an agency's "unexplained inconsistency" in interpretation to a possible inference of arbitrariness, largely apart from substantive context.[84] More strongly, "an agency that departs from its previous rules will be found to have acted arbitrarily and capriciously if it fails 'to supply a reasoned analysis for the change. . . .'"[85] Similarly, an agency "change that does not take account of legitimate reliance on prior interpretation" is suspect.[86] And without sensitivity to the context of the "purpose" in question, the detention of aliens for improper purposes is also said to be arbitrary and capricious.[87] More generally, decisions that pass beyond a certain degree of irrationality[88] or that "reflec[t] no policy"[89] have also been said to be arbitrary. These all seem like invariant rules or principles, independent of any further context.

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82. For further discussion of *State Farm*, see GUIDE TO JUDICIAL AND POLITICAL REVIEW, *supra* note 67, at 180–82 and *infra* note 101.

83. For the sake of clarity, invariantism does not imply that the invariant term can somehow bypass being actually applied in a given context. The idea of invariantism is instead that there is a useful, core, uniform meaning of some term that does not itself significantly vary when applied in various contexts. If we take "below freezing" to be toward the invariantist end of the spectrum, we must still test the air in the backyard, or whatever other context, in applying the term "below freezing."

84. Nat'l Cable & Telecomms. Ass'n v. Broad X Internet Servs., 545 U.S. 967, 981 (2005) (citing *State Farm*, 463 U.S. at 46–57).

85. Pub. Lands Council v. Babbitt, 529 U.S. 728, 752 (2000) (O'Connor, J., concurring) (quoting *State Farm*, 463 U.S. at 42).

86. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (citing United States v. Penn. Indus. Chem. Corp., 411 U.S. 655, 670–75 (1973); NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974)).

87. *See* Demore v. Kim, 538 U.S. 510, 532–33 (2003) (Kennedy, J., concurring); Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting).

88. *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 364 (1998); Comm'r v. Estate of Hubert, 520 U.S. 93, 130 (1997) (Scalia, J., dissenting).

89. *See* Vieth v. Juberlirer, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)); *id.* at 320–21 (Stevens, J., dissenting) (quoting *Baker*, 369 U.S. at 226).

The problem with these principles is not that they are wrong on the merits or even that they are subject to exception. Rather, the problem is their tendency to encourage the belief that arbitrary has a capturable meaning largely independent of changes in substantive, interest- and purpose-based context. One could say that the problem is in the Court's implication that "arbitrary" can be found largely apart from this context, just as one can find a temperature to be "below freezing."[90] There are, however, crucial, substantive variations in context to some extent in administrative law cases and even more clearly in other cases applying the idea of arbitrariness where the interest- and purpose-based stakes vary.

For instance, the administrative law case of *Citizens to Preserve Overton Park, Inc. v. Volpe*[91] is a classic example. When the Court discusses the arbitrary and capricious standard, there is a curious, indeed eerie, vacillation in tone.[92] To overdramatize, there is something of a repeated Dr. Jekyll and Mr. Hyde transformation in the Court's characterization of the arbitrary and capricious standard. It is possible that the Court's odd vacillation may reflect a vague, unarticulated sense that context may make a difference in the very meaning of "arbitrary."

Overton Park involved a very modestly explained decision by the Secretary of Transportation to authorize federal funds for a highway project running through Overton Park.[93] Applying arbitrary and capricious review,[94] the Court began, in suitably deferential fashion, by observing that "[c]ertainly, the Secretary's decision is entitled to a presumption of regularity."[95] But then there was almost immediately a transformation of the standard into a less deferential sort: "[T]hat presumption is not to shield his action from a thorough, probing, in-depth review."[96]

The Court then provided a sort of mixed, or "mid-transformation," standard: "[T]he court must consider whether the decision was based on a consideration of the relevant factors

90. *See supra* notes 48–83.
91. 401 U.S. 402 (1971).
92. *See id.* at 416.
93. *Id.* at 406.
94. *Id.* at 416.
95. *Id.* at 415.
96. *Id.*

and [more deferentially] whether there has been a clear error of judgment."[97] The Court concluded with a final transformation of the standard, from a Mr. Hyde-like, less deferential perspective—"this inquiry into the facts is to be searching and careful"[98]—to a Dr. Jekyll-like, more deferential standard—"the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[99] What I term here the "less deferential, Mr. Hyde-like" language is associated, understandably, with what has been called an aggressive judicial "hard-look" review of agency determinations.[100]

The precise extent of difference between the Court's more deferential and less deferential hard-look review language is unimportant for our purposes. Nor need we argue that there is a strict separation or dichotomy between deferential and hard-look review.[101] It does seem clear, however, that Jekyll and Hyde are not the same personality. Certainly, the *Overton Park* Court has assigned realistically inconsistent meanings to the idea of the arbi-

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97. *Id.* at 416.

98. *Id.*

99. *Id.*

100. For a discussion of the "hard-look" approach to review of agency action, see Miles & Sunstein, *supra* note 67, at 761–63 ("The goal of hard look review was to police agency decisions for genuine arbitrariness."). *See generally* Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151 (2006). For further examples of arguably Jekyll-and-Hyde language regarding administrative arbitrariness, see *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379–80 (5th Cir. 2008) (per curiam) (observing on the one hand that "[t]he arbitrary and capricious standard is 'highly deferential'" and on the other hand that "a searching and careful review" is required (citing *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415–16 (1971)); United States v. Garner, 767 F.2d 104, 116 (5th Cir. 1983)); *Am. Paper Inst., Inc. v. Am. Elec. Pwr. Serv. Corp.*, 461 U.S. 402, 413 (1983) (determining "whether the agency *adequately* considered the factors relevant" and "whether the agency committed a 'clear error of judgment'") (emphasis added) (quoting *Overton Park*, 401 U.S. at 416).

101. Arguably the most distinctive Supreme Court case applying a "hard look" review is *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See supra* notes 77–79 and accompanying text; Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) ("[W]e will not vacate an agency's decision unless it 'relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (quoting *State Farm*, 463 U.S. at 43)); United States v. O'Hagan, 521 U.S. 642, 658 (1997) ("In *State Farm*, we reviewed an agency's rescission of a rule under the same 'arbitrary and capricious' standard by which the promulgation of a rule under the relevant statute was to be judged . . . ." (citing *State Farm*, 463 U.S. at 41–42)); Reno v. Flores, 507 U.S. 292, 332–33 n.21 (Stevens, J., dissenting) (quoting *State Farm*, 463 U.S. at 43).

trary. The Court thus has failed in any attempt to provide an unequivocal, dictionary-style meaning of "arbitrary." The broader point, though, is that the Court's validation of both more deferential and less deferential language may amount to an initial, tentative step toward subject-matter contextualism.

Some courts in important administrative law cases have ventured beyond the mere contrasting Jekyll and Hyde attitudes legitimized by *Overton Park*. The well-known *Ethyl Corp.* case, for example, emphasized that the arbitrariness standard "is a highly deferential one," that it "requires affirmance if a rational basis exists for the agency's decision," and that the standard somehow accommodates both the searching and careful nature of the arbitrariness inquiry with the recognition that "the ultimate standard of review is a narrow one."[102]

What is interesting about *Ethyl Corp.* is that the court could have done a more substantively contextualized analysis of arbitrariness. The court could have taken the practical stakes involved—fuel efficiency versus any adverse health effects of lead fuel additives[103]—to be potentially high. And if the practical stakes and interests are assumed to be high, this consideration by itself might suggest a more rigorous standard of judicial review for arbitrariness.

Consider a previous example. We saw the standards for knowing of one's children's safety clearly being raised as soon as there was any recognized potential threat to the children.[104] Once the stakes were raised, the parent no longer knew that the children were safe. So, we should imagine, it might be with the law of arbitrariness: as the practical purposes and interests—the stakes—increase, so would the level of judicial review, and with it the very meaning of arbitrariness.[105]

What limited any upward adjustment of the meaning of arbitrary in *Ethyl Corp.* was the court's recognition of the unusual scientific and technical complexity of the underlying facts, and

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102. Ethyl Corp. v. EPA, 541 F.2d 1, 34, 37 (D.C. Cir. 1976) (en banc) (citing Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971)).

103. *See id.* at 7–9 (explaining how adding lead compounds to fuel results in lead emissions and adverse human health effects).

104. *See supra* notes 28–29 and accompanying text.

105. *See supra* notes 35–40 and accompanying text.

the court's assumed lack of competence in assessing such evidence, compared to that of the agency's technical experts.[106] In the words of Chief Judge Bazelon's concurrence, "[b]ecause substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures."[107]

However, courts might correspondingly impose a more demanding meaning on arbitrary where they felt entirely comfortable with the underlying factual issues, or where they suspected systematic agency bias of some sort.[108] This would be in some sense a contextually driven change in the meaning of arbitrary in an administrative case. The context at issue, though, would not refer to the substantive context, reflecting the underlying interests and stakes of parties, but merely to grounds for changes in the degree of technical confidence felt by the reviewing courts. Raising or lowering the bar for arbitrariness on such grounds still omits most of the more interesting differences we find in the meanings of arbitrariness depending upon subject-matter or interest-based context.

IV. SUBJECT-MATTER AND INTEREST-BASED CONTEXTUALISM: WHAT "ARBITRARY" MEANS IN THE DEATH PENALTY AND OTHER CASES

The stakes in administrative law cases can vary from a delay in a temporary recreational fishing license to loss of a fortune or of control over a major business enterprise. But decisions as to possible arbitrariness are also made in death penalty cases, and the death penalty is unique.[109] The uniqueness of the death penal-

106. 541 F.2d at 36–37. Thus the court modestly recognized that "[w]e must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Id.* at 36; *see also id.* at 66–69 (Bazelon, C.J. concurring).

107. *Id.* at 67 (Bazelon, C. J., concurring).

108. *See, e.g.*, N.Y. State Dep't of Soc. Servs. v. Bowen, 846 F.2d 129, 133 (2d Cir. 1988) (stating that despite deference owed to agency, "we think that [Health and Human Services] suffers from tunnel vision when it sees only Medicare and ignores the Medicaid program.").

109. *See, e.g.*, Caspari v. Bohlen, 510 U.S. 383, 394 (1994) (noting the "'uniqueness of the death penalty'" (quoting Linam v. Griffin, 685 F.3d 369, 375 (10th Cir. 1982), *cert de-*

ty in terms of the interests at stake means that in some respects, death penalty contexts will be substantively unique contexts.

Now, it is technically possible that the meaning of arbitrariness might not significantly change even in the unique death penalty context. Perhaps courts could apply the same idea of arbitrariness as in all other contexts, with making minimal adjustments as technically necessary in death penalty cases. But this seems extremely unlikely. If what counts as knowing that a child is safe varies with the actual recognized threat-level, it is difficult to believe that the meaning of arbitrary will not crucially vary as between casual fishing license and irrevocable death penalty cases.

Even a brief examination of some of the case law suggests that what arbitrary most typically means in a garden-variety administrative case differs from what arbitrary means in death penalty contexts. These differences are real differences in meaning, and not merely in the concrete consequences of applying the same meaning of arbitrary in different contexts.

A contrasting illustration may be helpful here. Someone who wins fifty dollars as the top prize in a lottery, and another person who wins five million dollars as the top prize in another lottery, have both won their respective lotteries in roughly the same sense. They have each won, in roughly the sense of being uncontestedly awarded the top prize among multiple entrants. The meaning of the term win is thus roughly the same, even if the practical, lifestyle consequences or prestige of winning for each differ radically. This continuity of meaning is not preserved, however, in the legal uses of the term arbitrary.

As a matter of the standard boilerplate language of death penalty procedure, no sentencing process can be tolerated that involves a substantial risk that the death penalty "would be inflicted in an arbitrary and capricious manner."[110] The test in the death penalty context thus seems to be not whether the process or

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nied, 459 U.S. 1211 (1983)); Harmelin v. Michigan, 501 U.S. 957, 1027 (1991) (Marshall, J., dissenting) (explaining that the Eighth Amendment requires comparative proportionality review "[b]ecause of the uniqueness of the death penalty" (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, & Stevens, JJ.))); Blystone v. Pennsylvania, 494 U.S. 299, 314 (1990) (Brennan, J., dissenting) (quoting Gregg, 428 U.S. at 188 (Brennan, J., dissenting)).

110. *See* Turner v. California, 789 P.2d 887 (Cal. 1990), *cert. denied*, 498 U.S. 1053, 1054 (1991) (Marshall, J., dissenting) (quoting *Gregg*, 428 U.S. at 188 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

outcome was really arbitrary, but whether the process created even a substantial risk of arbitrariness. Here, the standard has shifted from arbitrariness itself to something more like a "substantial risk of arbitrariness" standard.[111] In this, the meaning of "arbitrary," as in "arbitrary and capricious," clearly varies as between death penalty contexts and the more typical, lower stakes, routine, administrative contexts.

As it has evolved, the modern capital sentencing process has become divided into "the eligibility phase and the selection phase."[112] In the eligibility phase, commonly, specified aggravating factors are considered in order to narrow the pool of those defendants deemed deserving of the death penalty.[113] In direct contrast, the selection phase emphasizes a far less constrained, less guided, or less limited individualized examination of any relevant mitigating evidence, with far more room for jury discretion.[114]

For our purposes, it is relevant that arbitrariness is feared where jury discretion is during the eligibility phase, but arbitrariness is far less feared in allowing the jury to consider mitigating evidence during the selection phase.[115] Arbitrariness in death penalty cases thus takes on, perhaps fully justifiably, an oddly asymmetric quality. In these cases, arbitrariness breaks down into "positive" arbitrariness and "negative" arbitrariness. Arbitrary inclusion at the eligibility phase is impermissible,[116] but arbitrary exclusion at the selection phase is considered far less objection-

111. *See id.*; Tuilaepa v. California, 512 U.S. 967, 974 (1994) ("We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unreasonable risk of randomness, the mark of the arbitrary and capricious . . . .") (citing Stringer v. Black, 503 U.S. 222 (1992); Furman v. Georgia, 408 U.S. 238 (1972)); *see also* Lambrix v. Singletary, 520 U.S. 518, 530 (1997) (citing Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980)) (opinion of Stewart, J.).

112. Buchanan v. Angelone, 522 U.S. 269, 275 (1998) (citing *Tuilaepa*, 512 U.S. at 971).

113. *Id.* (citing *Tuilaepa*, 512 U.S. at 971–72).

114. *See id.* at 275–76 (citing *Tuilaepa*, 512 U.S. at 971–73).

115. *See id.*; *see also* Romano v. Oklahoma, 512 U.S. 1, 7 (1994) ("'States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.'") (quoting McCleskey v. Kemp, 481 U.S. 279, 306 (1987)).

116. Thus, in imposing the death penalty, "'channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.'" Ring v. Arizona, 536 U.S. 584, 606 (2002) (quoting Maynard v. Cartwright, 486 U.S. 356, 362 (1988)); *see also* Arave v. Creech, 507 U.S. 463, 470 (1993) (quoting Lewis v. Jeffers, 497 U.S. 764, 774 (1990)).

able.[117] By contrast, we see nothing approaching this ambivalence and asymmetry in typical administrative cases.

Again, I have no objection to this unusual contextual asymmetry of the role and meaning of arbitrariness. Discretion at the death penalty eligibility phase is not merely to be used well, or not "abused,"[118] but is to be minimized from the beginning, until, at a distinct later stage, it is invoked in the cause of leniency.[119]

This unique tension in the realm of arbitrariness and its control has been duly noted in the case law,[120] and led memorably to Justice Blackmun's death penalty epiphany in *Callins v. Collins*.[121] Referring to the attempt to somehow properly combine uniformity and individualized consideration in death penalty cases, Justice Blackmun concluded that "even this approach is unacceptable: It simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing."[122] Apparently, arbitrariness in any degree in this distinctive substantive context outweighs any affirmative value in the sentencing process operating non-arbitrarily in any other respects. This is typically not paralleled in other contexts, including many of the most typical administrative contexts.

Looking to the death penalty future, Justice Blackmun then reported that "I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness 'in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.'"[123] The idea that arbitrariness, in any degree, outweighs all other considerations at stake in death penalty cases is an extreme example of a broader pattern in the death penalty

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117. *See infra* note 123.

118. Compare the conjunction of arbitrariness, capriciousness, and the abuse, as distinct from the exercise, of discretion in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

119. *See supra* note 111.

120. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 360 (1993) (citing Gregg v. Georgia, 428 U.S. 153 (1976)); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Furman v. Georgia, 408 U.S. 238, 255–57 (1972) (Douglas, J., concurring)).

121. 998 F.2d 269 (5th Cir. 1993), *cert. denied*, 510 U.S. 1141, 1152–59 (1994) (Blackmun, J., dissenting).

122. *Id.* at 1152.

123. *Id.* at 1159 (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring)).

context. Here, because of the unique gravity of the stakes,[124] arbitrariness comes to dictate substantive law. The inevitable risk and consequences of arbitrariness in the death penalty context, in a way largely unparalleled in other contexts, has also been said to rule out the possibility of the death penalty for any crime against individuals not resulting in the death of the victim.[125]

This is simply not how the idea of the arbitrary, or any risk thereof, operates in other contexts. Relatedly, and again without reaching the merits, consider how the idea of arbitrariness in the death penalty context is developed in one final respect: the single juror holdout case. It has been said that "[a]pplication of the death penalty on the basis of a single juror's vote is 'intuitively disturbing.' . . . More important, it represents . . . a system that can be described as arbitrary or capricious."[126] Thus, Justice Stevens has argued that "[a] capital sentencing procedure that required the jury to return a death sentence if even a single juror supported that outcome would be the 'height of arbitrariness.'"[127]

Again, I have no quarrel with the merits of any such argument. My point is that the interest-based context again makes a dramatic difference in the very meaning of arbitrary. Suppose someone imagined that the height of arbitrariness judgment by Justice Stevens reflected merely a general rule that the judgment of many peers should control the legal outcome, as opposed to the judgment of merely one of their peers.[128] This would reflect a largely context-insensitive judgment that it is arbitrary for the one to, in effect, overrule the many.

But this context-insensitive interpretation of the meaning of arbitrary clearly will not do in the context of the death penalty, where the various interests are dramatically unique.[129] Thus, it is hardly surprising that for many observers, there can be a vast difference between isolated holdout jurors imposing, as opposed to preventing the imposition of, the death penalty. The single holdout juror may in the latter context be validated. Pennsylvania,

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124. *See supra* notes 36–38 and accompanying text.

125. *See* Kennedy v. Louisiana, 554 U.S. ___, ___, 128 S. Ct. 2641, 2665 (2008).

126. Beard v. Banks, 542 U.S. 406, 421 n.1 (2004) (Stevens, J., dissenting) (quoting McKoy v. North Carolina, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring)).

127. *Id.* at 420 (citation omitted).

128. *See id.* at 419–20 (citation omitted).

129. *See supra* note 109 and accompanying text.

for example, "requires that the jury unanimously agree that *no* mitigating circumstances exist and unanimously agree on a verdict for a sentence of death."[130] The Third Circuit pointed out the obvious resulting asymmetry: "Thus, while a single Pennsylvania juror can always *prevent* a death sentence, a single juror can never *compel* one. . . ."[131] Allowing a single juror, in disagreement with eleven peer jury members, to prevent the imposition a death sentence is certainly not thought of as the height of arbitrariness.[132]

The death penalty context thus provides the starkest and greatest contrast in the meaning of arbitrary to those found in the typical administrative agency context.[133] To oversimplify, this reflects most importantly the difference in the various interests, purposes, or stakes between deliberately executing a conscious human person in the name of the public[134] and, say, denying someone a temporary recreational fishing license.

There certainly may be middle-ground cases between these extremes. Consider the administration of the Employment Retirement Income Security Act[135] ("ERISA"), where the very meaning of arbitrary is shaded to one degree or another. Courts in such ERISA cases refer to "heightened,"[136] or to "sliding scale,"[137] or

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130. *See* Hackett v. Price, 381 F.3d 281, 299 (3d Cir. 2004) (citing 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2004)).

131. *Id.*; *see also* Whitehead v. Cowan, 263 F.3d 708, 732 (7th Cir. 2001) ("In Illinois, when a jury deliberates on the appropriateness of the death penalty at sentencing, its decision must be unanimous. However, if a single juror votes against the death penalty, it cannot be imposed.") (citing 720 ILL. COMP. STAT. 5/9-1(g) (2001)).

132. *See supra* note 128 and accompanying text.

133. See, for example, *supra* note 100 and accompanying text for a "highly deferential" arbitrary and capricious standard in an administrative context.

134. *See* R. George Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533, 536–37 (2000).

135. Pub. L. 93-906, 88 Stat. 829 (1976) (codified in scattered sections of 29 U.S.C.).

136. Consider, for example, the fact-sensitive contexts involving possible funding and administration conflicts of interest in ERISA benefit determinations, in *Williams v. BellSouth Telecomm. Co.*, 373 F.3d 1132, 1134 (11th Cir. 2004), where the court, under *Firestone Tire & Rubber Co. v. Bruch's*, 489 U.S. 101, 109 (1989), three-level review framework, employed a "'heightened arbitrary and capricious'" review where an ERISA plan administrator had a conflict of interest (quoting HCA Health Servs. of Georgia, Inc. v. Employers Health Ins. Co., 240 F.3d 982, 993 (11th Cir. 2001)). *See also* Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 378 (3d Cir. 2000) (holding that review of insurance company's funding and administration of ERISA benefits is a "conflict that warrants a heightened form of the arbitrary and capricious standard of review").

137. *See, e.g.*, *Pinto*, 214 F.3d at 379 ("[W]e side with the majority of courts of appeals, which apply a sliding scale method, intensifying the degree of scrutiny to match the degree

even to nearly "de novo"[138] versions of arbitrariness review without acknowledging that the meaning of arbitrary—somewhere between "highly deferential"[139] and "approaching de novo"[140] review—has plainly and undeniably shifted, given the distinctive interests, power relationships, and questions of control in such cases.

V. CONCLUSION

We have explored above why the crucial legal idea of arbitrariness and its close synonyms cannot be subjected to any convenient dictionary-type definition. The multiple meanings of arbitrary must instead vary as the substantive legal contexts, with their diverging purposes, interests, and stakes, vary. At various points, it is clearly more accurate and insightful to say not that arbitrary is used in the same way in two dramatically different such contexts, but that its use and meaning vary dramatically across such contexts.[141]

Recognizing the reality of this slippage—and even transformation—in the meaning of "arbitrary" would be a step forward in understanding the slipperiness and the murkiness of all the affected legal subject matters. This would include any area of the law tested for arbitrariness, and perhaps by related standards such as "clearly erroneous," "unreasonableness," being "unsupported by substantial evidence." More broadly, all areas of the law employing any similarly meaning-altering terms may also be subject to similar terminological and definitional murkiness.

But as our discussion of contextualism itself clearly indicates, legal terms are not used, and do not change their meanings, in a political and institutional vacuum. The purposes and interests

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of the conflict.").

138. *See id.*

139. *See supra* note 100 and accompanying text.

140. *See Pinto*, 214 F.3d at 379. For significant burden-shifting in such cases, see *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1561–62 (11th Cir. 1990).

141. *See* GARTH HALLETT, WITTGENSTEIN'S DEFINITION OF MEANING AS USE 3 (1967) ("The meaning of all expressions were their uses."); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G.E.M. Anscombe trans., Macmillan Publ'g Co. 3d ed. 1958) ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.") (emphasis in original). *See generally* A.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., Harvard Univ. Press 2d ed. 1975).

thought to be at stake in a given case, including the relevant political and ideological interests, are not fixed and unalterable. As politics and perceptions of interests changes, so should the very meaning of arbitrariness.[142] One aspect of increasing political polarization[143] may, predictably, be decreased consensus on the most relevant purposes and interests, and on their weight or value, in various legal contexts. Of course, if the Supreme Court were to abolish the death penalty, that would, to some degree, increase the clarity and consistency of meaning of arbitrary in the law. With generally increased political polarization, though, we can better understand and should generally expect further contest and confusion over important legal terms.

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142. *See* Miles & Sunstein, *supra* note 67, at 767 ("Political commitments significantly influence the operation of hard look review in EPA and NLRB cases."); *see also* STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 240 (6th ed. 2006) (listing other sorts of considerations that might affect the degree of deference a reviewing court gives to an administrative agency's interpretation of a term).

143. *See generally* BILL BISHOP WITH ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008); SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

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