

## BOOK REVIEWS

Asgeirsson, Hrafn. *The Nature and Value of Vagueness in Law*.  
Oxford: Hart, 2020. Pp. 216. \$90.00 (cloth).

The most famous example of vagueness in law comes from a hypothetical posed by H. L. A. Hart in 1958: “A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called ‘vehicles’ for the purpose of the rule or not?” (H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 [1958]: 593–629, 607). Actual examples of vagueness in law seem commonplace. Take the prohibition of child neglect: the content of that legal rule is indeterminate. What should judges do in applying the law to borderline cases? Will any decision amount to some pernicious form of judicial lawmaking?

Such concerns have made vagueness in law a focal point of jurisprudence for six decades, and Asgeirsson’s *The Nature and Value of Vagueness in Law* is an important contribution to this field. Asgeirsson says upfront that the aim of the book is not to defend One Big Idea; instead, it’s to make “piecemeal progress on a variety of closely connected issues” (2). This line undersells the project. All the same, I included it because it exemplifies how uninterested Asgeirsson is in selling the book: the prose is refreshingly modest and honest, with the limits of the many arguments laid bare. But the main point of the line is right: the book really does make a lot of progress, on an awful lot of issues. Plus, it’s refreshingly precise. Nary an argument goes by without the premises being explicitly identified.

The first task of the book is to connect vague language to vague law. In chapter 1 Asgeirsson defends a tight connection between the two by arguing that “the legal content of a statute or constitutional clause directly corresponds to its communicative content” (6). Such *communicative content theories* have drawn fire from those who identify apparent gaps between communicative content and legal content. I’ll mention just one apparent gap: Dale Smith’s discussion of *mistaken precedents*. Courts are fallible. But past decisions are weighty, and sometimes binding. So if a higher court misidentifies the communicative content of the statute that generated a legal rule (because they’re fallible), that error becomes part of the legal rule (because of *stare decisis*); the legal content no longer directly corresponds to the communicative content.

To solve this “Gappiness Problem,” Asgeirsson modifies the theory. We can’t identify legal communicative content with legal content. Instead, the communicative content “grounds a defeasible legal reason [with the same content] to take or refrain from a specific course of action” (14). These legal reasons interact with other legal reasons to determine all-things-considered legal obligations (14). This is the Pro Tanto view. It follows a broader Turn to Reasons in philosophy, which some

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love and some loathe. As with every big turn in philosophy, the proof is in the pudding. So let's see whether the Pro Tanto view yields much pudding.

Asgeirsson treats mistaken precedents as defeaters. A nonlegal illustration may help. I say, "Thorvaldsdottir's music is amazing! Go listen to it." Later on—perhaps after you forgot my recommendation—a friend says, "Daniel said, 'Thorvaldsdottir's *Rhízōma* is amazing! Go listen to it.'" Asgeirsson's idea is that my original utterance (like the statute or constitution) generated a reason whose content directly corresponds to its communicative content, but the friend's utterance (like the mistaken precedent) partially defeated that reason. Now you ought to listen to *Rhízōma* but not the rest of the oeuvre.

I see how this approach handles mistaken precedents that narrow the law. What about those that expand the law? Imagine that, instead, the friend said, "Daniel said, 'Icelandic contemporary classical music is amazing! Go listen to it.'" I cannot see how we get from the reasons I gave you (listen to Thorvaldsdottir) to what you now ought to do (listen to Icelandic contemporary classical) by treating the friend's utterance as partially defeating the reasons I gave you.

There are legal cases with the same structure. The Fifth and Fifteenth Amendments to the US Constitution enshrine rights against the deprivation of "life, liberty, or property, without due process of law." Courts interpreted these provisions as guaranteeing rights to "substantive due process." Assume *arguendo* that the communicative content of those Amendments did not include such rights. (This doesn't mean that these decisions were mistaken, but it does mean that they were mistaken if legal content corresponds to communicative content.) Since these precedents are binding on lower courts, and weighty for SCOTUS, the Amendments guarantee substantive due process rights. But all Asgeirsson says that precedents can do is modify statutory or constitutional legal reasons by "undercutting or outweighing them" (19). How do we explain an expansion of legal content via taking precedents to undercut or outweigh, or otherwise modify, the legal reasons whose content corresponds to what's communicated by the Amendments?

One possibility: precedents generate new legal reasons, rather than modify old ones; chapter 8 suggests this. But if the Pro Tanto view allows this, it isn't being monistic about the self-standing legal reasons, which will generate some distance from dominant forms of textualism and originalism (chaps. 6 and 7). More generally, I'm not sure how much the Pro Tanto view can support textualism and originalism without inheriting the problems both face with precedents.

There's much more to be said about chapter 1. I'm not sure, for example, why (a) we should abandon the Raz/Shapiro semantics for "legal obligation" owing to the problems I raised in a separate article (Daniel Wodak, "What Does 'Legal Obligation' Mean?," *Pacific Philosophical Quarterly* 99 [2018]: 790–816) but (b) we should adopt a pragmatic version of their view, without showing how it follows from Gricean maxims. But let's move on to chapter 2.

Here Asgeirsson tackles recent prominent defenses of the value of vagueness in law. The main target is Timothy Endicott, who focuses on examples like the prohibition of "child neglect" or "negligence," where the law must generally regulate a wide array of future conduct. Terms like "neglect" and "negligence" are associated, Endicott argues, with multiple dimensions that aren't commensurate

with each other; that's what makes them vague, as well as what makes them well suited to regulating a wide array of conduct that is especially damaging to children ("neglect") or risks that are unreasonable to impose on others ("negligence"). Just imagine how unwieldy and arbitrary the law would be if legislators only used precise language in regulating how to care for children.

Asgeirsson complains that what Endicott's argument really shows is that this *incommensurate multidimensionality* is valuable. True, incommensurate multidimensionality entails vagueness. But if X is valuable and X entails Y, does it follow that Y is valuable too? That an effective COVID vaccine exists entails that either an effective COVID vaccine exists or Trump is tweeting again. Do we want to say that this disjunctive fact (or state of affairs, or whatever bears value) is good just because one disjunct is good? Asgeirsson doesn't—and recognizes that this commitment is in tension with Standard Deontic Logic (61–62).

I'm sympathetic to the view that the value of X doesn't transmit to everything X entails. But I'm not sure this defeats Endicott's point.

Asgeirsson's position hangs on the view that when we explain the value of regulating "child neglect," incommensurate multidimensionality (rather than vagueness itself) is doing "the real work." Here's the defense of that: "First, lawmakers want/need to adequately regulate (a possibly open-ended) set of multiple related types of behavior. Second, there exists a term denoting the relevant set, a highly general term with multiple incommensurate dimensions. Third, it is not possible for lawmakers to compile a list—precise or not—of less general terms, such that (disjunctively) they adequately cover the relevant set, vis-à-vis the relevant legislative purposes" (47). My gut says that this isn't all of the real work. We need something additional: that borderline cases are left unclassified by the law, such that courts can use the relevant dimensions to nonarbitrarily classify future cases. If the classification of future cases wasn't left open (by vagueness), incommensurate multidimensionality wouldn't help one bit. If my gut is right—a big "if"—Endicott's argument may identify a way that vagueness itself features in the explanation of the value of using "child neglect," rather than just something entailed by something else that's of value.

Chapter 3 concerns a different way that vagueness can be valuable: via delegating limited lawmaking power to officials and courts. Using "child neglect" in legislation delegates limited power to judges to incrementally create new laws in borderline cases, which seems valuable. Sorensen influentially challenged this picture. It's valuable to use "child neglect" for this end only if officials and courts are in a better position than legislators to discover the right answer in borderline cases, but if there's genuine vagueness, there's no right answer to discover. Asgeirsson responds that where X is a genuine borderline case of the predicate "F," there is no right answer to the question "Is X F?" but there can be a right answer to the normative question "Should X count as F?" In other words, there's no right answer to discover as to whether X is child neglect, but there is a right answer as to whether X should count as child neglect.

Why do the answers to these questions come apart? Because it can be more costly, in a broad sense of that term, for legislatures to deliberate in advance about whether to count every future X as an F. I agree. However, the relevant normative question must be indexical for this argument to work ("Should we

count X as F now?”). Strictly speaking, some of the relevant deliberative costs aren’t costs of X counting as F, but of which legal body decides to count X as F at which point in time.

Chapter 5 turns toward a different and “somewhat neglected” (92) kind of vagueness in law. (I’m skipping chap. 4; brevity is a thing.) When the legal rule is “Child neglect is prohibited,” this content is vague. But it can also be vague what the legal content is. Is it the literal content of what was communicated, or some pragmatically enriched version thereof? When the explicit content of the legal rule is that all drug shops “shall be closed at 10:00 p.m. on each day of the week,” does the legal rule literally correspond to that, or does it include the implicated claim “and shall stay closed until morning”? In this case, Asgeirsson thinks that the content of the rule (i.e., the communicative content of the statute) was pragmatically enriched (113). But Asgeirsson holds that it will often be indeterminate whether this is so, “because legislative contexts generally contain little unequivocal information about legislative intent” (92).

Asgeirsson’s argument takes several turns, but the most important steps are as follows. One, the law issues directives. Two, what’s relevant to whether we should pragmatically enrich the content of a directive is the issuer’s ends. And third, “the law’s ends compete with each other in extremely complex ways” (110). Often, some end(s) would be served by a literal interpretation and some end(s) would be settled by an enriched interpretation; the common ground between the legislature and its audience doesn’t settle how these ends are properly balanced.

I wasn’t sure how to square the pessimism of chapter 5 with Asgeirsson’s optimism about identifying legislative purposes in chapter 7. Much of what’s said there—about using white papers and identifying the more sincere parts of legislative deliberations—could be applied here. True, that optimism concerns identifying what legislative purposes are; it doesn’t concern identifying their relative priority or “proper balance” (111). But it’s not like white papers and so on issue a long list of unranked goals. If there’s genuine tension here, I suppose I’d go with the pessimism of chapter 5. Much of the optimism of chapter 7 hangs on claims about why it is instrumentally rational for legislators to be sincere in deliberations: “If a committee’s proposal, for example, is not representative of the majority party’s collective interest, then it is highly probable that the proposal will be killed by either the Speaker or the Rules Committee” (155). I’m skeptical. What if the majority party ultimately just wants to posture for cable news and remain in power? Sincerity in deliberation only seems instrumentally rational to legislators’ goals if we assume that they ultimately want to legislate in good faith. If they don’t, it’ll be harder for courts to identify sincerely expressed legislative purposes, and hence harder to use those purposes to resolve borderline cases in ways that maximize fidelity to the law (which Asgeirsson also argues courts have strong reasons to do, in order to respect the importance of legislative bargaining in their decisions; 167).

The other core component of Asgeirsson’s discussion of adjudication comes in chapter 6, with a limited defense of a form of textualism. In particular, it defends a view on which the expectations that the makers of the law have about its application settle its legal content. Scalia defended this view for constitutional provisions: if law-makers (falsely) believed that solitary confinement didn’t fall within the scope

of the Eighth Amendment's prohibition of "cruel and unusual punishment," then it doesn't. John Perry dubbed this view "conception textualism" and held it to be "confused, implausible, and unworkable" because it does not apply "the same apparatus we use to determine what some individual says when they are talking to us" (John Perry, "Textualism and the Discovery of Rights," in *Philosophical Foundations of Language in the Law*, ed. Andrei Marmor and Scott Soames [Oxford: Oxford University Press, 2011], 105–29, 106). Perry's basic idea is that if you assert that all dogs are monsters while we both know that you (falsely) believe that Nala is not a dog, you have still asserted that Nala is a monster (you jerk): your false beliefs about the extension of "dog" don't determine the content of what you asserted. Asgeirsson is willing to grant that this is true of "speech acts with a *world-to-mind* direction of fit (such as assertions)" but pushes back on extending such a view to "speech acts with a *mind-to-world* direction of fit (such as directives)" (137). If you say, "Pat all the dogs," while we all know that you (falsely) believe that Nala is not a dog, you haven't directed anyone to pat Nala. Why the difference? The assertion "*misrepresented the world*," but with the directive the speaker only "represented the world as she would (in some sense) like it to be" (138).

I can't both be a good Australian and cast any aspersions on the Humeanism that underlies this view. But there's a Hume-friendly way of pushing back. Directives often represent how the speaker instrumentally wants the world to be. Humeans can treat instrumental desires as composed of intrinsic desires and means-end beliefs; the latter have a mind-to-world direction of fit. So what if we adjust the earlier case to make it common knowledge that you (truly) believe universal dog patting to be the means to some important end? I'm now inclined to say that you've directed people to pat Nala, despite your false belief that Nala is not a dog. Applying this view to the law would leave textualists in an awkward position. Whether Scalia is right about the Eighth Amendment may depend on whether we take the directive to express the lawmakers' intrinsic or instrumental desires.

There's so much more to be said about this richly rewarding book. It's full of interesting ideas that push forward long-standing debates about vagueness in law—and as this final discussion makes clear, these debates really matter not just for legal theory but for legal practice.

DANIEL WODAK  
*University of Pennsylvania*

Delston, Jill B. *Medical Sexism: Contraception Access, Reproductive Medicine, and Health Care*. London: Lexington Books, 2019. Pp. 360. \$115.00 (cloth).

Medical sexism, "the hierarchy of maleness or masculinity over femaleness or femininity in the medical context" (125), is systemic, pervasive, and harmful. In her book *Medical Sexism: Contraception Access, Reproductive Medicine, and Health Care*, Jill B. Delston explicates the phenomenon of medical sexism and argues that it is uniquely capable of explaining current practices in reproductive medicine that would, in other contexts and for other patients, be deemed unconscionable.