
How, if at all, might the philosophy of language contribute to our understanding of law and its interpretation? This is by no means an unfamiliar question in jurisprudence. As Marmor and Soames point out in their Introduction, some version of this question continues to dominate the debates between legal positivists and their rivals. The upshot is that we may very well wonder what, if any, need there is for a new collection of essays exploring the intersection between the philosophy of language and the law.

Marmor and Soames have commissioned these essays in the conviction that recent developments in the philosophy of language – particularly developments in the areas of vagueness and pragmatics – have important implications for our understanding of law and its interpretation (3, 13). They identify three main areas where the philosophy of language may contribute to our understanding: firstly, regarding the nature of law itself; secondly, how it may offer some new resources when determining the content of the law in a given legal system; and thirdly, how it can provide a sophisticated perspective on the role played by language in more particular contexts, such as in the legal definition of inchoate crimes.

There can be little doubt that the essays collected in this volume make for rewarding reading. The essays are clear, and they make minimal use of symbolic notation. Consequently, all of these essays can be read by philosophers and lawyers with equal profit. As I will explain in a moment, the theses defended in these essays are at the very least plausible, and they all succeed in highlighting how the specific issues in the philosophy of language with which they deal may have important implications for our understanding of law and its interpretation. Having said that, after summarising the contents of this collection, I will argue that it suffers from an important defect.

The first three essays take up the topic of vagueness. They address two main questions: do we have reason to value vagueness in legal provisions? And does the presence of vague provisions in the law frustrate its ability to guide the actions of its subjects? Timothy Endicott argues that it can be valuable to use vagueness when crafting normative texts (29). He pursues an interesting strategy. First, he explains why we have reason to value precision in legal provisions. For Endicott, this consists in the absence of arbitrariness in legal norms. More specifically, it consists in the ‘guidance value’ of providing clear standards which subjects can use to guide their conduct, and the ‘process value’ of controlling the application of legal norms (15). It is against this backdrop that Endicott develops his case for why we should value vagueness in legal provisions. His claim is that far from frustrating law’s guidance and process value, it actually requires the use of vague provisions in the law. As Endicott puts it, removing arbitrariness requires much more than providing clear standards. It also requires the use of vague standards.
which ‘delegate power in ways that may comport with the purpose of the law’ and furthermore ‘encourage desirable forms of private ordering that achieve the law’s purposes’ (26, 27).

Jeremy Waldron comes to vagueness from a different angle. His concern is whether vague, unclear, or imprecise provisions in the law frustrate its ability to guide the actions of its subjects (59). What concerns Waldron most is human dignity. He wants to explore whether the use of vague provisions in the law is ultimately consistent with a respect for persons as rational and autonomous creatures. Waldron’s thesis is that once we embrace ‘a more sophisticated notion’ of how the law guides action, it is not immediately clear why the use of vague and open-ended provisions such as ‘drive with no speed greater than is reasonable or proper’ is inconsistent with a concern for human dignity (62). What Waldron ultimately wants to reject is the idea that unless legal provisions provide unequivocal standards such as ‘drive 15 mph in some areas, and 20 in others’, they fail to guide our action. On the contrary, Waldron argues that the use of vague provisions can guide our action, and as such, that they are ultimately consistent with a respect for persons as rational and autonomous creatures. As Waldron puts it, such a provision ‘[c]redits the subject with the sophisticated ability to adapt his agency to his own practical thinking when this is required of him, and it indicates the kind of circumstance in which that ability is required. Such a requirement may be more onerous than a simple requirement to comply with a numerical rule, but it certainly treats people as having the dignity to respond positively to this task’ (65–66).

Marmor’s essay takes up the role of pragmatics in determining legal content. If we grant his starting assumption that ‘a great deal of the law . . . is determined by what legal authorities communicate’, then we should accept his inference that pragmatic features of communication such as implicatures and utterance presuppositions play an important role in determining legal content (83). Marmor has, of course, done more than anybody in his previous work to explain how, why, and in what way the contents of legal texts depend on/are determined by pragmatic features of communication (see eg. ‘The Pragmatics of Legal Language’ (2008) 21 Ratio Juris 423). The distinctive value of this essay however, lies in the way Marmor points to some important discontinuities between the way pragmatics function in law as opposed to ordinary conversations. As Marmor demonstrates, much of the pragmatics literature has focussed its attention on ordinary conversations where the parties are presumed to engage in a cooperative exchange of information (83). But Marmor’s core insight is that this model cannot accommodate the ‘strategic’ nature of legal communication (96). Indeed, if Marmor is right that pragmatics in the legal case are sensitive to ‘different kinds of interactions, with different normative goals in different contexts’ then his essay may pave the way for further research in working towards a more refined and subtle understanding of the role played by pragmatics in determining legal content (7).

John Perry’s and Gideon Rosen’s contributions focus on textualism, defined by Perry as ‘the view that the content of a statute . . . is determined by the original meaning of the text of the statute’ (105). There is of course a vast literature on textualism, particularly regarding its plausibility as a method for interpreting the US constitution. So what do Perry and Rosen contribute to this
protracted debate? I think the value of these two essays lies in the way they offer some original thoughts: firstly, on how we might individuate different conceptions of textualism; and secondly, on how we should go about putting the textualist view on its strongest footing. Perry’s essay, for example, draws a potentially fertile distinction between ‘meaning’ and ‘conception’ textualism (106). Roughly, whereas meaning-textualism takes the content of a statute to be determined by the original meaning of the words used at the time of a statute’s enactment; conception-textualism takes the conceptions or beliefs the enactors had about the properties represented by these words to be determinative (106). Indeed, Perry’s thesis is that while meaning-textualism should be considered ‘commonsensical and attractive’, conception-textualism is ‘confused, implausible, and unworkable’ (106).

Gideon Yaffe’s essay offers a distinctive perspective on how the philosophy of language may contribute to our understanding of law and its interpretation. He cautions against a blinkered focus on how the philosophy of language may improve our understanding of linguistic entities such as words, sentences, or utterances (216). Indeed, many resources from the philosophy of language have also been deployed in working towards a superior understanding of how the contents of our thoughts are determined. So how, if at all, might these developments improve our understanding of the law? As Yaffe points out, the law is very much concerned with determining the contents of our thoughts, and no more so than in the case of inchoate crimes like attempted murder. What Yaffe sets out to do, more specifically, is explain how the distinction between attributive (de dicto) and referential (de re) descriptions may have explanatory potential in this area. Can I be guilty of attempting to commit an offence in cases where the material condition for committing the offence is not present? Suppose I try to kill someone who in fact is already dead. Can I be convicted of attempted murder here? It is precisely this puzzle that Yaffe takes up in his essay. He explains how the de dicto/de re distinction not only helps us to focus on the problems involved, but also provides the basis for an impressive solution of his own.

Mark Greenberg’s essay develops an attack on what he calls the ‘standard picture’ of how law works and the ‘communication theory’ of how the content of the law is determined (217, 223). To fix ideas, consider H. L. A. Hart’s famous example of a statute prohibiting the use of vehicles in public parks. Intuitively speaking, it seems clear that the content of the law – by which I mean the legal rights and obligations that exist in a given legal system, at a given time – is largely determined by the semantic, assertive, and pragmatic content of statutes, precedents, and other legal texts (hereinafter ‘communicative content’). Indeed, it seems uncontroversial that whether I can ride my skateboard in a public park seems to be largely determined by what the statute means, says, or asserts. Here Greenberg raises two questions: firstly, why is that? What is it exactly that makes the communicative content of legal texts relevant when determining peoples’ rights and duties at law? Secondly, assuming that the communicative content of legal texts is indeed relevant when determining peoples’ rights and duties at law, what precise impact does it have on the content of the law in a given legal system?

Greenberg argues that most legal theorists adopt a certain position on these questions. Given the aims of this book, the crucial thing we need to see is how
this orthodox position gives the philosophy of language a pivotal role in determining the content of the law in a given legal system. Although it oversimplifies, we can summarise the position Greenberg has in mind in the following way: (1) the content of the law consists of directives issued by various legal authorities, such as legislatures and judges; (2) this entails that the content of the law is determined by what legal authorities communicate; (3) it follows that legal texts are linguistic texts with their content being an instance of linguistic meaning generally; (4) so in order to ascertain the legal rights and obligations that people have in a given legal system we should consult our best theories about language and communication (217).

Is there anything wrong with this picture of how law works and how its content is determined? Greenberg thinks that there is. To be sure, he does not deny that the communicative content of legal texts is relevant when determining legal content. But he insists that ‘a move from a text’s meaning to the existence of certain legal obligations requires argument’ (219). To see what Greenberg is driving at, let us return to Hart’s example. How are we to determine whether my skateboard constitutes a ‘vehicle’ for the purposes of the statute? Precisely which theory of communicative content should we deploy in performing this task? Should our focus be on the intentions of legislators? Or should it be on their utterances? To sum this up: how do we individuate what counts as relevant and irrelevant linguistic considerations in determining whether I can ride my skateboard in the park? I take Greenberg’s central point to be that no theory of language and communication will provide us with the answers we need. However sophisticated our theories of language and communication turn out to be, we will still be left with unanswered questions regarding how, why, and in what way the communicative content of legal texts determines what rights and duties people have as a matter of law.

For the sake of completeness, I should point out the foregoing leads Greenberg to adopt a non-positivist position similar to that of Ronald Dworkin. To be sure, his view is that normative considerations of democracy and fairness are just the kind of considerations that have the potential to explain the precise impact that the communicative content of legal texts has on the content of the law in a given legal system. The details of Greenberg’s proposal however, need not concern us now. What matters most at this point is that if Greenberg is right, there is an explanatory gap that needs to be filled between the meaning of legal texts on the one hand and the content of the law on the other, then far from having ‘a direct bearing on the content of the law’, it would seem that the philosophy of language has merely a secondary and largely derivative role to play (217).

Earlier I said that this collection suffers from an important defect. Having summarised its contents and having discussed Greenberg’s recent output, I am now in a position to explain what that defect is. The problem is that most of essays in this book proceed on the very assumptions that Greenberg’s argument rejects. They assume, in other words, that the content of the law is largely determined by the communicative content of legal texts; and more to the point, they do so without argument. I have already provided some clear examples of this in my preceding overview. As we have seen, Endicott’s focus is on the value of vagueness in crafting normative texts, and Marmor’s essay assumes from the start that ‘a great
deal of the law . . . is determined by what legal authorities communicate’ (83). These are by no means isolated occurrences. On the contrary, Waldron’s worry about the ability of vague legal standards to guide our action, and also Perry’s conception of meaning-textualism, only make sense if we assume at the outset that the content of the law is largely determined by the communicative content of legal texts.

I thought this made the book highly imbalanced and lacking in depth. To avoid misunderstanding, I am not that saying that the assumption that the content of the law is largely determined by the communicative content of legal texts is in any sense implausible. Nor am I saying that there is some rule that Greenberg’s challenge should be taken up. But the reader is entitled to some explanation as to why the authors take the starting point that they do, and for that reason the collection would certainly have benefited from counter-arguments to Greenberg’s claims. Interestingly enough, Marmor and Soames seem to be aware of this. To quote them directly, ‘though as authors we have bones to pick with his arguments, as editors we value the fact that he calls into question some of the main assumptions that we and other contributors rely on. We look forward to continuing the debate begun here’ (12).

But this leaves me unsatisfied. On the one hand, I can understand Marmor and Soames’s desire in commissioning these essays to bracket some questions in the pursuit of others. As I said earlier, there can be little doubt that within these working assumptions the essays are highly original, and I have tried to convey some of that originality in my preceding overview. But on the other hand, I maintain that the depth and quality of the discussion in these essays is marred by their inability to motivate their starting assumptions. Remember that this book promises an examination of the philosophical foundations of law. I think it should be uncontroversial that this necessitates an answer to the following question: how, why, and in what way might the philosophy of language contribute to our understanding of law and its interpretation? But that question has not been adequately addressed in these essays. The problem is that by assuming without argument that the content of the law is largely determined by the communicative content of legal texts, the essays in this collection leave some vital questions concerning the philosophical foundations of language in the law untouched.

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The concept of legal personality, used to distinguish between entities that are of relevance to the law and those that are not, plays a prominent role in international law. A challenge to the conventional wisdom that states are the sole legal person began in the 20th century with the emergence of various non-state actors

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possessing rights and obligations. The concept remains, as the International Court of Justice described it in 1949, one ‘giv[ing] rise to controversy’.

Despite its importance within the international legal system, international personality has not received extensive treatment by states, scholars, courts or tribunals, or the International Law Commission (ILC). No treaty or widely accepted rules of customary international law exist in relation to it and, unlike the law of treaties or state responsibility, the ILC has not attempted to codify the law in this area. Consequently, Legal Personality in International Law is a welcome addition to the limited literature on the subject.

In aiming to ‘offer a comprehensive analysis of legal personality in international law’ (2) Roland Portmann, who is scientific collaborator at the Swiss Ministry of Foreign Affairs and lecturer at the University of St Gallen, adopts a systematic approach. The book is divided into three parts. Part I establishes what is meant by the concept of personality in international law. Acknowledging that it is an ‘essentially contested concept’ (14), Portmann identifies five ‘conceptions’ of international personality. The ‘states-only’ conception provides that international legal personality is restricted to those possessing statehood. The ‘recognition’ approach takes into account the sociological and institutional changes of the 20th century so that while states are still viewed as original persons, other entities are recognised as possessing a derivative and limited form of personality. The ‘individualistic’ conception puts humans at the centre of discussions regarding personality; while the ‘actor’ conception has any entity that is effective as its focus. Finally, the ‘formal’ conception argues against any a priori determinations as to personality, and relies instead on an interpretation of the particular source of legal right or obligation in providing an a posteriori determination of the issue.

Part II of the book examines the origins and characteristic features of these conceptions. While this might seem a relatively straightforward task, the book is concerned here with the ‘intellectual history’ of the conceptions of personality in international law that it identifies (17). Indeed, Portmann examines historical events and their influence upon the jurisprudential and philosophical outlook of the scholars who shaped the development of the different conceptions. Having established their intellectual origins, each chapter provides examples of their manifestation in practice. This part of the book consequently covers historical, theoretical and practical ground in establishing the different conceptions of international personality and, in the process, provides a rich insight into their historical and contemporary underpinnings.

Part III of the book, although comprising of only two chapters, is where critical comment must be directed. In Chapter 10, Portmann evaluates the key assumptions upon which the different conceptions rest in order to identify which are still valid in contemporary international law. The essential differences are identified as being located in the nature and powers of the state, the relationship between statehood and individual freedom, the role of legal sources not derived from state will, and the relationship between the actual and the normative as a matter of international law. Based on this analysis, Portmann argues, in fairly absolute terms, ‘that the assumptions underlying the states-only, recognition and actor conceptions of international personality are discarded in contemporary international law. By contrast, the predispositions of the individualistic and formal
conceptions find considerable support in current international legal doctrine and practice’ (248, emphasis added). But this ambitious argument is never fully substantiated. This is not to say that the present reviewer disagrees with the points made in this chapter, just that the author is too quick to rely on them in dismissing certain conceptions in favour of others.

In rejecting the contemporary relevance of the states-only and recognition conceptions, for instance, Portmann argues that statehood today is a legal status determined by international law as opposed to being simply a historical fact, thus rejecting one of the key original assumptions of both these conceptions. Although Portmann presses this argument convincingly in many respects, it seems nonetheless insufficient to support the ultimate contention that these conceptions have been ‘discarded’ in contemporary international law. While the clear and discernible emergence of other actors within the international legal system leads to the obvious conclusion that states are not the only entity with legal personality – thus making a dismissal of the states-only conception not in itself controversial – Portmann dismisses the recognition conception too readily, even while acknowledging that ‘there might be some merit to the view that it represents the dominant conception of international personality today’ (80). For example, although it is true that the international legal system as it now stands gives greater prominence to the individual than it once did, principally through the emergence of human rights and international criminal law, this evolution has come about primarily through state practice in one form or another. In providing rights and obligations to individuals, whether through treaties or customary international law, states have recognised this particular actor as a limited international person. And just as they have provided this recognition, they could – in theory at least – take it away, providing, of course, that there is sufficient will among the international community of states.

Nevertheless, Chapter 11 establishes, in light of the conclusions in Chapter 10, a framework for personality in international law based largely upon the assumptions of both the formal and individualistic conceptions. At the forefront of this framework is the formal conception’s central tenet that ‘any entity that is addressed by an international norm is an international person’ (272). It then becomes ‘a matter of norm interpretation whether a specific entity enjoys international personality in a particular context’ (272). It follows that ‘[a]ll that is needed in order to determine whether a treaty norm has direct effect is to interpret the norm according to general rules of treaty interpretation’ (204). These rules, as the author identifies, are to be found in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties. But while these rules of treaty interpretation are at least alluded to – although not expanded upon – in establishing the framework, Portmann does not grant the reader the same insight in connection with the rules regarding the interpretation of customary international law norms in determining international personality. Instead, the author states that in case of a customary rule ‘the process of determining its personal scope may be more complex than with treaties, and involve a strong teleological perspective. But again, there is no presumption to be overcome: the system is completely open’ (272).

However, if the reader ventures outside of the confines of the cover of the book and takes a look at the rules of interpretation contained in Articles 31–33...
of the Vienna Convention, it soon becomes apparent that far from being ‘dis-
carded’ the recognition conception is in fact prominent in the rules that the
author adopts for determining personality in a treaty norm. Indeed, the notion of
discerning the intention of the parties to a treaty either at the time of its adoption
or through subsequent agreement or practice is a vital factor in interpreting the
norm in question. In this sense, and in the context of discussing legal personality,
the interpreter is looking for indications as to whether it was, or has subsequently
become, the intention of the parties that an entity should be recognised as
possessing such personality under the particular norm. Consequently, the appar-
sent simplicity of the ‘open system’ as portrayed by Portmann is open to question.

A more minor criticism of the book is the inclusion of frequent, and some-
times extensive, quotations of works in languages other than English without the
provision of translations. This has a tendency to disrupt the flow of reading and
denies full accessibility and a complete understanding to those readers who are
not simultaneously fluent in English, French, German and Italian. Nevertheless,
on the whole there is much to admire in this work that is in many respects, and
particularly in the first two Parts, a commendable piece of scholarship. The
relative lack of literature on this topic means that Portmann’s book will no doubt
find a place on the bookshelf of many international lawyers and particularly those
interested in the historical and theoretical underpinnings of the main conceptions
of international legal personality.

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Alison Duxbury, The Participation of States in International Organisations:
The Role of Human Rights and Democracy, Cambridge: Cambridge Uni-
versity Press, 2011, 380 pp, hb £60.00.

The issue of democracy beyond the state remains perplexing for scholars both of
democracy and of international law. Many international organisations affirm that
democracy is the only legitimate form of government at the level of the state,
yet there have been few efforts to democratise international organisations. One
possibility is to enhance the democratic credentials of international organisations
by restricting membership to functioning democracies. This is the focus of The
Participation of States in International Organisations, which examines the ways in
which international organisations have relied on the democratic credentials of
applicant and member states to restrict participation in the law-making and other
activities of the organisation.

The book, a revised version of Duxbury’s PhD thesis, is divided into six parts.
Chapter 1 examines how the ideas of human rights and democracy have been
used in the international system. Chapter 2 evaluates the ways in which the
concepts have informed decisions on membership of the League of Nations and
United Nations. Chapter 3 considers the issue in relation to the European Union.
Council of Europe, and NATO, in the context of regional integration; while Chapter 4 investigates the practice of excluding states from regional organisations in other parts of the world. Chapter 5 looks at the UN specialised agencies and international trade organisations. Chapter 6 concludes with an analysis of how the concepts of democracy and human rights have influenced debates on the admission and participation of states in international organisations.

The principal objective of the book is to question the legitimacy of the practices of international organisations when evaluating the democratic credentials of applicant and member states. The idea of legitimacy is used generally to evaluate the application of a ‘democracy test’ to applicant and member states against the stated functions of the organisation in light of its constitutive instruments, and the clarity and coherence of the criteria employed to evaluate the democratic standing of states. A difficulty with the work is that it fails to articulate a clear conception of legitimacy (normative or sociological), instead using the term as a way of demonstrating approval or disapproval of the decisions of international organisations beyond the limited conception of legitimacy as legality. What the work does well is to illustrate the ways in which ‘democracy-talk’ around membership and participation has been used to legitimate both states and international organisations in the international community, and to de-legitimize unpopular or pariah states, providing the basis for collective action. The work also highlights the difficulty in applying a single approach to diverse international organisations. The material on European regional integration since 1989 demonstrates the efforts to develop a democratic European identity and the integration of democratic states under supranational structures. The project of European regional integration is underpinned by a common understanding of the importance of democratic procedures and institutions to legitimate the exercise of regulatory power. The same argument cannot be made in relation to the United Nations. The authority of the United Nations rests on its universal membership and ability to deal with a limited number of specific problems in world society, notably international peace and security. Consequently arguments around the participation of non-democracies in the decision-making process of the UN Security Council or the democratic illegitimacy of Security Council resolutions might be misguided. This distinction is worthy of further investigation.

In conclusion, The Participation of States in International Organisations presents a welcome addition to the literature on democracy and international law, filling a significant lacuna with its focus on the ways in which human rights and democracy have been used in deliberations about questions of membership and participation.

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