

# ARGUMENT AND THE “MORAL IMPACT” THEORY OF LAW

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## ABSTRACT

*The innovative Moral Impact Theory (“MIT”) of law claims that the moral impacts of legal institutional actions, rather than the linguistic content of “rules” or judicial or legislative pronouncements, determine law’s content. MIT’s corollary is that legal interpretation consists in the inquiry into what is morally required as a consequence of the lawmaking actions.*

*This paper challenges MIT by critiquing its attendant view of the nature of legal interpretation and argument. Points include the following: (1) it is not practicable to predicate law’s content on the ability of legal officials to resolve moral controversies; (2) it would be impermissibly uncharitable to claim that participants in the legal system commit widespread error in failing to regard moral argument as the focus of legal interpretation; (3) whereas the legal official may initially respond to a conflict at the intuitive moral level, she must resolve the controversy at the deliberative, critical level, at which moral and legal thinking diverge; (4) because no two cases are precisely alike, and owing to the open texture of natural language, reference to extra-jurisdictional “persuasive” and “secondary” authority permeates legal argument, yet, nearly by definition, such linguistic sources cannot have engendered significant moral impacts in the home jurisdiction; and (5) one way or another, we ultimately arrive at linguistic contents.*

*The paper concludes by accepting, as undeniable, that legal institutional actions have moral impacts, and generate moral obligations. Officials are obligated to adhere to certain constraints in their treatment of one another, cases, litigants and citizens. Less explored, however, have been the ways in which legal pronouncements likely morally impact the community, beyond the issue of a duty to obey the law.*

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## INTRODUCTION

The actions of legal institutions change facts and circumstances that are often morally relevant to our decision-making. Such actions change our moral obligations by affecting our expectations, options, and projects, as well as the conditions under which we interact.<sup>1</sup> A community's problems are typically larger than any individual, and so one way in which its legal system can improve the moral situation is "by changing the circumstances so that everyone does have the obligation to participate in a particular solution."<sup>2</sup> Legal philosopher Mark Greenberg has been fashioning a new theoretical system from these deceptively simple insights.

But Greenberg's endgame is to convince readers that the moral obligations triggered by legal institution actions *are* legal obligations.<sup>3</sup> He calls this view the Moral Impact Theory "because it holds that *the law is the moral impact* of the relevant actions of legal institutions."<sup>4</sup> As a corollary, the Moral Impact Theory takes the practice of legal interpretation to consist of the inquiry into "what is *morally required* as a consequence of the lawmaking actions."<sup>5</sup> Greenberg's view is that, regardless of how practitioners may theorize their own practice, what they actually do – and indeed what they should do – is to argue for legal interpretations that do "not correspond" to the linguistic content of the texts they hold out as supporting their claims.<sup>6</sup>

Greenberg's readers are likely already familiar with the decades-long controversy in legal philosophy known as the "Hart-Dworkin" debate concerning the relation between law and morality.<sup>7</sup> Herbert Hart maintained that law and morality are firmly separate,<sup>8</sup> although he allowed

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1. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1290 (2014) [hereinafter Greenberg, *Moral Impact Theory*].

2. *Id.* at 1294.

3. *Id.* at 1290.

4. *Id.* (emphasis added).

5. *Id.* at 1303.

6. Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 72–73 (Leslie Green & Brian Leiter eds., 2011) [hereinafter Greenberg, *The Standard Picture*]. Greenberg's system is both descriptive (purporting to show "how the actions of legal institutions make the law what it is") and normative (offering "a correspondingly novel account of how to interpret legal texts"). Greenberg, *Moral Impact Theory*, *supra* note 1, at 1290.

7. See Scott Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22 (Arthur Ripstein ed., 2007).

8. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614 (1958).

in his later “inclusive” thinking for the *possibility* of moral tests of legality in certain instances.<sup>9</sup> Ronald Dworkin, in opposition, saw legal decision-making as resting on the search for morally appropriate principles that legal officials must take into account.<sup>10</sup>

Greenberg believes that an even more fundamental issue for legal philosophy arises from the way in which theorists go about explaining the nature of law’s content. Hence, he promises an “alternative to the two main views of law that have dominated legal thought.”<sup>11</sup> In contrast to what most positivists and anti-positivists alike have presupposed, law’s content is not explained directly from the authoritativeness and linguistic content of legal institutional pronouncements, but rather indirectly from the perspective of the *moral impacts* of those pronouncements or other institutional actions on the back end.<sup>12</sup>

Therefore, by Greenberg’s analysis, there is no separation of law and morals, but nor are moral principles included in law’s content merely because, in the interpretive exercise, they best justify those pronouncements. Rather, law *is*, fully and exclusively, the moral impact of legal institutional action,<sup>13</sup> and for this reason reckoning moral impacts must be legal argument’s defining task.

Greenberg’s model is novel, innovative, and noteworthy in a theoretical climate that has been increasingly receptive to links between law and morality. The work constructs a sophisticated “one-system picture,” by which law is rendered a branch of morality and affords the program’s constituent ideas “their most important expression” in the literature thus far.<sup>14</sup> This article, however, gives reasons why Greenberg’s central and game-changing claim is troubling.

Part I questions whether it is practicable to predicate law’s content on the ability of legal officials to resolve moral controversies. The Moral Impact Theory interprets the work of legal practitioners and officials in a new way, one that implicitly claims a special epistemic task, vantage point, and expertise on behalf of those legal actors, each of which defies

9. H. L. A. HART, *THE CONCEPT OF LAW* 258 (3d ed. 2012) (1961) [hereinafter HART, *THE CONCEPT OF LAW*].

10. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 26 (1978).

11. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1290.

12. *Id.* at 1301.

13. *See id.* at 1290, 1330–31.

14. Scott Hershovitz, *The End of Jurisprudence*, 124 *YALE L.J.* 1160, 1198–99 (2015); *see also* Brian H. Bix, *When Law Becomes Morality: Comments on Mark Greenberg’s Moral Impact Theory of Law* 1 (University of Minnesota Law School Legal Studies Research Paper Series, Paper No. 14-27, 2014) (stating that Greenberg’s paper “offers a new and provocative understanding of law and legal obligation”), <http://ssrn.com/abstract=2434075>.

practical reality. At the same time, Greenberg implicitly takes practitioners to task for not adopting a moral impacts explanatory project. If accepted, the Theory would oblige practitioners to reconsider the sort of discourse in which they engage.

Part II largely relies on recent institutional philosophy to critique Greenberg's view that legal interpretation consists of inquiry into "what is *morally required* as a consequence of the lawmaking actions."<sup>15</sup> Although rooted in the identification of law with moral impact, his approach runs counter to the best explanation of legal practice. Indeed, lest participants in the legal system uncharitably be deemed to pervasively misunderstand the nature of legal argument, it appears clear that determining what is morally required is not the principal focus of the legal interpretive inquiry. Rather, aligning with the logic of institutional reality, law's argumentative structure is best explained as accommodating nonmoral disagreement about the relationship between the existing legal materials and the new situation.

Part III then summons certain writings from moral philosophy to discuss further issues straining the Moral Impact Theory's identification of law with morality. Like some philosophical claims about morality, Greenberg's supporting thesis about legal argument overlooks the distinction between "intuitive" and "critical" thinking.<sup>16</sup> Although the legal official's opening response to a legal controversy may intuitively seek out moral cues or *prima facie* moral principles, conflicts are "irresoluble *at that level*."<sup>17</sup> It is only at the different level of reasoned critical thinking that the controversy can be resolved. At this level, however, deliberation falls within law's argumentative structure, which is now seen to rest primarily on nonmoral theoretical institutional concerns. Moral and legal deliberative structures are not necessarily the same, and indeed likely vary significantly.

Part IV concludes by suggesting two further objections derived from ethical theory and legal practice. First, the Moral Impact Theory does not overcome the open question whether holding that R is the law is tantamount to holding that R is right.<sup>18</sup> Contextualized to the practice of law, it remains an open issue whether argument about law's content is argument about moral impacts. Second, more concretely hampering the

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15. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1303.

16. See RICHARD M. HARE, *MORAL THINKING: ITS LEVELS, METHOD AND POINT* 25, 53 (1981).

17. *Id.*

18. GEORGE E. MOORE, *PRINCIPIA ETHICA* 1–37 (1903).

Theory is the widespread occurrence in adjudication of argument about the persuasiveness of extra-jurisdictional and secondary authority; yet, nearly by definition, such authority cannot have engendered significant moral impacts in the home jurisdiction.

Finally, having upset the notion that law's content consists in the moral impacts of legal institutional actions, this article briefly evaluates what the role and nature of those moral impacts are. The actions of legal institutions clearly have moral impacts, as Greenberg says. These impacts affect and condition legal official conduct and the legal system's quest for legitimacy. The most fertile ground on which to examine such moral impacts, however, is with the community itself. Legal institutional conduct affects the polity's moral profile in complex ways, some obvious, some quite subtle, and the community will have its own argumentative structures for assessing those impacts.

#### I. LEGAL INSTITUTIONS ARE NOT WELL SUITED FOR RECKONING MORAL IMPACTS

Legal officials and institutions neither have, nor are expected to have, the training or competence to decide "what is morally required." If, as Greenberg contends, "law is the moral impact of the relevant actions of legal institutions,"<sup>19</sup> and if legal officials do not adjudicate morality, and have no special epistemic expertise for doing so, then there is a serious disconnect between law and its practical administration.<sup>20</sup> Yet, on the Moral Impact Theory, the contribution of a statute or court decision to law's content depends on "the on-balance best resolution of conflicts between moral considerations," on what, in other words, "the relevant moral values, on balance, support."<sup>21</sup>

Anticipating this objection, Greenberg counters that, under the Moral Impact Theory, law can indeed serve the function of resolving moral disagreement. Law can fulfill this function the way it resolves controversies, "by having a mechanism for generating specific orders (directed at particular individuals) that are backed up with force. . . .

19. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1290.

20. Scott Hershovitz attempts to suggest a way out of this dilemma, and more generally out of the "fly-bottle" that is the Hart-Dworkin debate, namely, by continuing to talk as if, but not to think that, there is a "distinctively legal domain of normativity." Hershovitz, *supra* note 14, at 1192–94. This essay does not further address the eliminativist position as recommended by Hershovitz except, for now, to agree with Liam Murphy that, absent a genuinely legal domain of normativity, "it would be implausible to think that nothing important had been lost in translation." Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088, 1106 (2008).

21. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1330–31.

Specific orders directed at individuals are required in order to end disagreement in a peaceful way.”<sup>22</sup> Well maybe. But the Moral Impact Theory rejects “Explanatory Directness,” namely, the idea that the law created by the legal institution “is the law that it says it creates or means to create.”<sup>23</sup> The very point of the Theory is to claim that we derive the law by working out the impact of legal institutional decisions on moral obligations, rather than by “determin[ing] what the courts said or meant.”<sup>24</sup>

Greenberg’s reasoning is also a bit equivocal about how the relevant moral and hence legal obligations arise, which in turn likely implicates law’s ability to track them. On the one hand, Greenberg assigns moral reasoning a role “that is more procedural,” whereby practitioners engaged in interpretation ask about the moral implication of the fact that the legislature acted or the court decided in a particular way.<sup>25</sup> A legal system adjusts moral standards “by giving notice” of its enactments and pronouncements.<sup>26</sup> Decisions reached in a democratic system of governance in which “everyone has an equal opportunity to participate” have moral force.<sup>27</sup> By this view, when pro tanto moral obligations come about in “*the legally proper way*,” they are legal obligations.<sup>28</sup>

On the other hand, legal institutions change our moral obligations, under Greenberg’s theory, when they act in such a way as to change our broader “moral profile.”<sup>29</sup> Changes in law’s content arise, in other words, when legal institutions impact or alter the broader range of “our moral obligations, powers, privileges, and so on.”<sup>30</sup> This approach to moral impacts, however, would appear to be consistent with a variety of types of

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22. *Id.* at 1339–40.

23. Greenberg, *The Standard Picture*, *supra* note 6, at 71.

24. *Id.* at 75. Greenberg provides compelling exemplars of how, in legal interpretation, the same linguistic content may be read differently under different applications, the reasonable explanation being that the varying moral impact of the statutory content determines what the law is, hence how to construe the texts. *Id.* at 76–77. These interpretive outcomes are debated, however, and it begs the question to presuppose that law’s content is other than the statutory language *as interpreted*. In other respects, Greenberg attempts to deflate his theory’s conceptual implications for legal argument to a mere psychological matter. Considering that judges have “limited time and capacities,” and that the Moral Impact Theory, if accepted, might well make “impossibly difficult the everyday task of working out what the law is,” he responds that “[t]he skills of reading statutes and cases that lawyers learn in law school may be generally reliable ways of working out the impact of statutes and judicial decisions . . . without the need to consider moral considerations explicitly.” Greenberg, *Moral Impact Theory*, *supra* note 1, at 1336. But if so, Greenberg has deflated the Moral Impact Theory itself, rendering it fairly superfluous and lacking in explanatory power.

25. *Id.* at 1304.

26. *Id.* at 1311.

27. *Id.* at 1313.

28. *Id.* at 1307 n.41.

29. *Id.* at 1308.

30. *Id.*

legal institutional action, including legally improper action. Were the legislature, for example, to direct everyone to adopt a particular solution, albeit in a procedurally flawed manner, which might or might not be challenged in the courts, wouldn't there still be "moral reasons for following the solution that most other people are likely to follow"?<sup>31</sup>

Either view depicts the direction in which the theoretical explanation of law's content runs under the Moral Impact Theory. By contrast, in the usual understanding, named by Greenberg the "Standard Picture,"<sup>32</sup> the court or legislature announces a norm, which, if determined in the right way and recognized as such within the legal institution, becomes a valid legal norm.<sup>33</sup> Given moral reasons for obeying the law, the legal norm "ultimately gives rise to a genuine (moral) obligation."<sup>34</sup> The Moral Impact Theory's reversal in the explanatory direction from that of the Standard Picture is the Theory's genius. Greenberg is prone to begging the question, however, when, for example, he claims that "[i]t is intuitively clear" that an obligation motivated by animus or bent on morally iniquitous ends "is not a legal obligation, despite the fact that it is the result of actions of legal institutions."<sup>35</sup> The problem is that, quite the contrary, it *is* intuitively clear, it seems, that such obligations *are* legal but not moral.

But Greenberg next attempts to ameliorate the theoretical tension in a very interesting way. He stakes out, as his underlying premise, the view that "a legal system, by its nature, is supposed to change the moral situation for the better."<sup>36</sup> Concomitantly, by virtue of what Greenberg styles the "bindingness hypothesis,"<sup>37</sup> a legal system is supposed to

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31. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1312. From this angle, the relevant moral obligations changed or engendered by legal institutional action "are simply *genuine, all-things-considered, practical* obligations," which thereby constitute legal obligations. *Id.* at 1306. Greenberg allows that his theory is "a work in progress," and notes his uncertainty whether the law's content consists in such "bottom line" all-things-considered moral, hence legal, obligations, or rather pro tanto moral obligations. *Id.* at 1307 n.41.

32. *Id.* at 1318; see Greenberg, *The Standard Picture*, *supra* note 6, at 39.

33. See, e.g., HART, *THE CONCEPT OF LAW*, *supra* note 9, at 97.

34. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1319.

35. *Id.* at 1322.

36. *Id.*

37. Greenberg, *The Standard Picture*, *supra* note 6, at 84; Greenberg, *Moral Impact Theory*, *supra* note 1, at 1323 n.72. We cannot explore this hypothesis in depth here. However, Greenberg has not established the validity of its assumption that the law is supposed to generate all-things-considered moral obligations, or that it takes itself to do so. That law claims authority, or even peremptory authority, is not to say that it claims, or rests on, all-things-considered moral authoritativeness. Moreover, if Greenberg is correct that both legal theorists and practitioners take the Standard Picture for granted "extremely widely," *id.* at 1296, 1297 n.19, and if he is further correct that the Standard Picture "leaves only a limited role that morality could play," *id.* at 1299, then this further calls into



generate all-things-considered binding obligations.<sup>38</sup> Hence, actions by legal institutions that denigrate the moral system do not generate legal obligations; “legal obligations are not just any moral obligations that are created by the actions of legal institutions.”<sup>39</sup> Those types of legal institutional actions will, at best, change the moral profile “paradoxically,” by generating moral obligations to “remedy, oppose, or otherwise mitigate the consequences of the action . . . .”<sup>40</sup> This, however, is a “defective” way of generating obligations and not legally proper. Greenberg is now on firmer ground to restate the Moral Impact Theory, such that “[t]he content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way.”<sup>41</sup>

But which legal outcomes, or statutory or regulatory enactments, improve the moral system and which are deleterious? Is any particular action by a legal institution, focused narrowly on the litigants’ particularized interests, for the better or for the worse in relation to the larger good? These are the very questions that parties and litigants in their policy arguments, and interest groups and legislators in their representative guises, vigorously debate. The losers at any stage of the game believe that they have reasons to challenge the institution’s outcomes.<sup>42</sup> Importantly, there is always opportunity to do so. And even apart from outcomes in specific controversies, norms and circumstances in the world change external to the legal system, spurring us to view standing institutional practices in a new light. What had seemed settled now loses some or much legitimacy, at least for various factions within the community. All of this is in the nature of a legal system, which necessarily includes rules of change.<sup>43</sup>

A legal system would fail if it omitted settled rules of formal change or lacked ongoing practices, typically structures for argument, facilitating informal change.<sup>44</sup> Participants engaged in practices aimed at changing the law will claim to be in pursuit of an improved moral situation, to the

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question his premise that, “[b]y the law’s lights, at least, legal obligations are all-things-considered [moral] obligations.” Greenberg, *The Standard Picture*, *supra* note 6, at 94.

38. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1323 n.72.

39. *Id.* at 1321.

40. *Id.* at 1322.

41. *Id.* at 1323.

42. See Greenberg, *Moral Impact Theory*, *supra* note 1, at 1322.

43. See Jeremy Waldron, *Who Needs Rules of Recognition?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 327, 330 (Matthew D. Adler & Kenneth E. Himma eds., 2009) (describing H. L. A. Hart’s view that “[a] rule of change is a secondary rule that empowers some person or institution to alter the law, either in general or in some particular respect, by following a certain procedure and conforming to certain requirements”).

44. *Id.* at 349.

extent that moral language comes into play. But if legal institutional practice, via its argumentative structures, is on constant track “to remedy, oppose, or otherwise mitigate” the institutional status quo,<sup>45</sup> then the Moral Impact Theory appears to embed the notion of defect within the concept of law. Put differently, if law’s content is provided in terms of moral impacts and moral obligations, demarcated between the genuine and the defective, with the justified impulse to alter outcomes signifying defect, then a legal system’s normal and proper functioning is at once legally proper and defective.<sup>46</sup>

That a theory generates or rests on paradox gives reason to pause and consider the theory’s soundness.<sup>47</sup> The paradox just suggested is that, under the Moral Impact Theory (or so it seems), if the system is not working as it should then it is defective, and if the system is working as it should then it is also defective. The very act of reckoning moral impacts in relation to the legal obligations that follow threatens a sort of Buridan’s dilemma, wherein the moral agent is stuck midway between two interpretations.<sup>48</sup> But legal officials and subjects act continually, and change the law daily, perhaps suggesting that they are not engaged in any such reckoning.

Greenberg himself counts a claimed theoretical impediment to adjudication against the theory at issue. His reliance on the Supreme Court opinion in *Smith v. United States*<sup>49</sup> is illustrative.<sup>50</sup> Smith having offered to

45. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1322.

46. This paradox should count as a hybrid epistemic and semantic dilemma, resting on our inability to know, or at least the impracticability of understanding, what we actual mean when we speak of moral impacts and defectively engendered obligations. For his part, Greenberg has offered a related objection to the Standard Picture such that, if this view is true, then law, by its nature is “doomed to be defective.” Greenberg, *The Standard Picture*, *supra* note 6, at 104. He bases this conclusion on his presupposition that, by its nature, law treats legal obligations as morally binding in the all-things-considered sense. *Id.* at 95. Yet there is “widespread consensus” that such a condition is not satisfied by particularized or “piecemeal” authoritative pronouncements of actually existing legal institutions, being “the governments of contemporary nations.” *Id.* at 81, 96, 100. Greenberg has not made the case, however, that the “standard” view (in its positivist manifestation) would deem an ongoing “defect”—such that moral obligations “almost invariably diverge from the content of the authoritative pronouncements,” *id.* at 102—to be a problem for that view. So long as a legal system maintains sufficient legitimacy to endure, wouldn’t the sort of defect stated by Greenberg be problematic in precisely the way positivist legal theory claims?

47. Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1830 (2005); *see generally* David G. Carlson, *Legal Positivism and Russell’s Paradox*, 5 WASH. U. JURIS. REV. 257, 277 (2013) (claiming that Russell’s paradox “defeats positivist jurisprudence”).

48. *See* BERTRAND RUSSELL, 5 THE COLLECTED PAPERS OF BERTRAND RUSSELL: TOWARD PRINCIPIA MATHEMATICA, 1905–1908, at 798 (Gregory H. Moore ed., 2014).

49. 508 U.S. 223 (1993).

50. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1291.

trade a gun for cocaine, the question was whether he was properly sentenced under a statute increasing the penalties if the defendant “uses . . . a firearm” in furtherance of a drug-trafficking offense.<sup>51</sup> Greenberg summons *Smith* to show the peccability of the Standard Picture’s resort to linguistic content. Two competing ways of understanding the linguistic content of the statute in *Smith* leave “no way of adjudicating,” according to Greenberg.<sup>52</sup> This is because the text’s “semantic content,” approximating what is conventionally encoded in the language, requires that the court penalize any use of the firearm, whereas its “communicative content” points in the opposite direction by approximating what the legislature likely intended to communicate.<sup>53</sup>

Greenberg says that, in accord with widespread practice, both the majority and dissenting opinions in *Smith* assumed the Standard Picture without pause.<sup>54</sup> Yet the *Smith* majority did indeed decide the case, holding that Smith had “used” the firearm “precisely” in a manner contemplated by the statute.<sup>55</sup> If the Standard Picture’s commitments leave “no way of adjudicating,” however, then Greenberg inaccurately describes legal practice. If the court departed from the Standard Picture for purposes of resolving the case, then perhaps it applied moral considerations, or perhaps the Justices engaged in a nonmoral disagreement. The opinion’s text itself suggests the latter, an inquiry akin to what Hart had in mind when he described adjudicative analysis as concerning whether “a person’s case *falls under* the rule.”<sup>56</sup>

Were actors in the legal system gauging moral impacts, and were such impacts the ground of law’s decision theory, a further metaphor might be apt, via Schrödinger.<sup>57</sup> This is because any particular actions occurring in the legal system may be described as leading simultaneously to moral improvement, at least from one point of view, and deleterious impacts, at least from another. Nor might we be in a position to discern which is

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51. 508 U.S. at 226–37.

52. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1292.

53. *Id.* at 1291–92. It should be noted that Greenberg’s oppositional account of “semantic” versus “communicative” content—the notion that these “point in opposite directions,” *id.* at 1292—misconstrues the significance of the former notion. Both interpretations carry what Greenberg is labeling “semantic” content, which is a constant, whereas what he terms “communicative” content attempts a pragmatic narrowing of the expression’s meaning as would better fit the situation or context.

54. *Id.* at 1291.

55. 508 U.S. at 241.

56. HART, *THE CONCEPT OF LAW*, *supra* note 9, at 88 (emphasis added).

57. See Erwin Schrödinger, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger’s “Cat Paradox” Paper*, 124 *PROC. AM. PHIL. SOC’Y* 323 (John D. Trimmer trans., 1980) (1935).

which; certain thinkers “take no position on whether it is sometimes, always or never codified, in the sense of being ‘before the mind,’ when a moral judgment is made.”<sup>58</sup>

There are even more complex epistemic problems lurking. Whereas the Moral Impact Theory rests on practical, first-order normative assessments, the road to assembling a “moral profile,” and to assigning normative values to certain actions and circumstances, suggests the need for a prior, higher-order examination of where those principles come from and what they mean. If law is constituted by moral impacts, and if law’s interpretive mission is to resolve conflicts between competing first-order moral considerations, then it should seem reasonable to try to settle on a shared view of morality at the outset. Michael Smith has well defended the view, shared generally among moral philosophers, that “we should begin our study of ethics by focusing on meta-ethics, not normative ethics. For we cannot hope to do normative ethics without first knowing what the standards of correct argument in normative ethics are, and it is in meta-ethics that we discover those standards.”<sup>59</sup>

Once we begin to look at the Moral Impact Theory from the metaethical point of view, additional conundrums arise that are simply foreign to legal analysis and to theoretical jurisprudence. Under the Theory, when the legal institution acts, this alters the morally relevant background circumstances, and generates corresponding moral obligations.<sup>60</sup> Discerning those obligations requires moral judgment. Writing from the Kantian perspective, Barbara Herman explains that actions altering the moral agent’s circumstances present the agent with “a deliberative problem whose resolution leaves her obliged to act as deliberation directs.”<sup>61</sup> Yet institutionalizing any such deliberative problem presupposes some recognition of the standards or criteria upon which we deliberate.

Hence, once law’s content is defined to consist in the moral impacts of the actions of legal institutions, litigants, jurists and scholars are motivated to engage in prolonged *metaethical* discourse and dispute and, indeed, may be obligated to do so. Which theory of morality, in other words, should we adopt before even reaching the question of what moral impacts have resulted from legal institutional action?<sup>62</sup>

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58. Frank Jackson et al., *Ethical particularism and patterns*, in MORAL PARTICULARISM 79, 91 (B. Hooker & M. O. Little eds., 2000).

59. MICHAEL SMITH, THE MORAL PROBLEM 14 (1994).

60. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1318.

61. BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 177 (1996).

62. See, e.g., Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the*

Likely sensing this objection as well, Greenberg may be correct in stating that “[t]alk of genuine obligations does not presuppose any particular metaethical view . . . .”<sup>63</sup> While we may talk of genuine obligations without arriving at a higher-order commitment, however, law would have every incentive to incorporate metaethical discourse into its argumentative structures under the Moral Impact Theory. A noncognitive norm-expressivist view, for example, might pull in the direction of empirical assessment of community norms in support of litigant positions,<sup>64</sup> whereas a cognitive moral realism might counsel engaging expert witnesses in moral philosophy to hash out objective moral realities.

In sum, metaethics would have practical relevance to legal practice under a theory of law rooted in moral impacts. One theorist, for instance, discusses the metaethical question of whether morality rests on moral principles or something else, such as simply being the sort of person “who sees situations in a certain distinctive way.”<sup>65</sup> She puts it this way:

[T]he question of whether morality can and should be principle-based has important practical implications. If the predominance of moral principles in normative theory and our everyday life were to turn out to be no more than an unjustified prejudice in favor of principles, hospital ethics committees, for example, would have to reconsider seriously the methods by which they reach and justify their decisions.<sup>66</sup>

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*Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 801 (1997) (stating that, “[f]or example, both [John Hart] Ely and [Robert] Bork advance a metaethical, analytic argument against decisions such as *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)"]; see also Heidi M. Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1418 (1988) (arguing that “American jurisprudence has been hostage to the thesis that the truth of moral judgments is relative to the shared sentiments of discrete communities”); Jason C. Glahn, *Marching to Zion: Can (And Should) We Transform International Law with Moral Theory?*, 38 GEO. WASH. INT’L L. REV. 477, 480 (2006) (stating, regarding the “claim that there is no objective basis for morality itself,” that “[t]his metaethical challenge has been employed with great effect against those who urge the use of moral principles to decide cases”).

63. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1308 n.43.

64. See ALAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 292 (1990).

65. MAIKE ALBERTZART, *MORAL PRINCIPLES* ix (Bloomsbury Ethics 2014).

66. *Id.* at x–xi; see also Thomas M. Scanlon, *Contractualism and Utilitarianism*, reprinted in *MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES* 267, 270 (Stephen Darwall et al. eds., Oxford Univ. Press 1997) (explaining that “[t]he adoption of a philosophical thesis about the nature of morality will *almost always* have some effect on the plausibility of particular moral claims”) (emphasis added).

From the point of view of moral philosophy, the metaethical scene “is remarkably rich and diverse,”<sup>67</sup> but this does practical jurists no favors as they navigate law’s argumentative structure.

## II. THE MORAL IMPACT THEORY’S MISTAKEN VIEW OF LAW’S ARGUMENTATIVE STRUCTURE

Whether our institutional focus is that of morality or something else, we are burdened by the need to know how to proceed and what the rules of the game are. Legal practice integrates higher-level assumptions and understandings about how law is done. Even if law’s mostly backward-looking argumentative structure is morally motivated or justified, as may be the case, we can infer from practice that the jurist knows, by virtue of a higher-order understanding, to conscientiously engage with the argument in nonmoral terms.<sup>68</sup>

Most practitioners, officials, and theorists should agree about the phenomena—the oft-stated doctrines and recurring principles—toward which legal practice is ordinarily directed. Although they will diverge in saying what those doctrines and principles reveal about legality in particular cases, and about other aspects of law’s nature, they also share an understanding about law’s argumentative structures, which vary in familiar ways depending on whether the context is judicial, legislative, regulatory, and so forth. This Part attempts to show that, whatever the moral implications of particular outcomes, our best explanation of legal deliberative work, at least in the judicial sphere, rests on the law’s nonmoral argumentative fabric.

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67. Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, reprinted in *MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES* 3, 7 (Stephen Darwall et al. eds., Oxford Univ. Press 1997). This volume includes illustrative cognitivist and noncognitivist metatheories. See also BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 17 (1985) (asking, “[i]f there is such a thing as the truth about the subject matter of ethics—the truth, we might say, about the ethical—why is there any expectation that it should be simple?”).

68. See, e.g., Gregory B. David, *Dworkin, Precedent, Confidence, and Roe v. Wade*, 152 U. PA. L. REV. 1221, 1236 (2004) (explaining that “[s]econd-order legal principles provide reasons for how a judge should balance one first-order principle in relation to others. That is, a second-order principle suggests how a judge should weigh first-order principles”); Kenji Yoshino, Note, *What’s Past is Prologue: Precedent in Literature and Law*, 104 YALE L. J. 471, 503 (1994) (noting the “metalegal discussion of stare decisis” in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

A. *The Mistaken Moral View*

We begin by looking at Greenberg's view of legal interpretation. He lays out three possible understandings. The first is that of the Standard Picture, which asks, "what is the *linguistic content* of the legal texts?"<sup>69</sup> On this approach, which encompasses what the legal authority's pronouncements mean as both a semantic and pragmatic matter, says Greenberg,<sup>70</sup> there is "little or no role for moral reasoning," unless the texts explicitly use moral terms, or perhaps when officials seek to fill in gaps in the existing legal norms.<sup>71</sup>

Motivating Greenberg's rejection of the Standard Picture is the salient need to translate legal institutional actions and pronouncements into legal obligations, powers, privileges, and so on, these constituting law's content. For Greenberg, the Standard Picture does not adequately make this move, because it presupposes that legal pronouncements *directly* and linguistically communicate obligations, rather than indirectly changing them.<sup>72</sup> The problem, Greenberg says, is that "[a] move from a text's *meaning* to the existence of certain legal *obligations* requires argument."<sup>73</sup> Because law's goals are heavily imbued with moral considerations—furthering justice, advancing democratic principles, ensuring fairness and fostering legitimacy<sup>74</sup>—legal argument is best seen as rooted in moral reasoning, which is complex and controversial.<sup>75</sup> The Standard Picture, however, appealing to the linguistic, communicative content of those pronouncements, thereby paints a picture of law's argumentative structure that wrongly elides this complexity and controversy.<sup>76</sup>

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69. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1302.

70. Greenberg, *The Standard Picture*, *supra* note 6, at 48; see Thomas R. Lee, *Judging Ordinary Meaning*, 127 *Yale L. J.* 788, 815 (2018) (discussing the distinction between "semantics, which is concerned with the context-independent meaning of words, phrases, and sentences, and pragmatics, which involves the meaning of utterances in particular contexts") (quoting Richard Fallon, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 *U. CHI. L. REV.* 1235, 1246 (2015)).

71. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1302, n.33.

72. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 217, 219 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter Greenberg, *Legal Interpretation*].

73. *Id.*

74. *Id.* at 256.

75. *Id.* at 226.

76. *Id.*; see also *id.* at 230 (saying that "[a] central theme of the communication theorists is that the philosophy of language can cut through the confused debates of legal theorists and tell us what constitutes the content of the law").

The second understanding of legal interpretation recognized by Greenberg is Dworkin's, by whose account lawyers and judges grapple with the issue of which outcome-determinative principles best fit and justify the prior legal materials.<sup>77</sup> Greenberg objects, however, that, "[a]t least in general, a straightforward appeal to which interpretation yields a morally better standard does not seem permissible in legal interpretation."<sup>78</sup> Asking which principle would, *ex ante*, be the best seems divorced from the workings of legal practice.<sup>79</sup>

Moreover, the project by which law's content is determined by reference to principles that best fit and justify existing practice accepts, as the given data set, actual and often "severely morally flawed" practices that should not be followed.<sup>80</sup> Greenberg explains that Dworkin's evolving positions consistently appeared to "rule out in principle the possibility of legal obligations that the courts and similar institutions—because of, *e.g.*, their institutional limitations, their relations with other branches of government, and the like—should not enforce."<sup>81</sup> He sees an unsatisfactory circularity in Dworkin's view deriving legal content from enforcement obligations, emphasizing that an account of law should help explain why courts ought to enforce some rights and not others.<sup>82</sup>

Rejecting the Standard Picture and the Dworkinian account, Greenberg outlines a third way in which to comprehend legal interpretation. By the Moral Impact Theory, legal interpretation rests on moral reasoning about what is normatively required as a consequence of the actions taken by lawmaking institutions.<sup>83</sup> Further, what is morally required is not a matter of what the legal texts say on their face or mean in pragmatic contextual terms, although such linguistic content may be "one relevant consideration in the calculation of the moral impact of the actions."<sup>84</sup>

However innovative and influential in the law-as-morality project, Greenberg's Moral Impact Theory is problematic. Part II showed that, to the extent the Moral Impact Theory posits a morals-based epistemic

77. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1303; RONALD DWORKIN, *LAW'S EMPIRE* 66–67 (1986) [hereinafter *DWORKIN, LAW'S EMPIRE*].

78. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1293.

79. *Id.* (stating "[t]hus, we ask not which rule is morally better *ex ante*, but which moral obligations, powers, and so on (if any) the legislature actually succeeded in bringing about").

80. *Id.* at 1302.

81. *Id.* at 1300 n.28.

82. *Id.*

83. *Id.* at 1303.

84. *Id.*; *see also* Greenberg, *Legal Interpretation*, *supra* note 72, at 251 (more extremely claiming that "legislatures need not intend to communicate anything by enacting a bill").



vantage point, the Theory is necessarily suspect. This Part, in turn, seeks to establish that Greenberg's depiction of the role and nature of legal interpretation does not comport with actual legal practice. If so, this should pose a significant problem for the Moral Impact Theory, since Greenberg purports to find strong evidentiary support for the Theory in "the way in which lawyers, judges, and law practitioners work out what the law is [in] actual practice . . . ."<sup>85</sup>

Some further background on the moral view of legal argumentative practice should be helpful. Greenberg himself has noted Dworkin's "argument from theoretical disagreement" in opposition to legal positivism.<sup>86</sup> If positivism requires that the criteria of legality are fixed by a convergent social practice on the part of legal officials, and if theoretical disagreement in law nevertheless appears to occur somewhat frequently, then legal officials do not converge on, or engage in, a social practice that fixes the criteria of legality. The explanation is likely to be, according to Dworkin, that legal practice is connected to deliberation over moral assessments, which are typically controversial and subject to widespread disagreement.<sup>87</sup> Dworkin did regard theoretical disagreement in law as endemic, and this view supported his nonpositivist theory of law.<sup>88</sup>

Greenberg's challenge to the Standard Picture is a bit different. Rather than giving an argument for law's content *from* theoretical disagreement, Greenberg's is an argument from law's content *to* moral deliberation and disagreement.<sup>89</sup> He views the interpreter, being the legal official or practitioner, as assessing the moral impacts of the legal data, texts, and activities, and then engaging in a moral exercise weighing competing considerations that arise from conflicting interpretations.<sup>90</sup> Holding his theory out as a reflection of the "actual practice" occurring in the legal

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85. Greenberg, *The Standard Picture*, *supra* note 6, at 72; Greenberg, *Moral Impact Theory*, *supra* note 1, at 1325–37 (using case decisions to illustrate the ways in which legal interpretation by practitioners "involves working out the moral consequence of the relevant facts").

86. Mark Greenberg, *Principles of Legal Interpretation*, at Part IX, 51 (2016) (unpublished manuscript) [hereinafter Greenberg, *Principles*], <http://philosophy.ucla.edu/wp-content/uploads/2016/08/Principles-of-Legal-Interpretation-2016.pdf>.

87. DWORKIN, *LAW'S EMPIRE*, *supra* note 77, at 7–8.

88. *Id.*

89. Greenberg, *Principles*, *supra* note 86, at Part III, p. 22 (suggesting that "debates over legal interpretation can only be resolved, in the end, by addressing the fundamental issue of how the content of the law is determined").

90. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1330. Greenberg's view of legal interpretation, in contrast to Dworkin's, flows from his understanding that, for the Moral Impact Theory, "the law is *downstream* of the legal practices; on Dworkin's theory, by contrast, the law is *upstream* of the legal practices." *Id.* at 1301.

system<sup>91</sup>—or what would otherwise be the correct interpretive practice—Greenberg as a practical matter concurs with Dworkin that law’s argumentative structure is rooted in the sort of moral disagreement Dworkin and others label “theoretical.”<sup>92</sup>

However, the idea that law’s argumentative practice is centered on the resolution of moral conflicts is not only unlikely, but counter to the perhaps typically indifferent and sometimes hostile response with which legal officials greet efforts at moral argument. Although the empirical matter cannot be resolved here, it has appeared to be the case that judges deciding cases are not overly receptive to moral claims, and that they seldom claim moral superiority for the legal doctrines they apply. In contract law, for instance, courts hold that “moral obligations do not give rise to contractual liability.”<sup>93</sup> In tort law, mere moral responsibility does not give rise to legal liability.<sup>94</sup> Moral obligation—arising from official state conduct or otherwise—doesn’t impart a legal duty, nor does a moral lapse signify a breach of duty.<sup>95</sup> Judges are sometimes inclined to show disdain for moral argument, deeming this to indicate the lack of a compelling *legal* position.<sup>96</sup> Courts have said, “A mere moral consideration is nothing.”<sup>97</sup>

While courts may be unaware of a ground underlying their decision-making, it would be quite odd for them to be indifferent or openly hostile when presented with the type of reasoning that ought to ring true. Perhaps Greenberg might respond that judges so reacting have been presented with the wrong sort of moral reasoning, one such as Dworkin’s claiming that a certain outcome would best justify existing materials and hence be morally best. Yet it seems intuitively quite unlikely that a practitioner’s argument that the law is a moral impact, merely influenced by but not embodied in the relevant linguistic precedent, would be well received.

91. Greenberg, *The Standard Picture*, *supra* note 6, at 72.

92. See Steven Schaus, *How to Think About Law as Morality: A Comment on Greenberg and Hershovitz*, 124 YALE L. J. FORUM 224, 225 (2015).

93. *Steele v. Isikoff*, 130 F. Supp.2d 23, 31 (D.D.C. 2000).

94. See, e.g., *Petrosky v. Embry Crossing Condominium Ass’n*, 643 S.E.2d 855, 860 (Ga. App. 2007) (“Wade’s statement as the agent of the alleged tortfeasor can be considered, at best, an acceptance of moral responsibility, because . . . the Association has no liability.”).

95. E.g., *R.J. Reynolds Tobacco Co. v. Grossman*, 96 So.2d 917, 920–21 (Fla. App. 2012) (finding a husband has no legal duty to prevent his wife from smoking).

96. E.g., *Manwill v. Oyler*, 361 P.2d 177, 178 (Utah 1961) (“[I]f a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration.”).

97. *Musick v. Dodson*, 76 Mo. 624, 626 (1882) (quoting *Jennings v. Brown*, 9 M. & W. 501).

This article contends that law's institutional nature better explains its argumentative structure, and in nonmoral terms. There is a sense in which it seems right to say that law's present content, governing the new case, *might* differ from what was stated or prescribed on the face of the statutes or prior decisions, or what was actually intended as a psychological fact. Inherent in legal interpretation as practiced, however, is usually the inquiry into the relevance of the text as linguistically presented, and what the author intended. Because that inquiry concerns the extent to which prior institutional pronouncements are sufficiently "directed at" the present circumstances, and whether they provide a solution to the new matter with sufficient exactness,<sup>98</sup> the exercise does not immerse in *moral* disagreement.

Although we will not now wrestle directly with how this view may inform the ontological question of what makes something the law, we can at the least suggest that such a concept, informed by this article's view of law's argumentative structure, would derive from a legal institutional phenomenon that might be labeled "interventionist" interpretation.<sup>99</sup> This would mean that law's content is in flux, a proposition with which Greenberg would agree. But pace Greenberg, interpreters find the law "to date" in the legal texts and pronouncements, as best they can interpret these materials. If the pre-existing texts do not, as they rarely do, clearly or precisely match the new situation—because no two cases are precisely alike, and owing to the open texture of natural language – then the interpretive attitude intervenes to resolve the new matter. Unlike constructive interpretation in Dworkin's jurisprudence, however, interventionist interpretation is open to extralegal considerations.

The inquiry, however, is not dryly focused non-contextually on the linguistic content of the words used in the pre-existing legal materials. The *Smith* case, Greenberg's counterpoint to the Standard Picture,<sup>100</sup> poses no problem for an interventionist interpretive view, which asks in a generally Hartian manner whether the statutory language was sufficiently directed at, or intended to cover, the new situation, and whether it did so with

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98. See Alani Golanski, *Nonmoral Theoretical Disagreement in Law*, 42 MITCHELL HAMLINE L. REV. 225, 251 (2016).

99. See Hal Foster, *Smash the Screen*, 40 LONDON REV. BOOKS, Apr. 5, 2018, at 40 (reviewing HITO STEYERL, *DUTY FREE ART: ART IN THE AGE OF PLANETARY CIVIL WAR* (2017)). As Karl Popper put it, "all observation involves interpretation in light of theories." KARL R. POPPER, *OBJECTIVE KNOWLEDGE AN EVOLUTIONARY APPROACH* 295 (8th ed. 1994) (1972). Interpretation is itself theoretical, then, and one way of putting this might be to say that the interpreter intervenes from her own theoretical vantage point.

100. See *supra* notes 49–56, and accompanying text.

sufficient specificity.<sup>101</sup> The court was able to adjudicate by considering the pragmatic elements of the existing linguistic data.<sup>102</sup> For Greenberg, “[a] pragmatic content is one that a speaker conveys without encoding it, for example by taking advantage of background knowledge that is shared by the speaker and the audience.”<sup>103</sup>

Because pragmatic linguistic content assesses the contexts of utterances, including the speaker’s inferred (not encoded) intent, there should be a great deal of overlap between assessing pragmatic content and the precedential intentionality exercise discussed in this Part. The controversy in *Smith* seemed pretty clearly to center on this sort of linguistic dispute.<sup>104</sup> Although Greenberg demands more, and faults the justices for not explaining their competing interpretive exercises on the basis of underlying moral values,<sup>105</sup> the court’s practice appears to have conformed to institutional decision-making and judicial finality norms.

In this regard, as an alternative to Greenberg’s model, we next summarize a view that begins with the legal system’s institutional status, and its *direct* handling of legal data. We will later, in Part V, transition to an understanding of how the actions of legal institutions do engender significant moral impacts that inform decision-making exercises, within both the legal system and the larger community. Although legal institutional actions morally impact legal officials by informing their moral obligations, this dynamic alone does not lend credence to the theoretical construct by which law’s content *is* that moral impact, and Greenberg does not claim otherwise.

### B. *The Apt Nonmoral View*

Greenberg voices no qualms about the notion that a legal system is a socially created institutional construct. Nevertheless, he has not trained his sights on the constraints that follow from this premise, or from the further premise that, as an institution, law must abide an institutional logic.<sup>106</sup> Yet

101. *Compare* 508 U.S. at 228 (asserting that, “[o]f course, § 924(c)(1) is not limited to those cases in which a gun is used”) and *id.* at 235 (remarking that “[t]he evident care with which Congress chose the language of § 924(d)(1) reinforces our conclusion in this regard”), *with id.* at 245 (Scalia, J., dissenting) (“I have no doubt that the ‘use’ referred to is *only* use as a sporting weapon”); *see also* JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 151–52 (2010) [hereinafter SEARLE, MAKING THE SOCIAL WORLD].

102. *See supra* note 70 and accompanying text.

103. Greenberg, *The Standard Picture*, *supra* note 6, at 48 n.9.

104. 508 U.S. at 234–35.

105. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1329–30.

106. An alternative view has been that there is no logical structure to the social world, and hence that the logic of any particular human field, such as law, is autonomous and irreducible, not derivative

these straight-forward postulates arguably pull in a direction different from the one Greenberg has charted.

Institutions begin, as a logical matter, with the assignment to persons or objects of functions that will have to be recognized by the collective.<sup>107</sup> The assignment need not be verbal or effectuated by an overt exercise of power, but rather can begin with social practices that evolve in a certain way, such that “X counts as Y in context C.”<sup>108</sup> Vanguard work in the field of social ontology, including institutional philosophy, illustrates the foundational assignment of a status function, by imagining early humans who build a wall around their territory. Over time, the wall erodes leaving only a line of stones on the ground. Now, however, rather than a wall functioning to keep neighbors out by virtue of its physical characteristics, the larger community collectively recognizes and accepts the boundary symbolized by the line of stones. A normative reality, unique to human culture, has emerged separate and apart from the physicality of the entities involved.<sup>109</sup>

Understanding social behavior splits from the study of other natural phenomena by virtue of human symbolic and, when more sophisticated, linguistic allocations of duties and powers. As one thinker has opined, “the pioneers in this effort have been not the cosmologists who belatedly shifted their gaze from the heavens to the human community but rather . . . the law-makers who were confronted by the predicaments of human society.”<sup>110</sup> Over time, humans creating or sustaining institutional reality,

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of the logic of the broader institutional class of entities. See Gunter Gebauer, *Habitus, Intentionality, and Social Rules: A Controversy Between Searle and Bourdieu*, 29 *SUBSTANCE* 93, 76 (2000). I believe the concept of a “social ontology” is sensible, however, and hence that recent insights into institutional logic provide valuable resources for the theory of legal institutions. See Steven Lukes, *Searle Versus Durkheim*, in *INTENTIONAL ACTS AND INSTITUTIONAL FACTS: ESSAYS ON JOHN SEARLE’S SOCIAL ONTOLOGY* 191, 193 (Savas L. Tsohatzidis ed., 2010) (noting the critique of theorists such as Pierre Bourdieu, that they “failed to see how institutional facts ‘require linguistic or symbolic modes of representation or they cannot exist’”) (quoting John R. Searle, *Searle Versus Durkheim and the Waves of Thought: Reply to Gross*, 6 *ANTHROPOLOGICAL THEORY* 1, 65 (2006)); see generally RAIMO TUOMELA, *SOCIAL ONTOLOGY: COLLECTIVE INTENTIONALITY AND GROUP AGENTS* 226 (2013) (stating that “[a]n institution is a group phenomenon involving two key elements, constitutive norms and a social practice, where the norms confer an institutional (symbolic, social, and normative) status to the activity or to some item involved in the practice”); MARGARET GILBERT, *ON SOCIAL FACTS* 430–31 (1989) (advocating for an “ontological holism” according to which “social groups are plural subjects”).

107. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 69 (1995) [hereinafter, SEARLE, *CONSTRUCTION OF SOCIAL REALITY*].

108. See Andrei Marmor, *What’s Left of General Jurisprudence? On Law’s Ontology and Content* 10, (Cornell Law School Research Paper 18-26, 2018), <http://ssrn.com/abstract=3165550>.

109. SEARLE, *CONSTRUCTION OF SOCIAL REALITY*, *supra* note 107, at 39–40.

110. DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 2 (1990).

and increasingly sophisticated legal systems, rely upon their speech acts in a more self-conscious exercise of power, namely, by virtue of their assignments of “status functions.”<sup>111</sup>

Group members develop an evaluative attitude and justified expectations that others will adhere to the status functions that structure their social system. This is the way in which paper, for example, can function as a financial device. Individuals participating in the institution need not take the internal point of view, they need not collectively accept, approve of, or endorse the status-function assignments, so long as they collectively recognize the functional arrangements.<sup>112</sup> Tyrants and ruling social classes can hijack institutions, but even transactions permeated with fear and loathing are sustained when there is, at the least, some minimum level of cooperative intention by which participants collectively recognize the continued existence of assigned rights and obligations.<sup>113</sup>

A fully functional institutional system is thereby comprised of a web of role assignments, most of which are status functions iterated on top of other status functions. A human being at the brute physical level, for instance, is assigned the status of resident or citizen when certain conditions are fulfilled. She may become a student, and then a lawyer, when other conditions are fulfilled, and the lawyer might then become a judge. At each stage, the individual is assigned a status as the carrier of certain deontic powers—both positive, such as rights and authority, and negative, such as duties and obligations.<sup>114</sup>

When we exercise power through our speech acts as a means of creating or sustaining institutions, those speech acts must have an intentional, or propositional, content.<sup>115</sup> This simply means that the exercise of power must be about, or “directed at,” something.<sup>116</sup> Although individuals may exercise power over others without necessarily

111. SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 107, at 123–24. In this way, institutional facts are made true or false by virtue of collective intentionality and are thus observer relative. Their functional properties are thereby ontologically subjective, even as they are, at the same time, epistemologically objective.

112. *See generally* W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473, 1485 (2006).

113. *See* RAIMO TUOMELA, *THE PHILOSOPHY OF SOCIALITY: THE SHARED POINT OF VIEW* 173 (2007) (describing a collective commitment whereby group members, functioning in a “we-mode,” are “disposed to cooperate if the others do and to correct, sanction, and punish those who do not cooperate”).

114. *See* SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 107, at 125.

115. *See generally* Glenn R. Butters, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 *CATH. U. L. REV.* 51, 73–74 (1997).

116. Frederick I. Dretske, *The Intentionality of Cognitive States*, 5 *MIDWEST STUD. PHIL.* 281 (1980), *reprinted in* *THE NATURE OF MIND* 354, 354 (David M. Rosenthal ed., 1991).

considering the consequences, participants in the institution will at the least interpret that exercise of power by virtue of an “intentionality constraint,” gauging what they deem the exercise to be about.<sup>117</sup>

Moreover, for institutional participants to recognize what may be expected of them, the intentional content of the power relations will have to be sufficiently specified, an interpretive parameter labeled the “exactness” constraint.<sup>118</sup> Participants in the institution must be capable of knowing, although they need not actually know, what is expected of them, and more generally what status functions have been assigned.<sup>119</sup> A similar dynamic characterizes participation in legal institutional systems.

Greenberg’s view of the content of law, expressed in his earlier work, rejects the notion of legal rules, because these reside in the content of authoritative pronouncements, which Greenberg rejects as constitutive of law.<sup>120</sup> For the new philosophical work in social ontology, however, which has been an outgrowth of longer-standing philosophies of mind, language and consciousness, rules remain central in understanding the logic of institutions. Hence, an institution must be constituted by rules that permit the individuals, entities or objects involved to “count as” having a certain significance and status within the institution. A rule creating the landlords’ right to evict tenants invests them with a status by which they wield certain powers of eviction, and makes this the case by representing it as being the case.<sup>121</sup>

Although rules and principles are interpreted and applied in cases, future actors inevitably disagree about whether certain contingencies have been addressed, whether, that is, the prior resolutions are “directed at” the present case. Alternatively, the future actors may view the prior case as settling certain aspects of the new affair, but not others. The entity charged

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117. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 101, at 151; Michael J. Thompson, *Collective Intentionality, Social Domination, and Reification*, 3 J. SOC. ONTOLOGY 207, 223 (2017).

118. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 101, at 152.

119. *Id.* at 152. Of course, participants in an institution need not “discuss” power even when exercising or being affected by it. However, status functions must be assigned with sufficient exactness to render such a discussion possible in a “satisfactory” way. See SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW 127 (1929) (“[T]he law must be applied by men engaged in practical affairs and by so many of them that to be useful legal doctrine must be capable of being understood and stated by men who are neither profound scholars nor interested in abstract thought”).

120. See Mark Greenberg, *The Prism of Rules* 42, 48 (2007) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1042121](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1042121) (acknowledging that if the Moral Impact Theory, then called the “Dependence View,” is true, “then there are no legal rules”).

121. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 101, at 97 (explaining that the “constitutive rule” takes the form of a “standing declaration,” such that the declaration by its very nature and function constructs the reality, as, for example, an official declaration that “the oldest surviving son counts as the new king” makes it the case that the oldest surviving son is the new king).

with interpretation, typically the court, will usually discern a minimal content that has previously been determined with sufficient specificity, and the litigants' dissent will not gain traction. Beyond that, the parties to a legal event may disagree, and when their interests differ such that they aspire toward conflicting outcomes, they *will* typically disagree.

Litigants dispute how linguistic factors and social circumstances inform the determination about what was intended by the earlier outcomes, and toward which situations this preexisting legal data are directed. On a parallel plain, the arguments attempt to train the court's attention on competing factors for determining whether the earlier outcomes address the present circumstance with sufficient specificity. These are the dynamics that primarily account for law's argumentative structure, characterized by nonmoral disagreements that are typical and widespread in adjudication. Nor do these inquiries require an excavation of the *actual* intent driving prior judicial or legislative actions. Apart from the impracticability of reckoning prior collective intent, legal interpretation, on a compelling view, aims to understand what intentions may *now be deemed* to have been intended then, based on knowledge of the contextual setting of the pronouncement, the historical evidence, and the relevant communicative norms.<sup>122</sup>

As described,<sup>123</sup> Professor Hart sensed this point. For him, "the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society" centered on the inquiry whether "a person's case *falls under* the rule."<sup>124</sup> The notion of "falling under" the prior pronouncements is close to what we are getting at. We can reasonably surmise that reasoning from "precedent" and analogy reflects the nature of human thought as well as legal practice, serving our interests in both efficiency and coherence. Hart did not, however, have at his disposal an analytic description of the logic of legal institutions that allowed him to appreciate the intentionality and

122. See ANDREI MARMOR, *THE LANGUAGE OF LAW* 19 (2014) (adopting the view that the assertive content of an utterance "must be defined objectively as the kind of content that a reasonable hearer, with full knowledge of the contextual background of the speech, would understand the speaker to have intended to convey, given what the speaker expressed, the relevant contextual knowledge, and the relevant conversational norms that apply"); see also Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 829 (2012). One way to more accessibly illustrate the point is to consider the classical hypothetical statute prohibiting "vehicles" from entering the park, the present adjudication involving a newly invented gadget, perhaps a sort of hybrid electric bicycle. As a more general example, courts often consider competing interpretations of what the legislators should now be deemed to have intended based on the likely "fundamental" or "salutary" purposes of the existing provision. *Thomsen v. Mercer-Charles*, 901 A.2d 303, 309 (N.J. 2006).

123. See *supra* note 56, and accompanying text.

124. HART, *THE CONCEPT OF LAW*, *supra* note 9, at 88 (emphasis added).



exactness constraints that regularly and naturally generate nonmoral dispute from within law's apparatus.

The nonmoral view of law's argumentative structure better explains the nature of legal practice than does Greenberg's or Dworkin's morality-based theories. Consider, for instance, the most celebrated of Dworkin's practical examples,<sup>125</sup> the judicial disagreement occurring in the case of *Riggs v. Palmer*.<sup>126</sup>

Even in *Riggs*, in which Elmer had murdered his grandfather in order to gain his inheritance, the outcome-determinative disagreement did *not* center on the moral issue. The entire appellate panel agreed that morality would frustrate Elmer's scheme. The judges disputed whether the case should be decided in accord with the morally required outcome. They struggled to delimit their theoretical disagreement to the standard by which to weigh the presumed collective intention of the legislators against the precision of their statutory language regulating the making of testamentary documents.<sup>127</sup>

Even for the limited range of cases arising from the unsettled construction of constitutional or statutory clauses, in which different interpretive methodologies are available, the issues over which the litigants argue and which command the court's attention will in the first instance home in on the extent to which prior legal assertions and stipulations are directed at the present set of circumstances.<sup>128</sup> Owing to its institutional logic, the legal system's argumentative structure plausibly locates the controversy in nonmoral standards advanced by each side for determining whether the existing legal materials fit and hence control or guide the new matter, rather than in a network of conflicting moral obligations those pronouncements may have engendered.<sup>129</sup>

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125. DWORKIN, *LAW'S EMPIRE*, *supra* note 77, at 15–20.

126. 22 N.E. 188 (N.Y. 1889).

127. *Compare* 22 N.E. at 190 (majority panel asking “[w]hat could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate?”) *with* 22 N.E. at 191 (dissenting judges stressing that “the legislature has by its enactments prescribed exactly when and how wills may be made, altered, and revoked”).

128. *See, e.g.*, *Phillips v. City of Oakland*, No. C 07-3885 CW, 2008 WL 1901005, at \*2 (N.D. Cal., Apr. 28, 2008) (“Plaintiff . . . urges the Court to apply an interpretation of the Commerce Clause based on the original intent of the framers of the Constitution. Even if the Court were inclined to adopt such an interpretation, however, it is not free to disregard established precedent”); *Lowery v. Haithcock*, 79 S.E.2d 204, 208–09 (N.C. 1953) (“Our former decisions have liberalized the lien statute upon which plaintiff relies—perhaps beyond the original intent. Even so, we must apply the statute as heretofore construed by this Court”).

129. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1330. When either the prior data are deemed not to fit the new situation, such that the case is “unregulated” in Hart’s terms, HART, *THE*

### C. *A View From Practice*

The nonmoral view of law's argumentative practice, just summarized, is rooted in law's institutional nature and the constraints required by the logic of institutional structures. As in any field of study, complexities upon complexities will continue to engender refinements.<sup>130</sup> Institutional logic, however, sets as a baseline the social practice by which the group constructs a functional assignment such that *X* counts as *Y* in context *C*.<sup>131</sup> The institutional fact that is created in this way rests on the collective recognition of the existence of the assignment. The *X counts as Y in context C* formula substantially comports with Hart's understanding of the social practice of courts, officials, and private persons in their "use of unstated rules of recognition . . . in identifying particular rules of the system [that is] characteristic of the internal point of view."<sup>132</sup>

Nor, broken down to its elementary level, is the *X counts as Y in context C* figure formulated solely for some particularized subset of institutions in which deontic commitments are determined by shared understandings; rather, the logic underlies all institutional reality. This does not mean that there is, in fact, a shared understanding about law's content, or the validity of legal propositions. Quite the opposite accounts for the widespread theoretical disagreement characterizing law's argumentative structure.

Nevertheless, the argumentative structure by which the institution resolves the content and validity of its rules focuses on the social fact of the recognition or acknowledgment, and resides in disagreement about that social fact.<sup>133</sup> In other words, the new controversy arises over the manner and extent to which the prior institutional representations may apply now. Disputes about the standards for determining collective intentionality and the exactness of directives are disputes over what would render the newly competing legal claims true or false.<sup>134</sup> The centrality of institutionalized

CONCEPT OF LAW, *supra* note 9, at 272, or when the relevant community's morality has significantly shifted, judges in their discretion may take extralegal considerations, including the revised moral sensibilities, into account.

130. See generally INSTITUTIONS, EMOTIONS, AND GROUP AGENTS (Anita K. Ziv & Hans B. Schmid, eds., 2014) (twenty-two essays regarding various aspects of, and arguments about, social ontology).

131. See *supra* note 107–09, and accompanying text.

132. HART, THE CONCEPT OF LAW, *supra* note 9, at 102.

133. See Savas L. Tsohatzidis, *Searle's Derivation of Promissory Obligation*, in INTENTIONAL ACTS AND INSTITUTIONAL FACTS: ESSAYS ON JOHN SEARLE'S SOCIAL ONTOLOGY 203, 204–05 (Savas L. Tsohatzidis, ed., 2010) (but ultimately attempting to set forth counterexamples to Searle's thesis concerning institutional obligations).

134. DWORKIN, LAW'S EMPIRE, *supra* note 77, at 4.

argumentative structures is a principal characteristic that differentiates legal systems from other sorts of institutions.<sup>135</sup>

Placing moral disagreement at the center, however, would essentially involve a category dilemma, giving primacy to argument over issues other than the standing of the competing claims within the institution's practice.<sup>136</sup> With regard to a case such as *Riggs*, for instance, we might be led down a conceptual *mise-en-abîme* were we to settle on an outcome derived from a reasoned inference of the legal community's collective intention, yet still deem the case unresolved and then become embroiled in a larger moral controversy over whether that determination ought itself to be determinative. The institution's practice is to settle on an intentionality standard for finally determining Elmer's entitlement, and the *Riggs* court determined that the applicable standard intertwined the statutory language with the principle that a beneficiary not profit from his own wrongdoing. The court's engaging in a further exercise aimed at justifying its decision procedure would sabotage law's interest in finally resolving disputes, and be alien to law's practice.

Indeed, if the legal system is an institutional entity, and if *X counts as Y in context C* creates institutional facts, then proceeding to a moral controversy once we are able sufficiently to settle on the status of the parties in the litigated context would threaten an infinite regress requiring that each justification of the institutional belief about those statuses be justified in turn.<sup>137</sup> Rather, legal dispute ends with a resolution of the theoretical disagreement over the standard for reckoning the social practice by which the legal community collectively recognizes the

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135. Along these lines, James Boyd White has suggested that law may be distinguished from other institutions by virtue of "its central moment, the legal hearing," at which one version of its language is tested against another. James Boyd White, *Thinking About Our Language*, 96 YALE L. J. 1960, 1963 (1987). Greenberg notes Joseph Raz's view that legal systems distinguish themselves "by their claiming authority to regulate any type of behavior and by their claiming to be supreme." Greenberg, *supra* note 1, at 1324–25 (citing JOSEPH RAZ, PRACTICAL REASON AND NORMS 150–54 (1975)). He further references Shapiro's understanding that legal systems are unique because they are self-certifying, and hence need not establish the validity of their rules in a higher forum. Greenberg, *supra* note 1, at 1325 (citing SCOTT SHAPIRO, LEGALITY 222 (2011)).

136. See BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 534 (2017) (saying, with regard to the application of Searle's scheme to the concept of law, "[t]his perspective on social institutions facilitates a more nuanced view of what differentiates law from other social institutions, and helps expose multiple forms of law").

137. Cf. Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1107 (1982) (explaining that "[w]hy' questions have as much potential for infinite regress when pursued about factual beliefs as about moral beliefs. For example, while one may justify the belief that the tides will come in today as they did yesterday by referring to the moon's gravitational force, one must justify the belief that the moon has gravitational force. And if one has an explanation of gravitational force in terms of a yet more general set of laws, one must then justify the belief that those laws are true").

institutional status-function assignment.

This is not to say that any status-function assignment within legal or other institutions might not have been motivated by extralegal moral considerations, and if so the moral factor would have been incorporated into law's institutional norms. But resolving the institutional conflict now rests on social practice. Illustrating such a social practice, first in a simple, fairly nonmoral setting, consider a paper that counts as a dollar bill; once the bill is ripped, we ask what the social practice is, and whether the fragment, as a matter of custom or more formal prescription, counts as a dollar in that context.<sup>138</sup> A bit more complex, pulling in the direction of moral assessment, when we ask whether the able-bodied adult has been assigned the status of a rescuer in the context of a stranger in peril, we typically query whether legal officials have collectively recognized that individual's *legal* obligation to rescue under the circumstances. The point is that this, too, is a *nonmoral* inquiry into social practice.<sup>139</sup> These examples should help show that, although the term "status-function assignment" is superficially foreign to legal practice, its application is an apt description of the practice.

The question, then, is whether this nonmoral view better comports with the reality of legal practice than does Greenberg's Moral Impact Theory. For Greenberg, it is important that his theory derive from "the way in which lawyers, judges, and law practitioners work out what the law is," because "the actual practice of skilled practitioners is good evidence of the relation between legal texts and the content of the law."<sup>140</sup> Nor need we be concerned with the way practitioners "theorize" their own practice, dismissed by Greenberg as being "notoriously bad."<sup>141</sup>

138. See generally *Quinley v. Lehigh Valley Traction Co.*, 15 Pa. D. 977, 977 (1905) (wherein "[t]he conductor again stated that he would not take the torn note, and added, 'If you have no other money you must get off'"). As an aside, it has been generally accepted that custom counts as law in various circumstances. According to Jeremy Bentham, writing in the eighteenth century, for example, such custom gives rise to legitimate expectations, but it is the legal official's imprimatur that solidifies custom as societally binding. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 183, 238 (James H. Burns & Herbert L. A. Hart eds., 1977) (1928). Yet to the extent that custom does count as law, such law does not appear to be a "moral impact," but rather to take the form of social practice that may be perpetuated and enforced linguistically. It is unclear how Greenberg would account for this phenomenon, however.

139. See, e.g., *In re Agent Orange Product Liability Litig.*, 597 F. Supp. 740, 831 (E.D.N.Y. 1984) (noting "[t]he common law's extreme reluctance to impose on an 'innocent' bystander a duty to rescue someone in peril even if the rescue would involve little or no risk to the rescuer is not only well known but it is notorious").

140. Greenberg, *The Standard Picture*, *supra* note 6, at 72.

141. *Id.* Greenberg is likely rightly concerned here that few, if any, practitioners would characterize their legal dispute as a disagreement over the moral impacts of prior rulings.

It should be useful to venture a bit further into the case law. If moral analysis inheres in law's argumentative structure – either by virtue of the search for moral impacts per Greenberg, or morally justifying principles per Dworkin – we would expect this dynamic to show up most readily in the Supreme Court's constitutional jurisprudence.<sup>142</sup> Because precedents were few and hence the linguistic landscape minimal, and because “natural principles of justice” were then believed to be the source of the common law,<sup>143</sup> the earliest constitutional opinions should provide fertile ground for moral impact's reasoning.

In *Martin v. Hunter's Lessee*,<sup>144</sup> for example, the Supreme Court addressed the rebellious conclusion of Virginia's Supreme Court of Appeals “that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States.”<sup>145</sup> The controversy went to the heart of the new American constitutional morality. At stake was the conflict between Virginia's law authorizing the commonwealth to confiscate (pro-British) Loyalists' property and the later-executed 1794 Treaty of Peace with Britain,<sup>146</sup> precluding such confiscations.<sup>147</sup> Thomas Lord Fairfax, who owned five million acres known as the “Northern Neck of Virginia,”<sup>148</sup> passed the property along to his relative Martin, but Virginia to Hunter, more or less.<sup>149</sup>

One would expect the Supreme Court's resolution of a conflict between state and federal government arising under the new Constitution to brim with moral rationale. And *Martin* does not disappoint. Yet Justice Joseph Story's analysis in *Martin* is linguistically rigorous, and seems to follow a logical structure in which moral justifications are sandwiched between arguments rooted in what we might now characterize as the intentionality and exactness institutional constraints.

Justice Story examined the interplay of the Constitution, the Jay Treaty, relevant statutes or other federal pronouncements, and local

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142. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7 (1996) (favoring a “moral reading” of constitutional provisions that are written in moral language such that moral principles are incorporated into constitutional law).

143. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 7 (1977).

144. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

145. *Id.* at 323.

146. Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, by Their President, with the Advice and Consent of Their Senate Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116.

147. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812).

148. *Martin*, 14 U.S. at 307.

149. *Id.* at 306.

statutory and contractual actions. And, indeed, the *Martin* opinion continues that a critical constitutional impact was “to invest the general government with all the powers which they might deem proper and necessary,” including the power to prohibit the states from exercising powers in conflict with federal authority.<sup>150</sup> Yet Justice Story now immediately turns to a *denial* that “[t]hese deductions” rest on “general” moral reasoning.<sup>151</sup> Rather, he emphasizes the text of the Tenth Amendment, “the import of its terms,” and the principle of construction that “[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.”<sup>152</sup> The analysis purports to be anchored in linguistic content, however “general” the language may be.

Determining that, unless the Supreme Court could exercise appellate jurisdiction over state court cases, “the appellate jurisdiction of the supreme Court would have nothing to act upon,”<sup>153</sup> Justice Story argues from the linguistic impacts of moral forces, rather than the moral impacts of linguistic pronouncements. The framers intended the Constitution “to endure through a long lapse of ages,” and this served in the analysis to explain the use of general language, “leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects . . . .”<sup>154</sup> The *Martin* Court then lays a linguistic foundation for its resolution of the controversy, engaging in a lengthy disquisition about the language in Article III, “which must principally attract our attention.”<sup>155</sup>

There can, of course, be no direct or definitive proof in favor of a moral versus nonmoral view of law’s content. Any legal institutional writing, whether statutory or judicial, can be construed to say what the law is, as of that moment and in the context of the factual and legal circumstances being addressed, or to engender moral impacts in the legal system which rather constitute law’s content. The textual language directing the court clerk to engage in the ministerial act of “entering” a judgment on the docket, to embody the final institutional resolution of the matter, can be construed holistically as creating a moral obligation that maintains the system’s overall coordination and organization of citizens’ rights and duties.

Yet Greenberg rightly acquiesces in approaching the theory of law’s content as tightly connected to an understanding of law’s argumentative

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150. *Id.* at 324–25.

151. *Id.* at 325.

152. *Id.* at 325–26 (discussing U.S. CONST., amend. X).

153. *Id.* at 340.

154. *Id.* at 326–27.

155. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 327 (1816).

structure. If the latter is, arguably, primarily nonmoral, then this should qualify the theoretical soundness of a substantive view from morality. Greenberg does not overthrow the intuition that, in most cases, what is being argued over reveals what the argument is actually about. Conceptualizing law as morally desirable, or as typically aimed at fostering a morally improved social order, is consistent with a view of law's content and validity as separate from morality.<sup>156</sup>

In *Martin*, Justice Story implicitly asks whether the Constitution's language is directed at the controversy arising from the Virginia court's defiance. His interpretation of the text is necessarily interventionist, because the language does not precisely address the controversy. Justice Story might have tried to resolve the case by asking what outcome the relevant moral values, on balance, support.<sup>157</sup> He certainly justified his analysis by summoning, in favor of Supreme Court review, avoidance of the "public mischiefs" that would attend the lack of "*uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."<sup>158</sup>

Yet there is a difference between the moral impetus for legal institutional action and the moral impacts of that action. Also distinguishable are moral justifications in favor of a certain interpretation of the legal text and moral impacts resulting from that textual language. Justice Story went to great lengths, at the outset of the *Martin* opinion, to hold out "[t]he great respectability" of the Virginia court, its laudable "learning and ability."<sup>159</sup> However much rhetorical balm, the Court's message—and the pragmatic message consistently coursing through appellate review generally—is that the prior court may have erred legally, but not morally. It would be a leap not yet justified to relegate this implicit underlying assumption to systemic conceptual confusion.

More interestingly, appellate courts have a vested institutional interest in not being, and in not being perceived as, the *moral* overseers of the lower courts. The judges at both levels are cut from the same fabric, having had commensurable training, and having taken the same constitutional oaths, and are ostensibly devoted to quite similar societal and constitutional values, such as due process, equal opportunity, fair play, the rule of law, and so on. Overtly moral, rather than legal, conceptual and interpretive review of lower court decisions and legislative actions could

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156. SHAPIRO, *supra* note 135, at 404–05, n.8.

157. Greenberg, *supra* note 1, at 1331.

158. 14 U.S. at 347–48.

159. *Id.* at 324.

well destabilize the efficient jurisdictional interplay between the judicial levels and branches of government.<sup>160</sup>

### III. THEORETICAL PROBLEMS WITH THE MORAL IMPACT THEORY

#### A. *The Two-Level Problem*

From time to time an empiricist's conundrum is widely disseminated online, leaving people scratching their heads and wondering how precisely the same stimuli can generate incompatible impressions.<sup>161</sup> Something similar occurs here, to the extent that Greenberg discerns in actual legal practice an argumentative structure by which conflicts between moral considerations are resolved, while others discern disputes over social facts or nonmoral standards of fit. This disconnect is, in turn, relevant to the philosophical debate over the ontology of law.

Disagreeing with the Moral Impact Theory's premise, we must try to explain where Greenberg goes wrong. The moral philosopher Richard Hare has offered an astute critique of moral thinking gone awry that should be helpful. Hare's thesis was that a great deal of confusion had vexed both theoretical ethics and practical moral thinking as a result of neglect of the distinction between the two levels at which moral thought occurs.<sup>162</sup>

The two-level system begins with the general, *prima facie* principles that we intuitively summon when confronted by some morally challenging circumstance. Relatively simple moral principles are necessary but not sufficient for solving many moral problems that arise in new or more complex situations.<sup>163</sup> For one thing, the new situation will often require some sort of conciliation, a weighing and balancing of conflicting *prima facie* principles. Commitment to keeping one's promises, for example, sometimes gives way to later-arising and morally weighty demands to attend to someone else in need.

The non-intuitive kind of moral thinking, at which conflicts and difficult scenarios are resolved upon deliberation, happens at the level of critical thinking. Being moral, both levels of thought give rise, in Hare's

160. See generally *Sanders v. United States*, 594 F.2d 804, 823 (Ct. Cl. 1979) ("Judicial reluctance if not refusal to adjudicate or even advise Congress on merely moral claims is old in our jurisprudence.")

161. Maya Salam & Daniel Victor, *Yanny or Laurel? How a Sound Clip Divided America*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/science/yanny-laurel.html>.

162. HARE, *supra* note 16, at 25. In this discussion, we bracket the third, metaethical level.

163. *Id.* at 39.



system, to universal prescriptions. However, thinking at the critical level can involve a high level of specificity, and so principles generated in critical thinking can be of “unlimited specificity.”<sup>164</sup> Critical moral thinking not only adjudicates between competing general principles by, for example, picking out which differences between those principles and the new ones are relevant to the moral choice, but also selects our *prima facie* principles in the first instance.<sup>165</sup>

Intuitive thinking is meant to approximate what we would choose, as morally best, were we capable of perfect critical thinking at each moment.<sup>166</sup> Being ordinary human beings, however, we aren’t perfect, and necessarily pull from our inventory of general intuitive principles first, and then, if the situation permits and requires this, reason our way to an all-things-considered solution at the second level of critical moral thinking.<sup>167</sup>

The two-level analysis might itself seem fairly intuitive. But in this regard Hare is addressing an intricate dilemma and, by his clear headedness, making it look easy. For Hare, neglect of the distinction between the two levels of moral thought had caused substantial confusion.<sup>168</sup> Relevant here, a failure to disambiguate between the intuitive and critical levels of thinking appears to undergird the Moral Impact Theory as well. It is at the critical level that legal and moral thinking diverge.

No one would seriously doubt that the actions of legal institutions have moral impacts. With regard to the nature of those impacts, Greenberg confines his analysis to legal officials, because (1) ordinary citizens “do not have a general moral obligation to do what the legislature or other legal institutions command,” and, in contrast, (2) “the legal system *can* typically generate moral obligations of government officials . . .”<sup>169</sup> Certainly, by accepting an official position, taking the oath, and exercising authority over the lives of others, a citizen’s moral status and obligations are affected. The official thereby assumes various moral obligations to fellow officials and to the public. The legal community has a right to expect the official to further the legal system’s institutional interests, and

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164. *Id.* at 41.

165. *Id.* at 39, 49–50.

166. *Id.* at 46 (stating the Aristotelian view that, “[i]f we were archangels, we could by critical thinking alone decide what we ought to do on each occasion . . .”) (emphasis in original).

167. *Id.* at 27.

168. *Id.* at 25; see also Richard M. Hare, *Moral Conflicts*, in I THE TANNER LECTURE ON HUMAN VALUES 169, 184 (Sterling M. McMurrin, ed., 1980) (emphasizing that “[m]any confusions arise through our failing to distinguish between these different levels of appraisal”).

169. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1318 (emphasis in original).

the public a genuine expectation that she will proceed in good faith on behalf of the community.

Greenberg links law's moral content to legal institutional practices by locating that content "downstream of the legal practices."<sup>170</sup> However, the one-system of law and morality found downstream agglomerates moral impacts. Why, in other words, wouldn't an individual assuming an official position in the Cookie Factory or in nearly any discrete institution, find herself in a similar moral circumstance? Greenberg says little that would prevent us from applying his analysis, with equal force, in defense of a position holding that the content of the cookie-producing credo is that part of the moral profile created by the actions of cookie factories in the proper way.<sup>171</sup> Although he ascribes to legal systems a variety of important societal functions,<sup>172</sup> the distinctiveness he affords legal institutions really amounts to a matter of degree, as he appears to acknowledge.<sup>173</sup> When the Cookie Factory takes on a new supplier, or a new supermarket chain as customer, or even when it moves Mary's spot away from John's at her request, these decisions and actions impact or alter the broader range of the factory officials' moral obligations, powers, privileges, and so on, impacting their moral profile.

The "*genuine, all-things-considered, practical* obligations" that may thereby be created by the Cookie Factory's workings, however, do not in an abstract or general sense constitute the conceptual content of cookie production.<sup>174</sup> And yet it might well be reasonable to say that the Cookie Factory, "by its nature, is supposed to change the moral system for the better."<sup>175</sup> Cookies, like most institutional products or outcomes, are "supposed" to make people's lives better. This can no doubt be analyzed under various theories of morality. Cookie production should increase the general welfare by, *inter alia*, providing profits for the owners, jobs and wages for the employees, tasty treats for the public at a price trade-off that increases the consumer's general utility, and so forth.

To more distinctively tie the Moral Impact Theory to law, Greenberg now moves away from the notion that the Theory concerns pointedly a legal system's moral impacts upon legal officials. He says, instead, that we treat law "not merely as one relevant consideration among many, but as a

170. *Id.* at 1301.

171. *Id.* at 1323.

172. *Id.* at 1339.

173. *Id.* at 1325 (conceding that "it is plausible that the features that distinguish a legal system (or institution) from other systems are a matter of degree").

174. *Id.* at 1306.

175. *Id.* at 1322.

central concern,” because “the legal institutions change what we are obligated to do.”<sup>176</sup> We, however, are ordinary citizens and subjects, the sorts of individuals that Greenberg has elsewhere correctly deemed *not* to have “a general moral obligation to do what the legislature or other legal institutions command.”<sup>177</sup>

Law is ultimately not sharply-enough distinguished from other institutions under the Moral Impact Theory. Under the Theory, legal institutions change the facts and circumstances relevant to our moral obligations by, for example, altering people’s expectations, providing new options, or bestowing blessings on particular schemes.<sup>178</sup> The Cookie Factory’s new profit-sharing plan might do likewise. The fact that, in the legal context, the blessings are bestowed by “the people’s representatives”<sup>179</sup> rather than a board of directors does not by itself do the work of creating a discrete species of morally significant expectations, except by degree.

Greenberg further points out that, at a practical level, actions by legal institutions can improve the moral situation by engendering an obligation shared by all community members.<sup>180</sup> Whereas one volunteer may not make much of a difference, the community as a whole can make real progress. Wouldn’t this rationale, however, analogize to the Cookie Factory’s use of less sugar to promote health, or biodegradable packaging rather than petroleum-based plastic? These actions, too, would serve to relieve the individual of the task of altering her personal lifestyle to that extent, would impact all sales and purchases of the particular product, and more broadly could educate and thereby influence the consumer culture overall.<sup>181</sup>

The difficulties here arise from the tension within Greenberg’s Moral Impact Theory between (1) the need to localize institutional moral impacts to the set of individuals for which these impacts create true obligations, namely legal officials, and (2) the need to broaden the impacts to the set of

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176. *Id.* at 1304–05.

177. *Id.* at 1318.

178. *Id.* at 1290.

179. *Id.* Moreover, representatives in the political system may not even be truly representative of the people’s interests, and may be beholden to a far narrower grouping of interests, thus further blurring any posited distinction between them and the hypothetical board of directors. I thank Theanne Liu for this insight.

180. *Id.* at 1294.

181. See, e.g., Audrae Erickson, *Agriculture: Farmers, Agrifood Industry, Scientists, and Consumers*, 30 CAN.-U.S. L.J. 263, 263 (2004) (“Another new development produced by one of our member companies is biodegradable plastics from corn that will have an enormous and beneficial impact on the environment.”).

individuals for which institutional actions determine the content of the institution's prescriptions as a special case, namely all of us. But the conceptually prior question, returning to Hare, concerns the sort of moral impacts that the theorist takes as law's content, an issue that also implicates what might motivate the Theory.

A first explanatory candidate draws on Hare's two-level thesis. Reckoning the moral impacts of legal institutional actions is sensitive to competing and conflicting moral intuitions. Greenberg, of course, recognizes both that moral issues generate controversy and that statutory and appellate decisions often fail to resolve such controversy.<sup>182</sup> He responds, though, that law has important functions other than settling disagreements, such as checking government coercion and improving our moral situation.<sup>183</sup> At any rate, says Greenberg, the Moral Impact Theory acknowledges law's characteristic way of settling disputes, namely, "by having a mechanism for generating specific orders (directed at particular individuals) that are backed up with force."<sup>184</sup> He continues that "there are powerful moral reasons to give binding force to such specific orders of a government that has de facto authority."<sup>185</sup>

Greenberg's cursory response to the dilemma posed by a theory of law that identifies law's content with morals, namely, the inevitable generation of moral disagreement, is quite interesting in the light of Hare's own thinking about this matter. For Hare, the mechanism or procedure used in the legal system for resolving controversies is precisely the apparatus that separates law from morality.<sup>186</sup> If we ask what courts or legislators ought to do, then we can use moral reasoning, and hence Hare's two-level approach, to arrive at an answer.<sup>187</sup> When, however, law and morality are "not distinguished so carefully as for clarity they should be," as in natural law thinking, then the result is "to throw us back on our own intuitions (in effect, our moral intuitions), . . . without recourse to the critical thinking that would help us settle our differences."<sup>188</sup>

As next shown, it does appear that, in a significant way, Greenberg sticks to the intuitive level of moral thinking in his view of how law

182. Greenberg, *Moral Impact*, *supra* note 1, at 1339.

183. *Id.*

184. *Id.* at 1339–40.

185. *Id.* at 1340.

186. HARE, *supra* note 16, at 151.

187. *Id.*

188. *Id.* None of this is to claim that the Moral Impact Theory is a version of natural law *moral* theory. Greenberg asserts as "uncontroversial" that "at least many facts" about law's content are not among the universe's ultimate facts. Greenberg, *supra* note 1, at 1295.

resolves controversy. The state intervenes with a decision backed by force, one intuition prevailing over another. That Hare may have understood law to resolve conflict along these lines as well would not have been problematic for him, because he did not equate law with morality, and saw them as involving “quite different procedure[s].”<sup>189</sup>

Nor was Hare much concerned about law’s argumentative structure. He was a moral philosopher, and to the extent that he addressed legal rights and obligations, law was a foil for, not a focus of, his moral philosophizing. Greenberg, however, is fully concerned with the ways in which a legal system’s decision-making apparatus provides the “basic facts that determine the content of the law.”<sup>190</sup> Commitment to identifying those basic facts as moral ones risks the sort of confusion Hare critiqued. Moral intuitions might naturally be experientially prior for the judges when they receive the case. Resolving the case, however, turns them toward the sort of critical legal deliberation Greenberg deemed to fall short of explanatory moral analysis in *Smith*.<sup>191</sup>

On the other hand, it is also conceivable, perhaps even likely, that courts receive most cases in an institutionally prudential frame of mind, with moral intuitions somewhat secondary. In that event, their initial intuitions may concern the capabilities and interests of the legal system *qua* institution, including what approach the court should take to best preserve its legitimacy, to minimize problems and enhance efficiencies by providing fairly clear guidance for future decision-making, to generate the least societal pushback, and so forth. As an empirical matter, moral considerations are likely present in these intuitions in varying degrees. And elevating institutional survival over the suffering of affected individuals might be morally justified in certain cases.<sup>192</sup>

Beyond the quick intuitive level, however, legal decision-making grapples with the issues at the ponderous critical level. But it is at this level that legal thinking, and law’s argumentative structure, takes on distinct features, different from those that characterize critical moral thinking. Greenberg marshals at length the *Smith* court’s majority and

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189. HARE, *supra* note 16, at 151.

190. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1295.

191. *Id.* at 1328–30.

192. This dynamic sometimes plays out, for example, in toxic tort and other litigations when the court expresses sympathy for the foreseeable harm sustained by the plaintiff but nevertheless holds that deeming the particular defendant to have a legal duty to the injured party might be unfair in the final analysis and potentially impair the judicial system by engendering “limitless liability.” See *generally* *Hamilton v. Baretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001) (explaining that “judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another”).

dissenting opinions’ “diverse considerations in support of their opposing positions,” including such issues as how words are ordinarily used, how Congress intended the language to be construed, whether Congress would have wished its language to cover the situation, and whether Congress intended the type of transaction, involving a particularized “use” of a firearm, to warrant a heightened penalty.<sup>193</sup>

The unresolved question is whether the considerations marshaled by Greenberg exemplify critical moral thinking, or more likely nonmoral controversies over the standards for determining whether the existing legal materials are sufficiently *directed at* the present circumstances, and/or whether they provide a solution to the new matter with sufficient *exactness*. The issues in *Smith*, as cited by Greenberg himself, concern linguistic and intentionality concerns. This article’s thesis is that legal argument differs from critical moral thinking, and that law’s argumentative structure, at the critical level, reflects principally nonmoral theoretical disagreement over the relevance and applicability of prior institutional actions. The impulse to hold otherwise, we surmise, may derive from an impression created by the competing moral intuitions that often arise at the outset, when legal officials encounter the new case or situation.

In a more recent writing, Greenberg reaffirms that, under his Moral Impact Theory, the content of law consists of obligations, rights, powers, and so forth.<sup>193</sup> He suggests that a theorist might begin with a set of “some *prima facie* attractive positions on legal interpretation,” and then “use a method analogous to reflective equilibrium” to advance the theory.<sup>194</sup> At the same time, says Greenberg, legal interpretation should ascertain “the all-things-considered normative consequences” of the contemplated legal institutional action, and in doing so, need not necessarily involve direct moral or normative reasoning.”<sup>195</sup>

There is much to unpack there. Very briefly, however, use of the “method analogous to reflective equilibrium” will not necessarily place the interpreter at the level of critical moral thinking. The reflective equilibrium method originating with John Rawls is more closely identified with an adjustment of *prima facie* principles in the service of an overall coherence scheme.<sup>196</sup> While Greenberg does see law, albeit with some

193. Mark Greenberg, Response: *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. FORUM 105, 109 (2017).

194. *Id.* at 111 n.18.

195. *Id.* at 117–18.

196. NORMAN DANIELS, JUSTICE AND JUSTIFICATION: REFLECTIVE EQUILIBRIUM IN THEORY AND PRACTICE 21–22 (1996) (attempting to distinguish “wide reflective equilibrium” from

equivocation, as the “all-things-considered” outcome of institutional action, and although he allows that context may provide a determinant of legal content,<sup>197</sup> he does not well enough account for the likelihood that the moral impacts of one institutional action will conflict with those of another. It would be strange to have certain obligations constitute law’s content in one scenario, yet simultaneously not be law’s content in another.

This is why, for Hare, obligations and rights were most likely “concepts belonging to intuitive thinking and governed by prima facie principles.”<sup>198</sup> By contrast, a distinguishing feature of moral principles belonging to critical thinking was their quality of being overriding and not capable of being overridden.<sup>199</sup> This does not describe rights or obligations, the stuff of Greenberg’s content of law. Says Hare, “[w]e have, then, as elsewhere, a two-level structure of moral thinking, with claims about rights confined to the intuitive level.”<sup>200</sup>

Yet legal argument addressing controversy involves critical thinking. It is just that this critical thinking occurring within law’s argumentative structure is specialized, and rarely expressed in moral terms, by virtue of appeals to moral sentiments, or to the need for universalizable remedial principles, and the like. Indeed, in contrast to the universal prescriptions of unlimited specificity derived from critical moral thinking, at least in Hare’s model,<sup>201</sup> legal outcomes are presumed *not* universally prescriptive, but rather locally binding. However highly coveted are inter-jurisdictional consistency and uniformity.<sup>202</sup>

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subjectivism or intuitionism, as may characterize the simple attempt to “fit” intuitions under “narrow” equilibrium, but nevertheless explaining that the wide method remains “coherentist”); JOHN RAWLS, *A THEORY OF JUSTICE* 18–22, 46–53 (1971); see also Joel Feinberg, *Rawls and Intuitionism*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS’ “A THEORY OF JUSTICE”* 108, 108 (Norman Daniels ed., 1989) (1975) (hereinafter “*READING RAWLS*”) (contending that Rawls’ theory “is itself clearly intuitionistic, for it provides no method for weighing distinct principles of justice”).

197. Greenberg, *Principles*, *supra* note 86, at 47.

198. HARE, *supra* note 16, at 153.

199. *Id.* at 61, 153.

200. *Id.* at 153–54.

201. See *id.* at 41.

202. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 5 *cm.* b (Am. Law Inst. 1971) (reciting that “[a] court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws. It derives this law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning”). Again, Greenberg does not purport to adopt a traditional natural law theory (see *supra* note 188), which took at its core “an ideal of a universal super-law discoverable by reason, to which local law ought to conform and of which local law is at best a reflection.” Roscoe Pound, *A Comparison of Ideals of Law*, 47 *HARV. L. REV.* 1, 10 (1933).

### B. *The Open Question Problem*

We next consider a further philosophical difficulty. Participants in legal practice, as well as in the general community, hold the widespread belief that some rule R might both be the law, but not be (morally) right. In the common understanding, it is often an open question whether it is a good thing that we fulfill the legal obligation with which R saddles us, without doubting that R is the law.<sup>203</sup>

We can conceive of numerous situations, both speculatively and in reality, through which we clearly want to say that our all-things-considered moral obligation conflicts with our legal obligation, as when we may be compelled to engage in civil disobedience to protest unjust *legal* measures.<sup>204</sup> The general understanding that defective law is yet the law leads theorists such as Andrei Marmor to say, with Greenberg's model in mind, that common sense "has never stood in the way of philosophical arguments."<sup>205</sup> The Moral Impact Theory is an eliminativist work in progress that will have to better address this open question argument. Greenberg does not deny that there are evil "laws," in the form of texts issued by the legal institution.<sup>206</sup> But he does deny that such laws can comprise law's content.<sup>207</sup>

Applying the challenge to law's argumentative structure, the point is that it remains an open issue whether argument about the moral impacts of legal institutional action is argument about law's content. The moral impact of a prior legal decision or enactment may sometimes be expressly considered by a court when assessing the gravity of an error,<sup>208</sup> but otherwise courts typically take the view that "[w]hether a moral obligation

203. GEORGE E. MOORE, *PRINCIPIA ETHICA* 1–37 (1903). Moore's "open question" argument fell out of favor as a technique for demonstrating the "fallacy" of inferring moral conclusions from natural or factual premises. See Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2428–29 (1992). However, reductive or eliminativist theories must usually overcome some sort of open question argument. See Matthew Silverstein, *Reducing Reasons*, 10 J. ETHICS & SOC. PHIL. 1, 2 (2016).

204. Steven Schaus, *How to Think About Law as Morality: A Comment on Greenberg and Herschovitz*, 124 YALE L. J. FORUM 224, 231–32 (2015).

205. MARMOR, *supra* note 122, at 11.

206. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1338. Nor has Greenberg addressed whether law *motivates* actions in a way that deviates from morality's inherent motivating feature, although it is certainly significant that legal institutional pronouncements do so.

207. *Id.* at 1322.

208. *Greenwood v. State*, No. 1603, 2016 WL 6680471, at \*4 (Md. Ct. Spec. App., Nov. 14, 2016).



exists in a particular situation is primarily a question of policy and ethics rather than one of law . . . .<sup>209</sup>

There is much to be said for Greenberg's notion that practitioners are not especially competent to theorize their own practice.<sup>210</sup> That is simply not part of their training. But neither is gauging moral impacts. Moreover, moral theorizing about the common understanding is itself an intuitive, not critical, exercise.<sup>211</sup> The Moral Impact Theory, however, arises from Greenberg's presumption that practitioners' actual practice provides "good evidence of the relation between legal texts and the content of the law."<sup>212</sup> We accept this presumption as well-formed.

As with linguistic rather than moral intuitions, legal practitioners' utterances provide theoretical data concerning the sort of argument in which they themselves are engaging. There does not seem to be a theoretical impediment to concluding that legal officials' linguistic participation in law's argumentative structure clarifies the logic of their practice and the meaning of their speech acts. Anthropological or historical studies of by-gone legal entitlements or requirements, for example, look to legal texts and court records, and accept official explanations as evidence of what happened.<sup>213</sup> Greenberg might dismiss these projects as adhering to the Standard Picture. Yet excavating for law's content in historical or anthropological contexts under the assumption that such content "will almost invariably diverge from the content of the authoritative pronouncements,"<sup>214</sup> and hence that "the linguistic content of pronouncements (decisions, etc.) has no special status,"<sup>215</sup> would be hebetudinous.

Power relationships are ordinarily realized through the performance of speech acts and, for the institution—including a legal system—socially created by virtue of those speech acts to hold together and evolve, a level of public understanding as well as collective observation of those power

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209. *Koike v. Board of Water Supply*, 352 P.2d 835, 840 (Hawaii 1960); *Monroe v. Standard Oil Co.*, 452 U.S. 549, 562 (1981) (interpreting the Vietnam Era Veterans' Readjustment Assistance Act of 1974, saying that "the language relied on by the petitioner hardly supports a finding that Congress intended § 2021(b)(3) to convert a generalized moral obligation into a specific legal duty").

210. Greenberg, *The Standard Picture*, *supra* note 6, at 72.

211. Richard M. Hare, *Rawls' Theory of Justice*, in *READING RAWLS*, *supra* note 196, at 81, 84.

212. Greenberg, *The Standard Picture*, *supra* note 6, at 72.

213. See, e.g., Lena Salaymeh, *Every Law Tells a Story: Orthodox Divorce in Jewish and Islamic Legal Histories*, 4 UC IRVINE L. REV. 19, 54 (2014) (examining "the surviving historical evidence (primarily legal texts and some court records)" to assess a woman's ability to divorce under ancient Mesopotamian law).

214. Greenberg, *The Standard Picture*, *supra* note 6, at 102.

215. *Id.* at 59.

relations and status function assignments are required.<sup>216</sup> Regardless of how legal officials may theorize the relation between their pronouncements and legal content—if they do so at all—their stated beliefs about whether they themselves are deliberating morally likely count as significant data on that issue.

### C. *Widespread Consideration of Persuasive Authority*

In legal practice, the parties tender what Stephen Toulmin called “the exigencies of practical affairs [that] have provided the material for subsequent theoretical analysis.”<sup>217</sup> When the legal case begins, the first step for the litigants or the court is to discern whether the existing legal materials—prior decisions, enactments, and so forth—point the way ahead. If the answer is clearly “yes,” law is likely, but not strictly compelled, to accept that outcome and resolve the matter. If not, because the new situation is rarely quite like the old, and because natural language is necessarily open-textured, the litigants as well as the court will often summon some manner of persuasive authority.<sup>218</sup> But either way, the controversy that defines the case will at the outset be characterized by a claim that one outcome or the other is supported by existing institutional norms that are directed at the new situation.<sup>219</sup>

Now for the Moral Impact Theory, what is morally required is not a matter of what the legal texts say on their face or even what they mean in pragmatic contextual terms.<sup>220</sup> It may matter, as one consideration out of many, whether the prior institutional communicative acts frame the present controversy. But the prior and existing linguistic data is neither the law nor directly explanatory of what the law requires. Under the Theory, the sort of disagreement coursing through law’s argumentative structure is not about the intentionality and exactness of the data, but rather the moral implications of prior institutional actions.

So, in Greenberg’s project, the court now decides what are the moral impacts of prior relevant judicial or legislative actions, and those impacts, but not the texts or codifications, are the law to this point. When the

216. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 101, at 151; SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 107, at 124.

217. STEPHEN TOULMIN, 1 HUMAN UNDERSTANDING: THE COLLECTIVE USE AND EVOLUTION OF CONCEPTS 86-87 (1972).

218. *Reid v. Life Ins. Co.*, 718 F.2d 677, 680 (4th Cir. 1983) (noting that, “[i]n deciding a question of first impression, the decisions of courts of other jurisdictions are persuasive authority”).

219. See Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 HASTINGS L.J. 771, 774-75 (1999).

220. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1303.

analysis concludes, and judgment is entered, the law of the case is neither the rule announced in linguistic terms in the decision nor the speech act embodied in the decree entered in favor of one party and against the other. Rather, the law of the case is, indirectly, the moral impact of the rule as announced and the judgment as entered.

While it would seem that the legal pronouncement should effectuate an end to critical deliberation,<sup>221</sup> it may turn out that, under the Moral Impact Theory, the unremitting need to gauge moral impacts in flux threatens to upend any practicable sense of law's clarity and finality.<sup>222</sup> Partly to avoid such "routes to disaster,"<sup>223</sup> the moral legal philosopher Lon Fuller famously articulated certain criteria that any legal system must aspire towards, but that presuppose the critical importance of the linguistic content of legal communicative acts. These criteria include, for instance, (1) the adoption of general rules that permit the system to avoid merely ad hoc decision-making; (2) the publication of those rules such that participants may be capable of knowing what is expected of them; and (3) the articulation of the rules such as they may be understandable.<sup>224</sup>

Whether subscribing to the Moral Impact Theory or a nonmoral view of law's argumentative structure, the point will remain that the new situation is indeed new, and may or may not be "covered by" prior outcomes. If our naturally first inclination when confronting a new situation is to think back to and take authority from a prior, similar circumstance, and to seek guidance from how we dealt with or resolved that matter, then we can make the claim that asking whether the prior resolution covers the present case accords with the natural or inevitable way of approaching these questions. Constraints of exactness and intentionality allow our backward-looking inquiry to be satisfactory, and in legal analysis point in the direction of arguably relevant precedent, if any. Institutional logic and "the whole distinctive style of human thought" press legal officials and litigants to pass through these analytic portals in their practical approach to controversies.<sup>225</sup>

Greenberg's theory may derive, in part, from the tension created by the unmooring of law's existing content from its present adjudicative exercise. Both the moral and nonmoral views should agree that this

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221. See H. L. A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 253–55 (1982) (discussing the "peremptory or deliberation-excluding and content-independent" nature of interpersonal normative and legal transactions).

222. See *supra* notes 22–24 and accompanying text.

223. LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (1964).

224. *Id.*

225. HART, *THE CONCEPT OF LAW*, *supra* note 9, at 88.

detachment exists, because each matter arises in a new context rarely addressed with precision in prior “distinguishable” cases. Law’s argumentative structure juxtaposes the preexisting legal data as communicated *on the particular prior occasion, and in the particular prior context*, against the new situation, such that interpretation intervenes to reconceptualize those existing legal materials in the light of the new matter.<sup>226</sup>

Toward this end, there appears to be a further disconnect between the Moral Impact Theory’s view of law’s content and the commonplace practice of relying on persuasive authority.. Such authority, by definition, has not engendered any moral obligation on the part of the forum official, and does not compel any particular decision-making exercise. Indeed, persuasive authority, like advisory opinions, is minimally a linguistic source capable of influencing intentional states, but without imposing obligations.<sup>227</sup>

Because, in this scenario, extra-jurisdictional actions become the guiding authority for decision-making, the argumentative question cannot be what the moral impacts of prior institutional action are. For a moral impact theory, the question might be limited to what moral impacts do we now want to create. Receptiveness to extralegal inputs does not align with a moral impacts theory of law’s content, or with nonpositivist theory generally. Meanwhile, the constant incorporation of persuasive authority in our jurisprudence does presuppose the practice of examining standards of intentionality. This is because persuasive authority is all the less persuasive the more the binding data in the home jurisdiction is deemed to be directed at the new case, and vice versa. In this way, litigants and legal officials come to decide whether, and to what extent, persuasive authority may be appropriate or useful.

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226. See Marmor, *supra* note 108, at 17 (stating that “when judges and other officials interpret the law or apply it in novel ways, their engagement with the relevant norm is what makes it the law”); cf. DONALD DAVIDSON, *INQUIRIES INTO TRUTH & INTERPRETATION* 141 (1984) (explaining that “[w]e interpret a bit of linguistic behaviour when we say what a speaker’s words mean on an occasion of use”).

227. See *Thompson v. Lynch*, 788 F.3d 638, 646 (6th Cir. 2015) (saying, “[g]iven the factual similarities between the two cases, we would arguably be obliged to grant Thompson’s petition if *Velasquez* were a binding precedent in this circuit. But the Ninth Circuit’s holding in *Velasquez* is in fact persuasive authority only”); *In re Advisory Opinion*, 335 S.E.2d 890, 891 (N.C. 1985) (explaining that “[a]dvisory opinions of the justices as individuals may be persuasive authority for the points of law addressed, but they are in no sense binding or obligatory on those points”).

To be fair, Greenberg's writing does account for some relevance of persuasive authority, or "foreign law,"<sup>228</sup> but only *ex post* and in terms of what effect that material may have "on the Constitution's impact on the moral profile."<sup>229</sup> Yet courts consider persuasive authority daily even apart from any discernible prior impact upon the local jurisprudence, and likely without a sense of compunction regarding the moral effect here of those extra-jurisdictional pronouncements. Nor is it fully clear what Greenberg means when he mentions "the relevance of foreign law," for under his Theory this can only refer to the moral impacts of foreign legal institutional action, suggesting the need for quite an obscure causal analysis.

#### IV. LAW'S MORAL IMPACT UPON OFFICIALS AND THE COMMUNITY

This article has suggested a number of problems with the idea that law's content consists in the moral impacts of the relevant actions of legal institutions. At the same time, there is no question that legal institutional actions have moral impacts, and generate moral obligations. If we are not convinced that those impacts constitute the content of the law, then what can we say about their role and nature?

Legal institutional actions have moral impacts upon both legal officials and ordinary citizens. Legal officials assume obligations when they take an oath of office or make some similarly solemn commitment to follow and apply the law, particularly the Constitution, to the best of their ability. But it would beg the question to say that legal officials actually have a moral obligation to follow or apply the law. It is a different matter whether individuals who become legal officials have a moral obligation to act in ways that are conducive to justifying the legal system's authority, thereby promoting its legitimacy.<sup>230</sup> Legal officials, in other words, may arguably be obligated to implement their official roles in ways that improve the moral standing of the laws.<sup>231</sup>

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228. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1332.

229. *Id.*

230. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 7 (2d ed. 2009) [hereinafter RAZ, *AUTHORITY OF LAW*].

231. Cf. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1294.

Greenberg has not established that legal officials are morally obligated to arrive at a particular substantive outcome in any case or controversy. Rather, officials ordinarily commit themselves to treating litigants and other citizens in a certain manner, and deciding cases and controversies impartially and in accord with accepted norms and prescribed procedures.<sup>232</sup>

Yet if the moral impacts are themselves law's content, as Greenberg says, then the judicial normative exercise,<sup>233</sup> the practice by which decision-making creates norms,<sup>234</sup> reduces to a project of reckoning what those impacts are, and hence how the court is now obligated to act.<sup>235</sup> That judges lack any significant discretion has been an anti-positivist precept.<sup>236</sup> Greenberg does not really address the notion of discretion in his work on the Moral Impact Theory. Yet, as Raz opined early on, “[t]he thesis of judicial discretion does not entail that in cases where discretion may be exercised anything goes. Such cases are governed by laws which rule out certain decisions. The only claim is that the laws do not determine any decision as the correct one.”<sup>237</sup>

We suggest, however, that the most fertile ground for examining the moral impacts of legal institutional action is with the community itself.

232. See generally David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 565 (2001) (noting one jurist's view that “judges have a moral obligation to treat parties as persons instead of masked symbols of legal abstractions”); Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2310 (2017) (opining about “why judges may indeed have legal as well as moral obligations of judicial candor and about the ways in which legal obligations may generate moral obligations”); Carl A. Auerbach, *A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law* 75 MINN. L. REV. 539, 556 (1991) (“This moral obligation arises from the judicial commitment to carry out the rules of the office.”) (omitting citation).

233. See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons From Europe*, 82 TEX. L. REV. 1671, 1684 n.58 (2003); Susan Bandes, *The Idea of A Case*, 42 STANFORD L. REV. 227, 299 (1990) (explaining that, “in a number of contexts, the Court has recognized its norm creation function as more important than its dispute resolution function”).

234. As Kenneth Himma has stated, “the problem of explaining law's normativity is commonly thought one of the central problems in conceptual jurisprudence.” Kenneth E. Himma, *A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligations of Citizens* 3 (Sept. 4, 2012) available at <http://ssrn.com/abstract=2141033>; see also David Enoch, *Reason-Giving and the Law*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 1, 1 (Leslie Green & Brian Leiter eds., 2011) (addressing “the spectre of the normativity of law”).

235. See Greenberg, *Principles*, *supra* note 86, at 3 (stating, “[t]hat legal interpretation seeks to discover legal obligations (powers, rights, and so on) is partly intended to be a useful regimentation of ordinary usage”).

236. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 10, at 34 (arguing that “[i]t is the same thing to say that when a judge runs out of rules he has discretion, in the sense that he is not bound by any standards from the authority of law, as to say that the legal standards judges cite other than rules are not binding on them”).

237. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823, 843 (1972).

Legal institutional conduct affects the community's moral profile in complex ways, some obvious, some quite subtle. The variety of issues connected to the question of whether there is a duty to obey the law have been well visited in the literature.<sup>238</sup> We should accept Greenberg's understanding that ordinary citizens "do not have a *general* moral obligation to do what the legislature or other legal institutions command."<sup>239</sup> Whether members of a political community have *special* moral obligations to obey "legitimate" law has been debated, on the basis, for example, of associative, transactional and natural duty theories.<sup>240</sup>

The political philosopher Jürgen Habermas put it well in his reaction against the Kantian "subordination of law to morality."<sup>241</sup> Appealing to citizens' political autonomy and legislative self-determination, Habermas wrote that "[l]egitimate law is compatible only with a mode of legal coercion that does not destroy the rational motives for obeying the law: it must remain possible for everyone to obey legal norms on the basis of insight."<sup>242</sup>

Moral impacts upon the community, however, likely go well beyond the issue of a duty to obey the law. It is even conceivable that, in some instances, moral obligations can be generated precisely *because* officials have *declined* to impose legal duties. Consider, for example, a circumstance in which state law refrains from imposing a duty on employers or premises owners to test or safeguard air quality at the work site. Were the product seller to have no duty to warn, also under that state's law, about hazardous dust-releasing components that it knows will

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238. *E.g.*, THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS (William A. Edmundson ed. 1999); RAZ, AUTHORITY OF LAW, *supra* note 230, at 233–49.

239. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1318 (emphasis added); *see supra* text accompanying notes 163 & 171; *cf.* JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT ch. VII, § 90 (1690) (distinguishing civil society from "absolute monarchy," the former "setting up a known authority to which every one of that society may appeal upon any injury received, or controversy that may arise, and which every one of the society ought to obey"); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 62 (1985) (concluding that "the overall lesson of the exercise is that close examination reveals how complex, and how resistant to easy simplification, are the moral factors that bear on whether one should obey the law").

240. *See generally* A. John Simmons, *The Duty to Obey and Our Natural Moral Duties*, in IS THERE A DUTY TO OBEY THE LAW 93, 109 (Raymond G. Frey ed., 2005). As Professor Dworkin said, "[a]ssociative obligations are complex, and much less studied by philosophers than the kinds of personal obligations we incur through discrete promises and other deliberate acts." DWORKIN, LAW'S EMPIRE, *supra* note 77, at 196.

241. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 120 (William Rehg trans., 1996) (1992).

242. *Id.* at 121.

be added to its product post-sale,<sup>243</sup> such a no-duty ruling might then engender a moral responsibility on the part of the owner or employer to take protective action in lieu of the product seller.

Similarly unexplored has been the community's own argumentative structures for assessing legal institutional impacts. The settings will naturally range from small group conversations, including those between spouses, partners and siblings, to larger group contexts, such as block and community meetings, rallies, protests, and so forth,<sup>244</sup> and on to local and national advocacy and election campaigns. Whereas litigants and officials acting within the legal system primarily train their arguments on standards for assessing whether the prior legal materials have been directed at the new situation with sufficient exactness, and stake their claims on competing interventionist interpretations of those materials,<sup>245</sup> citizens in the community ask different questions.

Dworkin sensibly discounted the possibility that political communities arise from voluntary associations, pace John Locke for one,<sup>246</sup> because as people may not have chosen or consented to membership in their familial or biological group, they likewise may not have voluntarily associated with their larger political communities. He explained that the associative obligations can nevertheless be unwrapped by applying the interpretive attitude, by which we ask what membership in the community means, what are the responsibilities we owe one another, and what can we expect from others if we count them as members of our associative community.<sup>247</sup> We can then interpret our associative obligations in the way “most people think of them,” namely, by virtue of the obligations that arise “under social practices that define groups and attach special responsibilities to membership . . . .”<sup>248</sup>

243. See, e.g., *O’Neil v. Crane Co.*, 266 P.3d 987, 991 (2012).

244. See, e.g., Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 353 (2015) (describing how, after police officer Sean Williams had killed John Crawford, a twenty-two-year-old black man, at an Ohio Wal-Mart, the author immersed in the “Justice for John Crawford campaign: advising on civil disobedience actions, organizing legal observers and jail support, and accompanying organizers to meetings with cops and prosecutors”).

245. See *supra* text accompanying notes 98–103.

246. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 117 (1690) (arguing that “free men who are born under government do give their consent to it, doing this through the inheritance of land”).

247. DWORKIN, LAW’S EMPIRE, *supra* note 77, at 199. Some scholars have pointed out, however, that the natural duty perspective does not readily particularize the duty to the local political community. See e.g., Christopher H. Wellman, *Samaritanism and the Duty to Obey the Law*, in IS THERE A DUTY TO OBEY THE LAW 1, 35 (Raymond G. Frey ed., 2005).

248. DWORKIN, LAW’S EMPIRE, *supra* note 77, at 198.



We may very well not agree with Dworkin's theorizing here in service of the law-as-integrity program, but the point is that the community, comprised for the most part of "good citizens," might well see things in a Dworkinian light. It is unlikely, for instance, that community members believe their obligations in relation to the political and legal system end with "rules hammered out in political compromise."<sup>249</sup> For Dworkin, members of such a "rulebook" community generally accept that they ought to obey rules arrived at by certain procedures, "but they assume that the content of these rules exhausts their obligation."<sup>250</sup> He understandably recoils from the poverty of such a conception of community.

Dworkin's contrasting view of the genuinely associative community may provide helpful guidance in thinking about the parameters for argument through which community members process legal institutional actions. Consider, for example, the debate over legislation encouraging law enforcement officials to inquire into the citizenship status of detained individuals. Arguments touch on whether the undocumented person whose work benefits the community should be considered a member of the associative group, whether the group's well-being is hampered by virtue of immigrant's disincentive to report crime, and so forth.<sup>251</sup>

This helps illustrate why the attributes of a genuinely associative community are not self-executing, but must be nurtured. A community can easily regress from holding group-centered obligations in special regard, and even more so from a sense of responsibility and concern for the well-being of group members, individually and collectively. These, indeed, are some of the concerns animating those taking sides in the sanctuary city debates. For example, sanctuary city advocates will tend to decry the unduly restrictive sense of community seemingly represented by their opponents. At the same time, however, those opposing sanctuary status may believe the same about their own adversaries, taking their political community to begin, on that issue anyway, at the federal level and in the

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249. *Id.* at 211.

250. *Id.* at 210. Apart from a genuinely associative polis, and the rulebook community, the third model of community Dworkin outlined was that of members bound together "as a de facto accident of history and geography," *id.* at 209, which he summarily dismisses as admitting merely of the sort of community in which people "have no interest in one another except as means to their own selfish ends." *Id.* at 212. Cf. Julius Cohen, *The Political Element in Legal Theory: A Look At Kelsen's Pure Theory*, 88 YALE L. J. 1, 17 (1978) (stating of the German legal theorist Hans Kelsen, that he "adopts the lens of the rational egoist, perceiving 'community' as no more than a prudent, contrived convention to implement selfish needs and interests of individuals").

251. See Jonathan Blitzer, *Why Police Chiefs Oppose Texas's New Anti-Immigration Law*, THE NEW YORKER, June 2, 2017, at [www.newyorker.com/news/newsdesk](http://www.newyorker.com/news/newsdesk).

form of border violation legislation.<sup>252</sup>

This is not the place to discuss associative community at length. For now, we can end by surmising that, at the least, the robust or healthy political community would be attentive to the moral attitude about its governing law and legal institutional actions. Most members would likely agree that general good citizenship requires that they aspire toward morally legitimate governance, and likely that they obey laws generally seen as good. More controversial would be the issue of whether community members have any obligation to object to, or protest, those deemed bad or harmful.

And by virtue of the moral attitude held by members of a healthy political community, they would likely view themselves as obligated to assess the moral impacts of law's institutional actions. This, however, is not the way they would put it. They would view themselves as deliberating over the merits of the law itself, mostly as conveyed to them linguistically, either directly from judicial and legislative sources or via interpretive expertise. Numerous internal psychological and external structural circumstances condition the nature of that deliberation.<sup>253</sup> If assessing the moral impacts of state actions is itself a legitimate obligation assumed, at least sometimes, by members of well-functioning associative communities, then we have come full circle, and found a home for the Moral Impact Theory that genuinely aligns with actual practice.

#### CONCLUSION

The Moral Impact Theory is innovative and compelling. The elegant diagnosis underlying the Theory is that the link between the meaning of legal texts and the rights and obligations they engender requires argument.<sup>254</sup> Greenberg's argument is that legal institutional actions are a means of changing our obligations, rather than directly communicating them.<sup>255</sup>

But Greenberg's is *an* argument. While a moral impacts approach offers a one-system explanation of how legal obligations arise, it elides

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252. See generally Rose C. Villazor, "Sanctuary Cities" and Local Citizenship, 37 *FORDHAM URB. L. J.* 573, 574 (2010) (contrasting the traditional view of citizenship as residing "primarily in the nation-state" with alternative views situating citizenship in other political communities).

253. See, e.g., Kent Greenawalt, *A Contextual Approach to Disobedience*, 70 *COLUM. L. REV.* 48, 75 (1970) (reflecting that, "[i]f the existing channels of political decision-making are rigged, then one who disagrees with laws may have less reason to doubt his own judgment of their unfairness and less confidence that orderly attempts to achieve change will succeed").

254. Greenberg, *Legal Interpretation*, *supra* note 72, at 219.

255. *Id.*

legal institutions' lack of epistemic capability for reckoning those moral impacts, and does not ultimately grapple with the nature of law's argumentative structure and the sort of critical thinking that discretely characterizes legal deliberation.

Legal obligation can be explained in other ways. A legal system realizes its institutional mission—including resolving disputes, creating and manipulating norms, conveying powers and permissions—to the extent that participants and community members are both capable of understanding what is expected of them and collectively recognized as carrying those status assignments. Recognition of obligation, however, presupposes the concept of an obligation, which is conveyed linguistically and laden with propositional content.<sup>256</sup> The obligations themselves derive from legal institutional action that represents those obligations as existing.

In a profound jurisprudential study, one scholar inquired after the changing forms of Nomos “through the *longue durée* of discourse, argument, criticism, formulation, and reformulation . . . that comes down to us in largely textual terms.”<sup>257</sup> He concluded, “it is the very condition of communication, understanding, and the medium of language that permits, if not a meeting of minds, at least plausible interpretation over an expanse of time.”<sup>258</sup> In actual practice, legal officials, as well as the larger community, appear to see things this way.

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256. Greenberg effectively concedes this. Greenberg, *Moral Impact Theory*, *supra* note 1, at 1295 n.12 (acknowledging that, “[s]trictly speaking, the content of the law is not, say, the obligation to take a particular action, but *that* one is obligated to take the relevant action”).

257. KELLEY, *supra* note 110, at xi.

258. *Id.*